UTS UNIVERSITY OF TECHNOLOGY SYDNEY

Making Money by Publishing Fake News is Fraud

by Robert Size

Thesis submitted in fulfilment of the requirements for the degree of

C2028 Doctor of Philosophy

under the supervision of Professor Penny Crofts and Professor Derek Wilding

University of Technology Sydney
Faculty of Law

March 2026

CERTIFICATE OF ORIGINAL AUTHORSHIP

I, Robert Size, declare that this thesis is submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Faculty of Law at the University of Technology Sydney.

This thesis is wholly my own work unless otherwise referenced or acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

This document has not been submitted for qualifications at any other academic institution.

This research was supported by an Australian Government Research Training Program (RTP) Scholarship doi.org/10.82133/C42F-K220.

Signature:

Production Note:
Signature removed prior to publication.

Date: 9 March 2026

Acknowledgement

I acknowledge first and foremost my supervisors, Penny Crofts and Derek Wilding. I benefitted enormously from their support of my research, their incisive and constructive feedback on my work, the knowledge they shared of their own areas of expertise, and their persistence, perseverance and encouragement towards the end.

I am grateful to the Faculty of Law at the University of Technology Sydney for supporting my research and giving me valuable teaching opportunities along the way. I am also grateful to the Centre for Media Transition, not only for providing me with support, but also for the scholarship that allowed me to devote sufficient time to the research.

I am indebted to Kasia Czarnota for discussing my ideas, sharing her own and providing valuable feedback on an earlier draft. I also acknowledge Te'jhaan Altiok-Brown for proofreading and checking the cross-references of an earlier draft. Any mistakes in this final version are my own.

Finally, I acknowledge the family, friends and colleagues who repeatedly asked me "How is the thesis going?" and "Have you finished the thesis yet?" and "When are you going to finish the thesis?" I am not sure that these questions ever assisted or encouraged me in any way. But I am glad finally to have a new answer for them.

Statement of format

This is a conventional thesis structured as a series of chapters.

Table of contents

CERTIFICATE OF ORIGINAL AUTHORSHIP ..... **i**

Acknowledgement ..... **ii**

Statement of format ..... **iii**

Table of contents ..... **iv**

Abstract ..... **vii**

1. Introduction **1**

1.1 Introduction 1

1.2 Fake news as a new form of fraud 4

1.3 Why is fake news not already treated as fraud? 10

1.4 Research topic, methodology and contribution 19

1.5 Outline of argument and thesis 21

Part I **29**

2. The Fake News Problem **29**

2.1 Introduction 29

2.2 The modern fake news phenomenon 31

2.3 The 'problem' with fake news 41

2.4 'Solutions' to the problem 48

2.5 Conclusion 62

Part II **63**

3. False Assertion of Fact **63**

3.1 Introduction 63

3.2 The first element of each offence 65

3.3 Fake news as a false assertion of fact 71

3.4 The available counterarguments 76

3.5 Conclusion 85

4. Obtaining money 86

4.1 Introduction 86

4.2 The publisher deceives readers to obtain money from ad servers 89

4.3 The ad servers suffer no net financial loss 90

4.4 The ad servers receive that for which they bargained 97

4.5 Conclusion 130

5. Causation 132

5.1 Introduction 132

5.2 The general approach to causation 133

5.3 The causation element of each offence 138

5.4 The faking of the news causes the obtaining of the money 140

5.5 Possible counterarguments 142

5.6 Conclusion 155

6. Intent and recklessness 156

6.1 Introduction 156

6.2 Intentional or reckless false assertion of fact 158

6.3 Intentional obtaining of money 164

6.4 Intentional obtaining of money *by* false assertion of fact 169

6.5 Conclusion 171

7. Dishonesty and intent to defraud 172

7.1. Introduction 172

7.2 The safety valve element of each offence 175

7.3 Whether fake news publishers have a ‘claim of right’ 190

7.4. Whether fake news publishers possess ‘intent to defraud’ 196

7.5. Whether making money by publishing fake news is dishonest 197

7.6. Whether fake news publishers know they are dishonest 203

7.7 Conclusion 206

Part III 207

8. Fair notice and the fraud that does not defraud 207

8.1 Introduction 207

8.2 The difficulty of defining fraud 209

8.3 Broad fraud offences and fair notice 215

8.4 The scope of the fraud that does not defraud 218

8.5 Conclusion 229

9. Justification for criminalisation of frauds that do not defraud 230

9.1 Introduction 230

9.2 Inadequacy of justification for criminalisation of lossless frauds 232

9.3 The non-financial harm inflicted upon the individual victim 235

9.4 The exploitation of the individual victim 253

9.5 The harm to the public 263

9.6 Conclusion 278

10. Conclusion 281

10.1 Fake news has been fraud for a long time 281

10.2 Summary of thesis 284

10.3 Consequences of my argument 287

Bibliography 293

A Articles/Books/Reports 293

B Cases 322

C Legislation 342

D Other 343

Abstract

Making money by publishing fake news could and should be prosecuted as fraud. Section 192E of the *Crimes Act 1900* (NSW), section 2 of the *Fraud Act 2006* (UK) and the wire fraud statute (18 USC § 1343) prohibit intentionally obtaining money by making false assertions of fact. The language of each offence is broad enough to capture generating revenue from advertising alongside false news stories published online. The rationales underlying the criminalisation of fraud support interpreting each offence as encompassing conduct of this kind. And the 'fake news problem' requires a solution that attributes responsibility to those most responsible—namely, the publishers. By advancing these arguments, this thesis presents a legal solution to the 'fake news problem' that does not require the enactment of new laws, but rather characterises making money by publishing fake news as a new way of breaking existing laws. In doing so, it defends the breadth of the fraud offences in NSW and the UK, critiques limits placed upon the wire fraud statute by the Supreme Court of the United States, and provides a more complete account of the potential scope of the fraud offences, and the rationales underlying the criminalisation of fraud, than has been presented in the existing literature.

1. Introduction

1.1 Introduction

When Donald Trump rode down the escalator in Trump Tower to announce his first campaign for presidency, the United States was in a bad way. The President, Barack Obama, was an undercover Muslim.[1] Not only was he born outside the United States,[2] he was working to destroy the country from within by imposing sharia law.[3] His former Secretary of State and intended successor, Hillary Clinton, was the mastermind behind a global human trafficking and paedophilia ring.[4] Although Clinton had tried to avoid detection by setting up a private email server, evidence of her scheme was exposed when Wikileaks released emails from her campaign chairman, John Podesta.[5] Meanwhile, a terrorist group masquerading as an anti-racism movement was gathering support and waging violent protests in major cities.[6] Despite the nation's long held and profound commitment to the idea that 'all men are created equal',[7] the group insisted that *only* 'Black Lives Matter'.

Trump campaigned valiantly to save the American Dream from extinction. As a reward for his efforts, the biased 'fake news media' targeted him with false stories whilst concealing what was really going on around the country. Few news outlets dared to report the *real* stories. When news broke online that police officers in Los Angeles had discovered the bodies of twelve white women

---

[1] Joshua Gillin, 'Secret Service Agent Says Obama Is Muslim & Gay In New Tell-All Book', *PolitiFact*, 27 December 2016.
[2] D'Angelo Gore, 'Eight Years of Trolling Obama', *FactCheck.org*, 19 January 2017; Adam Serwe, 'Birtherism of a Nation', *The Atlantic*, 14 May 2020.
[3] Jon Greenberg, 'PAC claims Obama would force sharia law on courts', *PolitiFact*, 26 September 2012.
[4] Craig Silverman, 'How The Bizarre Conspiracy Theory Behind "Pizzagate" Was Spread', *BuzzFeed News*, 6 December 2016.
[5] Ibid.
[6] Dan Evon, 'Russia Put Black Lives Matter on Official Terror List', *Snopes*, 13 July 2016; Dan Evon, 'Two White Men Doused with Gasoline, Set on Fire by BLM', *Snopes*, 30 September 2016.
[7] United States Declaration of Independence (1776).

locked in freezers with the words ‘Black Lives Matter’ carved into their skin,[8] the mainstream press ignored the story. And when WikiLeaks released content confirming that Hillary Clinton had sold weapons to ISIS,[9] none of the major outlets covered the content.

Although the Democrats had the media in their pocket, they were unable to suppress the following Trump was gathering and soon resorted to paying people thousands of dollars to protest his rallies.[10] For those paying attention, the use of these tactics was expected. Trump had warned of voter fraud since at least 2012.[11] So it was no surprise when tens of thousands of ballets pre-marked for Clinton were found stashed in an Ohio warehouse.[12] At the very least, the fake ballots were proof that Trump’s campaign had the Democrats and the biased fake news media up against the ropes.

In these circumstances, the radical left started to get desperate. Two months before the election, in a last-ditch effort to undermine American values, President Obama signed an executive order banning the Pledge of Allegiance in schools nationwide.[13] When asked if he would accept the outcome if Trump won, Obama said he was ‘fully prepared’ to ignore the popular vote and remain in office: ‘I am not standing down as president if it means four years of President Trump’.[14]

After the second-highest ranking member of ISIS called on American Muslim voters to support Hillary Clinton,[15] a glimmer of hope arrived when Pope

---

[8] Joshua Gillin, ‘Story of 19 white women killed by Black Lives Matter supporter is fake news’, *PolitiFact*, 6 April 2017.
[9] Kim LaCapria, ‘WikiLeaks Confirms Hillary Clinton Sold Weapons to ISIS?’, *Snopes*, 13 October 2016.
[10] ‘Donald Trump Protester Speaks Out: “I Was Paid $3,500 to Protest Trump’s Rally”‘, *Snopes*, 6 June 2016.
[11] Linda Qiu, ‘Donald Trump’s baseless claims about the election being ‘rigged’’, *PolitiFact*, 15 August 2016.
[12] Dan Evon, ‘Tens of Thousands of Fraudulent Clinton Votes Found in Ohio Warehouse’, *Snopes*, 30 September 2016.
[13] Caroline Wallace, ‘Obama Did Not Ban the Pledge’, *FactCheck.org*, 2 September 2016.
[14] David Emory, ‘No, Obama Did Not Confirm He Will Refuse to Leave Office if Trump Wins’, *Snopes*, 8 September 2016.
[15] Kim LaCapria, ‘ISIS Leader Calls for American Muslim Voters to Support Hillary Clinton, *Snopes*, 21 October 2016.

Francis II announced his endorsement of Trump.[16] But the situation continued to deteriorate thereafter. Three days before the election, the FBI agent who was responsible for leaking emails relevant to the investigation into Clinton's private email server was found dead in an apparent murder suicide.[17] And on the morning of the election, a van full of illegal immigrants was exposed travelling from voting booth to voting booth in Arizona casting illegitimate votes for Clinton.[18] It seemed that Trump stood no chance of victory. The media were against him and the opposition were willing to stoop to any level to keep him out of office.

This was the dangerous and unfair world to which millions of people were exposed during the lead up to the 2016 Presidential Election. It was, however, a world of make believe. A fake world. And not one produced by some intelligent design, conspiracy or master plan. Not one invented by some media mogul pulling at the strings from the corner office of a towering skyscraper. Not one designed by some Soviet apparatchik wannabe in a dank room hidden deep beneath the Kremlin. It was a world created piece by piece by home-grown Americans, acting independently, but ably assisted by teenagers from poorer countries,[19] not for the purpose of making a statement or sending a message, but to *make money*. Most of the events recounted above were published in stories masquerading as news reports that were spread on social media for the purpose of generating advertising revenue. This fake news world—a world of unreported murders, terrorist threats, treason and voter fraud—emerged because a small number of people found a new way to make money by lying and quickly discovered that the worst lies were the best sellers.

Long before the modern fake news phenomenon, there was a word used to describe 'making money by lying'. The word was 'fraud'. It had been used for

---

[16] Sydney Schaedel, 'Did the Pope Endorse Trump?', *FactCheck.org*, 24 October 2016.
[17] David Mikkelson, 'FBI Agent Suspected in Hillary Email Leaks Found Dead in Apparent Murder-Suicide', *Snopes*, 5 November 2016.
[18] Brooke Binkowski, 'Van Full of 'Illegals' Shows up to Vote Clinton at Six Polling Places', *Snopes*, 8 November 2016.
[19] Mike Wendling, 'The (almost) Complete History of "Fake News"', *BBC*, 22 January 2018.

that purpose for centuries. The False Pretences Act of 1757,[20] which was the ancestor of the fraud offences in force in common law jurisdictions today, prohibited knowingly or designedly obtaining money, goods, wares or merchandises by false pretences. The phrase 'false pretence' translates roughly to 'false assertion of fact'; and a person who makes a false assertion of fact 'knowingly or designedly' does so whilst aware that the assertion is false. In other words, the original fraud offence prohibited obtaining money by lying. For the two hundred and fifty years between its enactment and the modern fake news phenomenon, making money by lying was a crime punishable by fines, imprisonment and (once upon a time) transportation.[21]

My central purpose in this thesis is to defend the proposition, which for so long was so far beyond controversy, that making money by lying is fraud. More specifically, my purpose is to argue that making money by publishing 'fake news' could and should be prosecuted as a form of fraud. Even more specifically, my purpose is to argue that by making false assertions of fact and presenting them as news stories for the purpose of generating advertising revenue contravenes section 192E(1)(b) of the *Crimes Act 1900* (NSW) (hereafter the "Crimes Act"), section 2(1) of the *Fraud Act 2006* (UK) (hereafter the "Fraud Act") and 18 USC § 1343 (hereafter the "wire fraud statute"). In seeking to achieve these purposes, I present a legal solution to the 'fake news problem' that: (a) does not require the enactment of new laws; (b) reflects appropriately the financial motivations of fake news publishers; and (c) emphasises that fraud as a crime is concerned with much more than financial harms inflicted upon individual victims.

1.2 Fake news as a new form of fraud

Today it is trite to say that there is a 'fake news problem'. False information about COVID-19, which the World Health Organisation once

[20] 30 Geo 2, c 24.
[21] Ibid.

described as an 'infodemic',[22] undermined efforts to fight the pandemic.[23] Millions of people in the United States, primed by years of false stories about voter fraud on social media,[24] bought into the 'Big Lie' that Donald Trump won the 2020 Presidential Election.[25] Several thousand of them were even willing to storm the Capitol to prevent the peaceful transfer of power.[26] There is no doubt that fake news has harmful real-world consequences. The question is what, if anything, should be done about it.

Any answer to this question depends upon what is meant by 'fake news'.[27] The phrase itself has gone out of vogue in the scholarly literature.[28] Beyond allegations of inherent vagueness,[29] the main reason why is that it has been misappropriated by those who spread false narratives.[30] During and after his first presidency, Donald Trump used the phrase to denigrate the legitimate news media and undermine accurate reporting.[31] Right wing commentators continue to label content with which they disagree as 'fake news'. And ordinary people often understand the phrase to mean nothing more than 'news that you don't believe is real'.[32]

---

[22] 'Managing the COVID-19 infodemic: Promoting healthy behaviours and mitigating the harm from misinformation and disinformation', *World Health Organisation*, 23 September 2020.
[23] See Chapter 2.
[24] See, eg, Dan Evon, 'Tens of Thousands of Fraudulent Clinton Votes Found in Ohio Warehouse', *Snopes*, 30 September 2016; Alex Murray, 'How to spot a fake US election claim', *BBC News*, 2 November 2016; David Emery, 'Three Million Votes in Presidential Election Cast by 'Illegal Aliens'?', *Snopes*, 16 November 2016; Kim LaCapria, 'Did a Study Determine 25 Million Fraudulent Votes Were Cast for Hillary Clinton?', *Snopes*, 30 January 2017.
[25] Jessica Lee, 'Does Biden Want Fraudulent Ballots To Count in the 2020 Election?', *Snopes*, 9 November 2020; Lois Beckett, 'Millions of Americans think the election was stolen. How worried should we be about more violence?', *The Guardian*, 16 April 2021.
[26] Shelly Tan, Youjin Shin and Danielle Rindler, 'How one of America's ugliest days unraveled inside and outside the Capitol', *Washington Post*, 9 January 2021.
[27] See, eg, Claire Wardle, '6 types of misinformation circulated this election season', *Columbia Journalism Review*, 18 November 2016.
[28] Daniel Funke, 'Should we stop saying fake news?', *Poynter*, 14 December 2017.
[29] Claire Wardle and Hossein Derakhshan, 'One year on, we're still not recognizing the complexity of information disorder online', *First Draft*, 31 October 2017.
[30] Ibid.
[31] Ibid. See also Lili Levi, 'Real "Fake News" and Fake "Fake News"' (2018) 16 *First Amendment Law Review* 232, 234, 257-262; Terry Flew, *Regulating Platforms* (Polity Books, 2021) 90.
[32] Rasmus Nielsen and Lucas Graves, 'What do ordinary people think fake news is? Poor journalism and political propaganda', *Columbia Journalism Review*, 24 October 2017.

Contrary to these loose and malicious usages, I use the expression ‘fake news’ throughout this thesis to refer to false stories published on websites masquerading as news websites. I do not use the expression to refer to the posting or sharing of other false information on forums or social media. I do not use it to refer to untrustworthy or irresponsible reporting by mainstream news outlets. I do not use it to refer to bad ideas or poorly founded opinions. And I do not use it to denigrate the real news media. In other words, I use the expression to refer to what its modern usage originally meant: the faking of the news by faux news websites, not just the spreading of false information.[33] As I explain below, it is this kind of ‘fake news’ that is liable to being characterised as a form of fraud.

Fake news of this kind is best categorised as a form of ‘disinformation’. This expression is typically used to describe ‘the deliberate creation and sharing of false and/or manipulated information that is intended to deceive and mislead audiences, either for the purposes of causing harm, or for political, personal or financial gain’.[34] Although there is evidence of Russian intelligence agencies spreading false information on social media and forums to support false narratives, sow confusion and increase division,[35] many fake news *websites* were and continue to be created for the purpose of financial gain.[36]

The evidence of this financial motive is obvious from the placement of ads on the websites. There is also evidence in the form of admissions made by the publishers themselves. Several prominent fake news publishers have participated in interviews with journalists. Many of them have admitted to

---

[33] Wendling (n 19).
[34] House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and ‘Fake News’: Final Report*, 14 February 2019, 7. See also Claire Wardle, ‘Information Disorder: The Essential Glossary’, *First Draft*, 9 July 2018.
[35] Philip Bump, ‘A blockbuster document purportedly from the Kremlin raises lots of questions — about itself’, *Washington Post*, 15 July 2021.
[36] Andrew Higgins, Mike McIntire and Gabriel Dance, ‘Inside a Fake News Sausage Factory: “This Is All About Income”’, *New York Times*, 25 November 2016; Wajeeha Ahmad et al, ‘Companies Inadvertently Fund Online Misinformation Despite Consumer Backlash’ (2024) 630 *Nature* 123.

publishing fake news for the purpose of making money.[37] Some have disclosed monthly earnings of tens of thousands of dollars.[38] Others have even employed writers to create content.[39]

At the same time, however, the significance of the profit motive driving so many fake news publishers has been underappreciated. In almost any other situation, proof that a person made money by lying would prompt calls for that person to be charged with fraud. As of the time of writing, I remain the only person who has called for fake news publishers to be charged with fraud.[40] Whilst several commentators have referred to fake news as 'fraudulent news',[41] they have done so using the word 'fraudulent' in a colloquial rather than a legal sense. And whilst several scholars have noted in passing that publishing fake news *could* be treated as fraud,[42] they have not gone the next step of examining how laws prohibiting fraud might be applied to fake news.

In this thesis, I take that next step by examining the extent to which publishing fake news for profit contravenes section 192E of the Crimes Act, section 2 of the Fraud Act and the wire fraud statute. I have chosen these three

---

[37] See, eg, Higgins, McIntire and Dance (n 36); Scott Shane, 'From Headline to Photograph, a Fake News Masterpiece', *New York Times*, 18 January 2017; Craig Silverman, Jane Lytvynenko and Scott Pham, 'These Are 50 Of The Biggest Fake News Hits On Facebook In 2017, *BuzzFeed News*, 28 December 2017.

[38] See, eg, Caitlin Dewey, 'This is not an interview with Banksy', *Washington Post*, 23 October 2014; Laura Sydell, 'We Tracked Down A Fake-News Creator In The Suburbs. Here's What We Learned', *NPR*, 23 November 2016; Eli Saslow, ''Nothing on This Page Is Real': How Lies Become Truth in Online America', *Washington Post*, 18 November 2018.

[39] See, eg, Terrence McCoy, 'Inside a Long Beach Web Operation That Makes up Stories about Trump and Clinton: What They Do for Clicks and Cash', *Los Angeles Times*, 22 November 2016; Craig Silverman, 'Here Are 50 Of The Biggest Fake News Hits On Facebook From 2016', *BuzzFeed News*, 30 December 2016.

[40] Robert Size, 'Publishing Fake News For Profit Should Be Prosecuted As Wire Fraud' (2020) 60 *Santa Clara Law Review* 29.

[41] See, eg, Caitlin Dewey, 'On the Internet, every day is April Fools' day', *Washington Post*, 30 March 2014; PEN America, *Faking News: Fraudulent News and the Fight for Truth*, 12 October 2017.

[42] See, eg, David Klein and Joshua Wueller, 'Fake News: A Legal Perspective' (2017) 20 *Journal of Internet Law* 5 (identifying fraud and unfair and deceptive trade practices as potential tools to fight fake news); John Riggins, 'Law Student Unleashes Bombshell Allegation You Won't Believe: 'Fake News' as Commercial Speech' (2017) 52 *Wake Forest Law Review* 1313, 1327 (dismissing fraud as viable solution); Ari Melber, 'Capitol Report: Regulating Fraud News', *New Jersey Law Journal*, 30 January 2017 (suggesting FTC could treat non-political fake news stories as fraudulent). Cf Leslie Jacobs, 'Freedom of Speech and Regulation of Fake News' (2022) 70 *American Journal of Comparative Law* i278, i288-290 (referring to my article).

offences because the fake news problem is most pressing in the United States, I am located in New South Wales, and the laws of both the United States and Australia share a common origin in the common and statutory law of the United Kingdom. Moreover, as the three offences prohibit roughly the same conduct but do so in different ways, the comparison provides an opportunity to gauge the extent to which the different offences are able to keep pace with the emergence of new schemes to make money in dishonest ways. The global nature of the fake news phenomenon means that the publishers are capable of acting within the jurisdictions of each country—particularly in Australia where the traditional legal approach to where something is 'published' asks not where the publisher was located but rather where the recipient of the publication was located.[43]

The scheme perpetrated by fake news publishers works in the following way.[44] First, the publishers purchase domains that look like real news organisations—www.ChristianTimesNewspaper.com or www.abcnews.com.co, for example. Secondly, the publishers build websites that looks like real news websites—often no more than a front page with space for text, pictures, links and (most importantly) ads. Thirdly, the publishers engage ad servers like Google's AdSense to populate the websites with ads. Fourthly, the publishers invent false stories that are designed to attract the maximum amount of attention. Fifthly, the publishers publish the false stories on the websites. Sixthly, the publishers post links to the stories on platforms like Facebook and Twitter (now 'X') and forums like Reddit and 4chan in the hopes of users both reading and sharing the stories. Finally, for each user that visits the website and/or clicks upon an ad, the publishers are paid by the ad servers. The publishers may act either in their personal capacities or through corporate structures like other legitimate businesses.

---

[43] See, eg, *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.
[44] See generally Higgins, McIntire and Dance (n 36); Craig Silverman et al, 'How Google's Ad Business Funds Disinformation Around the World', *ProPublica*, 29 October 2022. I discuss the scheme in greater detail in Chapter 2.

My *prima facie* arguments that fake news publishers violate the fraud offences by making money in this way are straightforward. In New South Wales, section 192E(1) of the Crimes Act states:

> A person who, by any deception, dishonestly—
>
> (a) obtains property belonging to another, or
>
> (b) obtains any financial advantage or causes any financial disadvantage,
>
> is guilty of the offence of fraud.

A fake news publisher engages in ‘any deception’ by publishing stories that are false but which look like news stories to trick readers into clicking links: any readers who believe the links are to legitimate news websites are deceived as to the true nature of both the websites and the stories. The publisher ‘obtains’ a ‘financial advantage’ because the ad server pays money to the publisher. The publisher obtains the financial advantage ‘by’ the deception because the ad server only pays money to the publisher when a reader sees or clicks upon an ad and the publisher exposes readers to the ads by deceiving them about the nature of the website and the stories. Finally, the publisher obtains the financial advantage dishonestly because deceiving people is *prima facie* dishonest and the typical publisher can point to no laudable motive to overcome the inherent dishonesty of the deception.

In the United Kingdom, section 2(1) of the Fraud Act states:

> A person is in breach of this section if he—
>
> (a) dishonestly makes a false representation, and
>
> (b) intends, by making the representation—
>
> (i) to make a gain for himself or another, or
>
> (ii) to cause loss to another or to expose another to a risk of loss.

A fake news publisher makes a false representation by presenting the website as a legitimate news website and the stories as legitimate news stories.

The sharing of the links to the website is tantamount to saying to social media users: ‘Click here to read a real news story’. The publisher intends to make a gain for himself by making the representation because he intends for the readers to see and click upon ads that trigger his entitlement to be paid by the ad server. And, for the reasons given above, the publisher does so dishonestly.

And in the United States, the wire fraud statute states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

A fake news publisher devises a ‘scheme or artifice … for obtaining money … by means of false or fraudulent pretenses [or] representations’. The scheme or artifice is the setting up of the website and the publishing and sharing of the stories. The false or fraudulent pretenses and representations encompass both the presentation of the stories as legitimate news stories and the false statements made within the stories. The scheme or artifice is for obtaining money because the publisher relies upon the stories to attract people to the ads, which triggers payment by the ad server. The publisher ‘transmits … by means of wire … communication … writings, signs, signals [and] pictures’ because the website is broadcast to the entire world via the internet. And the communication is ‘in interstate or foreign commerce’ because the purpose of the website is to generate advertising revenue from interstate and international sources.

1.3 Why is fake news not already treated as fraud?

Reduced to the basics, my argument that making money by publishing fake news constitutes fraud is simple: fraud is the offence of making money by

lying and fake news publishers make money by telling lies. In these circumstances, you may be wondering: how is this even a thesis? If the argument is so simple, why have the most notorious fake news publishers not already been charged with fraud? Why are they not locked up safe and sound in gaol away from their computers? There appear to be at least two interrelated answers to these questions. I will address each of them in turn.

1.3.1 Fake news as free speech

The first answer is that there is a widespread assumption that publishing fake news is protected as free speech.[45] For example, in an article for *Foreign Policy* published in late 2017, the then CEO of PEN America said:

> Like most fraudulent news, those deceptive articles are protected speech under the First Amendment and international free expression safeguards. Unless they cross specific legal red lines — such as those barring defamation or libel — fake news stories are not illegal, and our government does not have the power to prohibit or censor them'.[46]

A thorough examination of the free speech implications of prohibiting or censoring fake news is beyond the scope of this thesis. My purpose is simply to argue that making money by publishing fake news could and should be prosecuted as fraud. It is not to defend the interpretation or application of the fraud offences against whatever free speech arguments the publishers might attempt to rely upon. Nor is it to enter into the debate as to the appropriate

---

[45] See, eg, Flemming Rose and Jacob Mchangama, 'Shutting Down Fake News Could Move Us Closer to a Modern-Day '1984'', *Washington Post*, 10 February 2017; Joel Timmer, 'Fighting Falsity: Fake News, Facebook, and the First Amendment (2017) 35 *Cardozo Arts and Entertainment Law Journal* 669, 679-80; Annie Hundley, 'Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas' (2017) 92 *Tulane Law Review* 497, 502; Ashley Messenger, 'The Epistemic and Moral Dimensions of Fake News and the First Amendment' (2018) 16 *First Amendment Law Review* 328, 329-330; Jessica Stone-Erdman, 'Just the (Alternative) Facts, Ma'am: The Status of Fake News Under the First Amendment' (2018) 16 *First Amendment Law Review* 410, 415. Cf Clay Calvert et al, 'Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine' (2018) 86 *University of Cincinnati Law Review* 99 (arguing that restricting fake news is compatible with free speech).
[46] Suzanne Nossel, 'The Pro-Free Speech Way to Fight Fake News', *Foreign Policy*, 12 October 2017.

scope of the First Amendment to the Constitution of the United States, Article 10 of the European Convention on Human Rights, or the implied freedom of political communication under the Australian Constitution.

Nevertheless, in the interests of showing that accepting my argument will not lead to futile prosecutions, I should emphasise that publishing fake news articles for the purpose of financial gain is not likely to be characterised as 'protected speech under the First Amendment'. In *United States v Alvarez*, which is the most recent authority on the point, a majority of the Supreme Court held that: 'Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is *well established* that the Government may restrict speech without affronting the First Amendment'.[47] The wire fraud statute sits comfortably on the unrestricted side of the line drawn by the majority in *Alvarez*. I return to this issue in the conclusion of the thesis where I address some of the consequences of my argument.

1.3.2 Fake news as a fraud that does not defraud

The second (and in my view more significant) reason why fake news publishers have not already been charged with fraud is that the way fake news publishers make money by telling lies is unconventional in the context of the fraud offences. To paraphrase the *Foreign Policy* article, their conduct has not been characterised as crossing the 'specific legal red line'[48] separating regrettable from criminal deception. I will explain how and why that is so by comparing making money by publishing fake news to more conventional forms of fraud.

In the simplest of frauds, the perpetrator deceives the victim to deprive the victim of money or property and thereby obtain the money or property for her or himself. Think of a person who sells jewellery claiming it is made of gold

[47] *United States v Alvarez*, 567 US 709, 722-723 (2012) (emphasis added).
[48] Nossel (n 46).

when in fact it is made of pyrite (i.e. fool's gold). The buyer is deceived as to the nature of the property he or she wishes to buy. The buyer is deprived of what he or she pays by that deception. And the seller obtains the payment by that deception. Both the transaction and the fraud are straightforward.

In more complicated frauds, the perpetrator deceives the victim to obtain money or property from someone else. Think of a person who impersonates someone else to withdraw money from a bank. The teller is deceived as to the identity of the perpetrator. The owner of the account is deprived of the money withdrawn by that deception. And the perpetrator obtains that money by that deception.

In each of these examples, the person from whom the money was obtained would not have handed over the money had he, she or it known the truth. The buyer would not pay the same price for pyrite as he or she would pay for gold. The teller would not let one person withdraw money from an account belonging to someone else. And the account holder would not let someone else withdraw her or his money.

Making money by publishing fake news does not fit within this paradigm. Like the bank fraud example, the publisher deceives one person (the reader) to obtain money from someone else (the ad server). However, unlike the bank fraud example, the deception of the first person (the reader) is immaterial to the second (the ad server). The ad server agreed to pay the publisher for exposure to readers and the publisher delivered that exposure. In the absence of some contractual provision requiring the publisher not to place ads alongside false content, the publisher has adhered to the terms of the agreement with the ad server and is entitled to be paid.

The disjunct between the deception and the payment makes making money by publishing fake news an example of what I describe throughout this thesis as a 'fraud that does not defraud'. An early definition of the expression 'defraud' was given in *Re London and Globe Finance Corporation Ltd*. There Buckley J said:

> To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.[49]

However, the concept has expanded over time to encompass conduct that does not involve *deprivation* or involves 'dishonesty' or 'dishonest means' as opposed to only 'deceit'.[50] For example, *Hammerschmidt v United States*, Taft CJ said:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention. It is true that words 'to defraud' as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes.[51]

Similarly, in *R v Scott*, Viscount Dilhorne said:

> I have not the temerity to attempt an exhaustive definition of the meaning of "defraud." As I have said, words take colour from the context in which they are used, but the words "fraudulently" and "defraud" must ordinarily have a very

---

[49] *Re London and Globe Finance Corporation Ltd* [1903] 1 Ch D 728, 732.
[50] See, eg, *Balcombe v De Simoni* (1972) 126 CLR 576, 593-594 (Gibbs J) (stating that Buckley J's definition 'ever since they were reported … have been accepted and used in the criminal courts as providing a satisfactory account of the essentials of "defrauding" on the one hand and "deceiving" on the other" but going on to recognise that the meaning of the expression depends upon the context in which it is used.
[51] *Hammerschmidt v United States*, 265 US 182, 188 (1924).

> similar meaning. If, as I think, and as the Criminal Law Revision Committee appears to have thought, "fraudulently" means "dishonestly," then "to defraud" ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.[52]

Finally, in *Peters v The Queen*, Toohey and Gaudron JJ said:

> … there are difficulties in attempting an exhaustive statement of what is involved in the notion of defrauding or in the offence of conspiracy to defraud. Ordinarily, however, fraud involves the intentional creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to "some lawful right, interest, opportunity or advantage", knowing that he or she has no right to deprive that person of that money or property or to prejudice his or her interests.[53]

The making of money by publishing fake news is aptly described as a 'fraud that does not defraud' because neither the readers nor the advertisers may be characterised as having been 'defrauded'—whether under the early definition given by Buckley J or the expanded definitions from *Hammerschmidt*, *Scott* and *Peters*.

The crucial common element with each definition of 'defraud' is that the victim's economic interests are prejudiced (whether by economic loss or being exposed to a risk of economic loss) *by* dishonesty perpetrated by the defendant (whether outright deception or other dishonest means). This crucial element cannot be satisfied with respect to either the readers who read fake news or the ad servers who pay the publishers. Although the readers are deceived by the stories, the fact that they access the stories for free means that their economic interests are not prejudiced. And although the ad servers pay the publishers when readers are exposed to or click upon ads appearing alongside the stories,

---

[52] *R v Scott* [1975] AC 819, 839.
[53] *Peters v The Queen* (1998) 192 CLR 493, [30]. See also *Spies v The Queen* (2000) 201 CLR 603; [2000] HCA 43, [75]-[81] (Gaudron, McHugh, Gummow and Hayne JJ).

they are not deceived because they are not exposed to the stories, and they are not prejudiced because they agreed to pay the publishers for views and clicks.

The expression ‘fraud that does not defraud’ is appropriate because the conduct of the publishers appears to fall within the plain meaning of the fraud offences set out earlier but does not constitute ‘defrauding’ under either the early or modern definitions: although neither the readers nor the ad servers suffer prejudice to their economic interests brought about by dishonest means, the publishers still obtain money from the ad servers by deceiving the readers—without the deception of the readers, the views and clicks on the ads that trigger the obligation of the ad server to pay the publisher would not occur. This phenomenon flows from the business model adopted by the publishers which splits up those to whom they direct their content (i.e. the readers) from those from whom they make their profits (i.e. the ad servers).

1.3.3 Faking the news within a two-sided market

From an economist’s point of view, the fake news publisher operates within a *two-sided market*. A two-sided market is one in which a business provides two distinct products or services to two different types of consumers.[54] The business is commonly referred to as a ‘platform’ or a ‘matchmaker’ because it enables the consumers to interact with each other.[55] The key feature is that demand from one side must affect demand from the other.[56] In relation to fake news, the publishers must attract readers to profit from ad servers. Like other online content providers, they use the content as ‘bait’ to lure the readers and then sell their ‘eyeballs’ in the market for advertising.[57]

---

[54] Lapo Filistrucchi, Damien Geradin and Eric van Damme, ‘Identifying Two-Sided Markets’ (2013) 36 *World Competition* 33, 33-34.
[55] David Evans and Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Harvard Business Review Press, 2016) 1, 8.
[56] Filistrucchi, Geradin and van Damme (n 54) 33-34; Evans and Schmalensee (n 55) 57.
[57] Evans and Schmalensee (n 55) 79.

The two-sided market was first recognised by economists Jean-Charles Rochet and Jean Tirole in the year 2000.[58] Rochet and Tirole did not characterise the two-sided market as a new phenomenon. They saw it as an existing phenomenon the characteristics of which economists had failed to appreciate. They gave examples including: credit cards, which bring together cardholders and merchants; real estate agents, who bring together buyers and sellers; shopping malls, which bring together shops and shoppers; and newspapers, which bring together readers and advertisers.[59] Of these examples, the identification of newspapers is of particular relevance.

Newspapers have operated within a two-sided market linking readers and advertisers since the seventeenth century.[60] The typical newspaper charges its readers less than the marginal cost of production and distribution but turns a profit by hosting ads.[61] The readers make up the 'subsidy side' of the market; the advertisers make up the 'money side'.[62] The newspaper makes up losses on the subsidy side by charging prices that more than cover costs on the money side.[63] In some cases, the readers pay nothing, and the income comes entirely from the advertisers.[64]

The long reliance of the news media on advertising shows that the model adopted by fake news publishers is not new. The newness of the fake news phenomenon reflects, not anything revolutionary about the business model adopted by the publishers, but rather changes brought about by the internet.[65] The development of the internet is the reason why multisided markets have become so prominent over the last few decades. According to David Evans and

---

[58] Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1 *Journal of the European Economic Association* 1. See also Evans and Schmalensee (n 51) 14-15.
[59] Rochet and Tirole (n 58) 992.
[60] John McDonough and Karen Egolf, *The Advertising Age Encyclopaedia of Advertising* (Taylor & Francis, 2003) 747.
[61] Evans and Schmalensee (n 55) 32, 34.
[62] Ibid 93-94. See also Rochet and Tirole (n 58) 991 (referring to 'profit centre' on one side and 'loss leader' on the other).
[63] Evans and Schmalensee (n 55) 33, 99.
[64] Ibid 94.
[65] Riggins (n 42) 1314.

Richard Schmalensee: '[t]he platform age is upon us because of the development of powerful information and communications technologies that have lowered the cost and increased the reach of connecting platforms'.[66] Put simply, the internet made it possible to reach millions of people without having to make significant investments in time and capital. These changes meant, not only that anyone could create their own 'news' website, but that anyone could access a potential readership made up of millions of internet users.[67]

1.3.4 The criminalisation of frauds that do not defraud

The reliance of fake news publishers upon advertising revenue makes making money by publishing fake news different from conventional frauds. The essence of a conventional fraud is that the person from whom the money or property is obtained would not have relinquished the money or property had he or she been aware of the deception. This usually goes without saying, even in cases involving more than two parties. In a credit card fraud scenario, for example, there is no doubt that a bank would not approve of a perpetrator paying with a stolen card.

The difference between these kinds of frauds and making money by publishing fake news is that the same cannot be said about the ad server which populates the fake news website with ads and pays the publisher for exposure to readers. The ad server agreed to pay the publisher each time a person viewed or clicked an ad. Therefore, unless the ad server required the publisher to agree not to host ads alongside false information, the ad server cannot refuse to pay the publisher. The transaction, as between the publisher and the ad server (i.e. on the 'money side' of the two-sided market) is not dishonest.

For fake news publishers to be convicted of fraud, the existing offences must be interpreted as if they prohibit conduct of this kind—what I describe as

---

[66] Ibid 40.
[67] Philip Napoli, 'What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble' (2018) 70 *Federal Communications Law Journal* 55, 71-77.

‘frauds that do not defraud’. My earlier explanation (on pages 8-10) of the straightforward way in which making money by publishing fake news contravenes each offence demonstrates that the plain meaning of the legislation supports such an interpretation: if the legislation is taken at its plain meaning, making money by publishing fake news (and other frauds that do not defraud) are already capable of constituting each offence.

The problem, however, and the reason why this thesis exists, is that legislation cannot always be taken at its plain meaning. Courts are expected to construe legislation in context. They are also expected to have regard to purpose. For any given statute, minds reasonably may differ as to the proper outcome of this process. Moreover, for any given offence, prosecutors, judges and juries reasonably may differ as to what conduct does and does not warrant criminal sanction. Accordingly, for making money by publishing fake news to be treated as a form of fraud, the case for the criminalisation of frauds that do not defraud must be made. Throughout this thesis, I make that case for the purpose of showing that making money by publishing fake news is appropriately characterised, and may be prosecuted as, ‘fraud’.

1.4 Research topic, methodology and contribution

The thesis comprises doctrinal research involving the analysis of legislation and caselaw in three jurisdictions along with a review of academic literature and some policy literature. It seeks to examine the extent to which making money by publishing fake news could or should be prosecuted as fraud in New South Wales, the United Kingdom and the United States. The methodology I adopted in researching and drafting the thesis may be split into three stages.

The first stage encompassed undertaking research on the fake news phenomenon. This was to some extent a first-hand experience. During the lead up to the 2016 Presidential Election, I witnessed the proliferation of fake news articles (including several referred to in this thesis) on my own social media feed. I also witnessed the fallout—the real media articles attempting to comprehend the sudden flood of fake news, the politicisation of the phrase ‘fake

news', and the reactions of the platforms and the public. However, once I began work on the thesis, I turned more to multidisciplinary academic work. I considered research into how people interact with fake news and fact checking. I considered research into the effect of the fake news phenomenon—in particular, upon the 2016 Presidential Election and later the COVID-19 pandemic. And I considered legal scholarship concerning potential legal solutions to the fake news problem.

The second stage encompassed developing a thorough understanding of the three fraud offences I intended to address in the thesis. I familiarised myself with the main textbooks and seminal decisions in each jurisdiction. I spent time researching the development of fraud as an offence—starting before the emergence of the common law offence known as cheating and progressing through the false pretences, deception and dishonesty-based offences introduced by successive legislatures. I considered the significant academic and law reform literature relevant to the appropriate scope of the fraud offences. And I considered the work of classical legal theorists concerning the appropriate limits of the criminal law—in particular, the explanations for why we criminalise fraud.

The third stage involved bringing the previous two together by applying my understanding of the fraud offences to the facts of making money by publishing fake news. In this stage I drew upon settled doctrine to set out the extent to which making money by publishing fake news presently constitutes an offence under section 192E of the Crimes Act, section 2 of the Fraud Act and the wire fraud statute. I relied upon examples from decided cases to show where the conduct of the typical fake news publisher both conformed to and departed from that of more conventional fraudsters. I attempted to predict and address the kinds of counterarguments the publishers might attempt to rely upon to defend themselves—in particular, in relation to wire fraud, that neither the readers nor the ad servers were defrauded. And I marshalled settled doctrine, scholarship relevant to the fraud offences and classical legal theory to develop an argument justifying prosecuting fake news publishers (and others who engage in 'frauds that do not defraud') using the fraud offences.

My argument makes an original contribution to the literature concerning the proliferation of disinformation online—in particular the appropriate way in which society should address the 'fake news problem'. As I explained earlier, the existing scholarship has made use of the label 'fraudulent news' but has not recognised that making money by publishing fake news might actually constitute committing a fraud offence. My argument represents the first attempt, not only to undertake a doctrinal legal analysis of the prospects of using fraud offences in New South Wales, the United Kingdom and the United States to hold fake news publishers responsible for the harms they cause, but also to justify using the offences to do so.

My argument also makes an original contribution to the literature concerning the fraud offences. Although the existing scholarship has acknowledged that broadly drafted fraud offences may be used to prosecute what I describe as 'frauds that do not defraud', my argument represents the first attempt to provide a taxonomy of the circumstances in which such frauds may occur, and the most thorough justification for the criminalisation of frauds where the perpetrator either does not cause the victim to suffer an economic loss or does not dishonestly deprive the victim of money or property.

1.5 Outline of argument and thesis

As I explained earlier, my primary purpose in this thesis to argue that making money by publishing fake news *could* and *should* be prosecuted as fraud in the United States, United Kingdom and New South Wales. However, as my argument involves advocating for a plain meaning interpretation of the fraud offences, it necessarily extends beyond the merits of prosecuting only the making of money by publishing fake news. For my argument to succeed, I must prove that *any* fraud that does not defraud, not only is deserving of criminal sanction, but also is appropriately criminalised as a form of fraud. I advance the argument in three parts.

1.5.1 Outline of Part I

Part I comprises only Chapter 2. The purpose of this chapter is to set out the 'problem' for which my argument provides a solution. The chapter introduces the fake news phenomenon by examining several prominent fake news publishers and describing their motives, their methods and their readers. It describes the harms brought about by the proliferation of fake news including most importantly evidence of people changing their behaviour in response to false stories. It outlines briefly the main 'solutions' to the problem that have been implemented over the past few years—censorship by platforms such as Facebook and X; censorship by ad servers such as Google's AdSense; fact checking by independent organisations such as Snopes and PolitiFact; news literacy programs designed to improve the way people engage with information online; and legal solutions such as the tort of defamation. Finally, it argues that the existing solutions share a common flaw—namely, that they seek to reduce the prevalence and effect of fake news but do so by imposing burdens on platforms and readers without holding those most responsible (i.e. the publishers) to account. It concludes by putting forward the criminal law as the appropriate means to both deter the publication of fake news and hold the publishers themselves responsible.

1.5.2 Outline of Part II

Part II comprises Chapters 3-7. The purpose of these chapters is to establish the extent to which making money by publishing fake news *presently* constitutes an offence under section 2 of the Fraud Act, section 192E of the Crimes Act and the wire fraud statute. I undertake an orthodox doctrinal analysis of the extent to which making money by publishing fake news satisfies each element of these offences. In each chapter, I identify an element of the offences, set out what the prosecution is required to prove to establish the relevant element, and then examine the extent to which making money by publishing fake news satisfies those requirements. The originality and significance of my argument lies in its application of orthodox fraud doctrine to the novel issue of making money by publishing fake news.

In Chapter 3, I examine the extent to which fake news publishers make false assertions of fact. The making of a false assertion of fact is capable of constituting 'deception' under section 192E of the Crimes Act, a 'false representation' under section 2 of the Fraud Act, and a 'false or fraudulent pretense [or] representation' under the wire fraud statute. After identifying what the prosecution must prove to establish that the defendant made a false assertion of fact, I argue that fake news publishers make false assertions of fact by: (1) publishing false content in their stories; (2) falsely presenting their websites as real news websites; and (3) falsely presenting links to their websites as links to real news websites. I also explain that a fake news publisher charged with fraud may defend her or himself by raising a reasonable possibility that the assertions were not false or were not 'of fact'—for example, because the stories set out opinions or were satirical—but cannot rely upon any defence to the effect that the readers should have known better than to believe the stories.

In Chapter 4, I examine the extent to which fake news publishers obtaining money from ad servers satisfies the second element of each offence. I have already explained above that the offences require the prosecution to prove that the defendant 'obtain[ed] any financial advantage' (Crimes Act s 192E), acted with intent to 'make a gain' (Fraud Act s 2) or devised a scheme 'to defraud, or for obtaining money (etc)' (wire fraud). Accepting that the fake news publisher obtaining money from ad servers appears to satisfy each of these requirements, I consider three counterarguments a fake news publisher charged with fraud may attempt to rely upon to evade conviction.

First, I address the fact that the person deceived by the fake news publisher (the reader) is not person from whom the fake news publisher obtains the money (the ad server). I conclude that this presents no obstacle to my argument because none of the offences have been interpreted as requiring the person deceived to be the person from whom the money was obtained.

Secondly, I address the fact that neither the reader nor the ad server suffers a net economic loss because the readers do not pay to read the stories

and the ad server gets a quid pro quo being the attention of the readers. I conclude that this presents no obstacle to my argument because none of the offences require the defendant to cause her or his victim to suffer a net economic loss—that is, they each extend to what I describe as 'lossless frauds'.

Thirdly, I address the fact that neither the reader nor the ad server is defrauded because the reader is not deprived of money and the ad server is not subjected to the deception. I conclude that this presents no obstacle to my argument with respect to section 2 of the Fraud Act or section 192E of the Crimes Act because the legislative history and authorities relevant to those offences support my plain meaning interpretation. However, in relation to the wire fraud statute, I conclude that this does *presently* pose an obstacle to my argument because the Supreme Court's interpretation of the mail fraud statute in *Cleveland v United States* does not support my plain meaning interpretation.[68] I say 'presently' because, as I explain in the chapter, serious problems with the reasoning employed by the Supreme Court mean that the current interpretation may fairly be considered vulnerable either to reconsideration or legislative intervention.

In Chapter 5, I examine the extent to which fake news publishers obtain the money from the ad servers *by* the false assertions of fact they make to the readers. The causal connection between the faking of the news and the making of the money is an element of section 192E of the Crimes Act because the legislation requires the prosecution to prove that the defendant obtained the financial advantage *by* any deception. It is also relevant to section 2 of the Fraud Act because the legislation requires the prosecution to prove that the defendant made a false representation intending '*by making the representation*' to make a gain for himself (etc). And it is relevant to the wire fraud statute because the authorities require the prosecution to prove that the 'false or fraudulent pretenses, representations or promises' were 'material' in the sense

---

[68] 531 US 12 (2000). Although the decision related to the mail fraud statute in 18 USC § 1341, it applies equally to the wire fraud statute because the common language in the statutes is interpreted in *pari materia*: see, eg, *Pasquantino v United States*, 544 US 349, 355 (2005).

that they were capable of inducing the victim to part with her or his money or property. I address various counterarguments a fake news publisher might seek to rely upon but ultimately conclude that a jury applying their 'common sense' would find that fake news publishers obtain money by publishing fake stories just as much as real news publishers do by publishing real stories.

In Chapter 6, I examine the extent to which fake news publishers have the requisite 'intent' to obtain money by making false assertions of fact. I explain that each of the offences require the prosecution to prove that the defendant acted either intentionally or recklessly. I then argue that the *prima facie* case against the typical fake news publisher is strong—not least because so many of them have admitted in public interviews to knowing that their stories are false and to publishing the stories only for the purpose of generating advertising revenue. However, I also emphasise that the intent element provides a 'safety net' for fake news publishers who raise a reasonable possibility that they thought their stories were true, or intended the stories to be satirical, or published the stories for a purpose other than making money.

In Chapter 7, I examine the extent to which fake news publishers may be characterised as having acted 'dishonestly' or with 'intent to defraud'. I first address the test for dishonesty with respect to the Fraud Act, the test for dishonesty with respect to the Crimes Act, and the meaning of 'intent to defraud' with respect to wire fraud. Here I draw more upon academic literature than I do in relation to the previous elements because the meanings of 'dishonesty' and 'intent to defraud' have been and remain to some extent controversial. In relation to both dishonesty and intent to defraud, I argue that fake news publishers cannot rely upon any 'claim of right' to defend themselves—that is, they cannot point to any pre-existing right to the money they obtain from ad servers by lying to readers. In relation to intent to defraud, I once again am compelled by *Cleveland v United States* to conclude that the prosecution *presently* cannot establish that a person who makes money by publishing fake news possess 'intent to defraud' because the publisher's scheme is 'for obtaining money ... by means of false pretenses [or] representations' rather than 'to defraud'. In relation to dishonesty, I conclude that, whilst a jury would be

likely to characterise the conduct of typical fake news publisher as ‘dishonest’, they would be likely to acquit a publisher where there was a reasonable possibility that the publisher believed he or she was publishing the truth, opinion or satire.

1.5.3 Outline of Part III

Part III comprises Chapter 8 and Chapter 9. The purpose of these chapters is to defend the criminalisation of frauds that do not defraud like making money by publishing fake news. I say ‘defend’ because by this stage I will have proven that the legislation in the United Kingdom and New South Wales *already* criminalises frauds that do not defraud. The defence is necessary to address criticisms of the breadth of the fraud offences—to show that accepting my argument does not overextend the fraud offences or give rise to concerns about ‘fair notice’ and ‘fair labelling’. It is also necessary to continue my criticism of the limitations placed upon the mail and wire fraud statutes by the Supreme Court in *Cleveland v United States*—to show that those limitations preclude the prosecution of conduct that is appropriately characterised as fraud.[69]

In Chapter 8, I argue that accepting my interpretation does not give rise to concerns about ‘fair notice’. I do so in two ways. One is by emphasising that my interpretation relies upon taking the everyday language used in the legislation at face value rather than applying a vague label like ‘scheme to defraud’ to novel forms of dishonest commercial conduct. The other is by identifying exactly the circumstances in which a person may dishonestly obtain money or property without dishonestly depriving someone else of the money or property by doing so—in other words, showing that it is not difficult to identify (by reference solely to the language used in the legislation) the kind of conduct that would be characterised as fraud should my argument be accepted. My goals in doing so are both to be candid about what conduct I say ought to

[69] 531 US 12 (2000).

constitute an offence and to show that those who engage in the conduct could hardly be heard to argue that the legislation fails to provide sufficient notice that they were at risk of breaking the law.

In Chapter 9, I argue that frauds that do not defraud like making money by publishing fake news not only warrant criminalisation but also are appropriately criminalised as fraud. The crux of my argument is that frauds that do not defraud are deserving of criminal sanction for the same reasons as conventional frauds—that they are not only as bad as conventional frauds but also are bad for the same reasons. My argument proceeds in three stages. I will summarise them briefly.

First, I reiterate that each of the offences have been interpreted as capturing frauds where the victim suffers no net financial loss—what I describe as ‘lossless frauds’. I also reiterate that these kinds of frauds occur in two situations. One is where the perpetrator misrepresents the nature of the consideration but obtains from the victim consideration of equal or lesser value—for example, selling a fake Rolex for less than the fake Rolex is worth. The other is where the perpetrator makes a misrepresentation unrelated to the consideration that nevertheless persuades the victim to agree to a transaction—for example, a misrepresentation as to the reason why the perpetrator wishes to enter into the transaction. The common element of each situation is that the victim, but for the misrepresentation, would not have agreed to deal with the perpetrator, but does not suffer a financial setback from doing so.

Secondly, I examine why the offences have been held to capture lossless frauds: obviously, if the offences apply where the perpetrator does not cause the victim to suffer a financial loss, the offences must serve purposes beyond preventing and punishing the infliction of financial harm upon individual victims. I explain that the authorities themselves do not provide an adequate explanation for the criminalisation of lossless frauds because they typically go no further than referring to the dishonesty or lack of fair dealing on the part of the defendant. However, I then identify rationales for the criminalisation of lossless frauds from the literature. These include specific rationales such as George

Fletcher's 'commercial autonomy' theory—i.e. that fraud offences apply to lossless frauds because they exist to protect the victim's interest in disposing of property as he or she sees fit. They also include rationales built upon more general principles such as Joel Feinberg's exploitation principle—i.e. that the criminal law may be used to prevent wrongful exploitation of others. And they include rationales built upon public interests such as preventing losses to unidentifiable third parties, facilitating participation in commercial dealings, promoting productive and allocative efficiency, and countering economic incentives to engage in conduct that is antithetical to public order.

Thirdly, using making money by publishing fake news as my primary example, I argue that each of these rationales offers as much support for the criminalisation of frauds that do not defraud (and in some cases more) as they offer for the criminalisation of conventional frauds. My argument ultimately is an appeal to consistency. If lossless frauds warrant criminal sanction for the reasons I have identified, and frauds that do not defraud may be characterised as warranting criminal sanction for the exact same reasons, it does not make sense to prohibit one but not the other.

1.5.4 Outline of the conclusion

I complete the thesis with the conclusion in Chapter 10. I start by drawing a comparison between the modern fake news phenomenon and the 'Popish Plot' which swept England in the 1670s following the relaxation of laws concerning who could publish using a printing press. I then summarise the argument advanced throughout Chapters 2-9. Finally, I briefly discuss three consequences of my argument—first, the extent to which my argument could be applied to so-called real news networks that knowingly broadcast false stories; secondly, the extent to which my argument could be applied to platforms that knowingly or recklessly profit from the proliferation of fake news; and finally, the free speech implications of accepting that making money by publishing fake news is fraud.

Part I

2. The Fake News Problem

2.1 Introduction

In the previous chapter, I introduced my overall argument that making money by publishing fake news could and should be treated as fraud. I also explained that the argument proceeds in three stages. The first stage introduces the modern fake news phenomenon, lays out 'the problem' with that phenomenon, and addresses the weaknesses of the existing 'solutions'. The second stage examines the extent to which that making money by publishing fake news may be characterised as satisfying each element of section 192E of the Crimes Act, section 2 of the Fraud Act and the wire fraud statute. The third stage justifies the application of the offences to making money by publishing fake news and other 'frauds that do not defraud'.

In this chapter, I seek to complete the first stage of my overall argument. The material is built upon the diverse literature concerning the fake news phenomenon, the harm brought about by the proliferation of fake news, and the attempts to reduce the prevalence of fake news that have been implemented over the past several years. The chapter is split into three sections.

The first section provides a broader introduction to the fake news phenomenon by introducing several prominent fake news publishers and examining their motives, methods and readers. Using accounts given to journalists by the publishers themselves, I demonstrate that the typical fake news publisher is motivated primarily by financial gain and has recognised that controversial stories are more likely to generate attention and therefore earn revenue. I also rely upon research with respect to the way in which people interact with false stories to demonstrate that the publishers exploit vulnerabilities of particular types of readers—for example, rabid political partisanship, or scepticism of the science surrounding COVID-19. My goal in doing so is to provide a precise account of the conduct that I argue should be criminal throughout the remainder of the thesis.

The second section describes the harm brought about by the fake news phenomenon. Unsurprisingly, I explain that the most obvious harm arises as a result of people believing the false stories and changing their behaviour in response. But I also address broader harms such as exposing the online information environment to interference from actors not motivated by profit and more conventional frauds such as phishing scams. I conclude by proffering a statement of the 'fake news problem' that captures its source, the motives driving the publishers, and the effect upon the readers—namely: *Online content creators motivated by economic gain and driven by market forces are publishing false stories about controversial topics, presenting the stories to as many people as possible, and thereby causing people to form false beliefs and alter their behaviour in ways that are harmful on individual and societal levels*.[1]

The final section examines the main 'solutions' to the problem that have been implemented over the last several years. They are: (1) censorship by platforms such as Facebook and Twitter; (2) censorship by ad servers such as Google's AdSense; (3) fact checking by independent organisations such as Snopes; (4) news literacy programs; and (5) accepted legal solutions such as the tort of defamation. In the course of discussing these solutions, I argue that they share a common flaw—namely, that they seek to reduce the prevalence and effect of fake news but do so by imposing burdens on platforms and readers without holding those most responsible (i.e. the publishers) to account. I conclude by putting forward the criminal law as the appropriate means to both deter and allocate blame for the harm inflicted by fake news publishers. This sets the stage for the argument I advance in Chapters 3-9 that making money by publishing fake news could and should be prosecuted as fraud.

[1] I return to the harm inflicted by frauds that do not defraud (like making money by publishing fake news) in Chapter 9.

2.2 The modern fake news phenomenon

2.2.1 The Muslim Museum story

In late-2013, the *National Report* published a story reporting that President Obama had used his own money to keep the International Museum of Muslim Cultures open during a government shutdown:

> While up to 800,000 federal workers faced life without a paycheck as Day One of the government shutdown kicked in, President Barack Obama held a press conference to announce that he is using his own money to open the federally funded International Museum of Muslim Cultures. “During this shutdown, people will have to deal with some of their favorite parks and museums being closed,” Obama told reporters. “Just keep in mind, they will always be there. The Grand Canyon and the Smithsonian are not going anywhere.” Obama continued, “The International Museum of Muslim Cultures is sacred. That is why I have taken it upon myself to use my own personal funds to re-open this historic piece of American culture.”[2]

The story spread quickly on social media and was even reported on *Fox & Friends* by host Anna Kooiman.[3] The problem, of course, was that the story was not true. There was no such museum. Obama had not offered to fund any federal institution. And the *National Report* was not a real news publication. It was a fake news website invented by Paul Horner, a pioneer of the nascent fake news industry.

The Muslim Museum story was debunked by *Snopes* within a few days of its publication.[4] The author of the *Snopes* article described the story as ‘just a bit of satire from the *National Report*, a web site that publishes outrageous fictional stories such as “IRS Plans to Target Leprechauns Next,” “Boy Scouts Announce Boobs Merit Badge,” and “New CDC Study Indicates Pets of Gay Couples Worse at Sports, Better at Fashion Than Pets of Straight Couples.”’.[5] But the Muslim Museum story

---

[2] Paul Horner, ‘Obama Uses Own Money To Open Muslim Museum Amid Government Shutdown’, *National Report*, 2 October 2013.
[3] David Mikkelson, ‘Obama Uses Own Money to Open Muslim Museum Amid Government Shutdown’, *Snopes*, 5 October 2013.
[4] Ibid.
[5] Ibid.

was not like those other 'outrageous fictional stories'. Unlike frivolous stories about leprechauns, boy scouts, boobs and pets, the Muslim Museum story played upon two controversial political topics. The first was the government shutdown that led to federal government services closing and employees going unpaid whilst Congress sought to resolve a deadlock on healthcare reform.[6] The second was the persistent false narrative that President Obama was secretly a Muslim and actively working to undermine the United States from within.[7] The popularity of the story demonstrated something that would later become obvious to many other fake news publishers: false stories about politics sell.

2.2.2 The worst lies are the bestsellers

Horner first started publishing false news stories after burning out as a mortgage broker and failing to gain traction publishing more conventional comedy.[8] He went on to publish several of the most prominent false stories of the lead up to the 2016 Presidential Election. Among them were the now-infamous stories about protesters being paid to protest at Trump rallies and President Obama signing an executive order to ban the Pledge of Allegiance in public schools.[9] Following the election of Donald Trump, Horner expressed disbelief that people had believed his stores.[10] But the effect they were having must have been obvious at the time: the comments posted by users on the Muslim Museum story were full of people reacting as if the story was real.[11]

By late 2014, Horner's stories were being shared by millions of people and earning him thousands of dollars. He disclosed to Caitlin Dewey of the *Washington Post* that prior to the publication of a story purporting to out himself as being the

---

[6] Kirsten Appleton and Veronica Stracqualursi, 'Here's What Happened the Last Time the Government Shut Down', *ABC News*, 19 November 2014.
[7] Angie Drobnic Holan, 'Why do so many people think Obama is a Muslim?', *PolitiFact*, 26 August 2010.
[8] Caitlin Dewey, 'This is not an interview with Banksy', *Washington Post*, 22 October 2014.
[9] Caroline Wallace, 'Obama Did Not Ban the Pledge', *FactCheck.org*, 2 September 2016; Louis Jacobson, 'No, someone wasn't paid $3,500 to protest Donald Trump; it's fake news', *PolitiFact*, 17 November 2016.
[10] Caitlin Dewey, 'Facebook fake-news writer: 'I think Donald Trump is in the White House because of me', *Washington Post*, 17 November 2016.
[11] <https://web.archive.org/web/20131007212145/https://nationalreport.net/obama-uses-money-open-muslim-museum-amid-government-shutdown/>.

artist known as ‘Banksy’ he was earning about $10,000 per month from advertising alongside his stories.[12] Following the publication of that particular story, his revenue jumped to around $10,000 per day.[13] When asked what would happen if Google found a way to prevent fake news publishers using its AdSense service, Horner said: ‘that would suck. I don’t know what I would do’.[14]

Other pioneering fake news publishers had origin stories much like Horner’s. Aaron Smith, for example, launched www.empiresports.co in January 2014 with the ‘original intent’ of creating a ‘pure satire site with funny articles’.[15] However, after the success of some more ‘realistic’ articles, the site ‘morphed quickly’ into what Smith described as a ‘social experiment … to see how far the stories can go, how crazy they can get and still get people to share them’.[16] One of Smith’s writers, Robert Winland, was less circumspect about the true purpose of the website, telling Caitlin Dewey of the *Washington Post*: ‘I write because I know the sheep will look at it. *I know how to exploit people*. That’s how you get ahead in life.’[17] Dewey described Winland as a ‘piece of work’,[18] perhaps because he was willing to articulate, and even brag about, something that more self-conscious fake news publishers were less willing to concede—that he was exploiting people to make money, not making a political, cultural or social statement.

Cameron Harris is another example of this kind of candour. In late-2016, after hearing Donald Trump tell a crowd in Ohio that the election was going to be rigged, Harris published a story on his fake news website, www.ChristianTimesNewspaper.com, titled ‘*BREAKING: “Tens of thousands” of fraudulent Clinton votes found in Ohio warehouse*’.[19] A screenshot of the story is shown below. The story took Harris about fifteen minutes to put together.[20] After he

---

[12] Dewey (n 8).
[13] Dewey (n 8).
[14] Dewey (n 10).
[15] Caitlin Dewey, ‘“I will get the people to buy into my works just to rip their hearts out.” A Q&A with a professional Internet troll.’, *Washington Post*, 22 August 2014.
[16] Ibid.
[17] Ibid (emphasis added).
[18] Ibid.
[19] Scott Shane, ‘From Headline to Photograph, a Fake News Masterpiece’, *New York Times*, 18 January 2017.
[20] Ibid.

promoted it via several dummy Facebook accounts, it was shared with more than six million people.[21] The day after its publication, the board of elections in Franklin County, Ohio announced an investigation into possible election tampering.[22] Viewed in retrospect, Harris' fake voter fraud story may perhaps be characterised as one of several prominent fake news stories about election tampering that conditioned part of the public in the United States to believe that the 2020 Presidential Election was stolen. For Harris, however, the story was not about skewing the political discourse. He insisted to journalist Scott Shane that '[t]he money, not the politics, was the point'.[23] The story apparently earned Harris about $5,000.[24]



Other fake news publishers have attempted to downplay the significance of the profit motive. Jestin Coler is one example. Coler was responsible for several of the most prominent fake news stories of 2016 including the story published three days before the Presidential Election alleging that an FBI agent suspected of leaking

[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.

Hillary Clinton's emails had been found dead in an 'apparent murder-suicide'.[25] He created a company called 'DisInfoMedia Inc' to run the fake news websites, employed 20-25 writers to create the content and admitted to monthly earnings between $10,000 and $30,000.[26] But when his identity was exposed by journalists in late 2016, he insisted that he was not 'about the money' and claimed that his real purpose was to expose and denounce how readily the alt-right were willing to believe blatantly false stories.[27]

Coler's claim to having a laudable motive turned out to be no truer than the stories he published on his websites. He later admitted that his motives were financial—that he changed from 'simply messing around online to supplementing [his] income to assist in providing for [his] family'.[28] He even said that he saw Trump's presidential campaign as a huge opportunity to turn a profit.[29] Finally, beyond these admissions, Coler's setting up of a company and engaging writers demonstrates that he treated publishing fake news as a serious business.

2.2.3 The emergence of the market for fake news

The ability of these publishers to make so much money publishing false content online was the product of three developments that occurred during the 2000s and early 2010s.[30] First, user-friendly software like WordPress had made it easy for ordinary people to create professional looking websites,[31] which lowered the barrier to entry to the market for online content. Secondly, sophisticated ad servers like Google's AdSense had introduced simple tools to host advertisements alongside

---

[25] Laura Sydell, 'We Tracked Down A Fake-News Creator In The Suburbs. Here's What We Learned', *NPR*, 23 November 2016.
[26] Ibid.
[27] Ibid.
[28] Jestin Coler, 'A Former Fake News Creator on Covering Fake News', *Nieman Foundation*, 1 May 2017.
[29] NewsWhip, 'A Fireside Chat with the Fake News King', *YouTube*, 16 June 2017.
[30] See generally Hunt Allcott and Matthew Gentzkow, 'Social Media and Fake News in the 2016 Election' (2017) 31 *Journal of Economic Perspectives* 211, 214-215, 221; Terry Flew, *Regulating Platforms* (Polity Books, 2021) 87-88.
[31] 'How WordPress Changed the Internet', *BroadbandSearch* (Blog Post) <https://www.broadbandsearch.net/blog/facts-about-wordpress-changed-the-internet>.

their content,[32] which enabled ordinary people to monetise their websites with minimal effort. Finally, social media had given people digital spaces to communicate and share content with each other, which, as it continued to grow in popularity, gave content providers access to an interconnected readership of millions of people.[33]

The result of these developments was the emergence of a highly lucrative online market for attention in which content providers compete for clicks by or views from internet users. The market for news—in which both legitimate and fake news publishers compete—is but one part of this broader market. Fake news publishers like Horner, Smith, Harris and Coler competed in that market against other businesses built upon making money from advertising alongside online content. But they were unlike those other businesses in one crucial respect. Whilst the ordinary content providers were limited by the state of the world as it is, the fake news publishers did not regard themselves bound by the confines of reality. And in the online market for attention, being unrestrained by the confines of reality afforded a significant competitive advantage.[34]

2.2.4 The vulnerabilities exploited by fake news publishers

Each of the fake news publishers discovered how to make best use of that advantage. Coler described his findings in the following way:

> Stories that work best are those that are sensational in nature, but appeal to the consumer's confirmation bias … In order to maximize pageviews and increase revenue, stories aim to create an emotional response to get readers to share content. That emotional response can be one of hope, inspiration, anger, fear, etc., but the end goal is the share. While reaching a single reader is nice, reaching that reader and their hundred(s) of contacts is far nicer.[35]

---

[32] Megan Graham and Jennifer Elias, 'How Google's $150 billion advertising business works', *CNBC*, 18 May 2021.
[33] Cass Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford University Press, 2021) 6 and 48; Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda* (Oxford University Press, 2018) 4, 9-11.
[34] Allcott and Gentzkow (n 30) 217-219.
[35] Coler (n 28). The phrase 'confirmation bias' refers to 'the tendency to process information by looking for, or interpreting, information that is consistent with one's existing beliefs'. See https://www.britannica.com/science/confirmation-bias.

By publishing stories that appeal to confirmation biases and aim to evoke emotional responses, fake news publishers exploit vulnerabilities peculiar to their readers. Perhaps the most significant vulnerability is age: research has shown that those over the age of 65 are more likely to share fake news stories.[36] Ability to reason critically rather than emotionally is also important: research has shown that those who reason emotionally are more likely to believe false content,[37] those with higher emotional intelligence are less likely to believe false content,[38] those with lower critical and analytical skills are more likely to believe false content, [39] and those who are less willing to engage in effortful, deliberative and reflective cognitive processes were more likely to believe that COVID-19 was a hoax.[40]

Research has also drawn a link between belief in false content and intellectual humility: a person who recognises her or his own 'fallibility as a knower'[41] is more likely to investigate the legitimacy of false content.[42] It has shown that people who report hating their political opponents are the most likely to share fake news.[43] It has shown that those who believe false content tend to be lazy consumers of information—that susceptibility to partisan fake news is best explained by lack of reasoning, not motivated reasoning.[44] Finally, whilst political content on the extreme ends of the left-right spectrum has been shown to generate more interactions on

---

[36] Andrew Guess, Jonathan Nagler and Joshua Tucker, 'Less than you think: Prevalence and predictors of fake news dissemination on Facebook' (2019) 5 *Science Advances* 4586.
[37] Cameron Martel, Gordon Pennycook and David Rand, 'Reliance on emotion promotes belief in fake news' (2020) 5 *Cognitive Research: Principles and Implications* 47.
[38] Stephanie Preston et al, 'Detecting fake news on Facebook: The role of emotional intelligence' (2021) 16(3) *PLoS One* 0246757.
[39] Michael Bronstein et al, 'Belief in Fake News is Associated with Delusionality, Dogmatism, Religious Fundamentalism, and Reduced Analytic Thinking' (2019) 8(1) *Journal of Applied Research in Memory and Cognition* 108.
[40] Matthew Stanley et al, 'Analytic-thinking predicts hoax beliefs and helping behaviors in response to the COVID-19 pandemic' (2020) 27 *Thinking & Reasoning* 464, 472.
[41] James Spiegel, 'Open-mindedness and intellectual humility' (2012) 10(1) *Theory and Research in Education* 27.
[42] Jonah Koetke, Karina Schumann and Tenelle Porter, 'Intellectual Humility Predicts Scrutiny of COVID-19 Misinformation', *Social Psychological and Personality Science*, 18 January 2021. See also Bronstein et al (n 39).
[43] Mathias Osmundsen et al, 'Partisan Polarization is the Primary Psychological Motivation behind Political Fake News Sharing on Twitter' (2021) 115 *American Political Science Review* 999.
[44] Gordon Pennycook and David Rand, 'Lazy, not biased: Susceptibility to partisan fake news is better explained by lack of reasoning than by motivated reasoning' (2019) 188 *Cognition* 39; Gordon Pennycook et al, 'Predictors of attitudes and misperceptions about COVID-19 in Canada, the U.K., and the U.S.A.' [2021] *Personality and Social Psychology Bulletin* 1, 12; Gordon Pennycook and David Rand, 'The Psychology of Fake News' (2021) 25(5) *Trends in Cognitive Sciences* 388, 399.

social media,[45] there is evidence that conservatives are more likely to believe and share false content.[46]

Fake news publishers discovered this awkward reality by experimentation.[47] Horner, for example, described his experience writing stories for Trump supporters in the following way:

> I thought they'd fact-check it, and it'd make them look worse. I mean that's how this always works: Someone posts something I write, then they find out it's false, then they look like idiots. But Trump supporters — they just keep running with it! They never fact-check anything![48]

The research and these first-hand accounts show that fake news publishers exploit people with certain vulnerabilities. Beyond character traits, these vulnerabilities may include a lack of digital media literacy or a tendency to use social endorsements as credibility cues, and for older readers may even include age-related memory deterioration or other forms of cognitive decline.[49] In this respect, and at risk of jumping ahead, those who believe fake news are much like those who fall victim to more conventional frauds. Vulnerability breeds gullibility. And gullibility attracts exploitation.

2.2.5 Steps taken to encourage algorithms to promote false stories

In addition to drafting stories that target certain kinds of readers, fake news publishers take other steps to ensure their dishonesty translates to profit. The most significant are those that encourage readers to share the false stories on social

---

[45] Laura Edelson et al, 'Far-right news sources on Facebook more engaging', *Medium*, 4 March 2021.
[46] Guess, Nagler and Tucker (n 36) 3; Nicholas Havey, 'Partisan public health: how does political ideology influence support for COVID-19 related misinformation?' (2020) 3 *Journal of Computational Social Science* 319; R Kelly Garrett and Robert Bond, 'Conservatives' susceptibility to political misperceptions' (2021) 7(23) *Science Advances* eabf1234; Pennycook et al (n 2021PSPB) 13; Dimitar Nikolov, Alessandro Flammini and Filippo Menczer, 'Right and left, partisanship predicts (asymmetric) vulnerability to misinformation' (2021) 1(7) *Harvard Kennedy School Misinformation Review* 1.
[47] See, eg, Sydell (n 25); Andrew Higgins, Mike McIntire and Gabriel Dance, 'Inside a Fake News Sausage Factory: 'This Is All About Income'', *New York Times*, 25 November 2016; Shane (n 19).
[48] Dewey (n 10).
[49] Guess, Nagler and Tucker (n 36) 3-6; Nir Grinberg et al, 'Fake News on Twitter during the 2016 U.S. Presidential Election' (2019) 363 *Science* 374.

media, which accounts for about 42% of traffic to fake news websites.[50] As Coler said, 'reaching a single reader is nice', but 'reaching that reader and their hundred(s) of contacts is far nicer'. Of course, the primary way in which fake news publishers encourage readers to share their stories is by creating content that the readers are likely to share—content that appeals to emotions and confirmation biases. But creating the content alone is not enough. The publishers also take steps to expose readers to the stories by creating dummy accounts on social media and message boards to share the stories.[51] And to increase the prominence of the stories on social media, the publishers take advantage of algorithms that platforms like Facebook and Twitter use to rank content.

The algorithms used by platforms like Facebook and Twitter rely upon factors relevant to both individual users and the content. In relation to individual users, the algorithms expose readers to content they are likely to click upon based upon their previous interactions.[52] This means a reader who views, likes or shares one false story or video is likely to be exposed to more of the same kind of false content and may eventually become trapped in an 'echo chamber' of unreliable information.[53] In relation to the content, the algorithms consider 'hundreds of thousands of behavioral signals',[54] one of which is the extent to which users are already engaging with the story.[55] The logic is simple: content that is generating engagement on its own is likely to generate further engagement when its prominence is increased. For fake

[50] Allcott and Gentzkow (n 30) 222.
[51] See, eg, Higgins, McIntire and Dance (n 47); NewsWhip (n 29).
[52] Karen Hao, 'How Facebook got addicted to spreading misinformation', *Technology Review*, 11 March 2021.
[53] Petter Törnberg, 'Echo chambers and viral misinformation: Modeling fake news as complex contagion' (2018) 13(9) *PLoS One* e0203958; Samuel Rhodes, 'Filter Bubbles, Echo Chambers, and Fake News: How Social Media Conditions Individuals to Be Less Critical of Political Misinformation' (2022) 39 *Political Communication* 1.
[54] Elizabeth Dwoskin, 'How Facebook is trying to stop its own algorithms from doing their job', *Washington Post*, 10 April 2019.
[55] Craig Silverman, 'Here's Why Facebook's Trending Algorithm Keeps Promoting Fake News', *BuzzFeed News*, 26 October 2016; Tom Buchanan, 'Why do people spread false information online?' (2020) 15 *PLoS ONE* 1; Emmanouil Papadogiannakis et al, 'Who Funds Misinformation? A Systematic Analysis of the Ad-related Profit Routines of Fake News Sites', *Proceedings of the ACM Web Conference 2023*, 30 April 2023 ('the more luring the content of a website is, the more it is promoted by the algorithms').

news publishers, this means there is an incentive to get people, not just to share, but also to like and comment upon the stories.

Some fake news publishers use bots to promote their stories on social media.[56] Others employ more sinister tactics. One of the most egregious examples is Christopher Blair. Blair ran the Facebook page *America's Last Line of Defense*.[57] He posted content on the page from any one of his multiple fake news websites.[58] Although he described himself as a satirist,[59] the content hardly qualified as satire: stories like 'Obama Busted for Taking Federal Pension Money',[60] 'Pelosi's Office Spent More on Alcohol Last Year Than Food'[61] and 'Biden Appoints First Illegal Immigrant to Cabinet Position'[62] were self-evidently more likely to enrage than amuse. That, however, was the whole point. Blair's page amassed a following of over 200,000 people. Whilst most of the followers were conservatives, there was also a small group of liberals who 'policed' the page with Blair by shaming and taunting conservatives who believed the content.[63]

Blair claimed that his purpose was to embarrass his readers into thinking more critically about what they share online.[64] However, as with other prominent fake news publishers, there were good reasons to doubt his claim. His websites were plastered with ads obfuscating the content on the page; and much like Jestin Coler, he made admissions about his financial motives. According to a profile by the BBC, Blair started looking for a new source of income in liberal political blogging after the construction industry slumped following the Global Financial Crisis. But his blogging career never took off. Instead, he turned to writing false news stories, and soon discovered that people were more interested in fake news than any of his ideas or

---

[56] Chengcheng Shao et al, 'The spread of low-credibility content by social bots' (2018) 9 *Nature Communications* 4787.
[57] Daniel Funke, 'How a disinformation network exploited satire to become a popular source of fake news on Facebook', *PolitiFact*, 23 January 2020.
[58] Ibid.
[59] Ibid.
[60] https://bustatroll.org/2020/05/23/obama-busted-for-taking-federal-pension-money/.
[61] https://dailyworldupdate.us/pelosis-office-spent-more-on-alcohol-last-year-than-food/.
[62] https://americaslastlineofdefense.com/biden-appoints-first-illegal-immigrant-to-cabinet-position/.
[63] Anisa Subedar, 'The Godfather of Fake News', *BBC*, 27 November 2018.
[64] Eli Saslow, '"Nothing on this page is real": How lies become truth in online America', *Washington Post*, 18 November 2018. See also Joshua Gillin, 'If you're fooled by fake news, this man probably wrote it', *PolitiFact*, 31 May 2017.

opinions. Blair was able to quit his day job in construction by 2014. As he told the reporter: 'Once writing became lucrative enough to not destroy my body in construction any more … it became time to stay at home with the kids and do this'.[65]

The reality of what occurred on *America's Last Line of Defense* makes it even more difficult to accept Blair's claim that his goal was to change how his readers interacted with information online. A person who is publicly called 'pure trailer trash', 'a gullible moron' or a 'waste of flesh and time' by one of the users policing the page is hardly going to treat the experience as an opportunity to reconsider her or his actions. Plus Blair was in the business long enough to have practical experience of something researchers have only recently proven: that those who are corrected on social media, rather than accepting the correction, tend to spread even more false news, lean into their own views, and use more toxic language.[66] Blair must have known that his readers were not reacting by developing critical thinking skills. His real purpose appears to have been to goad them into arguments in the comments and thereby cause the ranking algorithms to promote the stories. His page was not really satire. It was a moneymaking scheme built on deceiving people and encouraging mean-spirited trolls to deride and insult those who were being deceived. In other words, it was just another (rather nasty) way of making money by telling lies.

2.3 The 'problem' with fake news

2.3.1 The 'Pizzagate' hoax

On 30 October 2016, a white supremacist Twitter account presenting itself as belonging to a Jewish lawyer in New York tweeted that the police were investigating evidence that Hillary Clinton was involved in an 'international child enslavement ring'. The next day, Sean Adl-Tabatabai posted a story on his fake news website (www.YourNewsWire.com) asserting that an 'FBI insider' had confirmed the claims. Other fake news websites followed suit soon after. Within the space of a few weeks, the story had morphed into allegations that members of the Democratic Party were

[65] Subedar (n 63).
[66] Mohsen Mosleh, 'Perverse Downstream Consequences of Debunking', *Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems*, 6 May 2021.

operating a child-sex ring in the basement of the Comet Ping Pong pizza restaurant in Washington DC.[67]

Most readers recognised the now-infamous 'Pizzagate' conspiracy theory to be false. But some believed it to be true. Some took to harassing the owner of the restaurant and his employees on social media. Some went so far as to make death threats.[68] One man, Edgar Welch, went so far as to drive two hundred miles from North Carolina to Washington DC to liberate the children from the restaurant.[69] Welch entered Comet Ping Pong armed with an AR-15 assault rifle,[70] pointed the rifle at one of the employees,[71] went through the restaurant looking for the children, and fired rifle multiple times into a locked closet.[72] He was later sentenced to four years imprisonment for assault with a dangerous weapon.[73]

The Pizzagate saga provides a striking example of the harm caused by one false story upon specific individuals. But for fake news publishers like Adl-Tabatabai and his imitators, the tweet would not have been presented in the form of a news article able to be shared on social media. But for people being exposed to and believing the stories, the owner and employees of the restaurant would not have been subjected to harassment and death threats. But for his own belief in the stories, Edgar Welch would not have endangered the safety of those inside the restaurant or spent years of his life serving a prison sentence.

Welch is an extreme example of a person altering her or his behaviour in response to believing false content read online. Of the unidentifiable number of

---

[67] Craig Silverman, 'How the Bizzare Conspiracy Theory Behind "Pizzagate" Was Spread', *BuzzFeed News*, 6 December 2016; Daniel Funke, 'Fact-Checkers Have Debunked This Fake News Site 80 Times. It's Still Publishing on Facebook', *Poynter*, 20 July 2018.
[68] Craig Silverman, 'How the Bizzare Conspiracy Theory Behind "Pizzagate" Was Spread', BuzzFeed News, 6 December 2016.
[69] Mark Fisher, John Woodrow Cox and Peter Hermann, 'Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.', *Washington Post*, 6 December 2016.
[70] Associated Press, '"Pizzgate" Conspiracy Theorist gets Four Years in Prison', *The Guardian*, 23 June 2017.
[71] John Stanton and Michelle Broder Van Dyke, '"Pizzagate" Conspiracy Theory Brought Armed Man To DC, Police Say', BuzzFeed News, 7 December 2016.
[72] Spencer Hsu, ''Pizzagate' gunman says he was foolish, reckless, mistaken — and sorry', *Washington Post*, 14 June 2017.
[73] Matthew Haag and Waya Salam, 'Gunman in "Pizzagate" Shooting is Sentenced to 4 Years in Prison', *New York Times*, 23 June 2017.

people who gave credence to the Pizzagate conspiracy theory, only Welch turned vigilante and attempted to liberate the children. The impact of believing fake news stories on less extreme individuals has less extreme consequences, although the effect is still harmful on both a personal and public level.

2.3.2 False stories about politics

In relation to false stories about politics, the primary risk of harm is that those who believe fake news may vote in ways in which they otherwise would not have voted.[74] Research suggests that acceptance of false information about candidates or issues has a meaningful impact on voting behaviour.[75] However, notwithstanding the undeniable potential for fake news to influence the outcome of an election, the precise impact is difficult to gauge in practice.

Following the 2016 Presidential Election in the United States, an analysis undertaken by *BuzzFeed* found that the most popular fake news stories were more widely shared on Facebook than the most popular mainstream news stories,[76] and post-election surveys revealed wide belief in false stories about politics and the campaign.[77] These kinds of findings, as well as everyday experience of the online environment during the campaign, led several journalists to suggest that fake news was responsible for Trump's victory.[78] In an interview with Caitlin Dewey, Paul Horner, who confessed that he did not think it was possible for Trump to get elected, said: 'Looking back, instead of hurting the campaign, I think I helped it'.[79] And when

---

[74] Joel Timmer, 'Fighting Falsity: Fake News, Facebook, and the First Amendment' (2017) 35 *Cardozo Arts and Entertainment Law Journal* 669, 671; Clay Calvert et al, 'Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine' (2018) 86 *University of Cincinnati Law Review* 99, 106.
[75] Brian Weeks and R Kelly Garrett, 'Electoral consequences of political rumors' (2014) 26 *International Journal of Public Opinion Research* 401, 414.
[76] Craig Silverman, 'This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook', *BuzzFeed News*, 16 November 2016.
[77] Craig Silverman and Jeremy Singer-Vine, 'Most Americans who see fake news believe it, new survey says', *BuzzFeed News*, 6 December 2016.
[78] Max Read, 'Donald Trump Won because of Facebook', *New York Magazine*, 9 November 2016; Hannah Parkinson, 'Click and elect: how fake news helped Donald Trump win a real election', *The Guardian*, 14 November 2016.
[79] Dewey (n 10).

pressed to say whether he thought he had personally helped elect Trump, Horner replied: 'I don't know. I don't know if I did or not. I don't know. I don't know.'[80]

In the highly charged and confused post-election environment, researchers set about attempting to determine the extent to which people were exposed to fake news and whether the exposure affected the outcome of the election. Several studies found that exposure to fake news was both limited and concentrated. Guess, Nyhan and Reifler, for example, found that fewer than half of Americans visited an untrustworthy website during the campaign season, that untrustworthy websites accounted for approximately 6% of online news consumption, and that 62% of the traffic to the untrustworthy sites came from the 20% of Americans with the most conservative news diets.[81] Some scholars relied upon these kinds of findings to downplay the effect of fake news upon the election.[82] Others emphasized the influence that fake news had on key voter cohorts. Gunter, Beck and Nisbet, for example, found that false information had a substantial impact on voters who voted for Barack Obama in 2012 but did not vote for Hillary Clinton in 2016, and suggested that the influence of false information on that discrete group '*might* have been enough to deny Hillary Clinton a majority in the Electoral College'.[83]

Given the razor thin margins upon which elections may turn, the chance of even small amounts of people becoming influenced by fake news presents a real threat to the integrity of democracy—assuming, of course, that one accepts that there is value in people making electoral choices that reflect reality.[84] But the precise influence of fake news on the outcome of the election may in fact be immeasurable, as its influence upon public discourse and the mood of the electorate is as important as its influence on the specific beliefs of individual voters. The sheer prevalence of

---

[80] Ibid.
[81] Andrew Guess, Brendan Nyhan and Jason Reifler, 'Exposure to Untrustworthy Websites in the 2016 US Election' (2020) 4 *Nature Human Behaviour* 472. See also Grinberg et al (n 49).
[82] Allcott and Gentzkow (n 30) 232; Jacob Nelson, 'Is "Fake News" a Fake Problem', *Columbia Journalism Review*, 31 January 2017; Duncan Watts and David Rothschild, 'Don't blame the election on fake news. Blame it on the media', *Columbia Journalism Review*, 5 December 2017.
[83] Richard Gunther, Paul Beck and Erik Nisbet, '"Fake news" and the defection of 2012 Obama voters in the 2016 presidential election' (2019) 61 *Electoral Studies* 102030.
[84] I make no attempt to defend this proposition.

false information makes it harder for people to stay informed or engaged;[85] and the introduction of false narratives both enables and emboldens other actors—politicians, hyper-partisan media and foreign powers—to make false assertions for non-financial purposes. The end result is what Benkler, Faris and Roberts describe as an 'epistemic crisis' where 'the perceived threats to our very capacity to tell the truth from convenient political fiction, if true, strike at the very foundations of democratic society'.[86]

2.3.3 False stories about COVID-19

In relation to false stories about the coronavirus pandemic, susceptibility to believing false information about COVID-19 has been found to arise due to vulnerabilities much like those underlying susceptibility to believing political fake news.[87] False stories promoting bogus cures, downplaying the severity of the pandemic and spreading wild conspiracies (like the pandemic being caused by 5G or Bill Gates or an intentional effort to establish a surveillance state)[88] led to people failing to take appropriate actions like staying home, avoiding contact and wearing masks.[89] And studies demonstrated that those who believed false information about the virus were less willing to get vaccinated.[90] These are not trivial harms. People died because they believed false information characterising the pandemic as a hoax or demonising the vaccines. Resources were spent treating people who (had they known and acted upon the truth) may never have required treatment.

---

[85] Allcott and Gentzkow (n 30) 212; Sunstein (n 33) 6 ('people now find themselves in a state of vertigo').
[86] Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda* (Oxford University Press, 2018) 6.
[87] Ibid; Stanley et al (n 40) 470-471.
[88] Sander van der Linden, Jon Roozenbeek and Josh Compton, 'Inoculating Against Fake News About COVID-19', *Frontiers in Psychology*, 23 October 2020.
[89] Stanley et al (n 40) 470.
[90] Jon Roozenbeek et al, 'Susceptibility to misinformation about COVID-19 around the world' (2020) 7(10) *Royal Society Open Science* 201199; Sahil Loomba, 'Measuring the impact of COVID-19 vaccine misinformation on vaccination intent in the UK and USA' (2021) 5 *Nature Human Behaviour* 337, 344.

2.3.4 Effect upon information environment

Beyond its effect with respect to particular issues, the fake news phenomenon has contributed to broad changes within the information environment. The confusion brought about by the proliferation of false content has created opportunities for other malicious actors to thrive. Those actors include politicians starting with Donald Trump, who, in the United States and elsewhere, have repurposed the expression 'fake news' to denigrate the legitimate news media.[91] They also include foreign adversaries like Russia, who were able to join in the spreading of false content, not to make money, but to sow discontent and sway opinion.[92] And they include more conventional fraudsters: those who run phishing and other online scams now build upon the false narratives promoted by fake news publishers to trick readers into downloading malware that can access their personal information.[93]

2.3.4 Effect upon legitimate media

The only possible upside to the fake news phenomenon is that legitimate journalists may have become more committed to transparency and accountability.[94] But that may have more to do with resisting the label 'fake news' imposed by Trump and his followers, as opposed to differentiating themselves from fake news websites. The overall effect of fake news upon legitimate journalism has been negative. As fake news publishers compete against the legitimate media for the attention of readers, at least some of the attention they generate (and, therefore, some of the revenue) comes at the expense of the legitimate media (allowing that the introduction of false content may also have expanded the market for 'news', not just siphoned from the legitimate media). Moreover, at least one mainstream media

---

[91] Benkler, Faris and Roberts (n 86) 18.
[92] Abigal Abrams, 'Here's What We Know So Far About Russia's 2016 Meddling', *Time*, 18 April 2019; Hannah Gilbert, 'The UK Company Spreading Russian Fake News to Millions', *BBC*, 4 April 2023; Olga Lautman, 'We're Winning, Say Russia's Fake News Manufacturers', *Centre for European Policy Analysis*, 16 October 2024.
[93] Stu Sjouwerman, 'How Disinformation Is Fueling A Fresh Wave Of Phishing Scams', *Forbes*, 13 November 2020.
[94] Hong Tien Vu and Magdalena Saldaña, 'Chillin' Effects of Fake News: Changes in Practices Related to Accountability and Transparency in American Newsrooms Under the Influence of Misinformation and Accusations Against the News Media', *Journalism & Mass Communication Quarterly*, 4 January 2021.

outlet appears to have stooped to the level of the fake news publishers: according to evidence in the suit filed by Dominion Voter Systems, hosts and other executives of Fox News privately expressed disbelief about Trump's claims that the 2020 election was 'stolen' whilst at the same time promoting the claim on air.[95]

2.3.5 Statement of 'the problem'

When the motives and methods of the publishers are considered in conjunction with the harmfulness of their conduct, it is clear that the 'problem' with fake news is made up of several components. The primary component is one of the main reasons why lying is generally considered to be wrong: those who believe the false stories may act in ways in which they would not have acted had they known the truth.[96] Another is the form in which the stories are presented: by dressing the statements up as news stories, the publishers both usurp the credibility of the legitimate media and enable the stories to be shared across platforms.[97] Another is the profit motive driving the publishers: as fake news publishers compete in the online market for attention, they are driven by market forces to create content that people are likely to click and share. The final component is the content of the stories: as stories that appeal to emotions and confirmation biases so readily attract attention, fake news publishers tend to produce content focusing on controversial topics like politics and the COVID-19 pandemic.

When these components are taken together, the 'problem' with fake news is perhaps best defined in the terms set out earlier: *Online content creators motivated by economic gain and driven by market forces are publishing false stories about controversial topics, presenting the stories to as many people as possible, and thereby causing people to form false beliefs and alter their behaviour in ways that are harmful on individual and societal levels*. Expressed this way, the 'problem' is not

---

[95] Jeremy Peters and Katie Robertson, 'Fox Stars Privately Expressed Disbelief About Election Fraud Claims', *New York Times*, 16 February 2023.
[96] Sissela Bok, *Lying: Moral Choice in Public and Private Life* (Harvester Press, 1978) 19-20; Thomas Carson, *Lying and Deception: Theory and Practice* (Oxford University Press, 2010) 98. See further Chapters 7 and 9.
[97] Zach Bastick, 'Would you notice if fake news changed your behavior? An experiment on the unconscious effects of disinformation' (2021) 116 *Computers in Human Behavior* 106633.

just what the publishers are doing or the effect of their conduct but also that they have the opportunities and incentives to engage in the conduct in the first place. This important point must be kept in mind when evaluating the adequacy of the supposed solutions to the problem addressed below.

2.4 'Solutions' to the problem

Governments, independent organisations and the academy broadly agree that fake news is a 'problem'. The main approaches they have adopted or proposed to fight the spread of misinformation and disinformation online may be broadly grouped into five categories. I will address each in turn.

2.4.1 Platform solutions

The first category comprises steps taken by social media platforms to censor the spread of fake news stories. Shortly after the 2016 Presidential Election, Mark Zuckerberg described the notion that fake news on Facebook influenced the outcome as a 'pretty crazy idea'.[98] However, after facing significant public backlash, Facebook soon announced that it would begin flagging fake news stories with the help of users and third-party fact-checkers.[99]

By 2018, fact-checkers on Facebook were debunking photo and video content as well as stories,[100] and the platform was not only labelling content as 'false', 'altered' or 'partly false', but also deprioritising the false content in the news feed.[101] The adoption of these policies led to some remarkable outcomes. In early 2021, for example, both Facebook and Twitter went so far as to label tweets and posts by then

[98] Olivia Solon, 'Facebook's fake news: Mark Zuckerberg rejects "crazy idea" that it swayed voters', *The Guardian*, 11 November 2016.
[99] Amber Jamieson and Olivia Solon, 'Facebook to begin flagging fake news in response to mounting criticism', *The Guardian*, 16 December 2016.
[100] Daniel Funke, 'Facebook expands fact-checkers' ability to debunk false photos and videos', *Poynter*, 13 September 2018.
[101] 'Fact-checking on Facebook', *Facebook for Business* <https://www.facebook.com/business/help/2593586717571940>.

President Trump as being disputed and possibly misleading.[102] And later, after Trump failed to stop the mob invading the Capitol, they blocked his accounts.[103]

Research has found that flagging content as false or unverified makes people significantly less likely to share the content.[104] At the same time, however, some may ignore a flag because they see flagging as reflecting partisan bias. With that in mind, in late 2020, Twitter experimented with a prompt that asked readers whether they want to read an article before retweeting it.[105] These kinds of prompts have been shown to reduce the sharing of false content.[106]

The steps taken by the platforms have been either wholly self-imposed or responses to regulatory initiatives such as the *EU Code of Practice on Disinformation* (now endorsed as the *Code of Conduct on Disinformation* under the Digital Services Act). The signatories to the code (including platforms such as Google and Meta but notably not X/Twitter)[107] agreed among other things to 'commit to deploy policies and processes to disrupt advertising and monetization incentives' for purveyors of disinformation.[108] The Australian Code of Practice on Disinformation and Misinformation involves similar voluntary commitments.[109] However, in December 2024, an attempt by the government to enact legislation giving legal force to commitments similar to those in the Australian Code was withdrawn due to concerns about freedom of speech.[110]

---

[102] Geoffrey Fowler, 'Twitter and Facebook warning labels aren't enough to save democracy', *Washington Post*, 9 November 2020.
[103] 'Permanent Suspension of @realDonaldTrump', *Twitter Inc*, 8 January 2021.
[104] Mike Krings, 'Study Examines What Makes People Susceptible to Fake Health News', *University of Kansas News Service*, 31 January 2021.
[105] James Vincent, 'Twitter is bringing its "read before you retweet" prompt to all users', *The Verge*, 25 September 2020.
[106] See, eg, Gordon Pennycook et al, 'Shifting attention to accuracy can reduce misinformation online' (2021) 592 *Nature* 590, 594; Ziv Epstein et al, 'Developing an accuracy-prompt toolkit to reduce COVID-19 misinformation online' (2021) 3 *Harvard Kennedy School Misinformation Review* 1. Facebook started testing something similar in May of 2021. See also Roland Hutchinson, 'Facebook wants you to read articles before sharing them', *Geeky Gadgets*, 11 May 2021.
[107] https://digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation.
[108] *EU Code of Practice on Disinformation* page 5.
[109] https://digi.org.au/disinformation-code/.
[110] Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024 (Cth); Olivia Di Iorio, 'The misinformation bill was axed. How else can we combat the 'biggest global risk'?', *SBS*, 3 December 2024.

Evidence as to the effectiveness of the steps taken by the platforms to reduce the spread of false information remains limited. Allcott et al measured the volume of Facebook engagements and Twitter shares of stories from 569 fake news websites between January 2015 and July 2018.[111] They concluded that 'the overall magnitude of the misinformation problem *may* have declined, *possibly* due to changes to the Facebook platform following the 2016 election'.[112] However, they also noted that the 'absolute level of interaction with misinformation remain[ed] high and that Facebook continue[d] to play a particularly important role in its diffusion'.[113]

More importantly, however, there is good reason to doubt that the platforms will ever fully commit to suppressing the spread of disinformation. Doing so would risk undermining a significant revenue stream, reducing user engagement and alienating conservative users.[114] Recent events appear to have borne out these criticisms, as both Meta and X have dropped third-party fact checkers in favour of crowdsourced fact-checking by the users of the platforms themselves.[115] However, any proper evaluation of the sincerity and success of the platforms' efforts to reduce fake news is beyond the scope of this thesis.

2.4.2 Ad server solutions

The second category of solution involves ad servers like Google's Ad Sense taking it upon themselves to introduce policies and practices directed towards preventing fake news publishers from making money via advertising. Of all the prevailing solutions, cutting off the revenue stream is the one that best reflects the motivations of the publishers. However, despite the steps taken by the larger ad servers to sever links with sites promoting false content following the 2016

---

[111] Hunt Allcott et al, 'Trends in the Diffusion of Misinformation on Social Media', Research & Politics, 9 May 2019.
[112] Ibid.
[113] Ibid.
[114] Shao (n 56); Michael Park, 'Separating Fact from Fiction: The First Amendment Case for Addressing "Fake News" on Social Media' (2018) 46 *Hastings Constitutional Law Quarterly* 1, 7 ('technology companies like Facebook are financially incentivized to promote and enable social engagement').
[115] Joel Kaplan, 'More Speech and Fewer Mistakes', *Meta*, 7 January 2025.

Presidential Election,[116] the evidence suggests that fake news publishers continue to have access to reliable sources of revenue.

According to research conducted in 2021, the top ten credible ad servers (including Google) were accounting for 66.7% of ad traffic on fake news websites,[117] and misinformation sites were receiving advertising revenue of $1 for every $2.16 received by legitimate newspapers.[118] More recent research has shown that the well-known legitimate advertising networks (such as google.com, indexexchange.com and appnexus.com) have direct advertising relationships with more than 40% of fake news websites and reseller relationships with more than 60% of fake news websites.[119] It is not clear whether the ad servers continue to permit ads to appear on fake news websites because they 'prefer to increase their profits at the expense of a more transparent, reliable and safe Web'[120] or because they are 'ill-informed about the roles of their own company and the digital advertising platforms that they use in financing misinformation outlets'.[121]

In any event, efforts taken by the larger 'legitimate' and 'credible' ad servers to cut revenue streams to fake news websites have no bearing upon the conduct of the many less-credible ad servers who have been willing to fill any void left by the absence of their more reputation-focused competitors.[122] For example, when Google started cracking down on Jestin Coler's websites, hundreds of other ad servers contacted him asking to work with sites owned by his Disinfomedia company.[123] It seems, therefore, that the efforts of the largest ad servers to isolate revenue streams

---

[116] See, eg, Julia Love and Kristina Cooke, 'Google, Facebook move to restrict ads on fake news sites', *Reuters*, 15 November 2016; Ginny Marvin, 'Google posts its new policy against fake news & 'misrepresentative' sites', *MarTech*, 15 November 2016; Tess Townsend, 'Google has banned 200 publishers since it passed a new policy against fake news', *Vox*, 26 January 2017.
[117] Lia Bozarth and Ceren Budak, 'Market Forces: Quantifying the Role of Top Credible Ad Servers in the Fake News Ecosystem' (2021) 15 *Proceedings of the Fifteenth International AAAI Conference on Web and Social Media* 83, 84.
[118] NewsGuard, *Special Report: Top Brands are Sending $2.6 Billion to Misinformation Websites Each Year* (2021); Papadogiannakis et al (n 55) 2765.
[119] Papadogiannakis et al (n 55) 2766, 2769.
[120] Papadogiannakis et al (n 55) 2679.
[121] Ahmad et al (n 36) 124.
[122] See generally Ishmael Daro and Craig Silverman, 'Fake News Sites Are Not Terribly Worried About Google Kicking Them Off AdSense', *Buzzfeed News*, 16 November 2016.
[123] Sydell (n 25).

are not effective: the publishers either find ways to continue to use the services or migrate to other ad servers.

2.4.3 Fact-checker solutions

The third category of solution involves independent organisations fact-checking suspicious stories published online. One of the prominent arguments against censoring false speech is that the proper remedy for false speech is 'more speech'—that 'truth will out' in the battle for dominance of the 'marketplace of ideas'.[124] Fact-checkers like *Snopes* and *PolitiFact* fulfil this role with respect to fake news. By fact-checking suspicious stories and publishing the results of their work online, they enable readers to confirm whether or not stories they have read online are true or false. Their work is indispensable when attempting to discern fact from fiction in the confusing online environment.

At the same time, however, fact-checking suffers from several flaws as a solution to the fake news problem. The primary flaw relates to the reach of fact-checkers—in simple terms, that the users are unlikely to be exposed to the fact checkers. There are several reasons why. First, research has found that falsity spreads 'significantly farther, faster, deeper, and more broadly than the truth in all categories of information',[125] which means that fact-checkers struggle to provide 'real time rebuttals'.[126] Secondly, research has confirmed that those who visit untrustworthy websites are highly unlikely to visit fact checking websites and that readers of particular fake news stories are even less likely to be exposed to articles debunking the particular stories.[127] Finally, the typical fake news reader is likely to be locked in her or his own 'filter bubble' or 'echo chamber' due to the 'intertwining of individual and algorithmic content personalization' on the platforms working to

---

[124] See generally Philip Napoli, 'What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble' (2018) 70 *Federal Communications Law Journal* 55, 60-72; Sunstein (n 33) 4 ('The best response to falsehoods is usually to correct them rather than to punish or censor them').
[125] Soroush Vosoughi, Deb Roy and Sinan Aral, 'The spread of true and false news online' (2018) 359 *Science* 1146.
[126] Lili Levi, 'Real "Fake News" and Fake "Fake News"' (2018) 16 *First Amendment Law Review* 232, 239.
[127] Guess, Nyhan and Reifler (n 81) 476.

'deflect news sources and content that do not correspond to the user's established content preferences and political orientation'.[128]

Another flaw relates to how fact checkers are received by those who consume fake news. As I explained above, researchers have found that social media users respond badly to being corrected online—that, rather than accepting the correction, users tend to spread even more false news, lean into their own views, and use more toxic language.[129] This is a specific manifestation of what psychologists have labelled the 'backfire effect'—the phenomenon by which a correction 'may actually reinforce the original (incorrect) belief'.[130] The extent to which fact-checking promotes a backfire effect among those who believe fake news is unclear.[131] However, it is at least clear that fake news readers who view fact-checkers as biased are unlikely to reconsider their beliefs.[132]

When these flaws are taken together, it appears that fact-checking, despite being a noble and necessary enterprise, is unlikely to influence those most vulnerable to exploitation by fake news publishers.

2.4.4 News literacy solutions

Fact-checking's greatest flaw is that it relies upon those who have been deceived by a false story both seeing and accepting the article explaining that the story was false. The fourth category of solution seeks to address the problem further upstream by helping people develop the news literacy skills they need to avoid forming false beliefs in the first place. The task of teaching people news literacy skills

---

[128] Napoli (n 124) 77.
[129] Mohsen Mosleh, 'Perverse Downstream Consequences of Debunking: Being Corrected by Another User for Posting False Political News Increases Subsequent Sharing of Low Quality, Partisan, and Toxic Content in a Twitter Field Experiment', *Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems*, 6 May 2021.
[130] Weeks and Garrett (n 75) 404-405.
[131] Briony Swire-Thompson, Joseph DeGutis and David Lazer, 'Searching for the Backfire Effect: Measurement and Design Considerations' (2020) 9(3) *Journal of Applied Research in Memory and Cognition* 286.
[132] Melissa Zimdars, 'Viral "Fake News" Lists and the Limitations of Labeling and Fact-Checking' in Melissa Zimdars and Kembrew McLeod (eds), *Fake News: Understanding Media and Misinformation in the Digital Age* (MIT Press, 2020) 365.

has been taken up by schools and universities,[133] as well as fact checkers and legitimate media.[134] Like the work done by fact checkers, efforts to increase the news literacy of the general population are indispensable to the overall fight against misinformation—the fake news problem would not be as potent if the many thousands of people who believe and share the stories stopped to think about what they were doing. However, much like fact-checking, efforts to improve news literacy suffer from several flaws.

The primary flaw is speed. The fake news problem demands a solution now, not in 25 years when the older generation is no longer online, and a new generation of news-literate students have reached adulthood. Another problem is reach. Some people may lack the ability to develop the critical thinking skills necessary to differentiate between real and fake news. Others may have personality traits or biases too deeply ingrained for any improvement of their critical thinking skills to make a meaningful difference. And others may simply refuse to accept that they lack the requisite critical thinking skills. Researchers have found that three in four Americans overestimate their ability to distinguish between real and fake news headlines and that there is a correlation between overconfidence and behaviour—that overconfident people are more likely to visit untrustworthy websites, more likely to fail to distinguish between true and false content, and more likely to like or share false content on social media.[135] In other words, those who most need to develop better news literacy skills appear to be the least receptive to their own fallibility.

For those reasons, whilst teaching news literacy skills is a venerable and necessary pursuit, it may not assist those most in need of assistance, and, at any rate, cannot do so fast enough to make a meaningful difference in the near future.

---

[133] Calvert et al (n 74) 116.
[134] See, eg, Glenn Kessler, 'The Fact Checker's Guide for Detecting Fake News', *Washington Post*, 22 November 2016.
[135] Benjamin Lyons et al, 'Overconfidence in news judgments is associated with false news susceptibility' (2021) 118 *PNAS* e2019527118.

2.4.5 Publisher focused legal solutions

Whilst there are specific limitations to the four kinds of 'solution' to the fake news problem I have just discussed, the solutions share what I consider to be a far greater common problem. The platform solutions seek to ensure that people do not see fake news. The ad server solutions seek to remove an incentive to publish fake news. The fact checking solutions seek to ensure that false stories are corrected. And media literacy solutions seek to ensure that people have the skills to discern fact from fiction. But none of these solutions seek to hold those who publish and profit from fake news to account.

By limiting exposure on social media, cutting off revenue streams, countering false stories and educating potential readers, the solutions seek to make it harder for the publishers to succeed. But they provide no real deterrent to those tempted to publish false content. And they express no disapprobation of those who do. Instead, they accept that people will publish false stories for personal profit and impose a gigantic burden upon the rest of society to work around the damage they cause. They expect businesses and individuals to expend a massive amount of time, energy and effort upon detecting and countering false information whilst demanding nothing of those who are responsible for creating it.

The only solutions capable of holding those responsible to account fall within the final category—that is, *legal* solutions focused upon the publishers rather than the public or the platforms. However, the only such legal solution that has attracted any significant support within the literature is the tort of defamation. Several scholars have touted pursuing defamation claims or reinvigorating the law of defamation as a solution to the fake news problem.[136] Cass Sunstein, for example, described

---

[136] See, eg, Lee Royster, 'Fake News: Potential Solutions to the Online Epidemic' (2017) 96 North Carolina Law Review 270, 274-276 (arguing in favour of extending defamation liability for platforms); Andrea Butler, 'Protecting the Democratic Role of the Press: A Legal Solution to Fake News' (2018) 96 *Washington University Law Review* 419 (arguing in favour of extending defamation liability to platforms); Randall Nice, 'Reviving the Lost Tort of Defamation: A Proposal to Stem the Flow of Fake News' (2019) 61 *Arizona Law Review* 205, 225-230. See also Michael Park, 'Separating Fact From Fiction: The First Amendment Case for Addressing "Fake News" on Social Media' (2018) 46 *Hastings Constitutional Law Quarterly* 1 (arguing for legal regulation of social media platforms); Ahran Park and Kyu Ho Youm, 'Fake News from a Legal Perspective: The United States and South Korea Compared'

defamation as the ‘sword’ that ‘victims of damaging falsehoods need, and deserve’.[137] The problem, however, is that there are ‘victims’ of fake news stories beyond those who are defamed by the publishers.[138] The thousands of readers who the publishers exploit for financial gain are also victims, as are the other content providers whose traffic is diverted by fake news websites. And none of them can rely upon defamation laws. Moreover, there are also significant problems with relying upon victims to do the work of holding fake news publishers to account. Not every fake news story is defamatory.[139] Not every person who is defamed has the resources to make a claim.[140] And not every person with the resources is interested in litigation.[141]

Consider the story alleging that police had discovered the bodies of twelve white women locked in freezers with the words ‘Black Lives Matter’ carved into their skin.[142] A person or organisation aligned with the Black Lives Matter movement *might* have standing to commence defamation proceedings against the publisher. But would commencing proceedings be the best use of their resources? Would the risk of failure be worth the risk of losing the time and money spent pursuing the litigation? Would the prospects of success be worth drawing further attention to the story? The answers to these questions are self-evidently ‘No’?

Also consider the successful defamation proceedings run against Alex Jones of *Infowars*. Jones broadcast stories alleging that the Sandy Hook elementary school shooting was staged. Relatives of those killed in the shooting gave evidence of being harassed for years by people who believed him. They spoke of strangers showing up at their homes to record them and people making abusive comments about them on social media. The daughter of the principal who was killed said she received rape

---

(2019) 25 *Southwestern Journal of International Law* 100, 105-112 (reviewing various torts and laws regulating trade practices and broadcasting).

[137] Cass Sunstein, ‘Defamation Law Can Slow the Plague of Fake News’, *Bloomberg*, 23 December 2020.

[138] Timmer (n 74) 685.

[139] John Riggins, ‘Law Student Unleashes Bombshell Allegation You Won’t Believe!: “Fake News” as Commercial Speech’ (2017) 52 *Wake Forest Law Review* 1313, 1323; Timmer (n 74) 685.

[140] Timmer (n 74) 685.

[141] Timmer (n 74) 685.

[142] Joshua Gillin, ‘Story of 19 white women killed by Black Lives Matter supporter is fake news’, *PolitiFact*, 6 April 2017.

threats mailed to her house. One father described how conspiracy theorists urinated on the grave of his seven-year-old son and threatened to dig up the coffin.[143]

Jones was ordered to pay $965 million in damages to the relatives of those killed in the shooting and an FBI officer who was among the first responders.[144] Jones responded by calling the verdict 'hilarious', asking: 'Do these people actually think they're getting any money?' and saying: 'I don't have any money, so this is all a big joke'.[145] Despite evidence that the Infowars empire generated $165 million in revenue between 2016 and 2018, the company filed for bankruptcy and Jones himself claimed to be worth less than $2 million.[146] Years later, the relatives of the victims are still seeking to enforce the verdict in the context of Jones and his company's bankruptcy.[147] If they are not successful, their reward for attempting to hold Jones to account will likely be the cost of taking legal action against him in the first place.

Of course, it did not have to be that way. Jones probably would not have found the outcome of the proceedings so 'hilarious' had they been a criminal prosecution funded by the state rather than a private suit funded by those he defamed in his stories. Had the proceedings been a criminal prosecution, the penalty probably would not have been an order to pay money avoidable by means of asset shifting but rather imprisonment and the recovery of his earnings by way of proceeds of crime legislation. In other words, had Jones been charged with a criminal offence, the outcome would probably have been one capable of punishing Jones, achieving retribution for his victims, expressing society's disapprobation for his conduct,

---

[143] Maya Yang, 'Alex Jones ordered to pay Sandy Hook families $965m over hoax claims', *The Guardian*, 13 October 2022.
[144] Joanna Slater, 'Alex Jones ordered to pay nearly $1 billion to Sandy Hook families', *Washington Post*, 12 October 2022.
[145] Annbelle Timsit, Leo Sands and Joanna Slater, 'Will Alex Jones pay Sandy Hook families $1B? What to know about the huge award', *Washington Post*, 13 October 2022.
[146] Ibid.
[147] Ibid; Dave Collins, 'Sandy Hook families offer to settle Alex Jones' $1.5 billion legal debt for a minimum of $85 million', *Associated Press*, 28 November 2023; Maya Yang, 'Judge blocks Sandy Hook families' settlement over Alex Jones bankruptcy', *The Guardian*, 6 February 2025.

deterring others from emulating that conduct, and perhaps even teaching Jones himself a lesson. Those are the functions uniquely served by the criminal law.[148]

2.4.6 The criminal law as an appropriate solution

As I explained in Chapter 1, my goal in this thesis is to show that there is a compelling argument in favour of imposing criminal sanction upon those who make money by publishing fake news—not by enacting new laws, but by recognising that fake news publishers have found a new way to break some very old laws. As a solution, the criminal law offers a means of holding those who publish and profit from fake news accountable for the staggering harms they have inflicted upon individuals and the public. Moreover, making money by publishing fake news is precisely the kind of conduct that is traditionally considered to be worthy of criminal rather than civil sanction.

The criminal law provides the means to hold accountable those whose harmful actions 'have no specifically identifiable victim' or have 'a large number of diffuse victims'.[149] Making money by publishing fake news is conduct of precisely this kind. The reader who suffers detriment arising from belief in a false story published on a fake news website may be 'specifically identifiable' as a victim. However, there are also 'diffuse victims' including honest content providers who lose revenue due to readers being diverted to fake news websites, readers becoming reluctant to consume news due to the prevalence of false information, and readers spending time scrutinising rather than consuming content.[150]

The criminal law provides the means to redress 'wrongs and harms in which the public is properly interested'[151] or 'that the community is responsible for punishing'.[152] According to Marshall and Duff, believing that conduct 'should be criminal' is to believe that the conduct 'should be declared wrong by the community:

---

[148] See generally Stuart Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press, 2012) 71.
[149] Green (n 148) 144.
[150] See further Chapter 9.
[151] Green (n 148) 146.
[152] Grant Lamond, 'What is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609, 621.

that it is a matter on which the community should take a shared and public view, and claim normative authority over its members'.[153] The conduct perpetrated by fake news publishers is conduct of this kind. Who would disagree that influencing people to vote in certain ways, or to engage in violent conduct, or to refrain from bona fide medical treatment, by lying, solely for the purpose of person financial gain, should be 'declared wrong by the community'? Who else but the public may take responsibility for punishing the publishers?

The criminal law provides the means for the public to express 'attitudes of resentment and indignation, and of judgments of disapproval or reprobation'.[154] It also operates to 'satisfy the desire for retaliation felt by victims of crime and to satisfy the public outrage generated by those crimes'.[155] The 'resentment and indignation' generated by the conduct perpetrated by fake news publishers is self-evident from the enormous efforts dedicated to counteracting the proliferation of fake news described earlier. The publishers inflicting so much harm solely for the purpose of personal financial gain is deserving of 'disapproval and reprobation' under almost any moral theory.[156] It is also reflected in evidence of people and leaders being 'highly concerned' about the 'virality' and 'influence' of misinformation.[157] And it is not hard to imagine victims desiring retaliation. Would anyone blame Edgar Welch for seeking retribution against the publishers whose promulgation of the Pizzagate hoax ultimately led to him being sentenced to a term of imprisonment?

Finally, the criminal law serves an 'educative or declaratory function in sustaining and reinforcing social standards'[158] and 'informing, shaping, and

---

[153] Sandra Marshall and Antony Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law & Jurisprudence* 7, 13 quoted in Green (n 148) 146.
[154] Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, 1970) 98.
[155] Lawrence Becker, 'Criminal Attempts and the Theory of the Law of Crimes' (1974) 3 *Philosophy & Public Affairs* 262, 279. See also Green (n 148) 145.
[156] See Chapters 7 and 9 re the wrongfulness of deception.
[157] See generally, Shelley Boulianne and Christian Hoffmann, 'Perceptions and Concerns About Misinformation on Facebook in Canada, France, the US, and the UK' (2024) 36 *International Journal of Public Opinion Research* edae048.
[158] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th ed, Oxford University Press, 2013) [3.5(s)].

reinforcing societal norms'.[159] One such norm is the 'norm in favor of truthfulness'.[160] This norm exists to some extent due to linguistic *necessity*: '[i]f most people do not ordinarily make their utterances with the intent to speak truthfully, a language cannot succeed in its function as a tool for communication'.[161] It also exists because lying is generally understood to be wrong.[162] According to Sunstein:

> ... it is important to emphasize that in well-functioning societies, restrictions on lying and safeguards against spreading falsehoods come mostly from social norms, not from law. If you fail to tell the truth, you are likely to face social punishments of various kinds. People are aware of that risk in advance, and so generally internalize the norm in favor of honesty, such that they feel shame or guilt if they violate it. In addition, people know that if they lie, their rivals or opponents might lie as well, and a norm in favor of truthfulness avoids a kind of mutual destruction. When things are going well, social norms do the work of law. When norms punish lying or the spread of falsehoods, there is much less pressure on the legal system to intervene.[163]

The present situation in the United States has put 'pressure on the legal system to intervene'. Beyond evidence of that pressure arising from the current political situation,[164] the fact that fake news publishers have felt comfortable participating in interviews with journalists and going on speaking tours is evidence of an unusual lack of shame or guilt. The interest taken by journalists may even be an example of what Stuart Green describes as 'society maintain[ing] something of a grudging respect for, or at least fascination with, particularly clever and audacious fraudsters (as it does for skilful cat burglars)'.[165] Either way, as Sunstein argues,[166] some level of further shaping and reinforcement is warranted by the changes to the information ecosystem I have described above.

---

[159] Green (n 148) 53 and 141.
[160] Cass Sunstein, *Liars* (Oxford University Press, 2021) 53.
[161] Alan Strudler, 'Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud' (1998) 146 *University of Pennsylvania Law Review* 1529, 1559.
[162] See Chapter 9.
[163] Ibid 53.
[164] At the time of writing, President Trump had just accused Ukraine of starting the war with Russia.
[165] Green (n 148) 130. 13 ways
[166] Sunstein (n 33) 4.

Notwithstanding the suitability of the criminal law as a solution to the fake news problem, the prospect of using the criminal law to prosecute fake news publishers has been unpopular in Australia, the United Kingdom and the United States. The unpopularity appears to rest upon three assumptions. The first is that new laws, which could be perceived as politically motivated, or used as a cover for the suppression of opinions and ideas, are required to impose criminal penalties upon fake news publishers.[167] The second is that the prosecution of fake news publishers would collide with the right to free speech.[168] The third is that people should just know better than to believe false content—that the law should not be used to protect people from their own gullibility.[169]

In the remainder of this thesis, I mount an original argument in favour of using the criminal law to prosecute fake news publishers that addresses each of these concerns. First, by demonstrating that making money by publishing fake news could be prosecuted as fraud,[170] I refute the notion that new laws are required. Secondly, by showing that making money by publishing fake news is appropriately characterised as a form of fraud,[171] I dispute the notion that fake news publishers are entitled to rely upon freedom of speech protections.[172] Finally, by showing that the law set its face against victim blaming in fraud centuries ago,[173] I dispel the notion that the readers should just 'know better than to believe false content'. Whilst there may be other avenues available to prosecute those who publish fake news for purposes other than financial gain—in Australia, for example, for breaching s 7 of the *Telecommunications Act 1997* (Cth), which prohibits using a carriage service in a way that reasonable persons would find menacing, harassing or offensive—my goal in this thesis is to show that making money by publishing fake news is not only capable of constituting each of the fraud offences I consider but also fairly labelled as 'fraud'.

---

[167] Timmer (n 74) 675.
[168] Timmer (n 74) 675.
[169] See Chapter 3.
[170] See Chapters 3-7.
[171] See Chapter 9.
[172] See Chapter 10.
[173] See Chapter 3.

2.5 Conclusion

In this chapter, I sought to complete the first stage of my argument by setting out the fake news ‘problem’. I first described the recent phenomenon of online content creators publishing false stories about controversial topics to attract attention and generate advertising revenue. I then described the harm brought about by the proliferation of their false stories with a particular focus upon stories concerning politics and the COVID-19 pandemic. Finally, I discussed the solutions to the problem with the goal of showing that the main solutions share a common flaw—namely, that they fail adequately to hold those responsible to account. In the next chapter, I begin the next stage of my argument by arguing that publishing fake news constitutes the first element of section 2 of the Fraud Act, section 192E of the Crimes Act and the wire fraud statute.

Part II

3. False Assertion of Fact

3.1 Introduction

In Part I of this thesis, I identified the problem for which I am proposing a solution—namely, that online content creators motivated by economic gain and driven by market forces are publishing false stories about controversial topics, presenting the stories to as many people as possible, and thereby causing people to form false beliefs and alter their behaviour in ways that are harmful on individual and societal levels. I also explained that the main 'solutions' to the fake news problem share a common flaw in that they require people and platforms to work around the publication of fake news without holding the publishers themselves responsible for their conduct. And I introduced the notion that the criminal law may already provide a solution to the problem capable of overcoming that common flaw—namely, prosecution for fraud. In this second part of the thesis, I progress my overall argument by examining the extent to which making money by publishing fake news presently meets the elements of the existing fraud offences in section 2 of the Fraud Act, section 192E of the Crimes Act and the wire fraud statute. The core purpose of this part is to explain the elements of each offence, to apply the facts of making money by publishing fake news to those elements, and to address any possible counterarguments that a fake news publisher may seek to rely upon. A secondary purpose is to identify some of the potential obstacles to my argument that I will go on to address in Part III.

This chapter concerns the first element of each offence. I describe this element as requiring the prosecution to prove that the defendant made a 'false assertion of fact'. Each offence actually extends further than the making of a false assertion of fact. For example, the New South Wales offence applies to 'any deception'—deception being a 'much broader concept' than making a false assertion of fact which 'encompass[es] an unlimited variety of devices by which the deceiver

creates false impressions in others' minds';[1] the English and New South Wales offences encompass making false assertions of law;[2] and the words 'any scheme or artifice to defraud' in the wire fraud statute encompass schemes that do not involve making assertions (such as those to receive kickbacks).[3] However, for the purposes of this thesis, there is no need to consider conduct of that kind. The first element of each offence may be establishing by proving that the defendant made false assertions of fact. And for the reasons I advance below, publishing fake news stories clearly is within that territory.

In this chapter, I argue that a typical fake news publisher makes false assertions of fact of three kinds. First, by publishing a false account of an event in the story, a fake news publisher makes a false assertion that the event in fact occurred. Secondly, by dressing up the story to look like a legitimate news story, a fake news publisher makes a false assertion that the story is a legitimate news story. Thirdly, by posting links to the story on social media, a fake news publisher asserts, not only that the headline posted in the link is a legitimate news headline, but also that the links will direct those who click on them to a legitimate news website. In making these arguments, I rely upon an orthodox interpretation of the first element of each of the offences rather than any novel theory as to what constitutes a 'false assertion of fact'.

In addition to identifying the false assertions of fact made by fake news publishers, I also consider three counterarguments that a fake news publisher charged with fraud may attempt to rely upon: first, that the stories were true or expressed opinions rather than facts; secondly, that the stories were so obviously false that the readers should have known better than to believe them; and thirdly, that the stories were satirical. In answer to the first counterargument, I explain that the prosecution cannot succeed where there is a reasonable possibility that the relevant assertion was an expression of opinion or the truth. In relation to the

---

[1] Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22 *Law and Philosophy* 393, 400; Stuart Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press, 2012) 128.
[2] *Fraud Act 2006* (UK) s 2(3); *Crimes Act 1900* (NSW) s 192B(1).
[3] 18 USC § 1346; *Skilling v United Sates*, 561 US 358 (2010).

second, I argue that longstanding authority precludes the publisher from relying upon an argument to the effect that ‘the story was obviously false’ or ‘the readers should have known better to believe the story’. Finally, addressing the third, I argue that the prosecution is unlikely to succeed where there is a reasonable possibility that the story was satirical in the sense that the content of the story was factual in form but not in substance.

The chapter is split into three sections. The first section breaks down what the prosecution must prove to establish that a defendant made a ‘false assertion of fact’—namely, that there was an ‘assertion’, that the assertion was of ‘fact’ and that the assertion was ‘false’. The second section uses examples of fake news stories to argue that publishing fake news constitutes the first element of each offence. The third section addresses the counterarguments upon which a person charged with fraud for publishing fake news may wish to rely. As with each chapter in this part of the thesis, the originality of the material arises not from my examination of the elements of the offences but from my application of those elements to making money by publishing fake news.

3.2 The first element of each offence

The ‘false assertion of fact’ element of each fraud offence may in turn be broken into three components: (a) that there was an ‘assertion’; (b) that the assertion was of ‘fact’; and (c) that the assertion was ‘false’. The principles with respect to each of these components are well-settled. I address each of them in turn.

3.2.1 That there was an ‘assertion’

The first component is best described as requiring an ‘assertion’ rather than a ‘statement’ because the law does not require the defendant to have expressly stated the false assertion of fact either orally or in writing. As Blackburn J said as far back as 1865: ‘[i]t is not requisite that the false pretence should be made in express words

if the idea is conveyed'.[4] In other words, the assertion may be either express or implied.[5]

Implied false assertions of fact were traditionally referred to as 'false pretences by conduct'. The seminal example is *R v Barnard*.[6] Dressed in a commoner's cap and gown, Barnard entered a bootmaker's shop claiming to belong to Magdalen College at the University of Oxford. The bootmaker supplied him with a pair of bootstraps, apparently on the assumption that a student from the university could be trusted to pay for them. Barnard was indicted for obtaining the bootstraps by false pretences. The report describes Bolland B saying the following:

> If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the university, and if so, would have been a sufficient false pretence to satisfy the statute.[7]

In other words, the law does not require the prosecution to prove that the defendant made an oral or written statement. It is savvy enough to recognise that more cunning individuals may rely upon conduct rather than words to convey their meaning.[8]

3.2.2 That the assertion was 'of fact'

The second component is that the assertion was 'of fact'. The Oxford English Dictionary defines a 'fact' as: 'A thing that is known or proved to be true'.[9] Perhaps more to the point, it states that in law the word means: 'The truth about events as opposed to interpretation'. The assertion has to be of fact because the next

---

[4] *R v Giles* (1865) Le & Ca 502; 169 ER 1490. See also *R v Cooper* (1877) 2 QBD 510, 513; *People v Randono*, 32 Cal App 3d 164, 174 (1973); *United States v Colton*, 231 F 3d 890, 898 (4th Cir, 2000). Section 2(4) of the Fraud Act gives legislative backing to this principle by stating: 'A representation may be express or implied'. Likewise, section 192B(1) of the Crimes Act states that the deception may be 'by words or other conduct'.
[5] Anthony Arlidge et al, *Arlidge and Parry on Fraud* (5th ed, Sweet & Maxwell, 2016) 4-006-4-011.
[6] (1837) 7 Car & P 784; 173 ER 342.
[7] Ibid.
[8] See, eg, *R v Story* (1805) Russ & Ry 81; 168 ER 695; *R v Freeth* (1807) Russ & Ry 127; 168 ER 718.
[9] Oxford English Dictionary https://www.lexico.com/en/definition/fact.

component is that the assertion was either true or false and assertions that are not factual are not capable of being proven to be either true or false.

Certain kinds of assertions are inherently factual. For example, if someone says that an object weighs a certain amount, has certain dimensions, and is made of a certain material, each assertion may be proved to be true or false by testing. However, beyond facts capable of being physically measured or tested, any kind of assertion that may be otherwise proven or disproven may form the basis of an act of fraud. The reports include cases of defendants who made false assertions about themselves—for example, about being wealthy,[10] possessing supernatural powers,[11] or being unmarried.[12] They include cases of defendants who made false assertions about other people—for example, that another person had died,[13] or was their benefactor.[14] And, most importantly for my argument, they include cases of defendants who made false assertions about events.

In most cases involving a false assertion about an event, the defendant claims an entitlement to be paid by the victim because of the event. For example, in *R v Airey* the defendant was a carrier who pretended to have delivered goods to obtain payment for the delivery.[15] There the 'event' was the purported delivery, which gave rise to an obligation to pay. But there are also examples of defendants who made false assertions about events to induce victims to engage in other transactions. For example, in *Young v The King* the defendants tricked the victim into believing that there was a bet upon a running race, when in fact there was no race and no bet, to induce the victim to pay them money to join in the bet.[16] These kinds of frauds may even involve false assertions of 'news'. In *R v De Berenger* the defendant spread rumours that Napoleon had been killed and that the United Kingdom was on the verge of peace with France. Along with his co-conspirators, he was charged with

[10] *Commonwealth v Burdick*, 2 Barr 163 (Pa, 1845); *R v Howarth* (1870) 11 Cox CC 588.
[11] *R v Giles* (1865) 10 Cox CC 44; *Jules v State*, 85 Md 305 (Md Ct App, 1897).
[12] *R v Copeland* (1842) Car & M 516; 174 ER 615.
[13] *R v Dent* (1843) 1 Cox CC 15.
[14] *Commonwealth v Hutchinson*, 2 Penn LJ 241 (1843); *R v Davis* (1868) 11 Cox CC 181
[15] (1801) 2 East 30; 102 ER 279.
[16] (1788) 1 Leach 505; 168 ER 354.

conspiracy to defraud for taking advantage of the resultant surge in the price of government bonds.[17]

These examples demonstrate that there is no limit on the kinds of facts capable of making up a 'false assertion of fact'. What matters is that the assertion was of a 'fact', not of something else. The courts have traditionally drawn a distinction between assertions of fact, assertions of law, expressions of opinion and the making of promises.[18] For present purposes, the most relevant of these distinctions is that between an assertion of fact and the expression of an opinion. That is because a fake news publisher charged with fraud could seek to defend her or himself on the ground that the stories conveyed opinions rather than facts—particularly where the stories were political in nature.

Both commentators and courts regard the line between an assertion of fact and expression of opinion as being difficult to draw. In his treatise on misrepresentation, John Cartwright said that the distinction was 'not as straightforward as might first appear'.[19] In their book on criminal fraud in Australia, David Lanham et al similarly described the boundary between the two as 'necessarily somewhat indistinct'.[20] And the Court of Appeals for the DC Circuit went so far as to admit that 'many statements … do not clearly fit into either category'.[21]

The Oxford English Dictionary defines an 'opinion' as a: 'view or judgement formed about something, not necessarily based on fact or knowledge'.[22] In relation to defamation, an 'opinion' has been described as: 'something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark [or] observation'.[23] The threshold question is whether the assertion is verifiable. This involves determining whether the assertion is capable of being proven to be true or

---

[17] (1814) 3 M & S 67; 105 ER 536. See also Tom Hadden, 'The Origin and Development of Conspiracy to Defraud' (1967) 11 *American Journal of Legal History* 25, 33 ('It seems likely that the spreading of false rumours could in itself have been regarded as a common law offence').
[18] See, eg, Wayne LaFave, *Criminal Law* (5th ed, West, 2010) § 19.7(b)(5).
[19] John Cartwright, *Misrepresentation* (Sweet & Maxwell, 2002) 21.
[20] David Lanham et al, *Criminal Fraud* (Law Book Co, 1987) 70.
[21] *Ollman v Evans*, 750 F 2d 970, 978 (DC Cir, 1984).
[22] https://www.lexico.com/en/definition/opinion.
[23] *Clarke v Norton* [1910] VLR 494, 499.

false: if an assertion cannot be proven to be true or false, it cannot constitute an assertion of fact.[24] This conforms to the dictionary definitions I set out earlier.

In some cases, the distinction between fact and opinion is easy to draw. 'Muhammad Ali was the greatest boxer of all time' is obviously an expression of opinion. 'This horse is seven years old' is obviously an assertion of fact. In other cases, the distinction is more difficult. For example, if a person asserts that something has a particular value, is it a statement of opinion or a statement of fact? In most cases, the answer is likely to be that it is a statement of opinion. However, if the opinion relates to a matter 'peculiarly within the knowledge' of the person who made the assertion,[25] or if the thing was in fact worthless,[26] then the answer is more likely to be that it is a statement of fact.

The distinction is most difficult to draw when it comes to implied assertions. A person who makes a promise may be treated as impliedly asserting that he or she in fact intends to (and can) fulfil the promise. Accordingly, a person who makes a promise that he or she does not in fact intend to fulfil (or in fact cannot fulfil) may be treated as having made a false assertion of fact. [27] Similarly, a person who expresses an opinion may be treated as impliedly asserting that he or she actually holds the opinion (i.e. 'this is my genuine opinion').[28] Accordingly, a person who expresses an opinion that he or she does not in fact hold (i.e. an 'ingenuine opinion') may be treated as having made a false assertion of fact.[29]

---

[24] *Ollman v Evans*, 750 F 2d 970, 981 (DC Cir, 1984). See generally Frederick Schauer, 'Facts and the First Amendment' (2010) 57 *UCLA Law Review* 897.
[25] *Williams v State*, 77 Ohio St 468 (Ohio, 1908). See also *Harrison v United States*, 200 F 665, 669 (6th Cir, 1912); *United States v New South Farm & Home Co*, 241 US 64, 70 (1916). See further LaFave (n 18) § 19.7(b)(5).
[26] See JW Cecil Turner, *Kenny's Outlines of Criminal Law* (18th ed, Cambridge University Press, 1962) ¶ 348.
[27] See *R v Cooper* (1877) 12 Cox CC 617 at 622 (Denman J); *Durland v United States*, 16 US 306, 313 (1896); Crimes Act s 192B(1)(a) (defining 'deception' as including 'a deception as to the intentions of the person using the deception').
[28] LaFave (n 18) § 19.7(b)(5).
[29] See, eg, *United States v Ballard*, 322 US 78, 89-90 (1944) ('The state of one's mind is a fact as capable of fraudulent misrepresentation as is one's physical condition or the state of his bodily health'); *R v Jeff* (1966) 51 Cr App R 28; *United States v Morris*, 80 F 3d 1151, 1163 (7th Cir, 1996). See also Fraud Act s 2(3) ('representation' includes a representation as to 'state of mind'). See generally David Ormerod and Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, Oxford University Press, 2018) 951-951. Cf Lanham et al (n 20) 70-71.

3.3.3 That the assertion was 'false'

The third component is that the assertion was 'false'. This means nothing more than the assertion was not true. To satisfy this aspect of each offence, the prosecution must prove that the assertion did not reflect reality. Exactly what the prosecution has to prove depends upon the nature of the alleged assertion. If the prosecution allege that the defendant said "X", the prosecution has to prove that "X" was false. If the prosecution allege that the defendant said "A", "B" and "C" but conveyed the impression "X", the prosecution has to prove that "A", "B" and "C" convey the impression "X" and that "X" was false. The individual statements "A", "B" and "C" may be promises or requests or expressions of opinion or even true assertions of fact. What matters is that together they conveyed "X" and that "X" was false. For example, in *R v Cooper* the defendant was convicted of false pretences for obtaining a large quantity of potatoes by means of the following letter:[30]

> Hamerton, Sheffeld, January 17th, 1877.
>
> Dear Sir,—Please send me one truck of Regents and one truck of Rocks as sample at your prices named in your letter. Let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours truly, William Cooper.
>
> P.S.—I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on.

The first sentence of the letter was a request (for two trucks of potatoes). The second contained both a request (that the potatoes be of good quality) and an expression of opinion mixed with a promise (that a good trade will be done). The third was a promise (to pay for the potatoes). And the postscript was a promise mixed with an expression of opinion (to be a good customer).[31] The defendant was convicted of obtaining the potatoes by the false pretence that he was a dealer in potatoes able to pay for a large quantity upon delivery—an impression conveyed by his ordering two *truckloads* as a sample and stating that a *good trade* will be done.

---

[30] (1877) 12 Cox CC 617.
[31] (1877) 12 Cox CC 617 at 622.

Coleridge CJ referred to cases including *R v Barnard* and said: '[t]he question in all these cases is what was intended to be conveyed to the mind of the prosecutor by the acts, conduct, or silence of the prisoner'.[32] In other words, the issue was the impression the letter conveyed, not its precise terms. The same approach has been taken to cases in which the defendant made *true* statements but (by concealing material information) conveyed a false impression.[33] Such assertions are often described as 'misleading'.[34]

3.3 Fake news as a false assertion of fact

In this section, I show that fake news publishers make false assertions of fact in three interrelated ways. As the modern fake news phenomenon originated with the stories published in the lead up to the 2016 Presidential Election in the United States, I do so by reference to three of the most widely shared fake news stories from that time.

3.3.1 The statements in the stories

According to an analysis conducted by *Buzzfeed*, the third most prominent fake news story published in 2016 was titled: '*Pope Francis Shocks World, Endorses Donald Trump for President, Releases Statement*'.[35] The story was first published by a site called *wt0e5news.com* but rose to prominence on *endingthefed.com*,[36] a popular fake news website run by a 24-year-old Romanian named Ovidiu Drobota.[37] The story described Pope Francis issuing statement in support of Donald Trump's

[32] Ibid 621 referring to *R v Barnard* (1837) 7 Car & P 784; 173 ER 342.
[33] See, eg, *R v Stevens* (1844) 1 Cox CC 83; *R v Kylsant* [1932] 1 KB 442, 445; *Linden v United States*, 254 F 2d 560, 567 (4th Cir, 1958); *Cacy v United States*, 298 F 2d 227, 229 (9th Cir, 1961); *Gusow v United States*, 347 F 2d 755, 756 (10th Cir, 1965); *United States v Colton*, 231 F 3d 890, 898 (4th Cir, 2000); *United States v Steffen*, 687 F 3d 1104 (8th Cir, 2012).
[34] Stuart Green, 'Lying, Misleading and Falsely Denying' (2001) 53 *Hastings Law Journal* 157, 162-168; Jennifer Saul, *Lying, Misleading & What is Said* (Oxford University Press, 2012) 1-3.
[35] Craig Silverman, 'Here Are 50 Of The Biggest Fake News Hits On Facebook From 2016', *BuzzFeed News*, 30 December 2016.
[36] Hannah Ritchie, 'Read all about it: The biggest fake news stories of 2016', *CNBC*, 30 December 2016.
[37] Tess Townsend, 'The Bizarre Truth Behind the Biggest Pro-Trump Facebook Hoaxes', *Inc.*, 21 November 2016.

campaign for the presidency during the 2016 election. It provides a simple example of a fake news story containing false assertions of fact.

The statement attributed to Pope Francis contained three express *assertions*: (1) that the Pope had released a statement; (2) that the Pope was hesitant to offer support for either candidate; and (3) that the Pope had resolved to endorse Trump. As each assertion was something that could be proven or disproven, each assertion was of *fact*: the Pope either had or had not made a statement; the Pope either was or was not hesitant to offer support; and the Pope either had or had not endorsed Trump. Finally, as at least the first and third assertions did not reflect reality, those assertions were *false*: the Pope had not endorsed Trump; and, at least until the press conference in which the Pope was driven to debunk the false story, the Pope had not even made a public comment about the election.[38]

Accordingly, as the Pope Francis story contained two false assertions of fact, the publishing of the story satisfied the first element of fraud.

3.3.2 The websites themselves

According to the *Buzzfeed* analysis, the most prominent fake news story published in 2016 was Paul Horner's story titled '*Obama Signs Executive Order Banning the Pledge of Allegiance in Schools Nationwide*'.[39] The story reported President Obama stating that the pledge was 'divisive' and 'contrary to America's deepest held values'. It reported Hillary Clinton offering support and promising to uphold the ban should she be elected. And it reported Donald Trump characterising the ban as 'the first step in many in [Obama's] plan to force Sharia law' upon the United States. Each of these assertions was an express false assertion of fact made in writing. However, the story is also an example of another kind of false assertion of fact—namely, the implied assertion conveyed by the presentation of the story on the fake news website.

[38] Ritchie (n 36).
[39] Silverman (n 35).

Consider the screenshot of the story below. Everything about the page conveys the impression that the story is a real news story. The top of the page looks the same as the top of a typical news website. There is a logo that mimics the logo of the American Broadcasting Company. There is a banner with links to certain kinds of stories—news, fashion, tech, video and world—just like a typical news website. There is a small blue box that states ‘news’. The headline is written in the same style as a typical news headline. Below the headline is the name of the reporter, the name of the media outlet, the date of the report, the number of views and the number of comments. There are links to share the story on social media. There is a picture of Obama signing something surrounded by people smiling. And, although it cannot be seen in the image reproduced below, at the time of publication, the empty space to the right contained ads.



The false assertion made by the presentation of the website is the same as that of the defendant in *R v Barnard*,[40] who posed as a university student to defraud the bootmaker. Because there is no statement on the page reading 'this is a real news story', the publisher does not expressly state to the world that the website is a real news website. However, by dressing the website in the garb of a real news website, the publisher conveys that impression. To repeat what Blackburn J said in *R v Giles*: '[i]t is not requisite that the false pretence should be made in express words if the idea is conveyed'. The typical fake news website is itself an implied false assertion of fact as to its own legitimacy. It gives the readers 'the idea' that they are reading real news. Once again, the requirements of the first element are met.

3.3.3 The links to the websites

The seventh most prominent fake news story of 2016 identified in the *Buzzfeed* analysis was titled: '*FBI Agent Suspected in Hillary Email Links Found Dead in Apparent Murder Suicide*'.[41] The story was published by Jestin Coler three days before the Presidential Election on *denverguardian.com*. According to an analysis conducted by *Buzzfeed*, the story had 567,000 Facebook 'engagements'[42]—i.e. it was shared, reacted to and commented upon 567,000 times.[43]

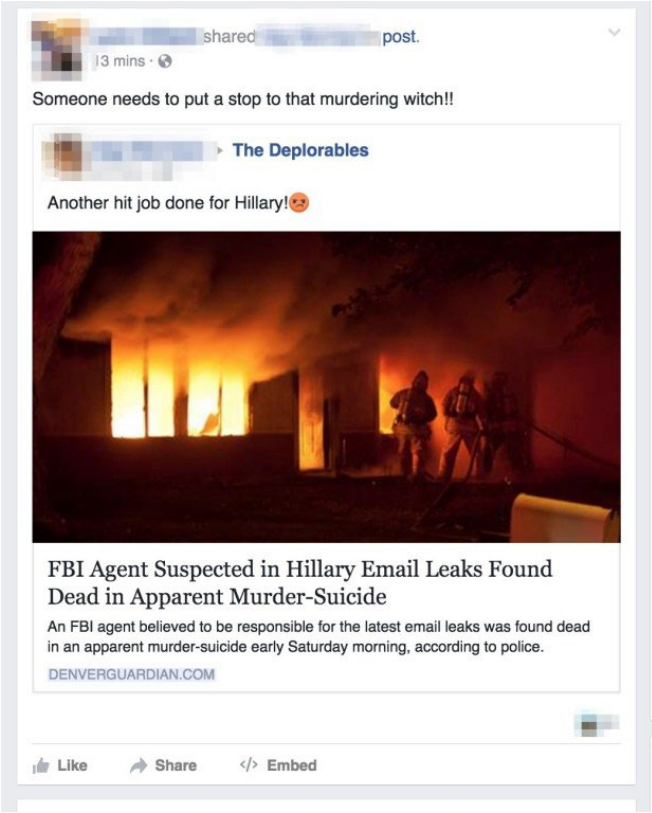
The screenshot below depicts the way in which the link to the story appeared when shared on Facebook. The link contained several express false assertions in writing—that an FBI agent was suspected to be responsible for leaks of Hillary Clinton's emails, that that FBI agent had been found dead, and that police had described the cause of death as a suspected 'murder-suicide'. It also contained an implied false assertion akin to that conveyed by Paul Horner's *abcnews.com.co* website. The headline is in the same style as the headline of a link to a legitimate news article. The blurb is in the style as a blurb in a link to a legitimate news article.

---

[40] (1837) 7 Car & P 784; 173 ER 342.
[41] Silverman (n 35).
[42] Silverman (n 35).
[43] Craig Silverman, 'This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook', *BuzzFeed News*, 16 November 2016.

The domain name ‘denverguardian.com’ sounds like a legitimate news website. And the photo appears in the same way as photos grabbed by Facebook from legitimate news articles appear.

More importantly, however, by means of these express and implied assertions, the link conveys another implied false assertion of fact—namely, that if users click the link, they will be taken to a legitimate news website.



The title, the blurb, the picture and the domain convey the impression that clicking the link will take the reader to a real news website to read a real news story. This false assertion of fact may be the most important of the three. That is because the links rather than the contents of the website are the real drivers of traffic to the website. They are the false assertions of fact by which the publisher really obtains the money. And even by them alone the requirements of the first element are met.

3.4 The available counterarguments

The prosecution must prove that the defendant made a false assertion of fact to the criminal standard—i.e. beyond a reasonable doubt.[44] If there is a reasonable possibility that the defendant did not make an assertion, or that the assertion was not false, or that the assertion was not of fact, the defendant is entitled to be acquitted. For that reason, a fake news publisher charged with fraud may raise counterarguments designed to cast doubt upon whether her or his conduct constituted making a false assertion of fact. I address three of these potential counterarguments under the following subheadings.

3.4.1 Reasonable possibility of opinion or truth

The first potential counterargument is that there is a reasonable possibility that the assertions made by the publisher were either: (a) not fact but rather opinion; or (b) not false but rather true. These are conventional answers to a charge of fraud. As I explained in section 3.2.2, expressing an opinion cannot constitute making a false assertion of *fact* (unless the defendant does not genuinely hold the opinion) and stating the truth cannot constitute making a *false* assertion.

The prospects of success of such a counterargument depend upon the nature of the relevant assertion. It would be unlikely to succeed with respect to any of the stories referred to in the previous section. There is no basis to argue that the Pope Francis Story was true or expressed an opinion. Nor is there a basis to argue that the implied assertions made by the page containing the Pledge of Allegiance Story—i.e. 'this is a real news story'—or the links to the Murder Suicide Story—i.e. 'this is a link to a real news website'—were true or expressed an opinion.

Nevertheless, it is possible to conceive of stories that are less plainly false, such that the prosecution cannot exclude a reasonable possibility that the stories were true. Likewise, it is possible to conceive of stories that are less plainly factual, such that the prosecution cannot exclude a reasonable possibility that the stories

[44] *Woolmington v DPP* (1935) AC 462; *Patterson v New York*, 432 US 197 (1977).

express opinion rather than fact. In this way, the first element serves an important filtering function: those who express opinions (no matter how abhorrent or unfounded) and those who tell the truth (no matter how confronting or unpopular) are beyond the reach of the offences. These filters go a long way to alleviating freedom of speech concerns that might otherwise arise with characterising the publication of fake news for financial gain as a criminal offence: the criminal standard of proof requires the prosecution to exclude any reasonable possibility that the stories expressed opinions or were true. I return to this issue in Chapter 10.

3.4.2 Obviously false stories

The second potential counterargument is that there is a reasonable possibility that the assertion was not truly 'false' because the falsity of the assertion was so obvious. This is tantamount to saying that the readers should have known better to believe the stories. For reasons I will explain, such a counterargument is not available at law. It is only worth considering because blaming the readers has been attractive to some commentators and the fake news publishers themselves. I will give some examples.

Shortly after the 2016 Presidential Election, the Chief Media Writer for *Poynter* argued that 'citizen stupidity' is the 'real problem with fake news',[45] and a contributor to *Forbes* suggested 'banning gullible people from the internet'.[46] More recently, *Vanity Fair* published an article titled: 'Nation's Imbeciles Lose their Minds over Fake News Biden is Taking their Red Meat Away'.[47] Finally, following evidence that readers were believing his false story about people being paid to protest Trump rallies, Paul Horner published the following 'correction' on his fake news website:

> This story is not real. No one needs money to protest Donald Trump. I personally went to two Donald Trump rallies and I can say with 100% certainty that NONE of the

[45] James Warren, 'The real problem with fake news? Citizen stupidity', *Poynter*, 2 December 2016.
[46] Kalev Leetaru, 'Should We Fight Fake News By Banning Gullible People From The Internet', *Forbes*, 17 December 2016.
[47] Bess Levin, 'Nation's Imbeciles Lose their Minds over Fake News Biden is Taking their Read Meat Away', *Vanity Fair*, 26 April 2021.

> protesters were getting paid. This story is mocking all of you sheep who think protesters are getting paid. Do your own thinking, retards.[48]

These examples demonstrate the existence of a sentiment that readers should know better than to believe fake news stories. Whatever the merits of that sentiment, it does not provide a valid counterargument to a fake news publisher charged with fraud. None of the offences require the prosecution to prove that the falsity of the assertion was of a particular standard—for example, that it was capable of deceiving a person exercising 'ordinary prudence'.[49] They require proof only that the assertion was false. Even the '*monumental credulity* of the victim is no shield for the defendant'.[50]

It is worth briefly noting that the law did not always work this way.[51] Historically, the position was the opposite. The original fraud offence at common law, which was known as 'cheating',[52] required the prosecution to prove that the 'cheat' was capable of deceiving a person exercising 'common care and prudence' or 'ordinary care and caution'.[53] The origin of the rule was *R v Jones*, where Holt CJ refused to 'indict one man for making a fool of another'.[54] Judge Cutting put the position more bluntly in *State v Estes*: 'if the [defendant] is chargeable with turpitude, the [victim] is equally so with stupidity. The Government cannot punish the one or protect the other'.[55]

---

[48] Ishmael Daro, 'The Toronto Sun Fell For An Obvious Hoax About Paid Anti-Trump Protesters', *Buzzfeed*, 28 February 2017.
[49] *R v Young* (1788) 1 Leach 505; 168 ER 354; *United States v Svete*, 556 F 3d 1157 (11th Cir, 2009).
[50] *Deaver v United States*, 155 F 2d 740, 745 (DC Cir, 1946).
[51] See generally Mark Zingale, 'Fashioning a Victim Standard in Mail and Wire Fraud' (1999) 99 *Columbia Law Review* 795; Lauren Lunsford, 'Fraud, Fools, and Phishing: Mail Fraud and the Person of Ordinary Prudence in the Internet Age' (2011) 99 *Kentucky Law Journal* 379, 382. See also Green (n 1) 64 and 129 (identifying victim-blaming as a potential reason why people view fraud as less serious than theft).
[52] Edward Hyde East, *A Treatise of the Pleas of the Crown* (P Byrne, 1806) vol 2, 813.
[53] *R v Wheatly* (1761) 2 Burr 1124; 97 ER 746.
[54] *R v Jones* (1703) 1 Salk 379; 91 ER 330. See also *Maine v Estes*, 46 Me 150, 151 (1858) ('if the pawner is chargeable with turpitude, the pawnee is equally so with stupidity'). See generally Simon Stern, 'R v Jones (1703)' in Handler et al, *Landmark Cases in Criminal Law* (Hart Publishing, 2017) 59.
[55] *State v Estes*, 46 Me 150, 151 (1858).

In the United Kingdom, the rule from *R v Jones* was rendered obsolete by the introduction of the false pretences offence in 1757.[56] In describing the purpose of the new offence, Ashurst J said: 'The Legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind'.[57] Likewise, Earle J said: 'It was once thought that the law was only for the protection of the strong and prudent. That notion has ceased to prevail'.[58] As Australia was settled after the introduction of the false pretences offence, the rule from *R v Jones* has never been the law in Australia. In the United States, remnants of the rule survived until the Court of Appeals for the Eleventh Circuit in *United States v Svete* became the final appellate court to hold that the prudence of the victim has no bearing upon the guilt of a person charged with fraud.[59]

In one of the few academic articles on victim blaming in fraud, Zingale observed that disregarding the prudence of the victim may have unintended consequences such as encouraging overreaching by prosecutors or a chilling effect on commerce.[60] At the same time, however, he also recognised that the consequences 'may prove relatively insignificant when weighed against the disadvantages that adhere to [the] alternative'.[61] Those disadvantages include 'distract[ing] juries from an evaluation of the culpability of the defendant', 'shift[ing the] focus towards the behavior of the victim', difficulties in drawing the line between prudence and imprudence, and abandoning 'those who most need the protection'.[62] To these may be added Judge Posner's observation that it 'would be very odd for the law to protect only those who, being able to protect themselves, do not need the law's protection'.[63]

---

[56] *R v Young* (1788) 1 Leach 505, 508; 168 ER 354, 356.
[57] *R v Young* (1788) 1 Leach 505, 508; 168 ER 354, 356; 3 TR 98, 103; 100 ER 475, 478.
[58] *R v Woolley* (1850) 1 Den 559, 564; 169 ER 372, 374.
[59] *United States v Svete*, 556 F 3d 1157 (11th Cir, 2009).
[60] Zingale (n 51) 812. See also the articles cited at n 51 above and John Diamond, 'Reviving Lenity and Honest Belief at the Boundaries of Criminal Law' (2010) 44 *University of Michigan Journal of Law Reform* 1, 10.
[61] Zingale (n 51) 817.
[62] Zingale (n 51) 817, 820 and 824.
[63] *United States v Coffman*, 94 F 3d 330, 334 (7th Cir, 1996).

The importance of the offences protecting those most in need of protection is a recurring theme of the decisions rejecting the notion that the prudence of the victim has any bearing upon the guilt of the perpetrator. The courts in each jurisdiction today recognise that fraud offences exist *because* people are not always careful, prudent, intelligent or discerning and that fraudsters particularly prey upon the vulnerable. As Judge Rubin said in *United States v Kreimer*:

> The truth about virtually every scheme to defraud could be obtained if the gull were clever and diligent enough. The truly careful are, perhaps, never defrauded because they are not deceived by the artifice. The laws protecting against fraud are most needed to protect the careless and the naïve from lupine predators, and they are designed for that purpose.[64]

This rationale may be applied directly to the publication of fake news. As I explained in Chapter 2, fake news publishers exploit their readers' confirmation biases, lack of digital literacy and other vulnerabilities. In this way, they share much in common with more conventional fraudsters who exploit more conventional vulnerabilities such as a lack of financial literacy, youth, old age, illness and financial desperation. I return to this issue in Chapter 9.

3.4.3 Reasonable possibility of satire

The third potential counterargument is that there is a reasonable possibility that the assertion was not 'of fact' because the assertion was satirical—i.e. not meant to be taken seriously. I have not been able to find any authority as to whether such a counterargument is available. I have found cases where the defendant argued that the false assertion was made 'for a lark'.[65] However, the cases tend to involve false factual assertions that were said to be *intended* as a joke, not assertions that themselves were not characterised as being factual in nature.

---

[64] 609 F 2d 126, 132 (5th Cir, 1980).
[65] See, eg, *R v Button* [1900] 2 QB 597 discussed in Chapter 6. See also Thomas Miles, 'Dupes and Losers in Mail Fraud' (2010) 77 *University of Chicago Law Review* 1111 (giving example of practical joke causing victim to travel to non-existent party).

Accordingly, I will deal with them in relation to the intent elements of the offences in Chapters 6 and 7.

The closest the law of fraud has come to distinguishing between false assertions of fact and satirical assertions is the distinction drawn between 'puffs' and false pretences.[66] This distinction would assist those who publish more frivolous forms of clickbait—links to articles like '*You won't believe how this woman lost fifteen pounds!*'. But it is unlikely to provide any real assistance for satirists. The problem faced by satirists is not like that faced by those who puff their wares. Statements like '*world's greatest pies*' and '*the finest silver*' are not assertions of fact. They are expressions of opinion. And as the Supreme Court of the United States held in *United States v New South Farm & Home Company*:

> when a proposed seller goes beyond [the mere exaggeration of the qualities which the article has, and] assigns to the article qualities which it does not possess, [or] does not simply magnify in opinion the advantages which it has, but invents advantages and falsely asserts their existence, he transcends the limits of 'puffing' and engages in false representations and pretenses.[67]

The problem for satirists is not that they exaggerate the facts. It is that they make literal false assertions of fact. *The Onion*, for example, once published a story reporting that the Harry Potter books had sparked a rise in Satanism among children.[68] The Harry Potter story reported that Satanic temples across the United States were 'filling to the rafters with youngsters clamoring for instruction in summoning and conjuring'. It also contained several made-up quotes from children, Satanists and religious leaders, although the quotes themselves dropped plenty of hints that the story was satirical.

Like many other prominent fake news stories, enough people believed the Harry Potter story that the fact checking website *Snopes* was eventually driven to

---

[66] See generally Francis Wharton, *A Treatise on the Criminal Law of the United States* (7th ed, Kay & Brother, 1874) 544.
[67] 241 US 64, 71 (1916).
[68] 'Harry Potter Books Spark Rise In Satanism Among Children', *The Onion*, 26 July 2000.

fact-check and debunk the story.[69] The factual form of the story shows that the satire problem requires a solution that treats false assertions made by genuine satirists differently to those made by other fake news publishers. It might be that the appropriate mechanism is to characterise the satirist as lacking the requisite 'intent to defraud' or 'dishonesty'. I deal with these issues in Chapter 7. However, it also seems appropriate to consider the extent to which satirical assertions are even capable of constituting 'false assertions of fact'. As the issue is alien to the law of fraud, guidance may be drawn from the way in which the courts have dealt with the issue in relation to another area that involves consideration of whether an assertion was factual in nature—namely, defamation.

In the United Kingdom and New South Wales, the plaintiff in a defamation action must prove that the defendant made an assertion that was defamatory. However, the defendant may defend her or himself by proving that the assertion was 'substantially true',[70] 'fair comment',[71] or 'honest opinion'.[72] In the United States, the plaintiff usually bears the onus of proving that the assertion was false,[73] and the defendant may defend her or himself by proving that the assertion was 'fair comment',[74] or that it cannot 'reasonably [be] interpreted as stating actual facts'.[75]

The courts in each jurisdiction have drawn a distinction between false assertions of fact and assertions that are factual in form but which are really satire or made 'in jest'.[76] Assertions that are satire or made in jest are not necessarily treated as being defamatory, either because they are properly characterised as assertions of

---

[69] David Mikkelson, 'Are Harry Potter Books Sparking a Rise in Satanism Among Children?', *Snopes*, 2 December 2001.
[70] *Defamation Act 2005* (NSW) s 25; *Defamation Act 2013* (UK) s 2.
[71] *Sutherland v Stopes* [1925] AC 47, 62; *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171, 173.
[72] *Defamation Act 2005* (NSW) s 31; *Defamation Act 2013* (UK) s 3.
[73] *Second Restatement of Torts* (American Law Institute, 1977) § 558.
[74] *Milkovich v Lorain Journal Co*, 497 US 1, 19 (1990).
[75] *Hustler Magazine Inc v Falwell*, 485 US 46, 57 (1988); *Milkovich v Lorain Journal Co*, 497 US 1, 20 (1990).
[76] *Triggs v Sun Printing and Publishing Association*, 71 NE 739, 743 (NY Ct App, 1904); *Salomone v Macmillan Publishing Co Inc*, 411 NYS 2d 105, 108-109 (NY, 1978); *Berkoff v Burchill* [1996] 4 All ER 1008, 1018; *McGuiness v JT Publishing Australia Pty Ltd* [1999] NSWSC 471, [5]-[7]; *Coleman v John Fairfax Publications Pty Ltd* [2003] NSWSC 564, [22]-[23]; *John v Guardian News & Media Ltd* [2008] EWHC 3066 (QB), [9]-[34]. See also *Entienne Pty Ltd v Festival City Broadcasters Pty Ltd* (2001) 79 SASR 19, 28-31; *Ten Group Pty Ltd v Cornes* (2012) 114 SASR 46, [198]-[203].

opinion,[77] or because they otherwise cannot seriously be treated as assertions of fact.[78] The courts determine whether the assertion was factual by asking whether an 'ordinary reasonable person' or 'reasonable reader' would interpret the assertion to be 'of fact'.[79] In answering that question, the courts consider, not just the assertion, but also the context in which it was made.[80]

One aspect of the context is the *medium* in which the assertion was made.[81] For example, a statement made during a comedic performance would be readily interpreted as satire.[82] Unfortunately, however, this indicator would not assist a genuine satirist writing for a fake news publication like *The Onion* or *The Betoota Advocate*. Satirical fake news is satire through parody. The parody is the adoption of the form of a news article. The satire is the content of the article. The adoption of the form of a news article is necessary for the satire to work.

Another aspect of the context is the *reputation* of the publisher. For example, in *Hormel Foods Corp v Jim Henson Production Inc* the Court of Appeals for the Second Circuit held that the pig named 'Spa'am' in the film *Muppet Treasure Island* did not infringe the trademark of the food product 'SPAM' because viewers would recognize *The Muppets* as satire.[83] This indicator would assist in distinguishing between a genuine satirist and an ordinary fake news publisher. On the one hand, publications like *The Onion* would be readily characterized as satire on account of

---

[77] See, eg, *Huster Magazine Inc v Falwell*, 485 US 46, 50 (1988); *Leidholt v LFP Inc*, 860 F 2d 890, 894 (9th Cir, 1988); *John v Guardian News & Media Ltd* [2008] EWHC 3066 (QB), [9]-[34].
[78] See, eg, *Berkoff v Burchill* [1996] 4 All ER 1008, 1018. The law in this sense is consistent with the approach taken by Chisholm and Feehan with respect to defining deception: 'One can make a statement merely in play or irony, and a statement made merely in play or in irony is not an assertion. What one asserts is meant to be taken seriously': Roderick Chisholm and Thomas Feehan, 'The Intent to Deceive' (1977) 74 *Journal of Philosophy* 143, 151.
[79] *Lewis v Daily Telegraph Ltd* [1964] AC 234; *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 467; *Mink v Knox*, 613 F 3d 995, 1007 (10th Cir, 2010). Note that this is different to asking whether an ordinary reasonable reader would know better than to believe the stories.
[80] *Yrissari v Clement* (1826) 3 Bing 432, 441; 130 ER 579, 583; *S & K Holdings Ltd v Throgmorton Publications Ltd* [1972] 1 WLR 1036, 1039; *Pring v Penthouse International Inc*, 695 F 2d 438, 442 (10th Cir, 1982); *Ollman v Evans*, 750 F 2d 970, 999-1000 (DC Cir, 1984); *Berkoff v Burchill* [1996] 4 All ER 1008, 1018; *Greek Herald Pty Ltd v Nikolopoulos* (2002) 54 NSWLR 165, 172-173.
[81] See, eg, *Freedlander v Edens Broadcasting Inc*, 734 F Supp 221, 228 (ED Va, 1990); *Cardtoons LC v Major League Baseball Players Association*, 95 F 3d 959, 967 (10th Cir, 1996); *John v Guardian News & Media Ltd* [2008] EWHC 3066 (QB), [21]-[22].
[82] See, eg, *Polygram Records Inc v Superior Court*, 170 Cal App 3d 543, 552-53 (Cal App, 1985).
[83] 73 F 3d 497, 503 (2nd Cir, 1996).

their satirical fame. On the other hand, publishers who hop from domain to domain building no familiarity with readers, as fake news publishers often do to avoid censorship and fact-checkers,[84] would be more likely to be characterized as making false assertions of fact.

Another aspect of the context is the presence of a *disclaimer*. A publication that contains a disclaimer stating that the material is false or satirical is less likely to constitute a false assertion of fact.[85] Fake news publishers who claim to be satirists often place disclaimers on their websites stating that the content is not true and/or is intended to be satire. Yet established satirists like *The Onion* do not. This difference demonstrates that a real satirist is less likely to have to tell the reader that the content is a joke. Nevertheless, the use of disclaimers is unlikely to assist either the genuine or fake satirical fake news publisher. That is because the disclaimers tend to be out of sight either on the *About Us* page or far below the text of the story where they have no bearing upon the impression given by the story or the links to the story on social media.

The final aspect of the context is the *content* itself.[86] A publication that publishes ridiculous stories is less likely to be held to have made a false assertion of fact than a publication that publishes believable stories, as is a publication that employs recognised forms of humour, not content where the 'joke' is obscure.[87] Fake news is sometimes easy to distinguish from genuine satire due to its lack of irony, farce or any other satirical device. However, as the most significant false assertions are those made by the social media posts (because the posts are what direct the readers to the fake news website), it may be more appropriate to judge the impression given by the content of the *post* upon the ordinary reasonable reader, as opposed to the impression given by the content of the story.

---

[84] Daniel Funke, 'Want to get away with posting fake news on Facebook? Just change your website domain', *Poynter*, 30 January 2019.
[85] See, eg, *LL Bean Inc v Drake Publishers Inc*, 811 F 2d 26, 27 (1st Cir, 1987); *Hustler Magazine Inc v Falwell*, 485 US 46, 48 (1988); *Cardtoons LC v Major League Baseball Players Association*, 95 F 3d 959, 962, 967 (10th Cir, 1996).
[86] *John v Guardian News & Media Ltd* [2008] EWHC 3066 (QB), [32]-[33].
[87] *Pring v Penthouse International Inc*, 695 F 2d 438, 443 (10th Cir, 1983); *Freedlander v Edens Broadcasting Inc*, 734 F Supp 221, 228 (ED Va, 1990).

A fake news publisher who professes to be a satirist may rely upon these factors to argue that there is a reasonable possibility that her or his stories were not factual in nature. It is hard to imagine such an argument succeeding in relation to stories like ‘Police Find 19 White Female Bodies in Freezers with “Black Lives Matter” Carved into Skin’. However, for stories where the claim is not so clearly untenable, contesting whether the story constitutes making a false assertion *of fact* provides an available counterargument to the publisher who professes to be a satirist. Much like the counterarguments based upon there being a reasonable possibility that the stories were true or stated opinions rather than fact, the availability of this counterargument goes some way to allaying concerns about freedom of speech. I return to this issue in Chapter 10.

3.5 Conclusion

In this chapter, I demonstrated that publishing fake news satisfies the first element of each offence by explaining that fake news publishers make false assertions of fact in three ways: by making false statements in their stories; by holding out the websites as being real news websites; and by holding out links to their stories as being links to real news stories. I also explained that a fake news publisher cannot be convicted where there is a reasonable doubt as to whether the publisher made a false assertion of fact—for example, where there is a reasonable possibility that the story was true or was not ‘of fact’ (perhaps because reasonable readers would interpret the stories to be satire). And I dispelled the possibility of a fake news publisher being able to argue that the readers should have known better than to believe the false assertions. In the next chapter, I examine the extent to which the obtaining of money by the typical fake news publisher satisfies the second element of each offence.

4. Obtaining money

4.1 Introduction

In the previous chapter, I argued that making money by publishing fake news satisfies the first element of each offence because the publishers make false assertions of fact. In this chapter, I address the second element of each offence, which requires the prosecution to prove that the defendant's conduct either had a particular object or resulted in a particular effect. The *object* of the conduct is the purpose for which it was perpetrated—typically, to acquire something or deprive someone of something. The *effect* is the outcome of its perpetration—the actual acquisition or deprivation.[1]

In New South Wales, the second element is framed by reference to its effect. Section 192E of the Crimes Act requires the prosecution to prove that the defendant *obtained* property, *obtained* a financial advantage, or *caused* a financial disadvantage. In contrast, the second element of fraud by false representation in the United Kingdom is framed by reference to the object of the false representation (i.e. its purpose). Section 2 of the Fraud Act requires the prosecution to prove, not that the defendant made a gain or caused a loss, only that the defendant *intended* by making the false representation to make a gain, cause a loss or expose another to a risk of loss. Likewise, the wire fraud statute requires the prosecution to prove that the defendant *devised* or *intended to devise* a scheme or artifice 'to defraud, or for obtaining money or property', not that the scheme or artifice was successful.

In a conventional fraud, satisfying the second element of each offence is straightforward. Consider, for example, a perpetrator who persuades someone to hand over money by pretending to have been sent to collect the money by someone

[1] Some commentators have referred to offences framed around the object of the accused as 'conduct crimes' and offences framed around the effect of the deception as 'result crimes'. See, eg, David Ormerod, 'The Fraud Act 2006—Criminalising Lying?' [2007] *Criminal Law Review* 193, 196; Maureen Johnson and Kevin Rogers, 'The Fraud Act 2006: The E-Crime Prosecutor's Champion or the Creator of a New Inchoate Offence' (2007) 21 *International Review of Law, Computers & Technology* 295, 298; Andrew Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th ed, Hart Publishing, 2019) 648.

else. The perpetrator obtains money (wire fraud), which is a financial advantage (Crimes Act s 192E), and thereby makes a gain (Fraud Act s 2). The victim is defrauded of the money (wire fraud), which is a financial disadvantage (Crimes Act s 192E), and thereby suffers a loss (Fraud Act s 2). Although the legislation in each case sets out different ways in which each offence may be committed, the perpetrator of a conventional fraud contravenes each of them at the same time.

My argument that making money by publishing fake news satisfies the second element of each offence is also straightforward: the publisher obtaining money is both the object (i.e. purpose) and effect (i.e. result) of faking the news. The publisher publishes and disseminates the stories in the hopes of attracting readers to the websites and generating ad revenue (the object or purpose of their conduct). And the readers seeing or clicking upon ads in fact triggers the ad server's obligation to pay the publisher (the effect or result of their conduct).

Despite this apparent simplicity, this second element is likely to be the most controversial with respect to my argument that making money by publishing fake news is fraud. That is because, as I foreshadowed in Chapter 1, the fake news publisher's obtaining of money differs from the conduct of the conventional fraudster in three significant ways. First, the person from whom the publisher obtains the money (the ad server) is not the person deceived by the publisher (the reader). Secondly, the person from whom the publisher obtains the money (the ad server) gets something of equal value in return for the money (the attention of the reader). Finally, the person from whom the publisher obtains the money (again the ad server), not only gets something of equal value in return for the money (again the attention of the reader), but in fact gets exactly that for which it bargained (again the attention of the reader).

The features that distinguish making money by publishing fake news from conventional frauds arise because fake news publishers compete within the two-sided market for attention that I described in Chapter 1. The primary purpose of this chapter is to examine the extent to which these distinguishing features present a problem for my otherwise straightforward argument that fake news publishers commit the second element of each offence because they obtain money. The

chapter is split into three sections. Each section addresses one of the distinguishing features set out above.

The first section addresses the fact that the person deceived (the reader of the fake news) is not the person from whom the money is obtained (the ad server who pays for exposure to the reader). I argue, relying upon consistent and longstanding authority in each jurisdiction, that this distinguishing feature *of itself* does not present a problem for my argument because none of the offences have been interpreted as requiring the person deceived to be the person from whom the money (etc) is obtained.

The second section addresses the ad server getting something of equal value in return for the money paid to the fake news publisher. I argue, again relying upon consistent and longstanding authority in each jurisdiction, that this distinguishing feature *of itself* does not present a problem for my argument because fraud offences traditionally have been interpreted as applying to what I describe as 'lossless frauds'—that is, frauds where the perpetrator deprives the victim of something but the victim receives something of equal or greater value in return and thereby suffers no net economic loss.

The third section addresses the ad server getting exactly that for which it bargained—namely, exposure to the readers. In relation to the United Kingdom and New South Wales, I argue that this distinguishing feature does not pose a problem for my argument because the legislative history and authorities support my plain meaning interpretation of section 2 of the Fraud Act and section 192E of the Crimes Act. However, in relation to the United States, I recognise that this distinguishing feature does pose a problem for my argument because: (a) the Supreme Court has interpreted the mail and wire fraud statutes as requiring the prosecution to prove that the scheme or artifice was 'to defraud' (notwithstanding a plain reading suggests the scheme or artifice may alternatively be 'for obtaining money or property' (etc)); (b) the fact that the ad server gets that for which it bargained means that the scheme cannot be characterised as a scheme 'to defraud' the ad server; and (c) the fact that the readers do not pay to read the stories means that the scheme cannot be characterised as a scheme 'to defraud' the readers. However, I also argue that the problem is 'not insurmountable' because the Supreme Court's interpretation was

subject to a vigorous dissenting judgment, has since been the subject of compelling academic criticism, appears to be inconsistent with its own longstanding canons of construction, and for those reasons (and more) may be considered vulnerable to reconsideration.

The material in the chapter is original insofar as it applies the existing law to making money by publishing fake news. Moreover, by using fake news as a vehicle to explore the outer limits of the offences and critique the limitations imposed by the Supreme Court upon the wire fraud statute, it also makes an original contribution to the debate concerning what should and should not constitute fraud. I return to this debate in Chapter 9 where I argue that the rationales underlying the criminalisation of conventional frauds support the criminalisation of 'frauds that do not defraud' like making money by publishing fake news.

4.2 The publisher deceives readers to obtain money from ad servers

The first feature that distinguishes making money by publishing fake news from conventional frauds is that the fake news publisher deceives one person (the reader) to obtain money from someone else (the ad server). This feature *of itself* does not pose a problem for my argument because it is present in many conventional frauds. For example, in *R v Kovacs*,[2] the defendant bought a Pekingese dog using a cheque card despite the bank informing her that her cheques would not be honoured. She argued that her conduct could not constitute 'obtaining a pecuniary advantage by deception' because she deceived the owner of the pet shop but obtained the pecuniary advantage (being an increase in her overdraft) from the bank. The Court of Appeal rejected her argument. It held that the relevant legislation did 'not provide either expressly or by implication that the person deceived must suffer any loss arising from the deception'.[3] The law in the UK today and in Australia is the same.[4] And in the United States, the preponderance of authority

[2] [1974] 1 WLR 370.
[3] *R v Kovacs* [1974] 1 WLR 370, 373.
[4] *R v Clarkson* [1987] VR 962; *DPP v Logan-Pye* [2007] NSWSC 1492, [31], [39]; *Fraud Act 2006* (UK) s 2.

favours the view that: ‘Nothing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived’.[5] Accordingly, the fact that the publishers deceive the readers to make money from the ad servers in and of itself is immaterial.

4.3 The ad servers suffer no net financial loss

The second feature that distinguishes making money by publishing fake news from conventional frauds is that the person from whom the publisher obtains the money (the ad server) does not suffer a net financial loss. The ad server and the publisher were parties to a contract. The contract required the ad server to pay the publisher each time a person viewed or clicked upon an ad. The publisher brought about people clicking upon and viewing the ads by making false assertions of fact about the stories, website and links to the website. However, so long as the ad server did not pay the publisher any more than the agreed amount per click or view, the ad server did not suffer a net financial loss. The publisher’s fraud (if it was a fraud) was ‘lossless’.

[5] *United States v Christopher*, 142 F 3d 46, 54 (1st Cir, 1998). See also *United States v Pepper*, 51 F 3d 469, 473 (5th Cir, 1995); *United States v Blumeyer*, 114 F 3d 758, 767 (8th Cir, 1997); *United States v Ratcliff*, 488 F 3d 639, 645 (5th Cir, 2007); *United States v Sorich*, 523 F 3d 702, 713 (7th Cir, 2008); *United States v McMillan*, 600 F 3d 434, 449-450 (5th Cir, 2010); *United States v Seidling*, 737 F 3d 1155, 1161 (7th Cir, 2013); *United States v Weimert*, 819 F 3d 351, 355, 372 (7th Cir, 2016); *United States v Greenberg*, 835 F 3d 295, 306 (2nd Cir, 2016); *United States v Berroa*, 856 F 3d 141, 171-172 (1st Cir, 2017). There is some authority to the contrary. In *United States v Evans*, 844 F 2d 36, 38-40 (2nd Cir, 1988) the Second Circuit said: ‘it may be the correct view of the statute . . . that the deceived party must lose some money or property’. But in United *States v Greenberg*, 835 F 3d 295, 306 (2nd Cir, 2016) the Second Circuit rejected the proposition: ‘wire fraud does not require convergence between the parties intended to be deceived and those whose property is sought in a fraudulent scheme’. In *United States v Lew*, 875 F 2d 219, 221 (9th Cir, 1989) the Ninth Circuit said that *McNally* ‘made it clear that the intent must be to obtain money or property from the one who is deceived’. Other circuits rightly doubted that proposition. See *Evans* at 39 (‘as we read *McNally*, the Supreme Court did not focus on whether the person deceived also had to lose money or property’) and Christopher at 54 (‘*McNally* itself says nothing about convergence’). In *United States v Walters*, 997 F 2d 1219, 1227 (7th Cir, 1993) the Seventh Circuit held that ‘only a scheme to obtain money or other property from the victim by fraud violates § 1341’. But in *Sorich* at 713 it explained that the statement ‘was not a requirement that the defendant receive the money or property [from the victim], but rather a way of illustrating a deeper problem with the case’. In *United States v Sawyer*, 85 F 3d 713, 734 n 18 (1st Cir, 1996) the First Circuit said: ‘the alleged victims of the mail fraud … must be the ones deceived’. But this is inconsistent with its later decisions in *Christopher* and *Berroa*.

4.3.1 The offences capture 'lossless frauds'

The fact that the publisher's conduct causes neither the reader nor the ad server to suffer a net financial loss does not *of itself* pose a problem for my argument. That is because fraud offences traditionally have not been interpreted as requiring the prosecution to prove that the defendant caused the victim to suffer, or even exposed the victim to a risk of suffering, a net financial loss. The position is the same in each jurisdiction.

In the United States, one leading text states that 'it is generally held that the lack of financial loss is no defence to false pretenses'.[6] My own painstaking research has found that this statement is correct. State-based offences akin to obtaining by false pretences remain in force throughout the United States today either as successors to older offences or repackaged as 'larceny by false pretenses' or 'theft by deception'. With the exception of Mississippi and New York,[7] the courts of every State in which the question has been asked have held that the prosecution does not have to prove that the victim suffered a loss.[8] In *State v Hurst*, for example, the

---

[6] Wayne LaFave, *Criminal Law* (5th ed, 2010) § 19.7(i)(3). See also Rollin Perkins, *Perkins on Criminal Law* (2nd ed, Foundation Press, 1969) 313-314; George Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000) § 1.3.4; Paul Coltoff, 'False Pretenses' (2020) 35 *Corpus Juris Secundum* § 26.

[7] The courts of Mississippi have consistently held that the victim must suffer an actual pecuniary loss. See *Simmons v State*, 160 Miss 582 (Miss, 1931); *Martin v State*, 200 Miss 142 (Miss, 1946); *Bruce v State*, 217 Miss 368, 374 (Miss, 1953); *Carter v State*, 386 So 2d 1102, 1105 (Miss, 1980); *State v Rivenbark*, 509 So 2d 1047, 1048-1049 (Miss, 1987); *Allred v State*, 605 So 2d 758, 761 (Miss, 1992); *Anderson v State*, 738 So 2d 253, 256-257 (Miss Ct App, 1998); *Terrell v State*, 237 So 3d 717, 728-728 (Miss, 2018). The courts of New York have come to the same conclusion in relation to larceny by false pretenses, which is the primary fraud offence in that State. See *People ex rel McGovern v Weisbard*, 139 Misc 385, 387 (Magis Ct, 1931); *People v Headley*, 37 Misc 3d 815 (KC Sup Ct, 2012). But the courts appear to have come to that conclusion by transforming the common law larceny requirement that there be a 'taking' into a requirement that there be an economic loss. There are other fraud offences that do not appear to require economic loss: see, eg, New York Penal Law § 187 (residential mortgage fraud), § 190.25 (criminal impersonation). The position taken by the courts of New York is anomalous among jurisdictions that prohibit larceny by false pretenses or theft by deception.

[8] Alaska: *Byford v State*, 352 P 3d 898, 902 (Ala Ct App, 2015); Arizona: *State v Mills*, 96 Ariz 377, 381 (Ariz, 1964); *State v Jahns*, 133 Ariz 562, 564-565 (Ariz Ct App, 1982); *State v Sharma*, 216 Ariz 292, 295 (Ariz Ct App, 2007); Arkansas: *Higgins v State*, 141 Ark 633, 636 (Ark, 1920); *Fisher v State*, 161 Ark 586 (Ark, 1923); *Moss v State*, 194 Ark 524 (Ark, 1937); *Stewart v State*, 256 Ark 619, 620 (Ark, 1974); *Hoover v State,* 262 Ark 856, 862 (Ark, 1978); California: *People v Weiger*, 100 Cal 352, 356-357 (Cal, 1893); *People v Bryant*, 119 Cal 595, 597 (Cal, 1898); *People v Wynn*, 44 Cal App 2d 723, 729 (Cal Dist Ct App, 1941); *People v Jones*, 36 Cal 2d 373, 382-383 (Cal, 1950); *People v Katzman*, 258 Cal App 2d 777, 790-791 (Cal Ct App, 1968); *People v Brady*, 275 Cal App 2d 984,

Supreme Court of South Dakota said that the victim was 'merely a witness whose ultimate financial gain or loss … is immaterial'.[9] There is even authority that the defendant may be found guilty where the victim has made an economic gain.[10] And in relation to wire fraud, the Supreme Court of the United States has held that the federal fraud statutes reflect the law relating to false pretences.[11] As the Court of

---

994-995 (Cal Ct App, 1969); *People v Ross*, 25 Cal App 3d 190, 195 (Cal Ct App, 1972); Colorado: *Stolz v People*, 59 Colo 342, 347 (Colo, 1915); *People v Bartels*, 77 Colo 498, 500 (Colo, 1925); District of Columbia: *Robinson v United States*, 42 App DC 186, 193 (1914); Connecticut: *State v Spitko*, 2 Conn Cir Ct 99, 103-104 (Conn Cir Ct, 1963); Florida: *Rosengarten v State*, 171 So 2d 591, 595-596 (Fla Dist Ct App, 1965); *Paulk v State*, 344 So 2d 304, 305-306 (Fla Dist Ct App, 1977); Georgia: *Harrell v State*, 192 Ga App 876, 877 (Ga Ct App, 1989); *Arnold v State*, 210 Ga App 843, 848-849 (Ga Ct App, 1993); *Bishop v State*, 223 Ga App 285, 286 (Ga Ct App, 1996); cf *Stratacos v State*, 293 Ga 401, 407-410 (Ga, 2013); Illinois: *People v Haissig*, 976 NE 2d 1121, 1138 (Ill App Ct, 2012); Iowa: *State v Huckins*, 212 Iowa 283 (Iowa, 1931); *State v Armstrong*, 183 NW 2d 205, 207 (Iowa, 1971); Kansas: *State v Stanley*, 116 Kan 449, 452 (Kan, 1924); *State v Stephens*, 263 Kan 658, 661-664 (Kan, 1998); Kentucky: *Commonwealth v Ferguson*, 135 Ky 32, 34-36 (Ky Ct App, 1909); *Chapman v Commonwealth*, 239 SW 2d 974, 975 (Ky, 1951); *Commonwealth v Burnette*, 875 SW 2d 865, 868 (Ky, 1994); Louisiana: *State v Hendon*, 170 La 488, 493 (La, 1930); Maine: *State v Bouchard*, 881 A 2d 1130, 1134-1135 (Me, 2005); Maryland: *Baskerville v State*, 23 Md App 439, 442-444 (Md Ct Spec App, 1974); *Lane v State*, 60 Md App 412, 421-422 (Md Ct Spec App, 1984); Massachusetts: *Commonwealth v Wilgus*, 21 Mass 177, 178-189 (Mass, 1826); *Commonwealth v Tenney*, 97 Mass 50, 58-59 (Mass, 1867); *Commonwealth v Coe*, 115 Mass 481, 502-503 (Mass, 1874); Michigan: *People v Lintz*, 251 Mich 367, 369 (Mich, 1930); *People v Harden*, 2005 WL 957420 (Mich Ct App, 2005); Minnesota: *State v Lone*, 361 NW 2d 854, 859-860 (Minn, 1985); Montana: *State v Brantingham*, 66 Mont 1 (Mont, 1923); Nebraska: *MacDonald v State*, 124 Neb 332 (Neb, 1933); New Hampshire: *State v Gruber*, 132 NH 83, 91-92 (NH, 1989); New Mexico: *State v McCall*, 1983 NM App Lexis 779, 25-26 (NM Ct App, 1983); North Carolina: *State v Hines*, 36 NC App 33, 42 (NC Ct App, 1978); *State v Cogle*, 182 NC App 71, 77 (NC Ct App, 2007); Rhode Island: *State v Aurgemma*, 116 RI 425, 429-430 (RI, 1976); South Dakota: *State v Hurst*, 507 NW 2d 918, 922 (SD, 1993); *State v Quinn*, 623 NW 2d 36, 40 (SD, 2001); Texas: *Buntian v State*, 15 Tex App 515, 521 (Tex Ct App, 1884); *La Moyne v State*, 53 Tex Crim 221, 224 (Tex Ct App, 1908); *Robinson v State*, 141 Tex Crim 318, 321-322 (Tex Ct App, 1941); Utah: *State v Roberts*, 711 P 2d 235, 238-239 (Utah, 1985); Vermont: *State v Switser*, 63 Vt 604, 608 (Vt, 1891); Virginia: *Quidley v Commonwealth*, 221 Va 963, 966 (Va, 1981); *Gardner v Commonwealth*, 262 Va 18, 26-27 (Va, 2001); *Polk v Commonwealth*, 2013 Va App Lexis 200, 15-17 (Va Ct App, 2013); Washington: *Re Rudebeck*, 95 Wash 433, 439-442 (Wash, 1917); *State v Sargent*, 2 Wash 2d 190, 193-194 (Wash, 1940); *State v George*, 161 Wash 2d 203, 210-212 (Wash, 2007); West Virginia: *State v Barnes*, 177 W Va 510, 513 (W Va, 1987); Wisconsin: *State v Kennedy*, 105 Wis 2d 625, 631-633 nn 1-2 (Wis, 1981); Wyoming: *Anderson v State*, 27 Wyo 345 (Wyo, 1921). I was unable to find any decisions on point in Delaware, Hawaii, Idaho, Indiana, Missouri, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina or Tennessee. The position in New Jersey is unclear. Old authorities require proof of actual loss. See *State v Kaufman*, 31 NJ Super 225, 229 (NJ Super Ct App Div, 1954); *State v Croland*, 54 NJ Super 594, 603-604 (NJ Super Ct App Div, 1959). But these authorities may not apply to the offence of theft by deception modeled on the Model Penal Code.

[9] 507 NW 2d 918, 922 (SD, 1993).

[10] *State v Sargent*, 2 Wash 2d 190, 193 (Wash, 1940).

[11] *Neder v United States*, 527 US 1, 24-25 (1999); *Shaw v United States*, 137 S Ct 462, 467 (2016).

Appeals for the Eleventh Circuit said in *United States v Maxwell*: 'financial loss is not at the core of … mail and wire frauds'.[12]

In the United Kingdom and Australia, the courts came to the same conclusion in relation to older offences that required proof of 'intent to defraud'. For example, in *Balcombe v De Simoni*, which I discuss in more detail below, McTiernan J said: 'the crucial characteristic of an intention to defraud is not the economic loss which may or may not result to the purchaser but the element of dishonesty'.[13] Similarly, in *R v Hammerson*, Bankes J said: "Where money is obtained by pretences that are false, *prima facie* there is an intent to defraud. This presumption, it is true, may be displaced; but here there was no suggestion of this, except the fact that value was given."[14] In each case, the 'fact that value was given' was treated as immaterial.

4.3.2 Lossless frauds in the factum

The criminalisation of lossless frauds means that the offences capture someone who induces her or his victim to agree to a transaction by misrepresenting the nature of the consideration *irrespective of the value of the consideration*. These kinds of frauds have been described as frauds *in the factum*.[15] In *People v Ross*,[16] for example, the defendant sold several cars with wound back odometers. The buyer agreed to buy the cars on the assumption that they had travelled the distance displayed on the odometers. Although the cars were worth the amount paid by the buyer, they were not what the buyer had agreed to buy. Accordingly, the defendant was convicted of theft by false pretences.[17] The critical feature of the case was that the consideration was not that for which the buyer bargained. The buyer was not 'ripped off' in a financial sense, as it was always possible to on-sell the cars and recover the purchase price. However, to use the words of Channell J in *R v*

---

[12] 579 F 3d 1282, 1302 (11th Cir, 2009).
[13] (1972) 126 CLR 576, 588.
[14] (1914) 10 Cr App R 121, 122. See also *R v Carpenter* (1911) 22 Cox CC 618, 624.
[15] See, eg, *People v Brady*, 275 Cal App 2d 984 (Cal Ct App, 1969); *State v Hines*, 36 NC App 33 (NC Ct App, 1978); *United States v Akinyoyenu*, 201 F Supp 3d 82 (DDC, 2016).
[16] 25 Cal App 3d 190 (Cal Ct App, 1972).
[17] Ibid 195.

Carpenter, the buyer received 'something altogether different from what he [thought] he [was] getting'.[18]

4.3.3 Lossless frauds in the inducement

The criminalisation of lossless frauds also means that the offences capture someone who induces her or his victim to agree to a transaction by making a misrepresentation, not about the nature of the consideration, but about some *collateral matter* that nevertheless induces the victim to agree to the transaction. These kinds of frauds have been referred to as *fraud in the inducement*: 'fraud about a collateral but still material matter that persuades a victim to enter a transaction he would otherwise have avoided'.[19] Frauds of this kind often occur in relation to loans and investments. If a person obtains a loan by making a false representation as to her or his identity,[20] ability to repay,[21] ownership of property pledged as security,[22] or as to the nature of property pledged as security,[23] none of the false representations relate to the nature of the consideration, which, strictly speaking, is a promise to repay the principal and interest in accordance with the loan agreement. Nevertheless, if the lender would not have loaned the person the money but for the false representation, the person has committed fraud. It does not matter that the person intended to repay the money. Nor does it matter that the person was able to repay the money. As the Supreme Court of Massachusetts said in *Commonwealth v*

---

[18] (1911) 22 Cox CC 618, 624.

[19] *United States v Feldman*, 931 F 3d 1245, 1270 (11th Cir, 2019).

[20] See, eg, *R v Hamilton* (1845) 1 Cox CC 244; *State v Jahns*, 133 Ariz 562, 564-565 (Ariz Ct App, 1982); *Lane v State*, 60 Md App 412, 421-422 (Md Ct Spec App, 1984); *People v Harden*, 2005 WL 957420 (Mich Ct App, 2005).

[21] See, eg, *People v Weiger*, 100 Cal 352, 356-357 (Cal, 1893); *State v Hooker*, 99 Wash 661 (Wash, 1918); *People v Benevento*, 239 NYS 2d 761 (NY App Div, 1963); *United States v Dinome*, 86 F 3d 277, 283 (2nd Cir, 1996); *R v Petkova* [2011] EWCA Crim 109.

[22] See, eg, *Commonwealth v Lincoln,* 83 Mass 233 (Mass, 1865); *Arnold v State*, 210 Ga App 843, 848-849 (Ga Ct App, 1993).

[23] See, eg, *Commonwealth v Coe*, 115 Mass 481, 502 (Mass, 1874); *People v Bryant*, 119 Cal 595, 597 (Cal, 1898); *People v Wynn*, 44 Cal Ap 2d 723, 729 (Cal Dist Ct App, 1941); *State v Mills*, 96 Ariz 377, 381 (Ariz, 1964); *Rosengarten v State*, 171 So 2d 591, 595-596 (Fla Dist Ct App, 1965); *R v Stratford* [2011] EWCA Crim 888.

Coe: '[n]either the promise to repay, nor the intention to do so, will deprive the false and fraudulent act in obtaining [the loan] of its criminality'.[24]

In cases of this kind, where the misrepresentation does not relate to the nature of the consideration, there is often a question as to whether the defendant in fact obtained the property *by means* of the misrepresentation. For example, in *United States v Regent Office Supply Co*,[25] the defendant (a stationery supplier) was charged with mail fraud because its salesmen obtained access to and solicited customers by pretending to have been referred by their friends or business associates, by pretending to be doctors or other professionals, or by pretending that the stationary belonged to a deceased estate. Although the Court of Appeals for the Second Circuit described their tactics as 'repugnant to the standards of business morality',[26] it held that the salesman had not engaged in a scheme to defraud because they 'did not attempt to deceive their prospective customers with respect to the bargain they were offering' but rather 'gave a false reason for being able to offer the bargain'.[27]

Cases like *Regent Office Supply Co* may be contrasted with other cases in which the false representation did in fact induce the victim to agree to the transfer. A colourful example of a fraud of this kind occurred in *Balcombe v De Simoni*.[28] The defendant was a door-to-door salesman who travelled around selling books. To increase his chances of making sales, he told potential purchasers that he was a student from South Australia competing in a contest to win $1000 and a goodwill trip abroad, and that he would earn points in the competition by selling books. He was convicted of obtaining $6.50 by false pretences from a lady to whom he sold a cooking book: 'His story seemingly excited the representee's sympathy for, so moved, she purchased through him a cooking book, which she otherwise would not

---

[24] 115 Mass 481, 502 (Mass, 1874). See also *R v Carpenter* (1911) 22 Cox CC 618, 624; *R v Kritz* [1950] 1 KB 82, 86-87; *R v Denning* [1962] NSWR 173, 179; *United States v Painter*, 314 F 2d 939, 943 (4th Cir, 1963).

[25] 421 F 2d 1174 (2nd Cir, 1970).

[26] Ibid 1179.

[27] Ibid 1182.

[28] (1972) 126 CLR 576. See also *R v Potger* (1970) 55 Cr App R 42; *United States v Schwartz*, 924 F 2d 410 (2nd Cir, 1991).

have done'.[29] He argued on appeal that he lacked 'intent to defraud' because he obtained the money pursuant to an 'agreement supported by a genuine and adequate consideration'.[30] The prosecution conceded that 'the book would have been delivered' and that 'its normal price was not less than $6.50'.[31] Gibbs J characterised the case as 'one in which there was no misrepresentation as to the nature or quality of the thing to be supplied in exchange for the money or as to the use for which the money would be put when it was paid over'.[32]

The High Court of Australia split 3-2 in favour of the prosecution. Each of the judges rejected the proposition that the prosecution had to prove that the defendant intended to cause the victim to suffer an economic loss. But they disagreed as to what the prosecution had to prove in circumstances where the victim received that for which he or she bargained. The judges in the majority held that the defendant had possessed intent to defraud simply because he lied to persuade the victim to purchase the book. For example, Gibbs J said that 'intent to defraud' meant nothing more than 'intent to deprive … by deceit'.[33] But the judges in the minority looked for something more. Barwick CJ, for example, said that the prosecution also had to prove that the defendant intended to 'do something to or with [the] property which the [victim] in handing it over did not intend, contemplate or understand should be done with it'.[34]

The striking feature of *Balcombe v De Simoni* is that the victim not only suffered no financial loss but was not even exposed to a risk of financial loss. *United States v Schwartz* is another example of such a case.[35] The defendants were arms dealers who exported night vision goggles to Argentina during the Falkland Islands War. As Argentina was listed on the Munitions Control List, an exporter had to obtain a licence from the State Department to export American-made military equipment to Argentina. The supplier of the night vision goggles asked the defendants to disclose

---

[29] (1972) 126 CLR 576, 584 (Barwick CJ).
[30] Ibid 588.
[31] Ibid 591.
[32] Ibid 591.
[33] Ibid 596.
[34] Ibid 583. See also *R v Potger* (1970) 55 Cr App R 42, 44.
[35] 924 F 2d 410 (2nd Cir, 1991).

the identity of their customer and provide proof that the customer would not export the equipment without a licence. The defendants concealed the identity of their Argentinian customer and fabricated proof that the goggles were being shipped to Texas. They were convicted of wire fraud. On appeal, they argued that they had not committed an offence because the supplier 'never suffered any economic harm'.[36] The Court of Appeals for the Second Circuit rejected their argument. Although the supplier was fully paid, the Second Circuit held that the supplier did not receive 'all it bargained for'.[37]

The different outcomes in *Regent Office Supply Co, Balcombe v De Simoni* and *Schwartz* show that the line between dishonest and fraudulent conduct may be hard to draw where the 'fraud' lies only in the inducement. The core difficulty is determining whether the false representation did in fact induce the victim to agree to the transfer. This is a question of causation. Was the victim induced to agree to the transfer by the deception? Or did the deception just form part of the background to the transaction? I return to these causation-related issues in Chapter 5. The point for present purposes is simply that the losslessness of the scheme perpetrated by the fake news publisher is not of itself an obstacle to my argument.

4.4 The ad servers receive that for which they bargained

The third feature that distinguishes making money by publishing fake news from conventional frauds is that the person from whom the publisher obtains the money (the ad server) gets exactly that for which it bargained (the attention of the reader). Unlike the first two distinguishing features, this feature may not be resolved by recourse to authority that is directly on point. That is because, so far as I am aware, there is not a single case in which the fraudulence of such conduct has been considered by a court in the United States, the United Kingdom or Australia. Accordingly, it is necessary to examine individually the extent to which each offence

[36] Ibid 420.
[37] Ibid 421.

may be interpreted as applying to conduct of this kind. I will begin with the wire fraud statute.

4.4.1 Wire fraud

As noted in Chapter 1, the wire fraud statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The wire fraud statute requires the prosecution to prove that the defendant *devised* or *intended to devise* a particular kind of scheme or artifice, not that the scheme or artifice was successful.[38] By encompassing those who only *intend* to devise a prohibited scheme or artifice, the wire fraud statute comes close to breaching a fundamental principle of criminal law: that the law ought not punish a person for her or his thoughts alone.[39] It avoids running afoul of the principle because of the jurisdictional elements of the offence—the requirement that writings, signs, signals, pictures or sounds were transmitted for the purpose of executing the scheme or artifice.[40] The *transmission* is the conduct element of the offence: the prosecution must prove that a transmission was made to further the prohibited scheme or artifice.[41]

---

[38] *Foster v United States*, 178 F 165, 173 (6th Cir, 1910); *Busch v United States*, 52 F 2d 79, 82 (8th Cir, 1931); *United States v Feldman*, 136 F 2d 394, 396 (2nd Cir, 1943); *United States v Carruthers*, 152 F 2d 512, 517 (7th Cir, 1945); *Kreuter v United States*, 218 F 2d 532, 535 (5th Cir, 1955).
[39] *Hales v Petit* (1565) 1 Plowden 253, 259; 75 ER 387, 397. See also James Fitzjames Stephen, *A History of the Criminal Law of England* (London, MacMillan & Co, 1883) vol 2, 78. See further Gabriel Medlow, 'Why is it Wrong to Punish Thought?' (2018) 127 *Yale Law Journal* 2342.
[40] Jed Rakoff, 'The Federal Mail Fraud Statute' (1980) 18 *Duquesne Law Review* 771, 775-777.
[41] See, eg, *United States v Loring*, 91 F 881, 885 (ND Ill, 1884); *United States v Horman*, 118 F 780, 780 (SD Ohio, 1901); *United States v Young*, 232 US 155, 159 (1914); *Mitchell v United States*, 142 F 2d 480, 481 (10th Cir, 1944); *United States v Hoffa*, 205 F Supp 710 (SD Fla, 1962). See generally CJ Williams, 'What is the Gist of the Mail Fraud Statute?' (2014) 66 *Oklahoma Law Review* 287. Cf Mark Zingale, 'Fashioning a Victim Standard in Mail and Wire Fraud' (1999) 99 *Columbia Law Review* 795, 803 (describing jurisdictional elements as 'not much more than a jurisdictional hook').

There is no doubt that a person who publishes stories on a fake news website transmits ‘writings, signs, signals, pictures or sounds’ by means of wire communications. Nor is there any doubt that the creation of the website and publication and promotion of the stories may be characterised as devising a ‘scheme or artifice’. The real question is whether the scheme or artifice may be characterised as one ‘to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises’. The answer to that question depends upon what that phrase means.

If the phrase is taken at its plain meaning, the statute appears to encompass frauds that do not defraud like making money by publishing fake news. That is because the prosecution appears to have the ability to charge a fake news publisher with devising or intending to devise ‘*a scheme or artifice … for obtaining money … by means of false or fraudulent pretenses*’: although the ad server gets that for which it bargained (i.e. attention), the publisher still *obtains* money *by* false pretenses because the attention is procured by deceiving the readers. This plain-meaning interpretation follows from the use of the word ‘or’ between the phrases ‘to defraud,’ and ‘for obtaining’. The use of the disjunctive word ‘or’ between those phrases appears to signal that the statute prohibits distinct kinds of schemes and artifices—first, those that are ‘to defraud’; and secondly, those that are ‘for obtaining money or property’ (etc).

Unfortunately, however, the Supreme Court has not favoured this plain meaning interpretation. Instead, it has adopted a strained interpretation which requires the prosecution to prove that a scheme or artifice for obtaining money (etc) was also ‘to defraud’—as if the word ‘or’ should be read conjunctively as ‘including’. The effect of its interpretation is that frauds that do not defraud (including making money by publishing fake news) are presently beyond the reach of the mail and wire fraud statutes.

In this section, I explain how and why the Supreme Court adopted its conjunctive interpretation of the wire fraud statute by reference to three significant

decisions—*Durland v United States*,[42] *McNally v United States*,[43] and *Cleveland v United States*[44]—and an amendment made to the mail fraud statute in 1909. After explaining the basis for the Supreme Court's interpretation, I then argue, relying upon the forceful dissenting judgment of Stevens J in *McNally*, academic criticism of the reasoning in both *McNally* and *Cleveland*, and my own critique of the reasoning in those decisions, that the Supreme Court's current interpretation is vulnerable to reconsideration.

Durland v United States

The defendant in *Durland* was charged with mail fraud for devising a phony investment scheme in which he sold bonds promising returns that he knew would never eventuate. The mail fraud statute at the time prohibited only 'schemes or artifices to defraud' and the false pretences offences in most states had been interpreted as prohibiting only misrepresentations of past or present fact.[45] The defendant argued that his scheme was not 'to defraud' on the basis that a scheme 'to defraud' could not encompass misrepresentations as to the future. The Supreme Court rejected his argument:

> We cannot agree with counsel. The statute is broader than is claimed. Its letter shows this: 'Any scheme or artifice to defraud.' Some schemes may be promoted through mere representations and promises to the future, yet are none the less schemes and artifices to defraud.[46]

The attitude taken by the Supreme Court in *Durland* has been credited with cutting 'the mail fraud statute loose from its common law moorings'[47] and is still often relied upon as justification for adopting a broad and flexible interpretation of the mail and wire fraud statutes.[48]

---

[42] 16 US 306 (1896) (hereafter 'Durland').
[43] 483 US 360 (1987) (hereafter 'McNally').
[44] 531 US 12 (2000) (hereafter 'Cleveland').
[45] *Durland v United States*, 16 US 306, 313 (1896).
[46] Ibid 312-313.
[47] Sarah Welling et al, *Federal Criminal Law and Related Actions* (West, 1998) § 17.3.
[48] Kristen Orr, 'Fencing in the Frontier: A Look into the Limits of Mail Fraud' (2007) 95 *Kentucky Law Journal* 789, 791.

The 1909 amendment

Thirteen years after *Durland*, Congress added the words 'or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' to the mail fraud statute. The words were inserted as part of a broader revision and codification of federal penal laws undertaken in 1909.[49] The codification was based upon recommendations made by the Commission to Revise and Codify the Penal Laws of the United States. However, the report submitted by the Commissioners did not provide any specific explanation as to why they had recommended the insertion of the new words,[50] and the congressman who introduced the legislation to the House of Representatives (unhelpfully) described the new words as 'self-explanatory'.[51]

Following the insertion of the new words, the appellate circuit courts adopted the plain-meaning approach to the statute that I outlined earlier. I will give some examples.

(a) In *Moore v United States*, the Court of Appeals for the Seventh Circuit said that the words 'or for obtaining ... or promises' were 'evidently intended to enlarge the scope of the act, and to denounce and punish the use of the mails in execution not only of a scheme to defraud, but also of a scheme to obtain money or property by means of false representations or promises'.[52]

(b) In *Busch v United States*, the Court of Appeals for the Eighth Circuit emphasized that it 'must be borne in mind that the charge [was] not the use of the mails in carrying out a scheme to defraud, but the use of the mails in carrying out a fraudulent scheme to obtain money and property by means of false pretenses'.[53]

---

[49] *An Act To Codify, Revise, and Amend the Penal Laws of the United States*, ch 321, § 215, 35 Stat 1088, 1130 (1909).
[50] Alex Botkin, David Watson and William Bynum, *Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States* (Government Printing Office, 1901) xvi. See generally Rakoff (n 40) 779.
[51] *McNally* (n 43) 357.
[52] 2 F 2d 839, 841 (7th Cir, 1924).
[53] 52 F 2d 79, 82 (8th Cir, 1931).

(c) In *United States v States*, the same court said that the two phrases were 'part of an uninterrupted listing of a series of obviously diverse schemes', that the 'more natural construction' was 'to view the two phrases independently', and that the alternative interpretation placed a 'very strained and limited meaning' upon the statute. [54]

(d) In *United States v Halbert*, the Court of Appeals for the Ninth Circuit said that the statute 'specifies several alternative ways in which the mail fraud offense may be committed'.[55]

(e) In *United States v Scott*, the Court of Appeals for the Eleventh Circuit said that the 'phrasing of [the] statute in the disjunctive prohibits two separate acts, each constituting an independent ground for prosecution and conviction of mail fraud'.[56]

These cases demonstrate that by the mid-1980s the courts had settled into treating the two phrases of the mail fraud statute as containing distinct ways to commit the offence of mail fraud—that is, as if it was possible to charge and convict a person with devising or intending to devise a scheme under either the first limb ('to defraud') or the second limb ('for obtaining' etc) or both. Had this approach remained in favour, making money by publishing fake news and other frauds that do not defraud could constitute mail or wire fraud already. However, the mid-1980s interpretation did not remain in favour. The starting point for its unravelling was *McNally*.

McNally v United States

The defendants in *McNally* aided a government official to obtain kickbacks in exchange for contracts with the state of Kentucky. They were convicted under the mail fraud statute for devising a scheme to defraud the citizens and government of

[54] 488 F 2d 761, 764 (8th Cir, 1973).
[55] 640 F 2d 1000, 1007 (9th Cir, 1981).
[56] 701 F 2d 1340, 1343-1344 (11th Cir, 1983). See also *United States v Margiotta*, 688 F 2d 108, 121 (2nd Cir, 1982); *United States v Frankel*, 721 F 2d 917, 920-921 (3rd Cir, 1983).

Kentucky of their 'right to have the Commonwealth's affairs conducted honestly'.[57] The prosecution secured their conviction by relying upon what was known as the 'intangible rights doctrine'. According to this doctrine, which developed over a series of decisions in the 1970s,[58] a person could be convicted of mail fraud for defrauding another of some intangible right, as opposed to money or property.[59]

Prosecutors relied upon the intangible rights doctrine to prosecute those who breached fiduciary duties or engaged in corrupt conduct.[60] In one seminal decision, an employee who arranged for his employer to purchase cabinets from a particular manufacturer in exchange for a kickback was convicted of devising a scheme to defraud his employer of its right to 'his honest and faithful services'.[61] In another, a governor who accepted bribes in return for fixing particular racing dates for a horse racing enterprise was convicted of devising a scheme to defraud the people of their right to his 'honest and faithful services as governor'.[62]

The defendants in *McNally* challenged the validity of the intangible rights doctrine by arguing that the mail fraud statute captured only schemes or artifices that had an object of depriving someone of money or property. At the time of the Supreme Court hearing, most of the appellate circuit courts had taken the opposite view and affirmed the validity of the intangible rights doctrine.[63] Nevertheless, a majority of the Supreme Court accepted the argument and held that the mail fraud statute did not prohibit schemes or artifices to defraud others of intangible rights.

In reaching their conclusion, the majority addressed the possibility that the words 'to defraud' were somehow limited by the words 'or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises'. They said:

---

[57] Ibid 352.
[58] See, eg, *United States v Bryza*, 522 F 2d 414 (7th Cir, 1975); *United States v Brown*, 540 F 2d 364 (8th Cir, 1976).
[59] *McNally* (n 43) 355.
[60] Ibid.
[61] *United States v George*, 477 F 2d 508, 513 (7th Cir, 1973).
[62] *United States v Isaacs*, 493 F 2d 1124, 1150 (7th Cir, 1974).
[63] *McNally* (n 43) 364-365.

> Because the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property. This is the approach that has been taken by each of the Courts of Appeals that has addressed the issue: schemes to defraud include those designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly … As the Court long ago stated, however, the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.' The codification of the holding in *Durland* in 1909 does not indicate that Congress was departing from this common understanding. As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.[64]

The majority described the amendment as a 'codification' of *Durland* because the amendment clarified that the statute encompassed misrepresentations as to the future (i.e. false promises). They said:

> The new language is based on the statement in Durland that the statute reaches 'everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future' … However, instead of the phrase 'everything designed to defraud' Congress used the words '[any scheme or artifice] for obtaining money or property.'[65]

A close reading of the above reasoning demonstrates that the majority did not actually rely upon the relationship between *Durland* and the 1909 amendment to support the abolition of the intangible rights doctrine. Although they said that it was 'arguable that [the two phrases] are to be construed independently', they did not go on to hold that the first phrase ('to defraud') was limited by or imposed a limitation upon the second ('or for obtaining money or property' etc). Rather, they held that the words 'to defraud' were limited to obtaining money or property because that was the

---

[64] Ibid 359 (internal citations omitted).
[65] Ibid 357-358 (internal citations omitted).

'common understanding' of the meaning of those words.[66] Strictly speaking, their decision affected the interpretation of the 1909 amendment only insofar as they said that the amendment did not 'indicate that Congress was departing from [the] common understanding'.[67]

The majority's characterisation of the effect of the 1909 amendment became the source of what Cutler described as 'Post-*McNally* confusion'.[68] Oxman viewed the majority as having held that the 'clauses of the statute *must* be read conjunctively'.[69] Bradley understood the majority to have based their decision on the ordinary meaning of the words 'to defraud' rather than the effect of the 1909 amendment.[70] Berkowitz adopted the following middle ground: 'Although the Court did *not* explicitly state that the two phrases are not to be read disjunctively, this seems to be the Court's implication'.[71] And Cutler himself saw the case as having 'strongly questioned the structural independence of the two clauses'.[72] As for the courts, some of them continued to interpret the two phrases of the mail and wire fraud statutes disjunctively notwithstanding the remarks made in *McNally*.[73]

Cleveland v United States

Cleveland resolved the confusion brought about by *McNally*.[74] The defendants in that case applied for licences to operate poker machines in the State of Louisiana. They concealed their dire financial circumstances by using the names of their children in the applications. They were charged with mail fraud. They argued that the scheme did not constitute mail fraud because they had not defrauded the State of

---

[66] *McNally* (n 43) 359.
[67] Ibid.
[68] Christopher Cutler, 'McNally Revisited: The "Misrepresentation Branch" of the Mail Fraud Statute a Decade Later' (1998) 13 *BYU Journal of Public Law* 77, 78.
[69] Peter Oxman, 'The Federal Mail Fraud Statute After McNally v United States' (1988) 25 *American Criminal Law Review* 743 (emphasis added).
[70] Craig Bradley, 'Mail Fraud after McNally and Carpenter: The Essence of Fraud' (1988) 79 *Supreme Court Review* 573, 575.
[71] Ellen Berkowitz, 'The Rise and Fall of the Right to Honest Government' (1988) 22 *Loyola of Los Angeles Law Review* 325, 339 (emphasis in original).
[72] Cutler (n 68) 85.
[73] See, eg, *United States v Cooper*, 677 F Supp 778, 780 (Del, 1988); *United States v Bonnett*, 877 F 2d 1450, 1544 (10th Cir, 1989); *United States v Cronic*, 900 F 2d 1511, 1513 (10th Cir, 1990); *United States v Ashley*, 905 F Supp 1146, 1155 (EDNY, 1995). See generally Cutler (n 68) 89-90.
[74] *Cleveland v United States*, 531 US 12 (2000).

property. The argument was premised upon the proposition that an unissued licence (i.e. a licence that had not yet been created) was not 'property' in the hands of the State. The District Court rejected their argument and held that unissued licenses did constitute property in the hands of the State.[75] The Court of Appeals for the Fifth Circuit affirmed its decision on appeal.[76]

On appeal to the Supreme Court, the defendants again argued that unissued licences did not constitute property in the hands of the State, and the prosecution for the first time advanced an alternative argument—namely, that the defendants had devised a scheme 'for obtaining' the licenses by 'false pretenses' and in doing so had devised a scheme within the second (but not the first) phrase of the mail fraud statute. The Court unanimously reversed the decisions below. In relation to the defendants' primary argument, the Court held that the poker machine licences were not 'property' in the hands of the State, that the defendants had not defrauded the State of any money or property, and that their conduct therefore did not constitute mail fraud.[77] And in relation to the prosecution's alternative argument based upon a disjunctive interpretation of the mail fraud statute, the Court said:

> Although we do not here question that video poker licensees may have property interests in their licenses, we nevertheless disagree with the Government's reading of § 1341. In *McNally*, we recognized that '[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently.' But we rejected that construction of the statute, instead concluding that the second phrase simply modifies the first by 'ma[king] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.' Indeed, directly contradicting the Government's view, we said that 'the mail fraud statute ... had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to the Government's interests as property holder.' We reaffirm our reading of § 1341 in *McNally*.[78]

---

[75] *Cleveland v United States*, 951 F Supp 1249, 1261 (ED La, 1997).
[76] *United States v Bankston*, 182 F 3d 296, 319 (5th Cir, 1999).
[77] *Cleveland* (n 44) 20.
[78] Ibid 25-26.

In other words, the Court unanimously held that the second phrase of the statute was limited by the first—that a scheme 'for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' must also be a scheme 'to defraud' to constitute mail fraud. Its interpretation in substance recasts the statute as prohibiting the following: 'devising or intending to devise any scheme or artifice to defraud, ~~or~~ <u>including a scheme or artifice</u> for obtaining money by means of false or fraudulent pretenses, representations or promises'. The effect of its interpretation is that making money by publishing fake news and other frauds that do not defraud are presently beyond the reach of the mail and wire fraud statutes. But there are compelling reasons to consider the decision as being open to reconsideration.

<u>Cleveland misread McNally</u>

The starting point is that *Cleveland* was built upon a misreading of *McNally*. The Court in *Cleveland* rejected the disjunctive interpretation of the mail fraud statute on the basis that the majority in *McNally* had held that the 'second phrase [of the mail fraud statute] simply *modifies* the first'.[79] However, as I explained above, and as commentators like Bradley, Berkowitz and Cutler recognised at the time, the majority in *McNally* did not expressly go that far. Although they adverted to the competing constructions of the two phrases, they went on to hold that the words 'to defraud' were limited to schemes concerning money and property because that was the 'common understanding' of the meaning of those words, not because the words inserted by the 1909 amendment 'modifie[d]' the original language. It follows that the Supreme Court has never actually given adequate consideration to the proper construction of the 1909 amendment. In the absence of previous Supreme Court authority with respect to the relationship between the first and second phrases of the mail fraud statute, the Court in *Cleveland* ought to have approached the issue afresh by applying the ordinary canons of construction.

[79] Ibid.

Cleveland and the plain meaning rule

Had the Supreme Court applied the ordinary canons of construction, the Court no doubt would have started with the 'plain meaning rule'. This rule requires unambiguous language to be applied according to its terms.[80] Applying the plain meaning rule would have required the court, unless it found ambiguity in the phrase 'to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises', to construe those words as prohibiting different kinds of schemes. So much was recognised by Stevens J (with whom O'Connor J agreed) in his vigorous dissent in *McNally*. Stevens J explained that the first and second phrases were independent. He then characterised the majority's conclusion as 'ignor[ing] the plain language of the provision',[81] 'show[ing] no fidelity to Congress' words',[82] 'senseless'[83] and an 'unwise … judicial amendment of the mail fraud statute'.[84] His concerns were echoed by commentators. Bradley, for example, argued that to 'write off the language [introduced by the 1909 amendment] as *merely* a codification of *Durland*, is to ignore the clear meaning of the words'.[85] Similarly, Dean and Green characterised the majority in *McNally* as having 'completely ignored the short but important word "or," and the crucial placement of a comma'.[86]

Given that following the ratio in *McNally* did not require the Court in *Cleveland* to adopt one interpretation over the other, the Court ought to have grappled with the concerns raised by Stevens J and academic commentators. Had the Court addressed those concerns, it is hard to see how the Court could have justified doing anything other than adopting a disjunctive interpretation via application of the 'plain meaning rule'. That is because the word 'or' between the words 'to defraud,' and 'for

---

[80] See, eg, *Consumer Product Safety Commission v GTE Sylvania Inc*, 447 US 102, 108 (1980); *Griffin v Oceanic Contractors*, 458 US 564, 570 (1982); *United States v Ron Pair Enterprises Inc*, 489 US 233, 242 (1989); *Hartford Underwriters Insurance Co v Union Planters Bank*, 530 US 1, 6 (2000); Sebelius v Cloer, 569 US 369, 381 (2013).
[81] *McNally* (n 43) 364-365.
[82] *McNally* (n 43) 366.
[83] *McNally* (n 43) 366.
[84] *McNally* (n 43) 368.
[85] Bradley (n 70) 581.
[86] Jeffrey Dean and Doye Green, 'McNally v United States and its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals get a Break?' (1988) 39 *Mercer Law Review* 697, 714.

obtaining' is not ambiguous. 'Or' means 'or'—that is, one or the other option is available. Alternatively, had the Court in *Cleveland* departed from the 'plain meaning rule' on the basis of some not-obviously-apparent-ambiguity, it is hard to see how applying any other canon of construction relevant to resolving ambiguity could have provided support for the conjunctive interpretation.

Cleveland and congressional intent

One canon relevant to resolving ambiguity is that 'clear evidence of congressional intent may illuminate ambiguous text'.[87] This canon offers limited assistance given what Stevens J dissenting in *McNally* described as 'the statute's scant legislative history'.[88] As I explained earlier, the only evidence relevant to the meaning of the second phrase was the Report of the Commissioners (which did not provide any specific explanation as to why they recommended the insertion of the new words) and the statement made by the congressman who introduced the bill (who described the amendment as 'self-explanatory'). The Commissioners stated in the introduction that they had not noted any 'changes of phraseology only' that were 'designed to secure uniformity or greater precision of expression'.[89] But that can hardly be taken to indicate intent that the second phrase be limited by the first. To paraphrase Kagan J in *Milner v Department of Navy*, relying upon that general statement to confine the meaning of the second phrase would be an example of 'allowing ambiguous legislative history to muddy clear statutory language'.[90]

Cleveland and the principle of lenity

Another canon of construction that applies where language is ambiguous is the 'principle of lenity'. This principle provides that 'where there are two rational readings of a criminal statute, one harsher than the other, [the courts] are to choose

---

[87] See, eg, *Milner v Department of the Navy*, 562 US 562, 572 (2011).
[88] *McNally* (n 43) 368. See also Jed Rakoff, 'The Federal Mail Fraud Statute' (1980) 18 *Duquesne Law Review* 771, 782 ('Although the historical context in which the mail fraud statute was promulgated thus suggests that Congress intended it to be given a broad construction and application, it seems unwise to rest much weight on this conclusion in the absence of more specific legislative history').
[89] Alex Botkin, David Watson and William Bynum, *Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States* (Government Printing Office, 1901) xvi.
[90] Ibid.

the harsher only when Congress has spoken in clear and definite language'.[91] It is also hard to see how this principle could have assisted with respect to the second phrase of the mail fraud statute. If anything, the principle supports the plain meaning interpretation. As the words used in the amendment are clearer and more definite than the phrase 'to defraud', to read them as a subset of the phrase 'to defraud' would invert the principle: in a perverse sort of way, it would employ the principle, which is reserved for cases of 'grievous ambiguity or uncertainty',[92] to undermine the least ambiguous words. Such an approach would contravene yet another canon of construction—namely, the rule against 'surplusage'.[93] This canon requires the court to 'give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed'.[94]

Cleveland and the presumption of consistent usage

The final canon of construction of relevance is the 'presumption of consistent usage'—that identical words in different parts of the same statute should generally be presumed to have the same meaning.[95] This canon invites comparison between the mail fraud statute and the bank fraud statute,[96] which shares the language but not the style of the mail fraud and wire fraud statutes. It provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the money, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

---

[91] *McNally* (n 43) 359-360. See also *Rewis v United States*, 401 US 808, 812 (1971).
[92] *Muscarello v United States*, 524 US 125, 138-139 (1998).
[93] Berkowitz (n 71) 356.
[94] *Montclair v Ramsdell*, 107 US 147, 152 (1883). See also *Hibbs v Winn*, 542 US 88, 101 (2004).
[95] *Atlantic Cleaners & Dyers v United States*, 286 US 427, 433 (1932); *Environmental Defense v Duke Energy Corporation*, 549 US 561, 574 (2007); *Utility Air Regulatory Group v EPA*, 573 US 302, 320 (2014). See also Antonin Scalia and Bryan A Garner, *Reading Law* (West, 2012) 170-173.
[96] 18 USC § 1344.

> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The meaning of the word 'or' between subsections (1) and (2) of the bank fraud statute arose for consideration in *Loughrin v United States*.[97] The defendant in that case had purchased goods from Target using stolen checks and returned the goods in exchange for cash.[98] He was convicted of breaching subsection (2) of the statute.[99] Before the Supreme Court, he argued that he should not have been convicted because he had defrauded Target, not a financial institution.[100] One aspect of his argument was that subsection (2) of the bank fraud statute was limited by subsection (1) in the same way that the second phrase of the mail fraud statute was limited by the first in *Cleveland*.[101] The Supreme Court rejected his argument:

> The single question presented is whether the Government must prove yet another element: that the defendant intended to defraud a bank. As Loughrin describes it, that element would compel the Government to show not just that a defendant intended to obtain bank property (as the jury here found), but also that he specifically intended to deceive a bank. And that difference, Loughrin claims, would have mattered in this case, because his intent to deceive ran only to Target, and not to any of the banks on which his altered checks were drawn … That is because the first clause of § 1344, as all agree, includes the requirement that a defendant intend to "defraud a financial institution"; indeed, that is § 1344(1)'s whole sum and substance. To read the next clause, following the word "or," as somehow repeating that requirement, even while using different words, is to disregard what "or" customarily means. As we have recognized, that term's "ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings." Yet Loughrin would have us construe the two entirely distinct statutory phrases that the word "or" joins as containing an identical element. And in doing so, his interpretation would make § 1344's second clause a mere subset of its first: If, that is, § 1344(2) implicitly required intent to defraud a bank, it would apply only to conduct already

---

[97] 573 US 351 (2014).
[98] Ibid 353.
[99] Ibid 355.
[100] Ibid 356.
[101] Ibid 359-62.

> falling within § 1344(1). Loughrin's construction thus effectively reads "or" to mean "including"—a definition foreign to any dictionary we know of.[102]

The Supreme Court's statement that to read 'or' as 'including' is foreign to any known dictionary undermines both *McNally* and *Cleveland* and defies the presumption of consistent usage. But the judges were alive to the disharmony they were creating. The defendant had relied upon *McNally* in support of his argument:

> Loughrin rightly explains that, despite the word "or," *McNally* understood [the mail fraud statute] as setting forth just one offense—using the mails to advance a scheme to defraud. The provision's back half, we said, merely codified a prior judicial decision applying the front half: In other words, the back clarified that the front included certain conduct, rather than doing independent work.[103]

The Supreme Court in *Loughrin* distinguished *McNally* on three grounds. The first ground related to the structural differences between the bank fraud and the mail fraud statutes:

> [T]he two statutes, as an initial matter, have notable textual differences. The mail fraud law contains two phrases strung together in a single, unbroken sentence. By contrast, § 1344's two clauses have separate numbers, line breaks before, between, and after them, and equivalent indentation—thus placing the clauses visually on an equal footing and indicating that they have separate meanings. The legislative structure thus reinforces the usual (even if not *McNally*'s) understanding of the word "or" as meaning . . . well, "or"—rather than, as Loughrin would have it, "including."[104]

There is no doubt that by separating the two phrases into subsections and dividing them by line breaks, Congress indicated its intention that the two phrases in the bank fraud statute were to be read disjunctively. But it does not follow from the absence of subsections and line breaks in the mail fraud statute that Congress intended the mail fraud statute to be read conjunctively. The failure of Congress to

---

[102] Ibid 356-57 (internal citations omitted).
[103] Ibid 359.
[104] Ibid 359.

draft the mail fraud statute in a more readable way is better characterised as nothing more than its adherence to a now (thankfully) defunct style of drafting.

The second ground upon which the Supreme Court in *Loughrin* distinguished *McNally* concerned the existence of what it called a 'serious chronological problem':

> Congress passed the bank fraud statute in 1984, three years *before* we decided that case. And at that time, every Court of Appeals to have addressed the issue had concluded that the two relevant phrases of the mail fraud law must be read "in the disjunctive" and "construed independently." *McNally* disagreed, eschewing the most natural reading of the text in favor of evidence it found in the drafting history of the statute's money-or-property clause. But the Congress that passed the bank fraud statute could hardly have predicted that *McNally* would overturn the lower courts' uniform reading. We thus see no reason to doubt that in enacting § 1344, Congress said what it meant and meant what it said . . . *i.e.*, that it both said "or" and meant "or" in the usual sense.[105]

This ground proposes that Congress, when it enacted the bank fraud statute in 1984, mistakenly believed, due to its reliance upon decisions that were overruled in 1987, that the Congress that amended the mail fraud statute in 1909 intended the mail fraud statute to be interpreted disjunctively. The Supreme Court relied on this argument to support its disjunctive interpretation of the bank fraud statute. But the argument also supports a disjunctive interpretation of the mail and wire fraud statutes. The ground accepts that Congress was aware of and satisfied with the disjunctive interpretation of the mail and wire fraud statutes in 1984. Re-enactment of a statute may be taken as evidence of legislative ratification of the 'settled construction' of the parts of the statute that are not altered.[106] And a failure of Congress to amend a statute after it has been interpreted may be characterised as 'legislative recognition that the judicial construction is the correct one'.[107] The

---

[105] Ibid 359-60 (internal citations omitted).
[106] See, eg, *Lorillard v Pons*, 434 US 575, 580 (1978); *Monessen SW Ry v Morgan*, 486 US 330, 338-339 (1988); *Pierce v Underwood*, 487 US 552, 567 (1988); *Ankenbrandt v Richards*, 504 US 689, 700 (1992); *Jama v Immigration and Customs Enforcement*, 543 US 335, 349-52 (2005).
[107] *Apex Hosiery Co v Leader*, 310 US 469, 488 (1940). See also *Bob Jones Univ v United States*, 461 US 574, 601 (1983) and *Zuni Pub Sch Dist No 89 v Department of Education*, 550 US 81, 90-91 (2007) (considering Congress's failure to criticize, revise, or reconsider an adopted definition of a statute while determining its construction).

enactment of the bank fraud statute was not a re-enactment of the mail or wire fraud statutes. But its *replication* of the language used in those statutes signals legislative approval of the disjunctive interpretation known to Congress in 1984.

The third ground upon which the Supreme Court in *Loughrin* distinguished *McNally* was based upon the 1909 amendment:

> And a peek at history, of the kind *McNally* found decisive, only cuts against Loughrin's reading of the bank fraud statute. According to *McNally*, Congress added the mail fraud statute's second, money-or-property clause merely to affirm a decision of ours interpreting the ban on schemes "to defraud": The second clause, *McNally* reasoned, thus worked no substantive change in the law. By contrast, Congress passed the bank fraud statute to *disapprove* prior judicial rulings and thereby expand federal criminal law's scope—and indeed, partly to cover cases like Loughrin's … We will not deprive that enactment of its full effect because *McNally* relied on different history to adopt a counter-textual reading of a similar provision.[108]

The proposition that congress intended the mail fraud statute to be read in the conjunctive because its purpose was to affirm *Durland* is the real crux of the distinction drawn by the Supreme Court between the mail fraud statute and the bank fraud statute. However, as explained above, it is by no means clear that Congress amended the mail fraud statute merely to 'codify' *Durland.* Nor is it clear that the majority in *McNally* reasoned that the clause 'worked no substantive change in the law'. This means that the Supreme Court justified its interpretation of the word 'or' as meaning 'including'—an interpretation that it said in *Loughrin* was 'foreign to any dictionary'—upon unsound reasoning. In these circumstances, the presumption of consistent usage suggests that the disharmony between the mail fraud and bank fraud statutes should not stand—that the universal interpretation should be one where 'or' means, in the Supreme Court's own words: 'well, 'or.''

[108] *Loughrin v United States*, 573 US 351, 360-361 (2014) (internal citations omitted).

Cleveland and federalism

When these canons are considered together, it seems hard to deny what Stevens J said dissenting in *McNally*: 'Certainly no canon of statutory construction requires us to ignore the plain language of the provision'.[109] The truth of this proposition in turn suggests that the real basis for the Court's reasoning in *McNally* and *Cleveland* was not adherence to legislative history or precedent but rather concerns expressed in each case about the breadth of the offence and potential effect upon federalism.[110] In *McNally*, the majority said:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights.

Similarly, in *Cleveland*, in relation to the government's argument that licences were property in the hands of the states, the Court said:

> We reject the Government's theories of property rights not simply because they stray from traditional concepts of property. We resist the Government's reading of § 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities.[111]

Finally, in *Cleveland*, in relation to the government's alternative argument that the mail fraud statute ought to be construed disjunctively, the Court said:

> Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities.

---

[109] *McNally* (n 43) 365.
[110] Dean and Green (n 86) 714.
[111] *Cleveland* (n 44) 24.

> For reasons already stated … we decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear.

The Supreme Court's concern about the mail fraud statute being used to regulate conduct that ought to be regulated by the states raises an important point of distinction between the mail fraud statute and the wire fraud statute. The wire fraud statute requires the prosecution to prove that the defendant 'transmit[ed] or cause[d] to be transmitted by means of wire, radio, or television communication *in interstate or foreign commerce*, any writings, signs, signals, pictures, or sounds for the purpose of executing [the] scheme or artifice'. The requirement that the transmission be '*in interstate or foreign commerce*' is not present in the mail fraud statute. Moreover, as the requirement necessarily excludes purely intrastate conduct, there is no need to read the wire fraud statute conjunctively to prevent the prosecution of conduct best left to the states—i.e. conduct that occurs wholly within state borders. Unlike the mail fraud statute, the wire fraud statute has in-built language capable of sorting between those schemes that warrant federal prosecution and those that do not.

The mail and wire fraud statutes have traditionally been interpreted as being in *pari materia* such that decisions with respect to one apply to the other.[112] The point of distinction identified in the previous paragraph provides a basis to question whether the statutes really ought to be interpreted in that way—at least insofar as the mail fraud statute is read narrowly to avoid federal prosecutors trampling over territory traditionally policed by the states. *Cleveland* could perhaps be distinguished on the basis that the concerns motivating the Supreme Court in that case do not apply with respect to wire fraud. Such a distinction would be consistent with the proposition that the 'gist' of wire fraud is the misuse of interstate and international telecommunications.[113]

---

[112] *United States v Pollack*, 534 F 2d 964, 971 (DC Cir, 1976); *United States v Donahue*, 539 F 2d 1131, 1135 (8th Cir, 1976); *United States v Tarnopol*, 561 F 2d 466, 475 (3rd Cir, 1977); *United States v Computer Sciences Corporation*, 689 F 2d 1181, 1188 n 14 (4th Cir, 1982); *United States v Feldman*, 711 F 2d 758, 763 (7th Cir, 1983).

[113] Cf Williams (n 41) 304-307 (arguing that real 'gist' of wire fraud is the fraudulent scheme rather than misuse of the wires).

Putting to one side the possibility of a distinction being drawn between the mail and wire fraud statutes, there is also a serious problem with the federalism-based justification for the conjunctive interpretation. The problem does not concern whether the majority in *McNally* and court in *Cleveland* were right to be concerned about federal overreach. That issue is beyond the scope of this thesis.[114] Rather, it concerns the method adopted by the Court in *Cleveland* to address the potential for overreach. The Court adopted the conjunctive interpretation of the mail fraud statute to ensure that obtaining a state-issued licence by false pretences could not constitute a federal offence. However, the Court did not consider what other kinds of conduct would be placed beyond the reach of the statute by adopting such an interpretation. The result was a judicial throwing out of the baby with the bathwater. The conjunctive interpretation adopted by the Court does not exclude from mail and wire fraud *only* schemes for obtaining *licences* by false pretences. It excludes *any* schemes for obtaining of money or property by false or fraudulent pretences, representations or promises that are not also schemes 'to defraud'. And it does so without the Court having given any consideration to what kind of conduct meets that description, whether the conduct is appropriately characterised as fraud, or whether the conduct is appropriately regulated at local, state or federal level.

This is a serious problem because fraud offences are traditionally 'highly open-textured' to keep pace with the 'constant and rapid pace of economic innovation' and 'evolving sophistication of social norms about commercial behaviour'.[115] As Buell explains in his seminal article on novel criminal fraud: 'Open-textured law that grows and innovates in competition with those who seek to evade it appears to be characteristic of any legal order that seeks to control harmful human behaviour, at least in any society mature enough to have a large economy'.[116] The

---

[114] It is addressed by Dean and Green (n 86) 714-715; Hadi Al-Shathir, 'And into the Maelstrom steps the United States Supreme Court: Licences are not "Property" for the Purposes of the Mail Fraud Statute' (2003) 68 *Missouri Law Review* 179, 191-193.
[115] Samuel Buell, 'Novel Criminal Fraud' (2006) 81 *New York University Law Review* 1971, 1972-1973.
[116] Ibid 1991.

mail and wire fraud statutes have long been recognised as fulfilling such a function.[117] As Burger CJ said in *United States v Maze*:

> [The mail fraud statute] traditionally been used against fraudulent activity as a first line of defense. When a 'new' fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil … The criminal mail fraud statute must remain strong to be able to cope with the new varieties of fraud that the ever-inventive American 'con artist' is sure to develop.[118]

Stevens J dissenting in *McNally* expressed a similar sentiment:

> Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified. The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication.[119]

I address these sentiments and their criticisms in detail in Chapters 8 and 9 where I argue in favour of the criminalisation of frauds that do not defraud. For present purposes, my point is simply that, if the Court wished to isolate conduct more appropriately regulated by state and local authorities from the federal criminal law, it ought to have developed some principle by which that kind of conduct may be carved out from the mail and wire fraud statutes, not adopted an interpretation of the statutes that was 'foreign to any dictionary'. Had the Court developed such a principle and otherwise adhered to the plain language of the statutes, the wire fraud statute could have provided the 'stop gap' means for the prosecution of those who devised schemes for obtaining money by faking the news in the lead up the 2016 election. Whether schemes of that kind ought to be characterised as fraud could then have been resolved by reference to the issues that I address in Chapters 8 and 9.

---

[117] Ibid 1990.
[118] 414 US 395, 405-407 (1974).
[119] McNally (n 43) 373.

Conclusion

The Supreme Court's present interpretation of the mail and wire fraud statutes precludes the prosecution of frauds that do not defraud like making money by publishing fake news. However, given the Court in *Cleveland* based its decision upon a misreading of *McNally*, and the majority's decision in *McNally* was in any event subject to vigorous dissent, the present interpretation may reasonably be regarded as open to reconsideration. The plain meaning reading of the statutes that was adopted prior to *McNally* and *Cleveland* would permit the prosecution of those who devised schemes for obtaining money by publishing fake news. Accordingly, making money by publishing fake news is *capable* of satisfying the second element of the wire fraud statute.

4.4.2 Section 2 of the Fraud Act

Section 2(1) of the Fraud Act provides:

> A person is in breach of this section if he—
>
> (a) dishonestly makes a false representation, and
>
> (b) intends, by making the representation—
>
> (i) to make a gain for himself or another, or
>
> (ii) to cause loss to another or to expose another to a risk of loss.

The offence is complete upon the dishonest making of a false representation with intent to make a gain *or* cause a loss *or* expose another to a risk of loss. The intended gain or loss or risk of loss must be in money or other property.[120] But there is no requirement: (a) that the gain, loss or risk of loss actually eventuate;[121] (b) that any person actually believe the false representation;[122] or (c) that the person to

[120] *Fraud Act 2006* (UK) s 5(2)(a).
[121] See, eg, *R v Jeevarajah* [2012] EWCA Crim 1299.
[122] Ormerod (n 1) 197; Johnson and Rogers (n 1) 298.

whom the representation is made be the person from whom the gain is intended to be obtained (etc).[123]

Much like the wire fraud statute, section 2 of the Fraud Act taken at its plain meaning appears to prohibit frauds that do not defraud like making money by publishing fake news. Subsection 2(1)(b)(i) prohibits dishonestly making a false representation to make a gain and subsection 2(1)(b)(ii) prohibits dishonestly making a false representation to cause loss or expose another to a risk of loss. The separation of these two objects into separate subsections and the use of the disjunctive 'or' between them appears to signal that the prosecution may prove that the defendant has committed the offence by proving one but not the other. Where the prosecution alleges that the defendant made a false representation with intent to make a gain, the possibility that the defendant may also have intended to cause a loss or expose another to a risk of loss (or did in fact cause a loss or expose another to a risk of loss) appears to be immaterial.

Legislative history

Unlike the wire fraud statute, the legislative history of the Fraud Act supports this plain-meaning interpretation. The Fraud Act was enacted following a decades-long reform movement that arose in response to problems with the fraud offences in the *Theft Act 1968* (UK) and the remaining fraud offences at common law. But it can be traced back even earlier to the Criminal Law Revision Committee whose work in the 1960s led to the enactment of the Theft Act.

The Committee had proposed that a person who 'dishonestly, with a view to gain for himself or another, by any deception induces a person to do or refrain from doing any act' should be guilty of an offence punishable by up to two years imprisonment.[124] Some of its members supported an even broader provision. They argued that the law should be simple in its terms and that the nature of any particular dishonest gain should be relevant only to sentencing.[125] Those opposed argued that

[123] *R v Brown & Brown* (1847) 2 Cox CC 348, 352; *R v Kovacs* [1974] 1 WLR 370; *Charles v Commissioner of Police for the Metropolis* [1977] AC 177, 187, 192-193.
[124] Criminal Law Revision Committee, *Theft and Related Offences* (Report No 8, 1966) 44.
[125] Ibid 45-46.

a general provision would be too broad to give precise guidance as to what kind of conduct was criminal. They also argued that such broad terms would capture forms of deception considered by the public to be unworthy of criminal sanction.[126]

Ultimately, the Parliament did not adopt the recommendations of the Committee and instead enacted narrower offences that attempted to specify the types of gains that were prohibited.[127]

Section 15 of the Theft Act provided:

> A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.

And section 16 provided:

> (1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.
>
> (2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where—
>
> (a) any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred; or
>
> (b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or
>
> (c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.

[126] Ibid 46-47.
[127] United Kingdom, *Parliamentary Debates*, House of Lords, 12 March 1968, vol 290, cols 157-174.

Parliament's attempt to specify the types of gains that were prohibited was not well received by the courts or the academy.[128] Just three years after the enactment of the *Theft Act 1968* (UK), the Court of Appeal said the following:

> Despite the aim of the still-youthful Theft Act 1968 to simplify the law, we feel that the time has already come to declare that so obscure is section 16 that it has created a judicial nightmare. It has even puzzled some academic lawyers; it is said to have led to certain erroneous dicta of this court in *R v Waterfall*; and during this year it has led to two decisions, *R v Page* and *R v Locker*, the former of which has, in the view of Professor JC Smith, been "impliedly overruled" by the latter, even though the court said in terms that they were following it. However that may be, section 16 unquestionably raises problems of analysis and exposition which may well daunt and defy those coping with the heavy criminal calendars which are commonplace in these days, and we venture to express the hope that it will be speedily replaced by a simpler provision.[129]

The difficulties experienced by the courts led Parliament to repeal section 16(2)(a) of the *Theft Act 1968* (UK) and introduce new offences of obtaining services by deception, evading liability by deception and making off without payment in the *Theft Act 1978* (UK). Nevertheless, by the time of its 1987 working paper on conspiracy to defraud, the Law Commission was once again motivated to propose the introduction of a general fraud offence that was broad enough to capture frauds that do not defraud.[130] The proposed offence was as follows: 'Any person who dishonestly causes another person to suffer [financial] prejudice, or a risk of prejudice, *or who dishonestly makes a gain for himself or another* commits an offence'.[131] The Law Commission explained its proposal in the following way:

> Faced with a choice between basing the offence on causing a loss or making a gain, there would seem to be advantages in the former. However, both prohibited results

---

[128] See generally Chris Monaghan, 'A Critical Commentary on the Fraud Act 2006' in Chris Monaghan and Nicola Monaghan (eds), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (Routledge, 2018) 1; ATH Smith, 'Reforming section 16 of the Theft Act' [1977] *Criminal Law Review* 259; Ormerod (n 1) 194; David Ormerod, 'A bit of a con? The Law Commission's consultation paper on fraud' [1999] *Criminal Law Review* 789, 791-792.
[129] *R v Royle* [1971] 1 WLR 1764, 1767 (internal citations omitted).
[130] Law Commission, *Conspiracy to Defraud* (Working Paper No 104, October 1987).
[131] Ibid [12.4].

might be incorporated as alternatives, so that proof of either result would satisfy this part of the offence. This would make the offence wider than one restricted to causing a loss, because there are circumstances where a person may fraudulently make a gain without any other person suffering a loss. An example would be where a fraudulent representation is made to a clerk to a local authority planning committee in order to obtain planning permission for a development: neither the clerk nor the local authority would suffer any loss or prejudice, but the person making the representation might obtain a substantial benefit. Is there any reason why such conduct should be excluded from the scope of a general fraud offence?[132]

In response to the working paper, GR Sullivan argued in favour of a general fraud offence that required proof of economic loss.[133] He described the proposed offence as 'stretching the concept of fraud beyond its appropriate ambit'.[134] In response to its example, he said:

> Under the working paper's proposal the developer's profit would be a fraudulent gain and his conduct within the general offence. But unless his conduct had caused economic detriment to the interests of particular individuals, is it apt to designate the developer's gain as fraudulent? From one perspective, absent any economic loss caused to individuals, the developer has merely unlocked the economic potential of the site. If, say, commuter housing is erected in the greenbelt, the wrongdoing is environmental, not economic. The fact that such wrongdoing was in part perpetrated by deception and motivated by gain does not alter its underlying nature. To designate such conduct fraudulent … takes the concept into the amorphous realm of public mischief.[135]

Thirteen years later, the Law Commission that recommended the enactment of the *Fraud Act 2006* (UK) did not adopt Sullivan's suggestion that the general

---

[132] Ibid [12.8].
[133] GR Sullivan, 'Framing an Acceptable General Offence of Fraud' (1989) 53 *Journal of Criminal Law* 92, 97-98.
[134] Sullivan (n 133) 97.
[135] Ibid 97-98. The better answer to the example may be that the gain of the developer was too remote from his deception of the planning committee to render the deception fraudulent. See Chapter 5 and Chapter 8.

offence require proof of economic loss. In its informal discussion paper, it explained its attitude as follows:

> If the new offence extended to the making of any gain by deception, it would catch the obtaining of a valuable service which costs the victim nothing to provide and for which the victim does not expect to be paid. We believe that there is no reason why such conduct should not be criminal, and that the greater simplicity of this approach is ample justification for the marginal widening of liability that it would entail. Defining the offence in terms of gain to the fraudster, without the need to prove a corresponding loss to the victim, would also preclude any argument that no offence has been committed because the victim got value for money and so suffered no 'loss'.[136]

In its final report, the Law Commission noted that four of fifteen submissions that commented on the proposal were opposed to it. Those opposed 'argued that intervention of the criminal law requires to be justified, and the justification comes in protecting people against harm; where there is no harm, it is hard to see what point there is in criminalising the dishonesty'.[137] To this argument the Law Commission responded:

> [T]he law should take a robust and realistic line on this issue. It may be that, where a person's dishonest conduct has genuinely caused no harm whatsoever to anyone else, that conduct is not appropriately described as fraud. However, for every case where this is truly so, there will be many where the loss to others is hard to identify but is none the less real … The fact that the defendant has dishonestly made a gain is not itself the *reason* for criminalising the defendant's conduct. It is, however, the obvious and visible symptom of conduct which, on closer inspection, proves to be anti-social in less obvious ways.[138]

The admission that conduct which has 'genuinely caused no harm whatsoever to anyone else' may 'not appropriately be described as fraud' somewhat weakens the arguments advanced in the conspiracy to defraud report and discussion paper. In

---

[136] Law Commission, *Fraud* (Report No 276, July 2002) 68-69 [7.47].
[137] Ibid 69 [7.48].
[138] Ibid 69 [7.49] (emphasis in original).

those documents, the Law Commission implied that preventing or punishing the dishonest making of a gain *was* the reason for criminalisation. In the above extract, it shifted towards justifying the framing of the offence in terms of gain because some losses are too indirect and diffuse to be susceptible of proof—as if dishonestly making a gain should be prohibited only because it is a 'symptom' of dishonestly causing a loss, not because dishonestly making a gain in and of itself is worthy of prohibition. I address these rationales in detail in Chapter 9.

Nevertheless, whatever its attitude as to *why* the offence should enable to prosecution of dishonest gains without proof of loss, the Law Commission rejected outright the proposition that the offence should be interpreted as requiring proof of loss to others. It concluded: 'For these reasons we believe that it would be unrealistic and artificial to say that the new fraud offence requires proof of loss to others. The dishonest making of a financial gain should suffice'.[139] Insofar as the attitude of the Law Commission is relevant to the interpretation of section 2 of the Fraud Act, this statement suggests that the offence was not intended to be subject to some implied limitation precluding the prosecution of frauds that do not defraud and therefore could be applied to making money by publishing fake news.

Authorities

The courts have adopted an approach that is consistent with that taken by the Law Commission. For example, in *R v Andrewes*,[140] the Supreme Court was tasked with resolving the extent to which the wages earned by a person who obtained employment by lying on his curriculum vitae were recoverable pursuant to proceeds of crime legislation. The proposition that dishonestly making such a gain did not constitute an offence absent proof of loss did not arise at any stage of the proceedings. On the contrary, the Supreme Court recognised that:

[139] Ibid 70 [7.51]. Strangely, perhaps, academic criticism of the Fraud Act, which has not been insignificant, has focused more upon the fact that prosecutors may charge those who dishonestly cause losses but do not make gains. See, eg, Ormerod (n 1) 203 ('one might ask whether this is properly described as fraud').
[140] [2022] UKSC 24.

> Mr Andrewes has performed valuable services for the hospice and the two trusts in return for the net earnings and, if one were to focus solely on his performance of the services (before his fraud was uncovered), it would be hard to deny that the hospice and the two trusts were receiving full value in exchange for the salary paid.[141]

However, it went on to say:

> But the hospice and the two trusts sought to employ or engage in a senior managerial position a person of honesty and integrity and Mr Andrewes would not have obtained the employment or office, which would have gone to another candidate, if the truth about his qualifications had been known.[142]

On that basis, the Supreme Court held:

> ... where one is considering proportionality, the relevant benefit from the fraud that it is proportionate to disgorge is not the full net earnings but rather the difference between the higher earnings that Mr Andrewes has obtained and the lower earnings that he would have obtained had he not used fraud and hence had not been offered the particular job.[143]

Academic commentary

Finally, academic commentary does not suggest that frauds that do not defraud are beyond the reach of section 2 of the Fraud Act. The two leading texts acknowledge that intent to make a gain or cause a loss or expose to a risk of loss are alternatives.[144] But they have differing views about the breadth of the offence. On the one hand, Ormerod and Laird express disappointment that 'Parliament created such wide and ill-defined offences',[145] although they appear to take issue with whether the offences should apply, not to those who intend to make gains without causing losses, but rather those who intend to cause losses without making

[141] Ibid [44].
[142] Ibid [44].
[143] Ibid at [45].
[144] David Ormerod and Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, Oxford University Press, 2018) 933; Simester et al (n 1) 650. See also Johnson and Rogers (n 1) 298 (noting that the new offence 'does away with the need for a victim altogether').
[145] Ormerod and Laird (n 145) 929.

gains.[146] On the other hand, Simester et al praise the simplicity of the legislation,[147] and state that it is 'really essential to fence in the marketplace with criminal law'.[148]

I return to the diverging viewpoints as to the appropriate scope of the fraud offence in Chapter 9 where I advance a rationale for the criminalisation of frauds that do not defraud. For present purpose, my point is that the law reform materials, authorities and commentary on section 2 of the Fraud Act support the proposition that the words ought to be taken at their plain meaning and therefore that a person who makes money by publishing fake news commits the second element of the offence simply by intending to make a gain.

4.4.3 Section 192E of the Crimes Act

Section 192E(1) of the Crimes Act provides:

> A person who, by any deception, dishonestly—
>
> (a) obtains property belonging to another, or
>
> (b) obtains any financial advantage or causes any financial disadvantage,
>
> is guilty of the offence of fraud.

Section 192E(1) of the Crimes Act taken at its plain meaning appears to prohibit frauds that do not defraud like making money by publishing fake news. Like the American and English offences considered above, the use of separate subsections and the word 'or' signals that there are separate ways in which the offence may be committed. In particular, it signals that the prosecution may prove that the defendant is guilty by proving *only* that the defendant dishonestly obtained a financial advantage by deception. The legislative history, approach adopted by the courts and academic commentary supports this plain meaning interpretation.

---

[146] Ibid 933 (giving the example of a person who starts a false rumour about a business intending to turn customers away from the business).
[147] Simester et al (n 1) 649.
[148] Ibid 645.

Section 192E of the Crimes Act is a descendent of section 16 of the Theft Act and section 82 of the *Crimes Act 1958* (Vic).[149] Section 82 of the Victorian Crimes Act was introduced in 1973 for the purpose of simplifying the existing property offences—to remove the 'many loopholes' of the 'highly technical and complicated' blend of common law and statute that existed prior to the reform.[150] The offence was based upon section 16 of the Theft Act but referred to a 'financial advantage' rather than a 'pecuniary advantage' and did not define the phrase. The Explanatory Memorandum explained that the phrase 'financial advantage' had been left undefined to avoid problems with the defined phrase 'pecuniary advantage' in section 16 of the Theft Act.[151] It also explained that the major benefit expected from the reform was that 'attention [would] be focused on the basic question of honesty or dishonesty, instead of on technical questions such as the precise legal analysis of the manner in which the property came into the hands of the accused man'.[152]

Following the amendments made in Victoria, New South Wales introduced a new offence in slightly different terms.[153] Section 178BA of the *Crimes Act 1900* (NSW) provided: 'Whosoever by any deception dishonestly obtains for himself or another person any money or valuable thing or any financial advantage of any kind whatsoever shall be liable to imprisonment for 5 years'. Like the Victorian Parliament, the Parliament of New South Wales left the phrase 'financial advantage' undefined, presumably for the same reason—i.e. to avoid technicalities and focus instead on the requirement that the defendant acted 'dishonestly'.

Section 178BA was repealed in 2009 as part of a broader effort to 'reform and modernize the law relating to fraud and forgery'.[154] However, it was replaced with section 192E (the offence under present consideration), which prohibits substantially

---

[149] New South Wales, Parliamentary Debates, *Legislative Assembly*, 28 March 1979, 3322.
[150] Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1973, 3845 (George Reid).
[151] Explanatory Memorandum, Crimes (Theft) Bill 1973 (Vic) 7.
[152] Explanatory Memorandum, Crimes (Theft) Bill 1973 (Vic) 2. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 1973, 3846 (George Reid). Alex Steel has suggested that the legislature did not adopt the restrictions imposed by s 16(2) of the Theft Act because the financial advantage offence was expected to be 'merely ancillary' to the other fraud and theft offences. Alex Steel, 'Money for Nothing, Cheques for Free? The Meaning of 'Financial Advantage' in Fraud Offences' (2007) 31 *UNSW Law Journal* 201, 206.
[153] *Crimes Amendment Act 1979* (NSW).
[154] Explanatory Notes, Crimes Amendment (Fraud, Identity and Forgery Offences) Bill 2009 (NSW) 1.

the same conduct. One theme of the reform was to ensure that the law could keep pace with technological developments. The Attorney-General said in the second reading speech that the new offences were 'technologically neutral' and would 'ensure that criminal conduct now and well into the future can be caught'.[155]

The courts have interpreted the offences in a manner consistent with the legislative intention of avoiding technicality. In *Matthews v Fountain*, for example, the defendant made out a cheque for $200 to an employee despite knowing that there were no funds in the account upon which the cheque was drawn and that the overdraft on the account had been reached.[156] As the defendant did not deprive the employee of any money, his conduct was another kind of fraud that does not defraud.[157] On appeal to the Supreme Court of Victoria, the defendant argued that the evasion of an existing debt was not a 'financial advantage'. Gray J rejected his argument. He said:

> I was referred to a number of dictionary meanings of "financial", "pecuniary" and "advantage". I do not feel any necessity to refer to them. The concept of "financial advantage" is a simple one. It is expressed by the use of two common words, each of clear meaning. I resist any temptation to elaborate upon them. In my opinion, the Victorian Parliament was wise in refraining from attempting a definition such as s16(2) of the Theft Act.[158]

Matthews v Fountain is one of several decisions in which the courts have refused to narrow the meaning of the phrase 'financial advantage'.[159] There are also decisions in which the courts have rejected the argument that the defendant must have caused her or his victim to suffer a financial disadvantage. In *R v Walsh*, for example, O'Bryan J said that it was 'not to the point that [the victim] might not suffer

---

[155] New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2009, 19507 (John Hatzistergos).
[156] [1982] VR 1045.
[157] See further Chapter 8.
[158] *Matthews v Fountain* [1982] VR 1045, 1049. Gray J's interpretation of s 82 was approved by the Victorian Court of Appeal in *R v Vasic* [2005] 11 VR 380, [13], [25], [27]. At [16] Nettle JA noted that it could be 'scarcely doubted' that s 82 of the Crimes Act 1958 (Vic) 'was intended to have an operation as broad as s 16 of the Theft Act, if indeed not broader'.
[159] See also *R v Murphy* [1987] Tas R 178, 183; *R v Walsh* (1990) 52 A Crim R 80, 81; *Taylor v The Queen* [2019] VSCA 162, [99].

any financial disadvantage',[160] and in *Elias v DPP (NSW)* Blanch J said: 'it is not relevant that no disadvantage was suffered.'[161]

The preponderance of the academic commentary has adopted the plain-meaning interpretation without criticism.[162] However, there are some who appear to assume (erroneously) that the obtaining of a financial advantage will carry with it a corresponding disadvantage. For example, Eburn, Howie and Slater suggest that 'it is apparent that 'to gain a financial advantage' is synonymous with 'to cause a financial loss to another''.[163] This, clearly, is wrong.

Accordingly, the legislative history, authorities and accurate academic commentary relevant to section 192E of the *Crimes Act 1900* (NSW) supports the plain-meaning interpretation and therefore the proposition that a person who makes money by publishing fake news commits the second element of the offence simply by obtaining a 'financial advantage'.

4.5 Conclusion

In this chapter, I examined the extent to which making money by publishing fake news constitutes the second element of wire fraud, section 2 of the Fraud Act and section 192E of the Crimes Act. I explained that the text, context and interpretation of the English and Australian offences supports my argument because the offences encompass making or intending to make a gain irrespective of whether the defendant also caused or intended to cause a loss. However, I also explained that the unanimous decision of the Supreme Court in *Cleveland* presently stands in the way of my argument with respect to the wire fraud statute. Applying *Cleveland*, the prosecution must prove that the scheme was 'to defraud' notwithstanding the use

---

[160] *R v Walsh* (1990) 52 A Crim R 80, 82.
[161] *Elias v DPP (NSW)* (2012) 222 A Crim R 286; [2012] NSWCA 302, [41]-[43].
[162] See, eg, Penny Crofts et al, *Waller & Williams: Criminal Law* (13th ed, LexisNexis Butterworths, 2016) 504, 596; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 4th ed, 2017), 843; David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 2020) 1049.
[163] See Michael Eburn, Roderick Howie and Paul Sattler, *Criminal Law and Procedure in New South Wales* (LexisNexis, 4th ed, 2014) 349 [7.56]. See also Peter Gillies, *Criminal Law* (Law Book Co, 1985) 371.

of the word ‘or’ connecting the first two limbs of the statute. I say ‘presently stands in the way’ because, as I have outlined above, there are compelling reasons to consider the interpretation in Cleveland as open to reconsideration—not least the fact that the Supreme Court has never actually considered the extent to which conduct that falls within the second but not the first phrase of the mail and wire fraud statues is appropriately characterised as fraud. I return to that issue in Chapter 9 where I advance rationales in favour of the criminalisation of frauds that do not defraud. The next chapter continues the present part’s application of the elements of each offence by examining the extent to which the publishing of the fake news may be characterised as the cause of the making money.

5. Causation

5.1 Introduction

Over the previous two chapters, I have argued that publishing fake news satisfies the first two elements of each fraud offence because the publishers make false assertions of fact and obtain money. In this chapter, I put the two together by arguing that fake news publishers obtain money *because* the of the false assertions of fact. This fulfils the third element of a conventional fraud offence—namely, that the perpetrator obtained the money *by means of* the victim's belief in the false assertion. This third element is known as 'causation'. It requires the act of the defendant (i.e. the making of the false assertion of fact) to be a 'legal cause' of the event (i.e. the obtaining of the money or property).

As I explain below, the causation analysis typically starts with determining whether the event would have occurred 'but for' the act of the defendant. The answer to this question with respect to making money by publishing fake news is clearly "No". That is because the publisher would not obtain money *but for* the publication of the stories. *But for* the publisher publishing the stories, the readers would not click the links to the stories. *But for* the readers clicking the links to the stories, the readers would not be exposed to ads. And *but for* the readers being exposed to or clicking upon ads, the publisher would not be paid by the ad server. Accordingly, the 'but for' test is satisfied.

However, as I also explain below, the question of whether the conduct of the publisher is a *legal* cause of the obtaining of the money is more complicated. The law requires the act of the defendant to be more than *a* cause of the obtaining of the money for it to be a legal cause. For a cause to be a *legal* cause, the conduct must be a 'proximate' or 'significant' or 'substantial' cause.[1] These expressions mean roughly the same thing—namely, that the defendant must have contributed to the event in such a way that makes it appropriate to hold the defendant responsible for

[1] These expressions are discussed further below.

the occurrence of the event. At the same time, however, the expressions are controversial, as there is no accepted account of exactly what makes it *appropriate* to hold the defendant responsible where there are multiple causes. Is it a matter of fact? Or is it that policy or morality demand the defendant be held responsible?

There is a massive literature devoted to debating these controversies. In this chapter, I address that literature to some extent. However, consistent with the purpose of this part of the thesis, my real focus is upon applying the law as expounded by the courts, not advocating for a change in approach. For that reason, I base my argument upon considerations that the courts traditionally take into account, as well as examples from fraud cases that are regularly applied by the courts. The argument is original insofar as I apply the existing law to making money by publishing fake news and consider causation-based counterarguments upon which a fake news publisher may seek to rely to avoid liability.

The chapter is split into three sections. The first section introduces the general approach taken by the courts to causation. The second section outlines the extent to which section 2 of the Fraud Act, section 192E of the Crimes Act and the wire fraud statute require the prosecution to prove that the defendant obtained the money *by* the false assertion of fact. The third section advances my argument that the publishing of the fake news—much like the publishing of real news—ought to be regarded as a legal cause of the publishers obtaining money.

5.2 The general approach to causation

The traditional first step in any causation question is to ask whether the event in question would have occurred 'but for' the conduct of the defendant. This step is typically known as the 'but for' or '*sine qua non*' or 'essential condition' test.[2] It may be employed in both an inculpatory and exculpatory fashion. In an inculpatory

[2] HLA Hart and Tony Honoré, *Causation in the Law* (2nd ed, Clarendon Press, 1985) 109-114; Michael Moore, *Causation and Responsibility* (Oxford University Press, 2009) 84; Wayne LaFave, *Criminal Law* (5th ed, 2010) § 6.4(b); Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th ed, Oxford University Press, 2013) 105; David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th ed, Oxford University Press, 2018) 64; Andrew Simester et al, *Simester and Sullivan's Criminal Law* (7th ed, Hart Publishing, 2019) 91-92.

fashion, it may be used to identify those who did cause an event. If the event would not have happened but for the act of the defendant, the act of the defendant may be said to be a cause of the event. In an exculpatory fashion, it may be used to exclude those who did not cause an event. If the event would have happened but for the act of the defendant, the act of the defendant may not be said to be a cause of the event.[3]

The basic rationale underlying the but for test is that a person should not be held responsible for something that would have happened irrespective of whether he or she engaged in the conduct in question. The test has been criticised for both vagueness and failing to match 'what for most of us are firm causal intuitions'.[4] It is vague in the sense that involves speculation as to what would have happened had the defendant not acted.[5] Its failure to match 'firm causal intuitions' arises because the test is both under and overinclusive.[6]

The most obvious examples of *under*-inclusiveness involve concurrent causes.[7] For example, if A and B each shoot C in the head at the exact same time, it cannot be said that 'but for' the act of A, C would not have died. If A had not squeezed the trigger, C would have been killed by B. Yet intuitively it makes sense to say that A and B are equally responsible.[8]

The most striking examples of *over*-inclusiveness occur where another cause contributes to the event in an unusual or extraordinary way. For example, if A attacks B and leaves B battered and bruised lying unconscious in the sand on a beach above the high tide line, and B drowns due to a *tsunami* causing the water to rush far past the ordinary level, A's conduct is a 'but for' cause of B's death. Yet intuitively it

---

[3] Hart and Honoré (n 2) 110-114; LaFave (n 2) § 6.4(b); Ormerod and Laird (n 2) 64; Simester et al (n 2) 91.
[4] Moore (n 2) 85. See also Hart and Honoré (n 2) 114-128.
[5] Moore (n 2) 84-85.
[6] Moore (n 2) 85-86; LaFave (n 2) § 6.4(b); Ashworth and Horder (n 2) 106; Ormerod and Laird (n 2) 64; Simester et al (n 2) 91.
[7] Moore (n 2) 86.
[8] Joseph Beale, 'The Proximate Consequences of an Act' (1920) 33 *Harvard Law Review* 633, 639; Moore (n 2) 8; LaFave (n 2) § 6.4(b); Ashworth and Horder (n 2) 103.

makes sense to blame the tsunami.[9] Events like the tsunami are known as 'intervening causes' or '*novus actus interveniens*'. They are sometimes said to 'break the chain' of causation.[10] But this description is inaccurate. The intervening cause does not undo the causal contribution made by the conduct of the defendant. Rather, the magnitude of the intervening cause is so great that the causal contribution made by the defendant is reduced to trifling significance.[11]

Due to these limitations, the but for test is best viewed as a 'rule of thumb'.[12] It provides a useful tool for connecting the conduct of the defendant to the event in question. But it is 'not a substitute for *true legal causation*'.[13] True legal causation does not seek to determine only whether the conduct of the defendant was *a* cause of the event in question. It seeks also to determine whether the conduct was a kind of cause that makes it appropriate to attribute liability to the defendant.[14]

The courts in New South Wales, the United Kingdom and the United States have taken broadly consistent approaches towards legal causation. In the United States, the courts ask whether the conduct of the defendant was a 'proximate' or 'legal cause' of an event.[15] In the United Kingdom, the courts ask whether the conduct was a 'significant' cause.[16] And in Australia, the courts ask whether the conduct was a 'substantial or significant' or a 'sufficiently substantial' cause.[17] In other words, the courts in each jurisdiction have been consistently vague—for what does it mean to a jury to say that the cause must be 'proximate' or 'significant' or 'substantial'?

---

[9] See, eg, *R v Hallett* [1969] SASR 141, 150. See also Rollin Perkins, 'The Law of Homicide' (1946) 36 *Journal of Criminal Law and Criminology* 391, 393-394; Hart and Honoré (n 2) 326-327; LaFave (n 2) § 6.4(f).
[10] Ormerod and Laird (n 2) 68.
[11] Simester et al (n 2) 97.
[12] Simester et al (n 2) 90-91. See also Hart and Honoré (n 2) 129; Moore (n 2) 84-89; LaFave (n 2) § 6.4(a) Ormerod and Laird (n 2) 64.
[13] Simester et al (n 2) 92 (emphasis added).
[14] Paul Ryu, 'Causation in Criminal Law' (1958) 106 *University of Pennsylvania Law Review* 773, 775, 785.
[15] *Burrage v United States*, 571 US 204, 210 (2014).
[16] *R v Kennedy (No 2)* [2008] 1 AC 269, 274.
[17] *Swan v The Queen* (2020) 94 ALJR 385; [2020] HCA 11, [24]-[25].

There is no doubt that a cause may be 'proximate' or 'significant' or 'substantial' without being the sole cause.[18] Beyond that, however, the meaning of these expressions is murky.[19] The process of determining whether an act was a 'legal cause' of an event is often said to be a matter of 'common sense'.[20] Jerome Hall described it as involving 'intuitive perception and experience'.[21] And the Court of Appeals of New York once described it as an arbitrary process based upon 'practical politics' rather than logic.[22]

If these accounts of legal causation are correct, the process seems to defy any further explanation. Henry Edgerton took that view when he said that it 'neither is nor should be possible to extract from the cases rules which cover the subject and are definite enough to solve cases'.[23] On Edgerton's view, the solution in any case depends upon 'a balancing of conflicting interests, individual and social' that are 'indefinite in number and value, and incommensurable'.[24] Some sceptics have even gone so far as to treat causation as nothing more than a 'pseudoprinciple' used to 'disguise the moral judgment made by the judge'.[25]

Others have resisted this reductive attitude towards causation. Hart and Honoré, for example, insisted in their seminal work on causation that the inquiry must not be thought of as 'necessarily a matter of mere impression, or so intuitive that it cannot be further elucidated'.[26] They argued that the 'common sense' employed in causation is 'not a matter of inexplicable or arbitrary assertions'.[27] They also said the 'causal notions which it employs, though flexible and complex and subtly influenced by context, can be shown to rest, at least in part, on statable

---

[18] Hart and Honoré (n 2) 87, 135 n 9; Ormerod and Laird (n 2) 65; Simester et al (n 2) 91.
[19] Henry Edgerton, 'Legal Cause' (1924) 72 *University of Pennsylvania Law Review* 211, 213; Ormerod and Laird (n 2) 63-64.
[20] Hart and Honoré (n 2) 9, 26. Cf Ormerod and Laird (n 2) 63.
[21] Jerome Hall, *General Principles of Criminal Law* (2nd ed, Bobbs-Merrill Co, 1960) 283-284.
[22] *Palsgraf v Long Island Railroad Company*, 248 NY 339, 352 (NY Ct App, 1928).
[23] Edgerton (n 19) 211.
[24] Ibid.
[25] Joshua Knobe and Scott Shapiro, 'Proximate Cause Explained: An Essay in Experimental Jurisprudence' (2021) 88 *University of Chicago Law Review* 165, 169, 174-175. See also Leon Green, 'Are There Dependable Rules of Causation' (1929) 77 *University of Pennsylvania Law Review* 601, 620.
[26] Hart and Honoré (n 2) 26. See also Charles Carpenter, 'Workable Rules for Determining Proximate Cause' (1932) 20 *California Law Review* 229, 233-234, 244.
[27] Hart and Honoré (n 2) 26.

principles', although 'the ordinary man who uses them may not, without assistance, be able to make them explicit.[28] Several scholars have sought to distil or taxonomise these principles.[29] More recently, Knobe and Shapiro have argued that the process does not require a 'single monolithic' judgment but rather separate inquiries into whether an act was wrong (a question of morality), whether the defendant deserves blame (a question of contribution), and whether the defendant should be held liable (a question of policy).[30]

I am inclined to agree with Michael Moore that the purpose of legal causation is to 'grade punishment proportionately to moral blameworthiness'.[31] On this approach, causation is more a question of culpability than of fact.[32] However, as I explained in the introduction to this chapter, resolving these theoretical issues as to the nature of causation is not necessary for my argument. For that reason, I propose to focus on considerations that are traditionally taken into account by the courts. Of these considerations, three are particularly relevant to making money by publishing fake news.

The first relates to the extent to which the defendant's conduct contributed to the event: the more remote the contribution made by the defendant, or greater the contribution made by other causes, the less likely the defendant's conduct was a legal cause.[33] The second relates to the foreseeability of the event, which may be relevant in both an inculpatory and exculpatory fashion. In an inculpatory fashion: the more foreseeable the event should have been to the defendant, the more likely the defendant's conduct was a legal cause.[34] In an exculpatory fashion: the more *unforeseeable* the contribution made by another cause, the less likely the

---

[28] Hart and Honoré (n 2) 26. See also Beale (n 8) 636.
[29] Carpenter (n 26); Ryu (n 14); Moore (n 2) Ch 4. See also Andrew Simeseter, 'Causation in (criminal) law' (2017) 133 *Law Quarterly Review* 416.
[30] Knobe and Shapiro (n 25) 170.
[31] Moore (n 2) 97.
[32] Moore (n 2) 98. See also Carpenter (n 26) 234.
[33] Beale (n 8) 640, 655; Carpenter (n 26) 242-244; Hart and Honoré (n 2) ch 3; Moore (n 2) 102-103; LaFave (n 2) § 6.3; Ormerod and Laird (n 2) 67-69; Simester et al (n 2) 94.
[34] Beale (n 8) 652; Edgerton (n 19) 220; Green (n 25) 611-612; Carpenter (n 26) 238-241; Moore (n 2) 83, 98; Ashworth and Horder (n 2) 103, 108 (referring to 'test of reasonable expectations'). See also Michael Moore, *Placing Blame* (Oxford University Press, 1997) Ch 8. Cf Hart and Honoré (n 2) 325; Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2005) 174-175.

defendant's conduct was a legal cause.[35] The third relates to the purpose or policy underlying the law: the more the defendant's conduct was contrary to purpose or policy of the law the defendant is accused of breaking, the more likely the defendant's conduct was a legal cause.[36]

5.3 The causation element of each offence

The causation requirements for fraud are specific to each offence. I will address each of them in turn.

5.3.1 Section 192E of the Crimes Act

Section 192E(1)(b) of the Crimes Act requires the prosecution to prove that the defendant 'by any deception … obtain[ed] any financial advantage'. The prosecution must prove both that the defendant obtained a financial advantage *and* that the defendant did so *by* deception. If the defendant did not obtain the financial advantage by deception—if, for example, the victim was not deceived, or had another reason to agree to the transaction—the prosecution will fail for want of causation.[37] Consistent with the general approach to causation described at section 5.2 above, the prosecution is not required to prove that the deception was the 'sole cause of the financial advantage'.[38] Rather, the prosecution is required to prove that the deception was the 'effective' or 'operative cause' of the obtaining of the financial advantage in the sense that the deception 'substantially or significantly contributed' to the obtaining of the financial advantage.[39]

---

[35] Beale (n 8) 652, 655; Edgerton (n 19) 231-233; Carpenter (n 26) 245-246; Hart and Honoré (n 2) 105; Moore (n 2) 98; LaFave (n 2) § 6.3; Ormerod and Laird (n 2) 68-69; Simester et al (n 2) 97-114.
[36] Green (n 25) 619, 625; Ryu (n 14) 804; Hart and Honoré (n 2) 102-103, 109-110; Tadros (n 34) 162-163; Simester et al (n 2) 94-95. Cf Carpenter (n 26) 230, 249 (differentiating purpose and policy from proximate cause).
[37] David Lanham et al, *Criminal Fraud* (Law Book Co, 1987) 71; LaFave (n 2) § 19.7(c); *Re Burton* [2021] NSWCCA 87 at [63]-[65].
[38] *Re Burton* [2021] NSWCA 87 at [64].
[39] *Re Burton* [2021] NSWCA 87 at [64]-[65].

5.3.2 Section 2 of the Fraud Act

Section 2(1) of the Fraud Act requires the prosecution to prove that that defendant 'dishonestly [made] a representation, and … intend[ed], by making the representation … to make a gain for himself or another, or … to cause a loss to another or to expose another to a risk of loss'. The offence does not actually contain a causation requirement. The prosecution must prove that the defendant made a false representation with the intent of making a gain, causing a loss or exposing another to a risk of loss. But the prosecution does not have to prove that the defendant actually made the gain, caused the loss or exposed another to the risk of loss. Nor does the prosecution have to prove that anyone was deceived by the false representation. This is important with respect to fake news publishers because it means the publisher cannot argue in her or his defence that the readers were not in fact deceived by the false stories (except, perhaps, in an attempt to argue that he or she did not act dishonestly, as to which see Chapter 7).

Despite the lack of a causation requirement in s 2 of the Fraud Act, the issues relevant to causation still come into play when judging the defendant's intent. As each of the leading texts explain, to prove that the defendant intended to make a gain *by making a false representation*, it helps to prove that the defendant made or could have made a gain by the false representation.[40] In this way, the considerations relevant to causation under offences like section 192E of the Crimes Act are also relevant to intent under section 2 of the Fraud Act: a failure to prove that the defendant gained or could have gained *by* the false representation may translate into a failure to prove intent.

5.3.3 The wire fraud statute

The wire fraud statute is similar to section 2 of the Fraud Act. The prosecution must prove that the defendant devised or intended to devise a fraudulent scheme or artifice and that the defendant transmitted or caused to be transmitted a

[40] Ormerod and Laird (n 2) 934-935; Simester et al (n 2) 651-653.

communication. But it does not have to prove that the scheme or artifice was effective.[41] The statute prohibits 'the *scheme*, not its success'.[42]

However, the wire fraud statute has been interpreted as having a requirement of 'materiality'.[43] The prosecution must prove that the false or fraudulent pretense, representation or promise was *material* to the obtaining of the money or property. Roughly speaking, this means that the prosecution must prove that the pretense, representation or promise *could have* induced the victim to enter into the impugned transaction. As the Supreme Court said in *Neder v United States:*

> a matter is material if:
>
> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
>
> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.[44]

In effect, the definition invites consideration of how a reasonable victim would have acted and/or what the defendant knew about how the actual victim would have acted. In circumstances where the defendant has *actually* obtained money or property by deceiving her or his victim, the defendant will be hard pressed to argue either that it was not reasonable for the victim to act upon the deception or that he or she did not know that the victim was likely to act upon the deception. In this way, the considerations relevant to causation under offences like section 192E of the Crimes Act are also relevant to materiality under the wire fraud statute: a failure by the prosecution to prove that the defendant could have obtained money *by* the false pretenses may translate into a failure to prove materiality.

5.4 The faking of the news causes the obtaining of the money

[41] *Durland v United States*, 161 US 306, 315 (1896). See generally LaFave (n 2) § 19.7(j)(3).
[42] *United States v Helmsley*, 941 F 2d 71, 94 (2nd Cir, 1991).
[43] *Neder v United States*, 527 US 1, 25 (1999).
[44] Ibid 22 n 5.

By publishing the false stories and posting them on social media, the fake news publishers set in motion a chain of events that lead to them earning revenue from ad servers. There is no doubt that 'but for' the publication of the false stories, the publishers would not earn the revenue: without the stories, the readers would not visit the websites and view the ads. Yet the conduct of the publishers is not the sole cause of the obtaining of the money. The publishers depend upon several other events and circumstances: social media users sharing their stories; readers deciding to click upon links to visit their websites; advertisers creating appealing ads that readers will want to click; ad servers placing ads that appeal to readers; under the *cost per click* pricing model, readers clicking upon the ads; and ad servers transferring money.

This causal chain is much longer than that involved in a more conventional fraud where A lies to B to obtain money or property from B or even C. At the same time, however, it is the same causal chain involved in any business that makes money competing in the two-sided market for attention online by advertising alongside online content including real news websites. For that reason, I anticipate that a judge or jury with everyday experience of the internet would find, as a matter of 'common sense', which is the standard they are required to apply when considering the issue of causation under s 192E of the Crimes Act,[45] that fake news publishers make money *by* publishing fake stories in the same way that real newspapers make money by publishing real stories. The alternative would be to accept the proposition that online news publishers do not make money by publishing news—that, for example, the Sydney Morning Herald makes money by exposing people to ads they are likely to click upon but not by publishing the news stories that expose the people to the ads in the first place.

Moreover, each of the three considerations that are traditionally taken into account by the courts, which I set out at the end of section 5.2 above, warrant attributing legal responsibility for the obtaining of the money to the conduct of the fake news publisher. The fake news publisher's conduct in drafting, publishing and

[45] *Re Burton* [2021] NSWCA 87, [64].

sharing the fake stories and engaging an ad server contributes to the obtaining of the money to a greater *extent* than any of the other causes. The obtaining of money stories is highly *foreseeable* given the automated way in which the publisher engaging an ad server will generate revenue for online content. And attributing responsibility to the fake news publisher is consistent with the purpose and policy of the fraud offences, which I address in detail in Chapter 9.

5.5 Possible counterarguments

Despite the common-sense appeal of the proposition that fake news publishers (like real news publishers) make money by publishing stories, there are some creative counterarguments that fake news publishers may attempt to rely upon to cause the jury to entertain a reasonable doubt about the matter. Three reasonably available counterarguments appear to be available. I will address each in turn.

5.5.1 The readers did not believe the stories because of disclaimers

A fake news publisher might argue that he or she cannot be found to have obtained money *by deceiving* the readers because of disclaimers on the fake news website. Several fake news publishers have relied upon their use of disclaimers to disclaim responsibility for readers believing their stories. For example, John Prager, one of Christopher Blair's collaborators, told Poynter that *America's Last Line of Defense* was 'about 3,000 disclaimers ahead of The Onion' and that they were 'getting really sick of people pretending that [they] aren't easily the most responsible people when it comes to self-identifying as fake'.[46]

The theoretical basis for such an argument is sound. A defendant cannot be found to have obtained money by means of the victim's belief in a false assertion if the victim did not actually believe the false assertion.[47] In *R v Light*, for example, the defendant placed ads in a newspaper inviting readers to send urine for testing to the

[46] Daniel Funke, 'Facebook's fact-checking project sometimes forces hoaxes to change their content', *Poynter*, 13 March 2019. See also Caitlin Dewey, '"I will get the people to buy into my works just to rip their hearts out." A Q&A with a professional Internet troll.', *Washington Post*, 22 August 2014.
[47] Lanham et al (n 37) 91, 121; LaFave (n 2) § 19.7(c).

'British Health Institute' along with a nominal fee.[48] The victims, not believing the accused to be *bona fide*, sent a solution of water with colouring ingredients mixed with soap and asked for an analysis. The defendant wrote back advising a course of treatment. He was charged with *attempting* to obtain the fee by false pretences. He argued that he could not be convicted because his victims never believed the false pretences. Although the Court of Criminal Appeal rejected his argument, it affirmed that no conviction was possible for the offence itself (as opposed to an *attempt* to commit the offence) 'unless it is shown that the mind of the prosecutor was misled *by* the false pretence, and that he was *thereby* induced to part with his money or goods'.[49]

But there are significant difficulties with the application of this argument to the use of disclaimers on fake news websites. The most obvious difficulty has been pointed out by numerous scholars and journalists.[50] It is that the disclaimers on fake news websites are often out of sight of the readers—on an 'About Us' page or far below the story, for example. As a disclaimer that the readers never see cannot really disclaim anything, the use of such a disclaimer cannot negate the causal relationship between the publication of the stories and the obtaining of the money.

Another difficulty is that any argument based upon the disclaimers does not amount to an argument that the readers, like the 'victims' in *Light*, realised the false assertions were false *from the beginning*. As the readers are not exposed to the disclaimers until they visit the website, the publisher would have no choice but to argue that the disclaimers 'broke' the chain of causation—i.e. notwithstanding that the readers were induced to visit the website by their belief that the website was a real news website, that they no longer held the false belief by the time they clicked upon the ads because they were exposed to disclaimers on the website.

---

[48] (1915) 24 Cox CC 718.
[49] Ibid 719. See also, *R v Mills* (1857) 7 Cox CC 270; *R v Hensler* (1870) 11 Cox CC 570; *R v Perera* [1907] VLR 240; *State v Wellington*, 34 Wash App 607 (Wash, 1983); *Ex parte Day*, 481 So 2d 1169 (Ala, 1985). See generally JW Cecil Turner, *Kenny's Outlines of Criminal Law* (18th ed, Cambridge University Press, 1962) 349; LaFave (n 2) § 19.7(c).
[50] See, eg, Dewey (n 43); Funke (n 46); Hunt Allcott and Matthew Gentzkow, 'Social Media and Fake News in the 2016 Election' (2017) 31(2) *Journal of Economic Perspectives* 211, 214.

There are three problems with this argument. First, it depends upon an assumption that the readers see the disclaimers and cease believing that the website is a legitimate news website *before* they see or click upon an ad, which may not always be the case—particularly if the disclaimers are placed in obscure locations out of sight of the readers. Secondly, it ignores the reality that the most significant false assertions are those that induce the readers to *visit* the website—i.e. the assertions made by the posts on social media, not within the stories themselves. From this perspective, the content of the page (including any disclaimers) is immaterial: the deception that induced the readers to visit the website was all that was required to bring about the readers clicking upon or seeing an ad. Finally, as I argue below, given the business model adopted by the publisher, it is inappropriate to segregate the readers seeing or clicking upon the ads from the reasons why they visited the website.

Moreover, as with the case of *R v Light* discussed above, the prosecution could frame the case as one of either fraud or attempted fraud. For example, with respect to s 192E of the Crimes Act, the prosecution could charge with either obtaining a financial advantage by deception or attempting to obtain a financial advantage by deception. If the prosecution was able to prove that the publisher in fact deceived readers, the appropriate offence would be obtaining a financial advantage by deception. Alternatively, if the prosecution was not able to prove that the publisher in fact deceived readers, the appropriate offence would be attempting to obtain a financial advantage by deception—that is, attempting to make people think that the links to the false stories were links to true stories and thereby obtaining payment from ad servers from the people seeing or clicking upon ads.

5.5.2 Other social media users are responsible for sharing the stories

A fake news publisher might argue that he or she cannot be found to have obtained money by deceiving the readers because other social media users shared the links to the stories—in other words, that it was *really* those other users who deceived the readers. Putting to one side the obvious counterargument that the publisher does not have to have made every post to be responsible for her or his own posts, there is a more technical problem with this argument. It depends upon an artificial distinction—that the ‘false assertion’ was the *sharing* of the story, as

opposed to the story itself. That is, the 'false assertion' (for the purpose of the legal analysis) is not that made by the publisher when publishing the story or posting it to social media, but rather is that made by some other user who shares the story.

My answer to this argument is that both assertions are causes of the publisher obtaining the money and the causal contribution made by the other readers cannot fairly be characterised as depriving the causal contribution made by the publishers of its proximity, significance or substance. Some of the traffic to the fake news website comes from assertions made by the publisher. Some comes from assertions made by other users. However, as the assertions made by the users disseminate the assertions made by the publishers, the two are appropriately treated as being inseparable. And the contribution made by the publishers may be fairly judged as involving greater moral obloquy.

Even if I am wrong to dismiss the distinction between the two assertions, the law provides means by which to hold the publisher responsible for assertions made by other social media users. The precise means depends upon the state of mind of those users. If the users were aware that the stories were false and had been published primarily for the purpose of generating advertising revenue, the means is to characterise the users as aiding and abetting the publishers—i.e. to treat them as accessories whose acts do not negate those of the principal. Alternatively, if the users were not aware that the stories were false and had been published primarily for the purpose of generating revenue, the means is to characterise the users as 'innocent agents'.

The 'doctrine of innocent agency' provides a method to hold responsible those who act through others who themselves are not criminally responsible because they are not aware that they are participating in a criminal act.[51] The plainest examples occur where the perpetrator acts through a child who is under the age of capacity, or someone who, by reason of mental illness, lacks the requisite *mens rea*. In such circumstances, the law treats the perpetrator as *the offender* rather than someone

[51] See generally LaFave (n 2) § 13.1(a); Ashworth and Horder (n 2) 109; Ormerod and Laird (n 2) 70, 182; Simester et al (n 2) 227-229; *Pinkstone v The Queen* (2004) 219 CLR 444; [2004] HCA 23, [8].

who counselled or procured the act; and the person who in fact did the act is referred to as an 'innocent agent'.

A simple example of fraud involving innocent agency occurred in *R v Butcher*.[52] The defendant got a young boy to pretend to have been sent by two men to collect their wages from their employer. The employer paid the wages to the boy who paid them to the defendant. The boy was too young to be held responsible under the criminal law. Accordingly, Cockburn CJ held that the defendant was 'responsible for the representation made by the boy as his innocent agent' and was as culpable 'as if he … had gone to the pay-table and made the false representation himself'.[53]

The fake news publisher and the defendant in *Butcher* are alike in the sense that they both rely upon others to assist in the perpetration of their dishonest schemes. However, the defendant in *Butcher* is unlike the fake news publisher in one significant respect. As he instructed the boy to make the misrepresentation, the boy was truly his *agent* (if the term is to be given a technical meaning).[54] The fake news publisher does not give a direct instruction to those who share the stories. However, it is arguable that posting the story to social media alone constitutes requesting others to share the story—there is a 'share' button on every post, after all. This argument is particularly attractive given the publishers undoubtedly desire others to share their stories.

More importantly, however, it may not even be necessary to rely upon the publishers encouraging readers to share the stories. The doctrine of innocent agency does not require the innocent person to be the 'agent' of the perpetrator in the strict, technical sense. For example, in *R v Michael* the defendant gave her child's nurse poison disguised as medicine, intending for the nurse to poison her child.[55] The nurse put the poison away, thinking that the child did not need the medicine. But later her own son administered the poison to the child. The defendant was convicted

---

[52] (1858) 8 Cox CC 77.
[53] Ibid 83; 1150.
[54] Glanville Williams, 'Innocent Agency and Causation' (1992) 3 *Criminal Law Forum* 289, 294.
[55] (1840) 9 C & P 356; 173 ER 867.

of murder even though she never instructed the nurse's son to administer the poison. She prepared the poison with the intent that someone else would administer it to her own child. It did not matter that the poison was administered by someone acting without express instructions.

Glanville Williams described innocent agency as a 'straightforward and commonsense doctrine'.[56] Peter Alldridge more cynically described it as 'a card to be pulled from the sleeve of the prosecutor … when all else seems to fail'.[57] According to Williams, the doctrine seeks to avoid the 'conceptual muddle' that might otherwise arise where one person acts through someone else who cannot be held responsible for the effect of her or his conduct.[58] From this perspective, it is entirely appropriate to rely upon the doctrine to hold fake news publishers responsible for the actions of users who share their false assertions without realising that the assertions are false. The users are no more responsible than postal workers who unwittingly process and deliver a letter-bomb sent through the mail.[59] And the business model adopted by the publishers depends upon unwitting users perpetrating their false assertions to generate more and more views of the stories and consequently the ads.

5.5.3 The publishers are not responsible for readers clicking ads

A fake news publisher might argue that he or she cannot be found to have obtained money by deceiving the readers because the false stories do not influence the decision made by the readers to look at or click upon the advertisements. This is the trickiest of the causation-related arguments. Its resolution depends upon the pricing model employed by the publisher.

The causal chain between the deception of the readers and the obtaining of the money under the *cost per impression* pricing model is clear. The fake news publisher publishes and promotes false news stories. But for the readers believing the stories to be true, the readers would not click links to the fake news website. But

---

[56] Williams (n 54) 294.
[57] Peter Alldridge, 'The Doctrine of Innocent Agency' (1990) 2 *Criminal Law Forum* 45, 48.
[58] Williams (n 54) 290.
[59] Ibid 292.

for the readers clicking links to the fake news website, the readers would not be exposed to ads. And but for the readers being exposed to ads, the ad server would not pay the fake news publisher. There is no-one other than the fake news publisher responsible for bringing the readers to the website and the publisher obtains money as soon as each reader arrives. Accordingly, without any other party or intervening act to blame, the publisher's conduct must be characterised as the predominant cause of the obtaining of the money.

The causal chain under the *cost per click* pricing model is not so straightforward. That is because it because involves a different final step: but for the readers *clicking on the ads*, the ad server would not pay the fake news publisher. The fake news publisher obtains money, not as soon as each reader visits the website, but only after each reader decides to click upon an ad. This introduces three additional causes to the scenario. The first is the reader, who makes the decision to click upon an ad. The second is the advertiser, which creates ads with attractive qualities to tempt readers to click. The third is the ad server, which uses the reader's data to display ads that the reader is likely to click based upon her or his browsing history. Each of these parties dilutes the responsibility of the fake news publisher. The question is whether they so dilute the publisher's responsibility that the publisher's conduct ceases to be a legal cause of the obtaining of the money.

I will preface my answer to this question by making a practical point. As there is no doubt that the publisher intends for the readers to click the ads, the maxim 'intended consequences are never too remote' may be said to apply.[60] By this I do not mean to suggest that the intent of the fake news publisher establishes that her or his conduct was a legal cause of the obtaining of the money. Although Victor Tadros has made a powerful argument that intent is relevant to causation,[61] the orthodox view is that intent and causation involve separate inquiries.[62] Rather, by saying that 'intended consequences are never too remote', I mean only that a judge or jury would be less likely to doubt the causal contribution of a publisher in circumstances

[60] Ashworth and Horder (n 2) 105; Ormerod and Laird (n 2) 83.
[61] Tadros (n 34) 175-181.
[62] Ibid 176.

where the publisher so obviously intended to make the money.[63] Whatever the precise legal position, that is just ‘common sense’; and, as I mentioned earlier, legal cause is often described by the Courts to be a matter about which the jury ought to apply their ‘common sense’.

The publication of the fake stories by the publishers is the ‘common sense’ cause of the obtaining of the money because treating the conduct of the readers or advertisers or ad servers as negating the contribution of the publishers would have absurd consequences. It would be tantamount to saying that any business that profits via advertising alongside content or a service does not make money *by* providing the content or service—that Google does not make money by providing a search engine, the *Sydney Morning Herald* does not make money by publishing news and Facebook does not make money by providing a social media platform. These strained conclusions are contrary to the way in which ordinary people perceive online businesses. Therefore, to the extent that *common sense* indicates legal causation, the everyday assumption that online businesses providers make money *by* providing content and services suggests that the conduct of the fake news publishers is a legal cause of the obtaining of the money.

Another reason is the predictability of the business model. The publishers know that getting readers to the website will lead to readers clicking ads. They do not know which readers will click. Nor do they know which ads the readers will click upon. But they may safely assume that at least some of the readers will click upon some of the ads. Other online content and service providers operate upon the same assumption. The act of a fake news reader clicking upon the ad is the ordinary, everyday, business consequence of bringing a person to a website supported by advertising. It is not some unforeseeable intervening cause like a lightning strike or a tsunami.[64] Therefore, to the extent that *foreseeability* indicates legal causation, the predictability of readers clicking ads suggests that the conduct of the publisher is a legal cause of the obtaining of the money. At the very least, neither the ads nor the

[63] Ashworth and Horder (n 2) 105.
[64] Hart and Honoré (n 2) 332; Ashworth and Horder (n 2) 112.

decision of the readers to click upon them may be characterised as *novus actus interveniens*.

The foreseeability of the readers clicking upon ads may be compared with the foreseeability involved in other frauds that rely on uncertain events. *R v Clucas* is an appropriate example.[65] The defendants in that case obtained by false pretences the opportunity to bet higher amounts on horse races than they otherwise would have been able to bet. They were convicted of obtaining their winnings by false pretences. On appeal, the King's Bench Division quashed their convictions. Lord Goddard CJ said that the false pretences were 'one contributing cause' but that the 'effective cause' was that the defendants backed a winning horse.[66] The underlying reasoning is easy to understand: obtaining money by betting on a race is contingent upon many factors that are hard to predict—at the very least, the performance of the horse, jockey and other competitors.

A fake news publisher charged with fraud would have difficulty relying upon the reasoning in *R v Clucas* for two reasons. The first is that obtaining money by publishing fake news is contingent only upon some of the readers clicking on ads—something that not only is more foreseeable than a horse winning a race, but is statistically almost a certainty. The second is that both the legislatures and the courts have declined to embrace the reasoning employed by Lord Goddard CJ in *R v Clucas*. In the United Kingdom, the effect of *R v Clucas* was undone by the enactment of the *Theft Act 1968* (UK), section 16(2)(b) of which defined a 'pecuniary advantage' as including being 'given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting'. Although that provision has since been repealed and replaced by the more general provision in s 2 of the *Fraud Act 2006* (UK), it seems unlikely that the courts would regard the law as having changed, as they have maintained that obtaining an opportunity to earn remuneration by a false representation constitutes fraud.[67] Similarly, in New South

---

[65] [1949] 2 KBD 226.
[66] *R v Clucas* [1949] 2 KBD 226, 230.
[67] See *R v Haboub* [2007] EWCA Crim 3320; *R v Dziruni* [2008] EWCA Crim 677; *R v Andrewes* [2020] EWCA Crim 1055. See also *Bacon v Salamane* (1965) 112 CLR 85; *United States v Doherty*, 867 F 2d 47 (1st Cir, 1989); *United States v Granberry*, 908 F 2d 278 (8th Cir, 1990); *United States v Aldissi*, 758 Fed Appx 694 (11th Cir, 2018).

Wales, the New South Wales Court of Criminal Appeal in *Re Burton* held that both a bet and the winnings resulting from a bet were capable of constituting a financial advantage within the meaning of s 192E of the *Crimes Act 1900* (NSW).[68]

A fake news publisher might argue in response that the deception of the readers had no bearing upon the choice of the readers to click the ads. In other words, that whilst the publisher does deceive the readers as to the content of the website, the publisher does not deceive the readers as to the content of the ads. This argument draws a distinction between inducing the readers to visit the website and inducing the readers to click the ads. It posits that the false assertions influence the former but not the latter—that the deception of the readers is spent by the time they are exposed to the ads. In support of this argument, the publisher might rely upon other cases in which the effect of the false assertion of fact was held to have ceased to operate on the mind of the victim by the time of the transaction.[69]

The seminal case is *R v Gardner*.[70] The defendant made a series of misrepresentations about his financial means and family connections. The victim allowed him to lodge at her property on the faith of those misrepresentations. Some days later, the defendant asked if he could stay on at the property as a boarder, which meant that the victim would provide him with food and drink in addition to accommodation. The victim allowed him to stay on. The defendant later absconded without making payment. He was convicted of obtaining the food and drink by false pretences. On appeal, however, the Court of Criminal Appeal quashed his conviction. It held that the 'obtaining of the articles, supplied under the contract made by reason of the false pretence, was too remote from the pretence in the particular case to become the subject of an indictment for obtaining those specified goods by false pretences'.[71] A fake news publisher charged with fraud could argue that the fake stories were akin to the defendant's earlier misrepresentation—i.e. that they had

[68] *Re Burton* [2021] NSWCCA 87, [22] and [87].
[69] Turner (n 49) 352.
[70] (1856) 7 Cox CC 136. See also *R v Bulmer* (1864) 9 Cox CC 492.
[71] *R v Gardner* (1856) 7 Cox CC 136, 138-139.

no significant or proximate or substantial bearing upon the readers deciding to click upon ads.

The problem for the fake news publisher who seeks to rely upon such an argument is that courts since *R v Gardner* have been far more willing to characterise false pretences as 'continuing' and far less willing to allow defendants to rely upon the passage of time alone to evade conviction.[72] Whilst *R v Gardner* remains seminal, it presents as somewhat of an anomaly, as later cases involving similar factual scenarios were decided in the opposite fashion.[73] Moreover, insofar as *Gardner* stands for the proposition that the passage of time may render a false assertion of fact too remote to be a legal cause, it hardly helps the fake news publisher. The typical reader would click an ad within seconds, or, at most, minutes, of arriving on the website, so it cannot be said that the belief in the false assertion has worn off or is no longer fresh in the memory by the time of the click.

The better approach for the publisher would be to argue, not that the belief has worn off, but rather that the belief was simply irrelevant to the decision whether to click upon an ad. In support of this argument, the publisher might rely upon the principle that one person cannot be held responsible for a 'free, deliberate, and informed act'—i.e. an 'autonomous act'—of another.[74] On this approach, the reader, not the publisher, must be held responsible for the click, because the decision to click was free, deliberate and (insofar as the ads were concerned) informed.

The principle that one person cannot be held responsible for an autonomous act performed by someone else treats the autonomous act as a *novus actus interveniens*. I am aware of no fraud case in which the principle has been applied—no doubt because the victim must believe the false assertion of fact and therefore cannot be said to be making an 'informed' decision. A straightforward example of the application of the principle in the context of homicide occurred in *R v Kennedy (No 2)*.[75] The defendant loaded up a syringe with heroin and handed the syringe to the

[72] See, eg, *R v Greathead* (1878) 14 Cox CC 108.
[73] See, eg, *R v Burton* (1886) 17 Cox CC 62; *R v Moreton* (1913) 23 Cox CC 560.
[74] Ashworth and Horder (n 2) 104.
[75] [2008] AC 269.

victim. The victim self-injected and later died of an overdose. The defendant was convicted of manslaughter. On appeal, the House of Lords held that he had not caused the death of the victim—that 'the act of supplying, without more, could not harm the deceased in any physical way, let alone cause his death'.[76] In relation to the principle more generally, it said:

> The criminal law generally assumes the existence of free will … [G]enerally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act … Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another.[77]

There are cases that have made inroads to the principle described in R v *Kennedy (No 2)*. For example, in *R v Wallace*, the defendant poured acid onto the victim's face, which led to the victim being permanently disfigured, suffering severe physical and psychological pain, and, ultimately, being legally euthanised by a doctor at his own request. In response to being charged with murdering the victim, the defendant argued that that the doctor's act was a novus actus interveniens. However, the Court of Appeal held that it would be open to a jury to find that the defendant's act caused the victim's death, and, therefore, that the defendant was guilty of murder.[78]

Nevertheless, the argument that clicks upon ads are autonomous acts and cannot be attributed to the publisher is perhaps the most seductive causation-based argument available to the fake news publisher. But there are practical reasons to doubt its application. Unless the readers were aware that they were participating in a scheme by which the publisher sought to deceive them for financial gain, they may not truly be said to have been 'informed'. They may even be described as 'innocent agents'. And whilst the fake news stories do not directly induce readers to click the ads, the publishers take other steps to induce the readers to act in that way. As I explained in Chapters 1 and 2, they engage ad servers knowing that the algorithms

---

[76] Ibid [7].
[77] Ibid [14].
[78] See, eg, *R v Wallace* [2018] EWCA Crim 690. See also *R v Field* [2021] EWCA Crim 380.

will match readers with ads that they are likely to click; and they position the ads in prominent places on the website. Given the two-sided model employed by the publishers, these acts combined with the publication and spread of the false stories as a matter of common sense are likely to be viewed in a holistic fashion. To use the language of the wire fraud statute, they are part of a broader 'scheme or artifice' to obtain money by advertising alongside false stories.

Moreover, as the House of Lords emphasised in *Kennedy*, 'causation is not a single, unvarying concept to be mechanically applied without regard to the context in which the question arises'.[79] The factual context relevant to the victim in *Kennedy* was that of a heroin user who made a free, deliberate and informed decision to take a life-threatening risk. The factual context relevant to the fake news reader is that of a social media user who makes a free, deliberate and (arguably) informed decision to do something utterly trivial—i.e. click on an online ad. The factual context relevant to the defendant in *Kennedy* was that of another user who supplied his friend with heroin. The factual context relevant to the fake news publisher is that of a person who sets out to profit by deceiving others. The legal context in *Kennedy* was whether the mere supply of a drug should be treated as a cause of death where the person supplied dies of an overdose. The legal context relevant to fake news is whether publishing online content should be treated as a legal cause of obtaining money generated by advertising alongside the content. In other words, the context in which the question arises in each case could not be any more different.

The reference to 'context' invites consideration of the purpose and policy underlying the law. As the purpose of the manslaughter offence is to prevent and punish the causing of death, it makes sense not to treat those who merely provide something with which someone else accidentally kills themselves as a legal cause of death. The contrary approach (reduced to absurdity) would mean that any person who sells knives or dangerous tools could be convicted of manslaughter of those who accidentally kill themselves using the knives or tools.[80] In contrast, as I explain

---

[79] Ibid [15].

[80] Something similar occurred in *R v Rebelo* [2021] EWCA Crim 306. The defendant sold weight loss supplements online. The victim overdosed on the supplements notwithstanding that she was repeatedly warned by her doctor, social worker and friend about the dangers involved in taking the

in Chapter 9, fraud offences exist to prevent and punish deceptive economic exploitation and the myriad consequential harms. It would undermine that purpose to exclude those who deceive others to bring about a high chance that they will act in a way that generates a financial gain. The readers are better characterised as pawns in the scheme to make money by deception, not beings whose autonomy negates the schemers' contribution to the scheme.

5.6 Conclusion

In this chapter, I argued that the publishing of false news stories is a legal cause of the obtaining of money by the publishers—undoubtedly under the cost 'per impression' model but arguably also where the ad server pays the publisher 'per click'. In New South Wales, this amounts to an argument that the publishers obtain the financial advantage *by* the deception. In the United Kingdom, it supports the argument that the publishers made the false representations with the intent to make a gain *by* the making of the representations. And in the United States, it demonstrates that the false pretenses and representations are *material* in the sense that they are capable of inducing readers to act in a way that leads to the publishers obtaining money. In making this argument, I have sought to demonstrate that the publishers cannot rely upon disclaimers, social media users sharing the stories or readers deciding to click upon advertisements to absolve themselves of responsibility. In the next chapter, I address the state of mind of the publishers.

---

supplements. The defendant was charged with gross negligence manslaughter. The Court of Appeal held that the jury had appropriately been directed that the prosecution had to prove that the victim "did not make a fully free, voluntary and informed decision to risk death by taking the quantity of the drug that she ingested" on the basis that "If she did make such a decision, or may have done so, her death flows from her decision and defendant only set the scene for her to make that decision".

6. Intent and recklessness

6.1 Introduction

Over the past three chapters, I have argued that fake news publishers obtain money by making false assertions of fact. These three requirements—first, making a false assertion of fact; secondly, obtaining money; and thirdly, the causal relationship between the two—make up the *actus reus* of a typical fraud offence. They are the physical elements that the prosecution must prove to secure a conviction. But proof of the physical elements alone is not enough. It is a principle of natural justice and of law that *actus non facit reum nisi mens sit rea* (actions alone do not make a person guilty unless the mind is guilty).[1] In addition to proving that making money by publishing fake news constitutes the physical elements of fraud, the prosecution must also prove that the publisher did so with the requisite *mens rea*.

The phrase *mens rea* was used in older cases to refer to 'evil intention' or 'knowledge of the wrongfulness of the act'.[2] Today, it is used to refer more generally to the 'fault' or 'state of mind' or 'mental state' elements of an offence.[3] Its purpose is typically described as being to ensure that the criminal law captures only those who are 'blameworthy' or 'culpable' or 'deserving' of punishment.[4] According to Ashworth and Horder:

> The essence of the principle of *mens rea* is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour

---

[1] *Fowler v Padget* (1798) 7 TR 508, 514; 101 ER 1103, 1106. The principle is subject to exceptions where the legislature has imposed strict or absolute liability. However, it is not necessary to address these exceptions in this thesis.
[2] *Sherras v De Rutzen* [1895] 1 QB 918, 921.
[3] Wayne LaFave, *Criminal Law* (5th ed, West, 2010) § 5.1; Penny Crofts et al, *Waller & Williams Criminal Law* (13th ed, LexisNexis Butterworths, 2016) 34; David Ormerod and Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th ed, Oxford University Press, 2018) 87; Andrew Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th ed, Hart Publishing, 2019) 135.
[4] *Sweet v Parsley* [1970] AC 132, 148; Mitchell Berman, '"Blameworthiness" and "Culpability" are not Synonymous: A Sympathetic Amendment to Simester', *Criminal Law and Philosophy*, 21 March 2024, text to notes 2-3. I say 'typically' described because there is a great deal of scholarship concerning the content and purpose of *mens rea*. However, it is not necessary to address this scholarship in this thesis, as I am relying upon the orthodox understanding of the concept.

> and consequences. This approach is grounded in the principle of autonomy: individuals are regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour, and respect for their autonomy means holding them liable only on the basis of their choices. The principle of *mens rea* may also be claimed to enhance the constitutional values of legality and rule of law, by reassuring citizens that they will be liable to conviction, and to the exercise of state coercion against them, only if they intentionally or knowingly cause or risk causing a prohibited harm. If this were achieved, the criminal law would ensure that 'each person is guaranteed a greatest liberty, capacity and opportunity of controlling and predicting the consequences of his or her actions compatible with a like liberty, capacity and opportunity for all.[5]

Consistent with Ashworth and Horder's conventional conception of the essence of *mens rea*, the fault element of an offence usually requires the prosecution to prove at least that the defendant *intended* to commit or was *reckless* as to committing the *actus reus* of the offence.[6] But it may also require proof of some other mental state.[7] For example, the original false pretences offence required the prosecution to prove that the defendant '*knowingly and designedly*, by false Pretence or Pretences, [obtained] from any Person or Persons, Money, Goods, Wares or Merchandizes, *with Intent to cheat or defraud* any Person or Persons of the same'.[8] The prosecution had to prove both that the defendant *knew* that the pretences were false and that he or she made the false pretences *intending to cheat or defraud* the victim.

The offences in force today are similar. The *mens rea* of a fraud offence typically requires the prosecution to prove two things. The first is that the defendant intentionally or recklessly committed the *actus reus* of the offence—for example, that the defendant intended to make (or was reckless as to making) a false assertion of fact, that the defendant intended to make money (or, depending upon the offence in question, was reckless as to making money), and that the defendant intended to

---

[5] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th ed, Oxford University Press, 2013) [5.4(a)].
[6] *R v G* [2004] 1 AC 1034, [32]; *Blackwell v The Queen* (2011) 81 NSWLR 119, 132-133.
[7] LaFave (n 3) § 5.1(a).
[8] 30 Geo 2, c 24.

make the money *by* making the false assertion of fact (or, again depending upon the offence in question, was reckless as to doing so). The second requirement is that the defendant acted '*with intent to defraud*' or '*dishonestly*'. These requirements operate to prevent the conviction of those who make money by making false assertions of fact but are not sufficiently blameworthy or culpable or deserving of punishment—the most obvious example being the defendant who *genuinely* thought her or his false assertions were true.

In this chapter, I address the first requirement by arguing that fake news publishers intentionally or recklessly make false assertions of fact for the purpose of making money. The *prima facie* case for my argument is strong. As I detailed in Chapter 2 and explain further below, the publishers themselves have admitted in public interviews to knowing that their stories are false and to publishing the stories for the purpose of generating advertising revenue. Moreover, the argument relies upon applying longstanding legal doctrinal principles. In making my case, I have no need to advocate for a different approach towards the fault element of the offences. Whilst my application of the principles to the conduct of the typical fake news publisher is original, my exposition of the principles is not.

The chapter is split into three sections. Each section describes and applies to making money by publishing fake news an aspect of the first requirement of the *mens rea* with respect to section 2 of the Fraud Act, section 192E of the Crimes Act and the wire fraud statute. I consider the second *mens rea* requirement for each offence—that is, acting with 'intent to defraud' or 'dishonestly'—in Chapter 7.

6.2 Intentional or reckless false assertion of fact

As I explained in Chapter 3, the prosecution may establish the first element of each offence by proving that the defendant made a false assertion of fact. The requisite *mens rea* with respect to this element of each offence is either intention or recklessness. Before turning to the offences themselves, it is necessary briefly to explain the orthodox meaning of these concepts.

6.2.1 The meaning of intent and recklessness

To say that the defendant *intentionally* performed an element of the *actus reus* is to say that the defendant acted 'with the purpose' of performing the element of the *actus reus*.[9] Another way is to say that the defendant decided to 'bring about' the 'state of affairs' or 'situation' that make up the *actus reus*.[10] The concept is not meant to be complicated and is usually left to the jury's 'good sense' without elaboration.[11] But it is tricky in the sense that it involves determining the defendant's state of mind. Obviously, the jury may only come to a conclusion by drawing inferences from evidence of what the defendant did or said; and, as a practical matter, the jury will be more likely to infer that a defendant intended an outcome if it was an obvious or foreseeable consequence of her or his actions.[12] But 'foresight does not necessarily imply the existence of intention'[13]—unless, according to some commentators, the foresight is of '*virtually certain* consequences*'*.[14]

To say that the defendant *recklessly* performed an element of the *actus reus* is more complicated. The concept of recklessness has been described as 'unjustified risk-taking'[15] occupying a 'middle ground' between intent and negligence.[16] It is made up of two components. First, the defendant must have been aware that her or his conduct *might* lead to a particular outcome—i.e. he or she must have perceived the risk of the outcome occurring.[17] Secondly, it must have been *unreasonable* to take the risk of causing the outcome in the circumstances.[18] Determining whether

---

[9] *R v Burke* [1991] 1 AC 135, 147. See generally Ormerod and Laird (n 3) 90.
[10] *Cunliffe v Goodman* [1950] 2 KB 237, 253; *He Kaw Teh v The Queen* (1985) 157 CLR 565.
[11] *R v Moloney* [1985] AC 905, 926.
[12] LaFave (n 3) § 5.2(a); Simester et al (n 3) 146; Ormerod and Laird (n 3) 90-91.
[13] *R v Hancock* [1986] AC 455, 471-472. See also *R v Moloney* [1985] AC 905, 928.
[14] See generally LaFave (n 3) § 5.2(a)-(b); Ormerod and Laird (n 3) 92-94.
[15] Simester et al (n 3) 154. See also LaFave (n 3) § 5.4(a); Ormerod and Laird (n 3) 86.
[16] Edward Hautamaki, 'The Element of Mens Rea in Recklessness and "Criminal Negligence"' (1951) 2 *Duke Bar Journal* 56, 57.
[17] *R v G* [2004] 1 AC 1034, 1055; LaFave (n 3) § 5.4(f); *Blackwell v The Queen* (2011) 81 NSWLR 119, 133, 141. The law in the United Kingdom was unsettled on this point until the decision of the House of Lords in *R v G*: see generally, Simester et al (n 3) 155-150 and Cath Crosby, 'Recklessness—The Continuing Search for a Definition' (2008) 72 *Journal of Criminal Law* 259.
[18] *R v G* [2004] 1 AC 1034, 1055-1057; LaFave (n 3) § 5.4(a). In *Aubrey v The Queen* (2017) 260 CLR 305; [2017] HCA 18 at [50] the High Court of Australia rejected an argument that the jury must be directed about reasonableness in relation to recklessness. However, the majority did so on the basis that juries already take reasonableness into account when determining recklessness, not on the basis that the issue is irrelevant. At [49] the majority said: 'Of course, the reasonableness of an act

taking the risk was unreasonable requires the jury to consider matters like the probability of the risk occurring, the nature and gravity of the harm being risked, and the social utility of the defendant's conduct.[19]

6.2.2 The fraud offences capture intentional or reckless false assertions of fact

For section 192E of the Crimes Act and section 2 of the Fraud Act, the availability of both intention and recklessness arises from the statutory text. Section 192B(2) of the Crimes Act provides that the 'deception' in section 192E may be 'intentional or reckless'. And section 2(2) of the Fraud Act provides that a 'representation' under section 2(1) is 'false' if 'it is untrue or misleading, and … the person making it knows that it is, *or might be*, untrue or misleading'. For the wire fraud statute, the availability of both intention and recklessness arises from the authorities. In *West v United States*, for example, the Court of Appeals for the Tenth Circuit held that the jury could not find the defendant guilty unless they found that the defendant 'knew [the representations] were false at the time they were made, or acted with reckless indifference as to whether they were true or false'.[20] I have identified equivalent authority in each other circuit.[21]

This aspect of the *mens rea* means the prosecution cannot secure a conviction where there is a reasonable possibility that the defendant did not realise that the assertion was (or might be) false. The position for each offence is the same: if the defendant 'genuinely believes that what he [or she] said was true, he [or she] is

---

and the degree of foresight of harm required to constitute recklessness in so acting are logically connected. So much is implicit in the notion of an accused's willingness to 'run the risk' or to proceed notwithstanding a risk'.

[19] Simester et al (n 3) 154 citing *Aubrey v The Queen* (2017) 260 CLR 305; [2017] HCA 18, [49]-[50]; LaFave (n 3) § 5.4(f).

[20] 68 F 2d 96, 98 (10th Cir, 1933).

[21] First Circuit: *Greebel v FTP Software Inc*, 194 F 3d 185, 198 (1st Cir, 1999); Second Circuit: *United States v Amrep Corporation*, 560 F 2d 539, 543 (2nd Cir, 1977); Third Circuit: *United States v Boyer*, 694 F 2d 58, 59 (3rd Cir, 1982); Fourth Circuit: *United States v Bermes*, 9 Fed Appx 207 (4th Cir, 2001); Fifth Circuit: *United States v Edwards*, 458 F 2d 875, 881 (5th Cir, 1972); Sixth Circuit: *United States v Hathaway*, 798 F 2d 902, 909 (6th Cir, 1986); Seventh Circuit: *United States v Reicin*, 497 F 2d 563, 571 (7th Cir, 1974); Eighth Circuit: *United States v Henderson*, 446 F 2d 960, 966 (8th Cir, 1971); Ninth Circuit: *Irwin v United States*, 338 F 2d 770, 774 (9th Cir, 1964); Eleventh Circuit: *United States v Sawyer*, 799 F 2d 1494, 1502 (11th Cir, 1986); DC Circuit: *United States v Philip Morris USA Inc*, 566 F 3d 1095, 1121 (DC Cir, 2009).

entitled to be acquitted'.[22] If the jury accepts that there is a reasonable possibility that the defendant genuinely believed the assertion to be true, it follows that there is a reasonable doubt as to whether the defendant intentionally or recklessly made the false assertion. The offences are not designed to capture those who make mistakes as to the truth or falsity of what they say. As Lord Heschell said with respect to the tort of deceit: 'To make a statement careless whether it be true or false, and therefore without real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true.'[23]

However, the requirement that the belief must be *genuine* does not mean that the jury is required to take at face value the word of a defendant who claims to have believed the truth of a false assertion. For example, in *United States v Keller*, the defendant claimed to believe that the bogus cancer treatments he sold could treat or cure cancer, but the Court of Appeals for the Fifth Circuit held that the jury were entitled to infer that he knew the treatments were ineffective.[24] Had the defendant persuaded the jury to form a reasonable doubt about that issue, he would have been entitled to an acquittal: the belief must only be *genuine*; it does not have to be *reasonable*,[25] although a jury no doubt would consider the reasonableness of an alleged belief when considering whether or not to entertain the possibility that the alleged belief was genuinely held.

6.2.3 Application to typical fake news publisher

In the typical case, the prosecution would have strong prospects proving that a fake news publisher intentionally or recklessly made false assertions of fact. The flagrant falsity of the typical fake news article provides an ample basis to infer that the publisher *knows* that the assertions are false. Moreover, the prosecution may also be able to rely upon: (a) direct admissions, as so many fake news publishers

---

[22] *Ivey v Genting Casinos (UK)* [2018] AC 391, [66]. See also David Lanham et al, *Criminal Fraud* (Law Book Co, 1987) 68-69; LaFave (n 3) § 19.7(f).
[23] *Derry v Peek* (1889) 14 App Cas 437, 364, 867, 874 quoted in Glanville Williams, 'Recklessness in Criminal Law' (1953) 16 *Modern Law Review* 234, 235.
[24] 14 F 3d 1051, 1056 (5th Cir, 1994).
[25] Lanham et al (n 22) 68-69; LaFave (n 3) § 19.7(f); Ormerod and Laird (n 3) 953.

have participated in interviews with journalists and admitted to creating false content deliberately;[26] (b) indirect admissions—for example, in the case of Sean Adl-Tabatabai, the creator *Your News Wire* and *News Punch*, who said to a journalist: 'When you say facts are sacred, I would argue that no they're not';[27] and (c) the disclaimers the publishers purport to rely upon to argue that their readers ought not have been deceived by the false content. Putting to one side whether the disclaimers are even capable of negating the falsity of the stories, which I discussed in section 3.4.3 of Chapter 3, the presence of the disclaimers demonstrates that the publishers know the stories are false: if the publishers thought the stories were true, they would not feel the need to disclaim the falsity of the stories to the readers.

There appear to be two ways in which a fake news publisher charged with fraud could raise a reasonable doubt as whether he or she intentionally or recklessly made false assertions of fact.

The first is by giving evidence that he or she did not *know* that the stories were false. Such a publisher would no doubt face an argument that he or she was at least aware that the story *might* not be true and published the story despite the risk of its falsity—i.e. acted recklessly. Any publisher who gave evidence to the contrary would have to answer several questions. What made you think the story was true? Where did you find out about the story? Did nothing about the story arouse your suspicions? Did you make any efforts to research the story? Did you attempt to interview the people involved? Unless the publisher provided credible answers to these questions, it seems unlikely that an ordinary jury would give the publisher the benefit of a 'reasonable doubt'. However, it would remain open to the publisher to argue that he or she nevertheless did not act 'dishonestly' or with 'intent to defraud' notwithstanding her or his awareness that the story might be false. I address these possible arguments in Chapter 7.

---

[26] See, eg, Caitlin Dewey, 'This is not an interview with Banksy', *Washington Post*, 23 October 2014; Andrew Higgins, Mike McIntire and Gabriel Dance, 'Inside a Fake News Sausage Factory: "This Is All About Income"', *New York Times*, 25 November 2016; Scott Shane, 'From Headline to Photograph, a Fake News Masterpiece', *New York Times*, 18 January 2017.
[27] Richard Godwin, 'Sean Adl-Tabatabai on being in the eye of the 'fake news' storm', *Evening Standard*, 16 February 2017.

Perhaps the only kind of fake news publisher who could get away with arguing that he or she believed the false stories is a *bona fide* conspiracy theorist. A *genuine* conspiracy theorist who *truly* believed that her or his assertions were true could not be said to have intentionally or recklessly made a false assertion of fact. As Judge Learned Hand said in *Knickerbocker Merchandising Co v United States*: 'a man [may] not be charged for his honest beliefs, *however imbecile they might be*'.[28] However, if the publisher gave evidence of her or his belief that the stories were true, the prosecution would no doubt ask the publisher how he or she was able to form a genuine belief despite the lack of evidence. Unless the publisher also had recourse to a defence based upon mental illness,[29] it is hard to imagine a jury doubting that the publisher was aware of the *possibility* that the story was not true and concluding that the publisher was reckless.

Alex Jones, the creator and host of *InfoWars*, is a good example. Jones is perhaps the most prominent 'conspiracy theorist' active today. Yet in a custody battle with his ex-wife over their two children, Jones' lawyers reportedly told the court that he was a 'performance artist' merely 'playing a character'.[30] Jones later contradicted his lawyer's statement during a segment of *InfoWars*.[31] This contradiction gives rise to three possibilities. First, that Jones' lawyer spoke without or despite instructions. Secondly, that Jones is a performance artist but denied the statement to preserve his fan base. And thirdly, that Jones is not a performance artist but instructed his lawyer to say he was to secure custody of his children. Whatever the answer, somebody was not telling the truth. And Jones has since admitted to the falsity of at least one conspiracy peddled on his show—that the parents of the children who were killed in the Sandy Hook school shooting were paid actors.[32]

---

[28] 13 F 2d 544, 546 (2nd Cir, 1926).
[29] See, eg, Amanda Sakuma, 'Alex Jones blames "psychosis" for his Sandy Hook conspiracies', *Vox*, 31 March 2019.
[30] Maya Rhodan, 'President Trump's Favorite Conspiracy Theorist Is Just "Playing a Character," His Lawyer Says', *Time*, 17 April 2017.
[31] Erica Killelea, 'Alex Jones Custody Trial: 10 WTF Moments', *Rolling Stone*, 28 April 2017.
[32] Bernd Debusmann Jr, 'Alex Jones concedes Sandy Hook school shooting was '100% real'', *BBC*, 3 August 2022.

The second way in which a fake news publisher charged with fraud could raise a reasonable doubt as whether he or she intentionally or recklessly made false assertions of fact is by giving evidence that he or she did not expect or intend the readers to interpret the stories as being 'of fact'. This kind of argument could assist a genuine satirist who expected and intended for her or his readers to recognise the false stories to be satirical (for reasons like those I gave at section 3.4.3 of Chapter 3). However, such a publisher would no doubt be required to answer questions concerning her or his knowledge of the way in which people were responding to the stories. If the publisher could be shown to have realised that readers were reacting to the stories as if they were true and continued publishing false stories despite the reaction, the prosecution would be likely to succeed in proving that the publisher recklessly made false assertions of fact.

6.3 Intentional obtaining of money

As I explained in Chapter 4, the prosecution may establish the second element of section 192E of the Crimes Act by proving that the defendant obtained money (i.e. a financial advantage). I also explained that, whilst neither section 2 of the Fraud Act nor the wire fraud statute require the prosecution to prove that the defendant actually obtained money, doing so is likely to assist in proving that the defendant intended to 'make a gain' or devised a scheme or artifice 'for obtaining money'. As I detail below, the requisite *mens rea* with respect to this element of each offence appears to be intention but not recklessness.

6.3.1 The fraud offences capture only intentional obtaining of money

Whilst section 192B(2) of the Crimes Act provides that the deception may be intentional *or reckless*, there is no corresponding provision stating that the obtaining of the money may be intentional *or reckless*. Accordingly, a defendant who intentionally deceives her or his victim, but does not do so intending to obtain a financial advantage (etc), appears to be beyond the reach of the offence.

Section 2(1)(b)(i) of the Fraud Act expressly requires the prosecution to prove that the defendant '*intend*[*ed*] … to make a gain'. I have been unable to locate any authority on the point. However, Ormerod and Laird argue that the phrase 'intends'

should bear its ordinary meaning,[33] and Simester et al appear to proceed upon that assumption.[34] Accordingly, the defendant who merely realised that he or she could make a gain, but did not intend to make the gain, appears to be beyond the reach of the offence.

The wire fraud statute requires the prosecution to prove that the defendant 'devis[ed] or intend[ed] to devise any scheme or artifice … *for* obtaining money or property'. On my plain meaning interpretation of the statute, the purpose of the scheme must be the obtaining of money or property. Accordingly, the defendant who devises a scheme or artifice merely realising that he or she could obtain money or property, but not intending to obtain the money or property, ought to be beyond the reach of the statute.

This aspect of the *mens rea* means that the prosecution cannot secure a conviction where there is a reasonable possibility that, although the defendant intentionally or recklessly made the false assertion of fact, the defendant did not intend to obtain the money. Such circumstances are most likely to arise where the defendant had another reason for making the false assertion. *R v Wakeling* is an unusual yet appropriate example.[35] The defendant received parochial relief from the local parish. An overseer of the poor asked the defendant to work to help maintain his family. Although the defendant had previously received two pairs of shoes from the parish, he told the overseer that he could not work because he had no shoes. The overseer left and later returned with a pair of shoes, which the defendant accepted. The defendant was convicted of obtaining the shoes by false pretences. However, his conviction was later overturned on the basis 'that the conviction was wrong; the statement made by the [defendant] being rather a false excuse for not working than a false pretence to obtain goods'.[36]

6.3.2 Application to typical fake news publisher

[33] Ormerod and Laird (n 3) 934.
[34] Simester et al (n 3) at 650-653.
[35] (1823) Russ & Ry 504; 168 ER 920.
[36] Ibid.

In the typical case, the prosecution would have strong prospects proving that the publisher intended to obtain money, so long as the publisher engaged an ad server to populate the website with ads. That is because the engagement of an ad server that pays for views and clicks on ads is *prima facie* evidence of intent to make money.

Moreover, there is ample evidence from the mouths of the publishers themselves that their overall goal is to make money. I gave several examples in Chapter 2 but can give some more. A fake news publisher from the nation of Georgia told reporters from *The New York Times* that 'his only incentive was to make money from Google ads by luring people off Facebook pages and onto his websites'.[37] And Cameron Harris, a resident of Maryland who created the *Christian Times Newspaper*, insisted in an interview with Scott Shane that '[t]he money, not politics, was the point'.[38] Any publisher who admitted to publishing for profit would have a hard time denying intent to obtain money via advertising.

Nevertheless, there are some publishers who ascribe to themselves other motives. Paul Horner, who I introduced in Chapter 2, insisted that his story purporting to disclose the identity of Banksy, which he said earned him as much as $10,000 per day, was not about the money but rather about 'paying tribute to Banksy'.[39] Christopher Blair, who I also introduced in Chapter 2, consistently claimed to be a satirist aiming to re-educate imprudent social media users.[40] And Sean Adl-Tabatabai, another prominent fake news publisher from the late 2010s, defined his 'job' as 'overseeing and editing an alternative news website' and 'cover[ing] stories that the mainstream media isn't covering'.[41]

These sorts of excuses are unlikely to avail the publishers. Even if a fake news publisher had other reasons for publishing the false stories, the prosecution would still be able to prove that he or she intended to obtain money. The law on this point is clear: where the prosecution must prove that a defendant intended a

---

[37] Higgins, McIntire and Dance (n 26).
[38] Shane (n 26).
[39] Dewey (n 26).
[40] See Chapter 2.
[41] Godwin (n 27).

particular outcome, it does not have to prove that the outcome was the *sole* intent of the defendant.[42]

The only possible counterargument would be that the making of the money was incidental rather than intentional—for example, that the goal was to skew public opinion or sow discord and that the ads were placed on the site as an afterthought (i.e. '*Why not make money at the same time?*') or to lend legitimacy to the website (i.e. '*I need ads to make this look real*'). There is some authority to support the prospects of such an argument. *R v Steane* may be the best example.[43]

The defendant in *Steane* broadcasted for the Nazis during the Second World War. He was convicted of doing an act likely to assist the enemy. On appeal, he argued that he lacked 'intent to assist the enemy' because he acted to save his family from being put in a concentration camp. Although there was no doubt that his participating in the broadcasts assisted the enemy, Lord Goddard CJ held that it was open to the jury to find that the defendant did not intend to assist the enemy, but rather intended to save his family.[44]

A fake news publisher whose main goal was to skew public opinion or sow discord could make a similar argument. The publisher could seek to differentiate between the intent to skew public opinion or sow discord and the intent to obtain money by doing so. However, there are good reasons to doubt that a judge or jury would entertain any such argument.

First, unlike the defendant in *Steane*, the fake news publisher has more than two options available. The choices are not 'publish fake news and obtain money' or 'do not publish fake news'. The option of publishing fake news without making money was always available: the publisher did not have to host ads on the website.

---

[42] Simester et al (n 3) 151; LaFave (n 3) § 5.2(d).
[43] [1947] KB 997.
[44] Ibid 1007. See also *Haupt v United States*, 330 US 631 (1947).

Secondly, decisions like *Steane* have been criticised for mixing up *intent* with *desire*.[45] The conventional approach is to distinguish between these concepts.[46] The reason why is simple: a person may intend to do something that he or she has no desire to do—putting down a sick animal, for example. Steane intended to make the broadcasts, which as a matter of fact aided the enemy, notwithstanding he had no desire to aid the enemy.

Thirdly, decisions like *Steane* have been criticised for making artificial distinctions when they could be better explained by recourse to conventional doctrines.[47] Steane only made the broadcasts because his will was overborne by the threat to his family. An orthodox resolution of his case would have involved finding that Steane intended to do an act likely to assist the enemy but acquitting him based upon the defence of duress.[48]

Fourthly, decisions like Steane collide with the fundamental rule that 'motive is irrelevant to responsibility'.[49] Steane's motive in making the broadcasts was not to assist the enemy. It was to help his family. Nevertheless, he must have had foresight that assisting the enemy was 'virtually' the 'certain consequence' of his making the broadcasts.[50]

Finally, as Ormerod and Laird point out, the defendants in cases like *Steane* are usually acting out of laudable motives—in *Steane*, to save his family from the horrors of the camps.[51] A fake news publisher whose underlying motive was to skew opinion or sow discord could hardly claim to be acting out of a laudable motive, although the option might be open to a genuine satirist whose motive was to entertain, ridicule or criticise. The problem, however, is that even genuine satirists act at least partially from financial motives. Publications like *The Onion* and *The*

---

[45] Ormerod and Laird (n 3) 95-96.
[46] Jerome Hall, *General Principles of Criminal Law* (2nd ed, Lawbook Exchange Ltd, 1960) 108.
[47] Ibid.
[48] Ibid.
[49] Guyora Binder, 'The Rhetoric of Motive and Intent' (2002) 6 *Buffalo Criminal Law Review* 1, 2 quoting Jerome Hall, *General Principles of Criminal Law* (Lawbook Exchange, 1947) 153 and Alan Norrie, *Crime, Reason, and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 1993) 37.
[50] See generally LaFave (n 3) § 5.2(a)-(b); Ormerod and Laird (n 3) 92-94.
[51] Ibid.

Betoota Advocate are businesses with employees to pay and other expenses to meet. It would be artificial to characterise them as so motivated by publishing satire that they lacked intent to obtain money by their content.

In this sense, publishers of satirical fake news are much like the defendant in *R v Button*.[52] The defendant in that case entered a running race under a false name to secure a more favourable handicap. After he won the race and his deceit was discovered by the handicapper, he was charged with attempting to obtain the prize money by false pretences. In his defence, he argued that he had entered under the false name 'for a lark'. The defence was unsuccessful. Whilst it may have been possible that he entered the race only for his own amusement,[53] the jury found him guilty—no doubt convinced by his winning of the race that he intended to claim the prizes.

The same may be said for fake news publishers (including genuine satirists). Once they have employed an advertising service to populate the website with ads, their intent to obtain money is clear beyond any reasonable doubt. The more compelling arguments available to genuine satirists are those advanced in Chapter 3 (that satirical stories do not convey assertions 'of fact') and Chapter 7 (that genuine satirists do not act with 'intent to defraud' or 'dishonestly').

6.4 Intentional obtaining of money *by* false assertion of fact

As I explained in Chapter 5, the prosecution may establish the third element of section 192E of the Crimes Act by proving that the defendant obtained the money (i.e. a financial advantage) *by* the false assertion (i.e. the deception). I also explained that, whilst neither section 2 of the Fraud Act nor the wire fraud statute require the prosecution to prove that the defendant actually obtained money by the false assertion, doing so is likely to assist in proving that the defendant 'intend[ed], *by making the representation* … to make a gain' (Fraud Act s 2(1)(b)(i)) or devised a

[52] [1900] 2 QB 597.
[53] See generally *United States v Masten*, 170 F 3d 790, 795 (7th Cir, 1999).

scheme or artifice '*for* obtaining money' (wire fraud). The requisite *mens rea* with respect to this element of each offence appears to differ.

6.4.1 The link between intent and causation

The language of section 192E of the Crimes Act appears to permit a defendant to argue something to the effect of 'I am not guilty because I deceived the victim with the intent of obtaining X but instead obtained Y'. Such a situation could arise where the victim is not persuaded to give the defendant what he or she requests but offers something else instead. Consider a person who pretends to be homeless for the purpose of obtaining money by begging. If a passer-by believed that the person was homeless and was unwilling to give the person money, but was willing to buy the person lunch, the person could argue that he or she did not intend to obtain the meal by means of her or his deception. However, as the person could be charged with attempted fraud for the same conduct, there is unlikely to be any real utility in relying upon such an argument.

Moreover, whatever the utility of the argument, it does not appear to be available with respect to section 2 of the Fraud Act or the wire fraud statute. Section 2 of the Fraud Act requires the defendant to have intended 'by making the representation … to make *a* gain', not *the* gain that the defendant in fact made. And the wire fraud statute requires the prosecution to prove that the defendant devised or intended to devise a prohibited scheme or artifice, not that the scheme or artifice was successful. Neither offence leaves any room for a defendant to argue that he or she ought to be acquitted because the false representation or scheme had an outcome different to that he or she originally intended—unless, perhaps, the discrepancy was capable of indicating that the defendant did not act with 'intent to defraud' or 'dishonestly'. I address these concepts in Chapter 7.

6.4.2 Application to typical fake news publisher

In the typical case, the prosecution would have strong prospects of establishing this requirement as well. As Ormerod and Laird explain, if the jury are satisfied that the defendant obtained money by making a false assertion of fact, their natural inclination is to ask: 'if [the defendant] did not intend that his representations

would lead to the gain or loss why did he make it?'[54] A fake news publisher could attempt to argue that he or she intended to lure the readers to the website by making the false assertions of fact but intended to obtain the money by exposing them to ads. This argument would be likely to fail for the same reason the similar argument about causation would be likely to fail—i.e. it relies upon an artificial distinction between luring readers to the website and exposing them to ads. To use the language of the wire fraud statute, the conduct of the fake news publisher is part of one *scheme or artifice*. The false assertions made in the stories cannot be separated from their intended and foreseeable effect upon the readers.

6.5 Conclusion

In this chapter, I have argued that typical fake news publishers possess the first *mens rea* requirement of the fraud offences because they intend to make false assertions of fact, intend to make money, and intend to make the money by making the false assertions of fact. This first requirement goes some way towards protecting freedom of speech by ensuring that only those who are blameworthy (in the sense that they are aware of what they are doing) may be convicted: if the jury think there is a reasonable possibility that the fake news publisher genuinely believed her or his stories to be true, or genuinely believed that the readers would not think the stories were factual in nature, the publisher is entitled to be acquitted. The final element of the offences, which requires the prosecution to prove that the defendant acted with 'intent to defraud' or 'dishonestly', provides further protection. I address that element in the following chapter.

[54] Ormerod and Laird (n 3) 952.

7. Dishonesty and intent to defraud

7.1. Introduction

In the previous chapter, I addressed the first aspect of the *mens rea* for each offence by arguing that fake news publishers possess the requisite mental state with respect to each aspect of the actus reus—i.e. that they intentionally or recklessly make false assertions of fact and that they intentionally make money by means of those false assertions of fact. In this chapter, I address the second aspect of the *mens rea* for each offence. For section 192E of the Crimes Act and section 2 of the Fraud Act, the second aspect requires the prosecution to prove that the defendant 'dishonestly' obtained the financial advantage and 'dishonestly' made the false representation. For the wire fraud statute, it requires the prosecution to prove that the defendant acted with 'intent to defraud'.

In the United Kingdom and Australia, the meaning of the word 'dishonestly' with respect to fraud offences has been a matter of some controversy. As I explain below, the courts and legislatures have adopted different approaches across different jurisdictions and over time. There is also a substantial body of academic commentary concerning, not only the merits of the competing approaches, but also the appropriateness of including dishonesty as an element of the offences. However, despite these controversies, there is at least a broad consensus as to two matters. The first is that the prosecution must prove *at least* that the defendant was dishonest according to the standards of ordinary/decent people. The second is the purpose of the dishonesty element is to provide a mechanism by which a jury may acquit a defendant whose conduct (despite satisfying the other elements of the offence) does not involve sufficient moral obloquy to warrant criminal sanction.[1] Consistent with

[1] David Lanham et al, *Criminal Fraud* (Law Book Co, 1987) 35, 75-76; Model Criminal Code Officers Committee, Chapter 3: Theft, Fraud, Bribery and Related Offences (Australian Government Printing Service, 1995) 129.

that purpose, the dishonesty element has been described as the 'safety valve'[2] or 'escape-route'[3] of the offences.[4]

In the United States, the phrase 'intent to defraud' has a longstanding meaning with respect to the offence of obtaining property by false pretences. If the defendant knew the pretence was false and intended to obtain the property by the pretence, he or she had 'intent to defraud' *unless* he or she: (a) believed in a legal entitlement to the property (i.e. had what is traditionally known as a 'claim of right'); (b) intended to restore the property to the owner (i.e. did not intend to 'permanently deprive' the owner of the property); or (c) obtained the property to satisfy a debt owed by the owner (i.e. another form of 'claim of right').[5] However, as I explain below, the federal appellate courts in the United States have adopted a different approach with respect to the 'intent to defraud' element of the wire fraud statute. They have retained the core of the traditional definition by requiring the prosecution to prove that the defendant intentionally or recklessly deceived someone to deprive someone of money or property. But some courts have also required the prosecution to prove that the defendant intended to 'harm' her or his victim. And others have rejected the availability of the common law 'claim of right' defence.

In this chapter, I evaluate the prospects of the prosecution proving beyond a reasonable doubt that the typical fake news publisher acts 'dishonestly' or with 'intent to defraud'. The chapter is split into five sections.

The first section sets out the test for 'dishonesty' in the United Kingdom, the test for 'dishonesty' in New South Wales and the meaning of 'intent to defraud' with respect to the wire fraud statute. Because the precise meaning of 'dishonesty' and 'intent to defraud' has been so controversial, I engage more with scholarship in this chapter than I have in the previous four. Surprisingly little has been written about

---

[2] Chris Monaghan, 'A Critical Commentary on the Fraud Act 2006' in Chris Monaghan and Nicola Monaghan (eds), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (Routledge, 2018) 5.
[3] JR Spencer, 'Dishonesty: What the Jury Thinks the Defendant Thought the Jury Would Have Thought' (1982) 41 *Cambridge Law Journal* 222, 225.
[4] See generally David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th ed, Oxford University Press, 2018) 871-872.
[5] Wayne LaFave, *Criminal Law* (5th ed, 2010) § 19.7(f)(2).

how jurors are likely to reason about dishonesty notwithstanding the significant utility that such research would provide to any lawyer tasked with defending a person charged with fraud. The material in the first section goes some way towards filling that gap by drawing upon the work of moral philosophers to identify circumstances in which members of an ordinary jury might be expected to doubt that a defendant acted 'dishonestly'. However, beyond that modest contribution to the scholarship, my primary goal is to explain rather than critique the current state of the law.

The second section addresses the possibility that a fake news publisher may be able to negate acting with 'intent to defraud' or 'dishonesty' by relying upon a 'claim of right'. I address this topic first because having a 'claim of right' traditionally provided an answer to an allegation of fraud. The phrase 'claim of right' is shorthand for having a genuine belief in a legal right to the money or property obtained by the alleged fraud. It is possible to imagine a fake news publisher arguing that he or she was legally entitled to generate ad revenue by publishing false stories. However, as I argue below, such an argument would not raise a 'claim of right' consistent with the authorities: the claim must be of a *pre-existing* legal right to the money or property, not of a right to obtain the legal right to the money or property by deception.

The third section engages with an obstacle to my argument with respect to the wire fraud statute—namely, that fake news publishers *cannot* be found to have 'intent to defraud' because a scheme to make money by publishing fake news defrauds neither the readers nor the ad servers. As I explain below, I am compelled to concede this point because of the interpretation adopted by the Supreme Court in *Cleveland v United States*.[6] However, as I also explain below, if the wire fraud statute were interpreted as per its plain meaning (as I argue it should be in Chapters 4, 8 and 9), a fake news publisher could be found to possess 'intent to obtain money or property by false or fraudulent pretenses, representations, or promises'. On that approach, the final element of the wire fraud statute would be satisfied.

The fourth section examines whether a jury is likely to consider making money by publishing fake news to be dishonest according to the standards of

---

[6] 531 US 12 (2000).

ordinary/decent people. This is the test for dishonesty in the United Kingdom and the first limb of the test for dishonesty with respect to section 192E of the Crimes Act. Adopting the starting point that ordinary jurors would be likely to consider intentionally publishing false stories to make money to be dishonest, I examine five arguments that I anticipate fake news publishers might rely upon in an attempt to create a reasonable doubt as to the dishonesty of their conduct.

The final section examines the circumstances in which a jury might entertain a reasonable doubt as to whether a fake news publisher charged with fraud realised that making money by publishing fake news was dishonest according to the standards of ordinary/decent people. This is the second limb of the test for dishonesty with respect to section 192E of the Crimes Act. As this issue turns so much upon the circumstances of the individual publisher, I attempt only to make some general points about how a jury might resolve the matter.

7.2 The safety valve element of each offence

7.2.1 The test for dishonesty with respect to section 2 of the Fraud Act

Section 2 of the Fraud Act requires the prosecution to prove that the defendant '*dishonestly* [made] a false representation'. The origin of this 'dishonesty' element was the *Theft Act 1968* (UK). Prior to the enactment of the Theft Act, the false pretences offence required the prosecution to prove that the defendant acted with 'intent to defraud',[7] and the larceny offence required the prosecution to prove that the defendant acted 'fraudulently'.[8] The word 'dishonestly' was substituted in the expectation that jurors would find it easier to understand than those expressions, which had acquired a somewhat technical meaning over time.[9] Unfortunately, the substitution led to new difficulties, not just for jurors, but also for judges, who

[7] *Larceny Act 1916* (UK) s 32(1).
[8] Ibid s 1(1).
[9] Criminal Law Revision Committee, *Theft and Related Offences* (Report No 8, 1966) 39.

struggled to reach a consensus as to the appropriate test for the new 'dishonestly' requirement.[10]

The test from R v Ghosh

After a decade or so of conflicting decisions,[11] the Court of Appeal settled the meaning of the dishonesty requirement in *R v Ghosh*.[12] The defendant in that case was a doctor who had charged a hospital for surgeries that he had never performed. He argued that he had not been dishonest because the hospital had underpaid him in other respects. Although the Court of Appeal held that 'a finding of dishonesty was inevitable, whichever of the tests of dishonesty was applied',[13] it set out the following two-limbed test as the correct test for the meaning of dishonesty:

> In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails … If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.[14]

The first limb of the test asks the jury to determine whether what the defendant did was dishonest according to the ordinary standards of reasonable and honest people. The second limb of the test asks the jury to determine whether *the defendant knew* that reasonable and honest people would consider what he or she did to be dishonest. The Court introduced the second limb to ensure that a person could not be found to have done something dishonestly in circumstances where the

---

[10] See generally *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391; [2017] UKSC 67, [52]-[74]. See also Spencer (n 3).
[11] *R v Waterfall* [1970] 1 QB 148; *R v Royle* [1971] 1 WLR 1764; *R v Gilks* [1972] 1 WLR 1341; *R v Feely* [1973] QB 530; *R v Greenstein* [1975] 1 WLR 1353; *Boggeln v Williams* [1978] 1 WLR 873; *R v Landy* [1981] 1 WLR 355; *R v McIvor* [1982] 1 WLR 409.
[12] [1982] QB 1053.
[13] Ibid 1065.
[14] Ibid 1064.

person did not realise that what he or she was doing was dishonest. It gave the following example:

> Take for example a man who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest. It seems to us that in using the word "dishonestly" … Parliament cannot have intended to catch dishonest conduct in that sense, that is to say conduct to which no moral obloquy could possibly attach.[15]

The Court emphasized that the second limb of the test was not intended to 'abandon all standards but that of the accused himself' or bring about a state of affairs in which 'Robin Hood would be no robber':[16]

> It is no defence for a man to say "I knew that what I was doing is generally regarded as dishonest; but I do not regard it as dishonest myself. Therefore I am not guilty." What he is however entitled to say is "I did not know that anybody would regard what I was doing as dishonest."[17]

The two-limbed test for dishonesty was employed by courts in the United Kingdom between the decision in *Ghosh* and the decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* almost forty years later.[18]

The test from Ivey v Genting Casinos (UK) Ltd

The issue in *Ivey* was whether the appellant had breached an implied term in a contract with a casino not to cheat at gambling. The appellant argued that he could not have cheated unless he had committed the statutory offence of cheating under section 42 of the *Gaming Act 2005* (UK), which, he said, required the prosecution to prove that he had acted dishonestly according to the *Ghosh* test.[19] The Supreme

[15] Ibid 1063.
[16] Ibid 1064.
[17] Ibid 1064.
[18] [2018] AC 391; [2017] UKSC 67.
[19] Ibid [37].

Court rejected both that argument and the correctness of the *Ghosh* test.[20] It then said with respect to the meaning of dishonesty:

> When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.[21]

In the wake of *Ivey*, there was uncertainty as to whether criminal courts would continue to apply the *Ghosh* test in relation to fraud.[22] The remarks made in *Ivey* were *obiter dicta*;[23] and, as some commentators pointed out, Parliament was aware of the *Ghosh* test when it enacted the Fraud Act,[24] and presumably chose not to define 'dishonesty' to leave the *Ghosh* test in place.[25] Nevertheless, the courts soon abandoned the *Ghosh* test in favour of the test enunciated by the Supreme Court in *Ivey*.[26] Therefore, in relation to section 2 of the Fraud Act, to prove that the defendant made a false representation 'dishonestly', the prosecution must persuade the jury only that the defendant was being dishonest 'according to the standards of ordinary decent people' when he or she made the representation.

---

[20] Ibid [49], [74].
[21] Ibid [74].
[22] See, eg, Andrew Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th ed, Hart Publishing) 586.
[23] *Director of Public Prosecutions v Patterson* [2017] EWHC 2820 (Admin), [16].
[24] Explanatory Notes, Fraud Bill 2006 (UK) s 2, [10] ('The current definition of dishonesty was established in *R v Ghosh* [1982] Q.B.1053').
[25] Monaghan (n 2) 8-9 quoting Matthew Dyson and Paul Jarvis, 'Poison Ivey or Herbal Tea Leaf?' (2018) 134 *Law Quarterly Review* 198, 201; Karl Laird, 'Dishonesty: Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)' [2018] *Criminal Law Review* 395, 399; David Ormerod and Karl Laird, 'Ivey v Genting Casinos – Much Ado About Nothing?' (2018) 9 *UK Supreme Court Yearbook* 380, 398-399.
[26] See, eg, *DPP v Patterson* [2018] 1 Cr App R 28; [2017] EWHC 2820 (Admin), [16]; *R v Pabon* [2018] EWCA Crim 420, [23]; *London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Sinfield* [2018] EWHC 51 (QB), [62].

Dishonesty as a safety valve

Much of the debate about the test for dishonesty has focused upon the application of the requirement to theft rather than fraud. In the United Kingdom, section 1(1) of the Theft Act provides a person is guilty of theft 'if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'. The word 'dishonestly' must do the heavy lifting of sorting between those appropriations that constitute theft and those that do not.[27] Scholars have consistently questioned whether the dishonesty requirement is fit for that purpose,[28] often on the ground that there is no objective standard of dishonesty for jurors to apply.[29] These criticisms have been borne out by research into how jurors reason about dishonesty. In a study conducted by Emily Finch, four mock juries were asked to determine whether a defendant who found a winning lottery ticket in the street and claimed the prize without seeking to find the true owner had acted dishonestly.[30] The individual members of the juries had widely divergent views about whether the defendant had acted dishonestly—so much that some were willing to disregard the legal test they had been instructed to apply.[31]

But the dishonesty requirement does not perform the same function with respect to fraud as it does with respect to theft. Whilst the *actus reus* of theft may be something as innocuous as picking something up in the street,[32] section 2 of the Fraud Act requires the prosecution to prove that the defendant made a *false representation* with *intent* to make a gain or cause a loss before the issue of dishonesty even arises. Unlike picking up something in the street, making a false representation with intent to make a gain or cause a loss is something that ordinary people are likely to consider to be *prima facie* dishonest—i.e. dishonest unless there

[27] Terry Palfrey, 'Is Fraud Dishonest? Parallel Proceedings and the Role of Dishonesty' (2000) 64 *Journal of Criminal Law* 518, 522; Ormerod and Laird (n 25) 872.
[28] Spencer (n 3) 222-223; Palfrey (n 27) 520-521; Alex Steel, 'The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31 *UNSW Law Journal* 712, 730 and 732.
[29] Spencer (n 3) 225; Kenneth Campbell, 'The Test of Dishonesty in R v Ghosh' (1984) 43 *Cambridge Law Journal* 349, 349, 358-359; Palfrey (n 27) 521-522.
[30] Emily Finch, 'The Elephant in the (Jury) Room: Exploring Mock Jurors' Understanding of Different Approaches to Dishonesty' [2021] *Criminal Law Review* 513.
[31] Ibid. See also John Gardner, 'Ordinary Decent Honesty' (2018) 9 *UK Supreme Court Yearbook* 290, 299.
[32] I.e. larceny by finding.

is a persuasive justification for the conduct.[33] That is because, as I explain in Chapter 9, there is a well-recognised moral presumption against lying. For that reason, the dishonesty requirement in the fraud offences really serves an exculpatory function.[34] By this I mean that it provides a way for a defendant who has made a false representation to make a gain or cause a loss to argue that he or she nevertheless should not be convicted.

This exculpatory function is what makes the dishonesty requirement a 'safety valve' for the fraud offences. It gives the jury the ability to acquit a defendant whose conduct satisfies the other elements of the offence (i.e. a defendant who is proven to have made a false representation with intent to make a gain etc) on the basis that they are not convinced beyond a reasonable doubt that the defendant acted dishonestly. In *R v Bonollo*,[35] McGarvie J gave the following example of circumstances in which this may occur:

> For example, a farmer working with dangerous harvesting machinery on a hot day may have drunk as much intoxicating liquor as is consistent with his own safety. His brother sees him take another bottle and is concerned for the farmer's safety. By deception he obtains the bottle from him and empties it on the ground. The other constituent elements of an offence under s 81(1) are present and the brother had no basis for a belief that he had a legal right to take the liquor and destroy it. The ordinary decent citizen would hardly regard the brother as obtaining the liquor dishonestly.[36]

Matters relevant to dishonesty

The dishonesty requirement asks the jury to make a *moral* judgment about the blameworthiness of the defendant's deceptive behaviour.[37] Beyond the study by Emily Finch referred to earlier, surprisingly little has been written about how a jury

---

[33] Gardner (n 31) 308-309 (explaining that deception may render an otherwise honest appropriation dishonest).
[34] Steel (n 28) 733.
[35] [1981] VR 633, 653.
[36] *R v Bonollo* [1981] VR 633, 653;
[37] Campbell (n 29) 357; Palfrey (n 27) 519; Alex Steel, 'Dishonesty Outside of England and Wales: Ivey in International Comparison' (2018) 9 *UK Supreme Court Yearbook* 341, 349; Brenda Hale, 'Dishonesty' (2018) 9 *UK Supreme Court Yearbook* 243, 255.

would make such a judgment.[38] However, accepting that there is no way to predict definitively how any individual jury would think, it seems safe to assume that ordinary jury members would be likely to consider some of the matters that moral philosophers have considered when attempting to map the wrongfulness of deception, as well as those that courts historically have considered in relation to the limits of the fraud offences.

One consideration is the nature of deception. Subject to only a few exceptions,[39] moral philosophers tend to agree that lying (intentionally making a false statement in a context where others may rely upon its truth) is worse than misleading (intentionally making true statements but leaving out information to create a false impression).[40] Unlike those who merely mislead, the liar impliedly asserts that he or she is telling the truth.[41] In practice, the criminal law works much the same way. Although some scholars still question whether making misleading statements should constitute fraud,[42] each of the offences may be committed by a person who has misled her or his victim.[43] On that basis, an ordinary jury may be expected to think that making a false statement is more dishonest than making a misleading statement.

Another consideration is the knowledge of the defendant. On the one hand, a person who makes a false assertion of fact by mistake (i.e. whilst believing the assertion to be true) cannot be said to be lying,[44] let alone to be telling a wrongful lie. For that reason, a jury would be highly unlikely to find a person to have acted

---

[38] One notable exception is Gardner (n 31).
[39] Jennifer Saul, 'Just Go Ahead and Lie' (2012) 72 *Analysis* 3.
[40] See, eg, Joseph Kupfer, 'The Moral Presumption Against Lying' (1982) 36 *Review of Metaphysics* 103, 103 quoting Sissela Bok, *Lying: Moral Choice in Public and Private Life* (Harvester Press, 1978) 32. See also Arnold Isenberg, 'Deontology and the Ethics of Lying' (1964) 24 *Philosophy and Phenomenological Research* 463, 475-479; Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22 *Law and Philosophy* 393, 400 ('Moral philosophers frequently distinguish between lying and deception and condemn lying as the worse offense'). I have paraphrased the definitions of 'lying' and 'misleading' from Jennifer Saul, *Lying, Misleading & What is Said* (Oxford University Press, 2012) 1-20.
[41] Alexander and Sherwin (n 40) 402.
[42] See, eg, Andrew Simester et al, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing, 2019) 657; Ormerod and Laird (n 25) 952.
[43] See Chapter 3.
[44] Saul (n 39) 2 n 5; Thomas Carson, *Lying and Deception: Theory and Practice* (Oxford University Press, 2012) 15-40.

dishonestly where they accept that there is a reasonable possibility that the person made the false assertion of fact believing it to be true. On the other hand, a person who makes a false assertion of fact recklessly (i.e. whilst not believing the assertion to be either true or false), arguably can be said to be lying.[45] For that reason, it seems fair to assume that a jury would be likely to find a person to have acted dishonestly even if they accepted there was a reasonable possibility that the person made the false assertion without *knowing* it was false. However, it would depend upon matters such as the nature of the false assertion, the extent to which the person knew it might be false, the risks inherent in making the false assertion, and any steps the person took to determine its truth or falsity.

Another consideration is the motive of the defendant. In day-to-day life, people often tell lies that they regard as too trivial or commonplace to be wrongful.[46] These kinds of lies are referred to as 'white lies'. Examples include false pleasantries (like saying 'Good' when asked 'How are you?' even though you are having a terrible time) or making a false excuse (like saying 'I've got other plans' when asked to go on a date despite being available). The criminal law takes broadly the same approach. The maxim *de minimus non curat lex* ('the law does not concern itself with trifles') may exclude from fraud trivial examples of obtaining money or property by deception;[47] and a jury might not regard deception akin to a white lie to be sufficiently dishonest to warrant a conviction.[48]

The only lies that are broadly considered acceptable by moral philosophers are those told for altruistic purposes. Lying to help someone else is not considered to be as wrong as lying out of self-interest; and lying to help someone else avoid harm is almost universally regarded as laudable, not immoral.[49] Although it may be 'wrong' to lie, the wrongfulness of lying is outweighed by the rightfulness of helping the

---

[45] Carson (n 44) 15-40 (arguing that 'lying' may be defined as making a false statement not believing the statement to be true and intending to deceive another).
[46] Bok (n 40) 57-58; Kupfer (n 40) 108-113.
[47] See, eg, *United States v Granberry*, 908 F 2d 278, 280 (8th Cir, 1990); *United States v Schwartz*, 924 F 2d 410, 418 (2nd Cir, 1991).
[48] See, eg, *R v Feely* [1973] QB 530, 539; *Boggeln v Williams* [1978] 1 WLR 873; *R v Clarke* [1996] Crim LR 824. See generally Model Criminal Code Officers Committee (n 1) 129.
[49] Lisa Griffin, 'Criminal Lying, Prosecutorial Power, and Social Meaning' (2009) 97 *California Law Review* 1515, 1551-1552; Kupfer (n 40) 110.

person avoid harm. However, at the same time, the notion that a person may be excused from liability because he or she acted for an altruistic purpose collides with the prevailing attitude of the law. For centuries, the common law has shown no leniency to those who steal or defraud for altruistic purposes, even where those purposes arise from desperation—to feed starving children, for example.[50] Instead, it has relied upon the prerogative of mercy,[51] and, in practice, prosecutorial discretion,[52] to alleviate the harshness of punishing those who break the law to help others. As the Supreme Court of Michigan said in *People v Lennox*:

> What [the defendant] did with the money is immaterial. The law does not sanction the obtaining of money under false pretenses, though the object to which it is devoted be meritorious. The criminal character of the act is not determined by the subsequent use of the money, but by the means used in obtaining it.[53]

Nevertheless, it is hard to imagine a jury finding a person who acted out of altruism alone to have been dishonest;[54] and the dishonesty requirement has come to be seen as alleviating the law's traditional rigidity with respect to those who act for altruistic purposes.[55] As I explained in the introduction, each case will invariably turn on its own facts, as well as the extent to which the jury are persuaded by the defendant's claim to have acted out of altruism.

The only situation that the law has singled out as being *inherently* not dishonest is where a person lies to obtain something that the person believes he or she is legally entitled to obtain. Such a person is said to have a 'claim of right'.[56] The morality of lying in such circumstances is difficult to ascertain. On the one hand, lying

---

[50] Matthew Hale, *Historia Placitorum Coronæ* (1736) vol 1, 54 ('if a person being under necessity for want of victuals, or clothes, shall upon that account clandestinely, and *animo furandi* steal another man's goods, it is felony, and a crime by the laws of England punishable with death'); Edward Hyde East, *A Treatise of the Pleas of the Crown* (P Byrne, 1806) vol 2, 698-699 (stating that necessity 'can never be admitted as a legal defence in a country like this, where such humane laws prevail for the care and maintenance of the poor'). See also Stuart Green, *Thirteen Ways to Steal a Bicycle: Thirteen Ways to Steal a Bicycle* (Harvard University Press, 2012) 82-84.
[51] See, eg, *R v Dudley and Stephens* (1884) 14 QBD 273, 288.
[52] See generally Stephanos Bibas, 'The Need for Prosecutorial Discretion' (2010) 19 *Temple Political & Civil Rights Law Review* 369.
[53] 106 Mich 625, 627 (1895).
[54] See East (n 50) 699.
[55] See, eg, Model Criminal Code Officers Committee (n 1) 129.
[56] See below section 7.3.

might be the only readily available means available to obtain the thing short of violence or stealth; and it is arguable that someone who has unlawfully detained property is not entitled to be told the truth. On the other hand, there are legal processes available to obtain property that has been unlawfully detained; and the lie is presumably told out of self-interest. Nevertheless, whatever the moral position, historically, the legal position is clear: a person who believes that he or she has a legal right to the money or property obtained does not act dishonestly. I return to this issue in section 7.3 below.

7.2.2 The test for dishonesty with respect to section 192E of the Crimes Act

Section 192E of the Crimes Act requires the prosecution to prove that the defendant "dishonestly … obtain[ed] any financial advantage". The section differs from s 2 of the Fraud Act in that the dishonesty is linked to the obtaining of the financial advantage rather than the deception of the victim. However, for reasons I will explain, the two are interrelated.

As I explained above, the test for dishonesty in the United Kingdom for 40 years was the two-limbed test laid down by the Court of Appeal in *R v Ghosh*. The Supreme Court in *Ivey* amputated the second limb of the *Ghosh* test—i.e. the requirement that the defendant *realised* that her or his conduct was dishonest according to the standards of ordinary people—in part to bring about harmony between the definitions of 'dishonest' in the civil and criminal law.[57] But its main purpose was to prevent defendants from being able to rely on misconceived ideas about what other people would consider to be ordinary standards of honesty in response to a charge of fraud. It said:

> There is no reason why the law should excuse those who make a mistake about what contemporary standards of honesty are, whether in the context of insurance claims, high finance, market manipulation or tax evasion. The law does not, in principle, excuse those whose standards are criminal by the benchmarks set by society, nor ought it to do so. On the contrary, it is an important, even crucial,

[57] *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391; [2017] UKSC 67, [62].

> function of the criminal law to determine what is criminal and what is not; its purpose is to set the standards of behaviour which are acceptable.[58]

The High Court of Australia had reached a similar conclusion as to the merits of the *Ghosh* test some twenty years earlier in *Peters v The Queen*.[59] In that case, Toohey and Gaudron JJ said:

> In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest … by the standards of ordinary, decent people.[60]

This test is the same as the test set forth by the Supreme Court of the United Kingdom in *Ivey*.[61] However, the test does not apply in New South Wales, as Parliament reintroduced the *Ghosh* test following the decision in *Peters*. Section 4B of the *Crimes Act 1900* (NSW) presently provides:

> "***dishonest***" means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.[62]

Therefore, despite the concurrence of the two ultimate appellate courts, different tests for dishonesty apply in relation to section 2 of the Fraud Act and section 192E of the Crimes Act. Both require the prosecution to prove that the defendant acted dishonestly 'according to the standards of ordinary/decent people' (i.e. the first limb of the *Ghosh* test). But section 192E further requires the prosecution also to prove that the defendant knew that her or his conduct was

---

[58] Ibid [59].
[59] (1998) 192 CLR 493.
[60] Ibid [18], [145] approved in *Macleod v The Queen* (2003) 214 CLR 230, [46].
[61] David Lusty, 'Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67: Test for Dishonesty in the United Kingdom Brought Into Line With Australian Common Law' (2017) 41 *Criminal Law Journal* 281, 284.
[62] The position is the same in South Australia and the ACT: *Criminal Law Consolidation Act 1935* (SA) s 131(1); *Criminal Code 2002* (ACT) s 300. In Victoria, the Court of Appeal of Victoria has maintained that the word 'dishonestly' in s 82 of the *Crimes Act 1958* (Vic) is used in a 'special sense' that asks only whether the defendant obtained property 'without any belief that he [or she] has in law the right to deprive the other [person of the property]': *R v Salvo* [1980] VR 401, 422, 440.

dishonest according those standards (i.e. the second limb of the *Ghosh* test). As the Supreme Court explained in *Ivey*, this provides an additional (but questionable) safety valve where there is a reasonable possibility that the defendant made a mistake about contemporary standards of honesty.

7.2.3 Intent to defraud with respect to wire fraud

The wire fraud statute does not in its terms state that the prosecution must prove that the defendant possessed 'intent to defraud'. Nevertheless, the courts have held that the prosecution must prove that the defendant acted with 'intent to defraud'.[63] The Supreme Court has held that the words 'to defraud' refer to 'wronging one in his property rights by dishonest methods or schemes' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching'.[64] Using that definition as a starting point, one might expect proving 'intent to defraud' to involve nothing more than proving that the defendant intended to deprive someone of something by trick, deceit, chicane or overreaching. However, exactly what the prosecution has to prove remains surprisingly unsettled.

The unsettled meaning of 'intent to defraud'

Several appellate circuit courts define 'intent to defraud' as 'acting willfully and with specific intent to deceive *or* cheat, usually for the purpose of getting financial gain for one's self *or* causing financial loss to another'.[65] But there are obvious problems with this definition. The use of the word 'or' between the words 'deceive' and 'cheat' suggest that intent to deceive alone suffices to prove intent to defraud. And the reference to the purpose being 'getting financial gain for one's self *or* causing financial loss to another' suggest that intent to gain without intent to deprive may suffice to prove intent to defraud. Both of these propositions are contrary to the traditional meaning of 'to defraud'—i.e. to deprive by deceit.[66]

---

[63] See, eg, *United States v Hoffman*, 901 F 3d 523, 545 (5th Cir, 2018).
[64] *Hammerschmidt v United States*, 265 US 182, 188 (1924) quoted in *McNally v United States*, 483 US 350, 358 (1987).
[65] See, eg, *United States v Treadwell*, 593 F 3d 990, 998-1000 (9th Cir, 2010); *United States v McClellan*, 794 F 3d 743 (7th Cir, 2015).
[66] *Re London and Globe Finance Corporation Ltd* [1903] 1 Ch D 728, 732.

Several appellate circuit courts also state that proving 'intent to defraud' involves proving 'intent to harm'.[67] This approach distinguishes between schemes that cause the victim to suffer an economic loss and schemes that do not. Where the scheme causes the victim to suffer an economic loss, the intent to cause the loss constitutes the requisite 'intent to harm'. Where the scheme does not cause the victim to suffer an economic loss—for example, where the defendant obtains a job by false pretences but thereafter works to earn her or his salary[68]—the position is trickier. Several courts had defined 'actual harm or injury' as including the denial of the victim's 'right to control its assets by depriving it of information necessary to make discretionary economic decisions'.[69] However, the Supreme Court recently disapproved of those authorities in *Ciminelli v United States*.[70] I address its decision in Chapter 9.

The status of the claim of right

Notwithstanding the claim of right's longstanding status as a defence to false pretences, at least the Second Circuit has departed from the principle that a person who believes that he or she has a legal entitlement to the property obtained cannot be said to possess intent to defraud.[71] In *United States v Gole*, the Second Circuit said:

> If Gole's theory of self-help were the law, anyone who believed that he was legally entitled to benefits from a pension plan, or an insurance policy, or a government program, but who was concerned that he or she might nevertheless be denied such benefits, would be given carte blanche simply to lie to obtain those benefits. Such a course of action would often be much easier than pursuing legal remedies through civil actions in court, and would guarantee success as long as the misrepresentation remained undiscovered. We will not encourage people to lie to obtain benefits rather

[67] *United States v Regent Office Supply Co*, 421 F 2d 1174, 1180 (2nd Cir, 1970); *United States v Novak*, 443 F 3d 150, 156 (2nd Cir, 2006); *United States v Takhalov*, 827 F 3d 1307, 1310 (11th Cir, 2016).
[68] See, eg, *United States v Granberry*, 908 F 2d 278 (8th Cir, 1990).
[69] See, eg, *United States v Rossomando*, 144 F 3d 197, 201 n 5 (2nd Cir, 1998).
[70] 598 US 306 (2023); 143 SCt 1121.
[71] Wayne LaFave, *Criminal Law* (5th ed, 2010) § 19.7(f)(2).

than pursue their rights in civil actions. Such controversies may be resolved by civil suit or settlement, but cannot be won by using lies and deception.[72]

The Seventh Circuit appears to have taken the same position.[73]

Intent to defraud as a safety valve

Notwithstanding the controversy as to its precise meaning, in practice the 'intent to defraud' element of the mail and wire fraud statutes appears to fulfil a 'safety valve' function similar to the dishonesty element of the English and New South Wales offences.

Addressing the cases decided prior to the early 1900s, Jed Rakoff has demonstrated that the 'most important influence in determining the construction given to the mail fraud statute … was the degree of moral concern felt by the judge as to the underlying facts of the fraud'.[74] Similarly, addressing more recent decisions, Samuel Buell has shown that there are examples of courts in the United States adopting an approach to 'intent to defraud' reminiscent of the *Ghosh* test for dishonesty.[75] Buell examined decisions of appellate courts searching for the basis upon which they were distinguishing between novel forms of dishonest commercial conduct that warrant prosecution and those that do not. He found that the difference seemed to depend upon whether the defendants displayed any 'badges of guilt'.[76] A 'badge of guilt' is conduct by which a person reveals their own guilty conscience—most often by attempting to conceal the conduct.[77] I will relate just one of Buell's examples: the decision of the Court of Appeals for the Seventh Circuit in *United States v Dial*.[78]

The first defendant in *Dial* was a stockbroker who was convicted of mail and wire fraud for trading ahead of his clients (i.e. using the knowledge of their upcoming

---

[72] *United States v Gole*, 158 F 3d 166, 168 (2nd Cir, 1998).
[73] *United States v Black*, 625 F 3d 386, 392 (7th Cir, 2010).
[74] Jed Rakoff, 'The Federal Mail Fraud Statute' (1980) 18 *Duquesne Law Review* 771, 800.
[75] See above.
[76] Samuel Buell, 'Novel Criminal Fraud' (2006) 81 *New York University Law Review* 1971, 1983-1987, 1999-2005.
[77] Ibid.
[78] 757 F 2d 163 (7th Cir, 1985).

trades to make advantageous trades for himself). On appeal, he argued that trading ahead was not fraudulent. The Seventh Circuit recognised that treating trading ahead as fraud would risk using the criminal law 'to hold businessmen to the maximum, rather than minimum, standards of ethical behavior'.[79] However, after noting that the defendant had traded under a false name and his accomplice had deleted records of the trades, it said that their 'elaborate efforts at concealment provide powerful evidence of their own consciousness of wrongdoing, making it unnecessary for us to decide whether the same conduct, done without active efforts at concealment, would have been criminal.'[80] In other words, there was no need to determine whether trading ahead was fraudulent per se because the defendant's own behaviour proved that the defendant himself realised that his conduct was dishonest.

Buell's examples fasten upon the courts considering the extent to which the defendant was conscious of her or his own wrongdoing. However, there are also examples of the courts considering more objective matters such as the commercial realities in which the transaction occurred. For example, in *United States v Weimert*,[81] the Court of Appeals for the Seventh Circuit held that the mail and wire fraud statutes could not be 'stretched to criminalize deception about a party's negotiating positions, such as a party's bottom-line reserve price or how important a particular non-price term is'.[82] In support of their decision, they explained that 'negotiating parties, and certainly the sophisticated businessmen in [the] case, do not expect complete candor about negotiating positions, as distinct from facts and promises of future behaviour'.[83] In other words, they held that certain kinds of misrepresentations were insufficiently nefarious to provide the basis of a 'scheme to defraud'. The decision is consistent with Alex Steel's observation that the 'dishonesty' in fraud is 'the intention to deal with the person in a way that knowingly goes beyond the boundary of acceptable negotiation practices'.[84]

---

[79] Ibid 170.
[80] Ibid (internal citation omitted).
[81] 819 F 3d 351 (7th Cir, 2016).
[82] Ibid 357.
[83] Ibid 358.
[84] Steel (n 28) 734.

Together these decisions show that the courts in the United States have treated the 'intent to defraud' element of the mail and wire fraud statutes as providing a means to prevent the conviction of defendants whose conduct is not seen to be deserving of criminal sanction.[85] That they have done so should hardly be surprising. As Buell has argued, fraud offences prohibit 'wrongful behaviors embedded within regions of socially acceptable or desirable conduct',[86] and 'social inquiry is needed to determine when sharp dealing in commerce crosses over the line to fraud'.[87] The inclusion of some kind of 'safety value' is necessary to ensure that defendants who the community do not consider to be sufficiently blameworthy, culpable or deserving of punishment are not convicted. Without such a 'safety valve', there would be a significant risk of inappropriate convictions undermining the moral legitimacy of the federal criminal code.[88]

7.3 Whether fake news publishers have a 'claim of right'

Although a person charged with wire fraud might not be able to rely upon a 'claim of right' (depending on the jurisdiction in which he or she has been charged), claiming to have believed in a legal right to obtain the relevant money or property remains a genuine answer to an allegation of having obtained a financial advantage 'dishonestly' for the purposes of section 192E of the Crimes Act,[89] and arguably remains a genuine answer to an allegation of having made a false representation 'dishonestly' for the purposes of section 2 of the Fraud Act.[90] However, for reasons I will explain, such an answer would not be available to a person charged with fraud for making money by publishing fake news.

---

[85] See also Green (n 50) 110 (arguing that Canadian courts have taken a similar approach to the requirement of 'fraudulence' in theft).
[86] Samuel Buell, 'Culpability and Modern Crime' (2015) 103 *Georgetown Law Journal* 547, 548. See further Chapter 9.
[87] Ibid 552.
[88] See Chapter 9.
[89] *R v Love* (1989) 17 NSWLR 608, 614-615.
[90] Cf Ormerod and Laird (n 4) 931-932.

7.3.1 The nature of a 'claim of right'

The 'claim of right' derives from the common law relating to larceny. For centuries, the prosecution had to prove that the defendant acted *animo furandi* (i.e. 'with intent to steal');[91] and a defendant who believed that he or she had a legal right to deprive the victim of her or his property could not be said to have acted *animo furandi* because he or she could not be said to have intended to *steal* the property. Sir James Fitzjames Stephen explained the principle in the following way: 'If the alleged offender thinks that he has a right to take the property, either because he believes it to be his own, or because he believes the owner has consented to his doing so, he does not act feloniously'.[92] Stephen regarded the principle as so elementary that he said it 'has no history'.[93]

After the enactment of the False Pretences Act of 1757, the courts held that a person who believed that he or she had a legal right to property possessed by her or his 'victim' could not be said to have acted with 'intent to defraud'.[94] In other words, the courts transplanted the claim of right from theft to fraud. This meant that a person who lied to obtain property could not be convicted if he or she believed that he or she owned or otherwise had permission to obtain the property. More than two hundred years later, after the intent to defraud requirement was replaced with dishonesty, the courts in the United Kingdom and New South Wales maintained the earlier position by holding that a person who had a claim of right should not be found to have acted dishonestly,[95] although that proposition has since become controversial among academics.[96]

---

[91] See, eg, Henry Bracton, *De Legibus et Consuetudinibus Angliae*, tr Samuel E Thorne (Harvard Law School Library, 2003) vol 2, 425; Hale (n 50) vol 1, 508-509; East (n 50) vol 2, 659–660.
[92] James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan & Co, 1883) vol 3, 142.
[93] Ibid.
[94] *R v Williams* (1836) 7 C & P 354; 173 ER 158; *R v Bernhard* [1938] 2 KB 264, 270-271. See also Stephen (n 85) vol 2, 124 ('Fraud is inconsistent with a claim of right made in good faith').
[95] *R v Woolven* (1983) 77 Crim App Rep 231, 236; *R v Love* (1989) 17 NSWLR 608, 614-615.
[96] Ormerod and Laird suggest that the test for dishonesty in *Ivey* enables a jury to find that a defendant who had a claim of right had nevertheless acted dishonestly: Ormerod and Laird (n 4) 931-932. Alex Steel made the same point with respect to the Australian offences: Alex Steel, 'The Meanings of Dishonesty in Theft' (2009) 38 *Common Law World Review* 103, 134.

In practice, the process of raising a 'claim of right' operates in the following way. If the defendant wishes to argue that he or she did not act dishonestly, he or she may rely on evidence that he or she believed that he or she had a legal right to the money or property obtained.[97] If the defendant is able to adduce such evidence, the prosecution must prove beyond a reasonable doubt that the defendant acted *without* a belief in that right. The test does not require the belief of the defendant to have been reasonable.[98] Nor does it require the belief to have been based upon an accurate understanding of the law.[99] But the belief must have been genuine.[100] And it must have been in a legal right, not a moral right.[101]

7.3.2 The potential 'claim of right' argument for fake news publishers

A fake news publisher charged with fraud could argue that he or she believed in a legal right to obtain money from the ad server. At first blush, this may appear to be an iron clad claim of right. The publisher and the ad server were parties to a *bona fide* agreement. Pursuant to the agreement, the publisher was entitled to be paid a certain amount each time a reader viewed or clicked upon an ad. Therefore, the publisher has not only a *claim* of right, but in fact had a contractual right to be paid, and cannot be said to have obtained the financial advantage dishonestly for the purposes of s 192E of the Crimes Act, or to have made the false representation intending to obtain money dishonestly for the purposes of s 2 of the Fraud Act, or to have had intent to defraud for the purposes of the wire fraud statute.

If this argument is correct, it would mean that publishing false stories to profit by deceiving thousands of people cannot be 'dishonest' in the eyes of the law.

---

[97] *Macleod v The Queen* (2003) 214 CLR 230, [39]. This is known as meeting the 'evidential burden'. See, eg, *R v Bedford* (2007) 98 SASR 514; (2007) 172 A Crim R 492, [17]-[23].
[98] *R v Nundah* (1916) 16 SR (NSW) 482, 485-490; *R v Gilson and Cohen* (1944) 29 Cr App R 174, 180; *R v Fuge* (2001) 123 A Crim R 310, 314-315. However, if the belief claimed by the defendant is unreasonable, it may be less likely to engender a reasonable doubt in the minds of the jury: *Macleod v The Queen* (2003) 214 CLR 230, [42].
[99] *R v Clayton* (1920) 15 Cr App R 45; *R v Bernhard* [1938] 2 KB 264, 272.
[100] *R v Nundah* (1916) 16 SR (NSW) 482, 485-490; *R v Clayton* (1920) 15 Cr App R 45; *R v Bernhard* [1938] 2 KB 264, 271; *R v Gilson and Cohen* [1944] 29 Cr App R 174, 180; *Walden v Hensler* (1987) 163 CLR 561, 571; *R v Fuge* (2001) 123 A Crim R 310, 314-315; *Macleod v The Queen* (2003) 214 CLR 230, [42].
[101] *Harris v Harrison* [1963] Crim LR 497; *R v Fuge* (2001) 123 A Crim R 310, 314-315; *R v White* [2011] EWCA Crim 1927, [20].

However, there are good reasons to doubt the correctness of the argument. The fake news publisher *does* have a legal right to be paid by the advertising service. However, that right is contingent upon exposing readers to advertisements, and the publisher exposes the readers to the advertisements by deception. This means that the issue is not whether the publisher has a legal right to be paid. That is beyond question. Rather, the issue is whether the publisher can rely on that right to negate her or his dishonesty in circumstances where he or she *brought about the existence of the right by deception*.

The courts in Australia have dealt with a superficially similar issue in several cases. In *R v Salvo* the appellant believed he had a legal right to reclaim a car that he had sold to someone else.[102] He tricked the purchaser into returning the car by pretending to be willing to buy back the car and presenting a cheque that he did not intend to honour. The issue was whether having the claim of right negated the dishonesty of tricking the purchaser to get the car back. The Full Court of the Supreme Court of Victoria held that it did—that a claim of right 'does not require a belief in the accused in a right to obtain the property *by deception*, or by the particular deception employed',[103] only a belief in the right to the property.

The New South Wales Court of Criminal Appeal followed *R v Salvo* in *R v Love*.[104] The defendant in that case tricked an owner of land into signing a document transferring him title to the land. The trial judge instructed the jury that the prosecution had to prove that the defendant 'did not honestly believe that he was entitled to obtain control of the property *and was entitled to do so in that deceptive way*'.[105] The Court of Criminal Appeal held this to be a misdirection. It said that 'when a claim of legal right of the kind now in question is raised, the issue is whether there was a belief in a legal right to obtain the property, *not whether there was a belief in a legal right to practise the deception'*.[106]

---

[102] [1980] VR 401.
[103] Ibid 440. See also 421.
[104] (1989) 17 NSWLR 608.
[105] Ibid 613 (emphasis in original).
[106] Ibid 615-616.

Therefore, in accordance with *R v Salvo* and *R v Love*, a fake news publisher charged with fraud could argue that he or she did not act dishonestly because: (a) he or she had a belief in a legal right to obtain money from the ad server by exposing readers to advertisements; and (b) he or she did not have to believe in a legal right to do so by deception.

7.3.3 The problem with the potential 'claim of right' argument

Superficially, the argument set out above may sound convincing. But there is a crucial distinction between the conduct of the defendants in *R v Salvo* and *R v Love* and that of the fake news publisher. The defendants in *R v Salvo* and *R v Love* believed in *pre-existing* legal rights to the car and the land. The deception they employed was the means by which they sought to realise those legal rights and *regain* possession of what they considered was rightfully their own property. In contrast, the fake news publisher has no right to be paid by the advertising service *until* it exposes readers to the advertisements, and it exposes the readers to the advertisements by deception. The deception employed by the fake news publisher is not the means by which it *obtains* the financial advantage; it is the means by which it *becomes entitled to obtain* the financial advantage in the first place. The actual obtaining of the advantage occurs when the advertising service transfers money to the bank account of the fake news publisher.

This distinction should be taken to negate, not only the ability of the fake news publisher to rely on the principle enunciated in *R v Salvo* and *R v Love*, but also the ability of the fake news publisher to rely upon a claim of right at all. The notion that a claim of right negates the dishonesty of obtaining money by fraud is predicated upon the defendant believing that he or she had a *pre-existing* right to the money. As Dawson J said in *Walden v Hensler*,[107] a claim of right 'is necessarily a claim to a private right arising under the civil law'.[108] It is based upon the logic that, 'if a person [takes] what he [already] believes to be his own, it is impossible to say that he is

[107] (1987) 163 CLR 561.
[108] *Walden v Hensler* (1987) 163 CLR 561, 592-593 referring to *Cooper v Phibbs* (1867) LR 2 HL 149, 170 and approved in *Macleod v The Queen* (2003) 214 CLR 230, [41].

guilty of [theft]'.[109] That logic breaks down if the principle is extended to circumstances in which the belief in the right arises because of the theft or force or fraud for which the person has been charged.

It may assist to consider some of the significant decisions in which the courts have upheld a claim of right. In *R v Leppard* an innkeeper was held not to have committed robbery after beating up one of his customers to obtain payment for drinks for which the customer refused to pay.[110] In *R v Wade* a travelling umbrella mender was held not to have stolen an umbrella because he believed he was entitled to retain the umbrella as security for the cost of repairs owed to him by its owner.[111] In *R v Bernhard* a woman was held not to have committed blackmail by threatening her former lover because she believed that he was contractually bound by a promise to pay her not to divulge the details of their relationship to his wife.[112] In *R v Holden* an employee of a tyre company was held not to have stolen scrap tyres from his employer because, after seeing other employees take scrap tyres with permission from their supervisor, he believed that he was entitled to take them.[113] And in *R v Langham* a man who requested a refund upon returning a crossbow purchased from a sports store was held to be entitled to argue that he had not robbed the store by purchasing a shotgun from the store and using it to demand his refund at gunpoint.[114]

In each of these decisions, the defendants believed in pre-existing entitlements to the money or property in question. The fake news publisher cannot claim to have had any such belief because the entitlement to be paid by the ad server does not arise until *after* the readers have been exposed to the ads. The deception is what gives rise to the right to be paid by the ad server, not the means employed to realise it. The only way in which the fake news publisher could rely upon a claim of right is if the ad server refused to pay for the revenue generated by

---

[109] *R v Reed* (1843) Car & M 306, 308; 174 ER 519, 520.
[110] (1864) 4 F & F 51; 176 ER 462.
[111] (1869) 11 Cox CC 549.
[112] [1938] 2 KB 264, 271.
[113] [1991] Crim LR 478.
[114] (1984) 36 SASR 48, 53-54, 66.

the website and the publisher employed deception to obtain the payment. But no claim of right may avail the publisher prior to that point.

7.4. Whether fake news publishers possess 'intent to defraud'

As I explained earlier, the courts in the United States require the prosecution to prove that the defendant acted with 'intent to defraud' to secure a conviction for wire fraud. Applying *Cleveland*, this requires the prosecution to prove that the defendant acted with 'intent to deceive *and* cheat'. On this approach, a fake news publisher cannot be characterised as having intent to defraud. There are two reasons why.

First, although the publisher clearly intends to deceive her or his readers, the publisher does not intend to deprive the readers of money or property. The intent is to deprive the readers of their attention. As the Supreme Court in *McNally* held that the mail fraud statute captures only schemes or artifices to deprive others of money or property,[115] an intent to obtain the attention of the readers cannot constitute intent to defraud.[116]

Secondly, although the publisher clearly intends to deprive the ad server of money, the publisher does not deceive the ad server. The publisher and the ad server are parties to a contract whereby the ad server has agreed to pay the publisher for exposing its ads to readers. As the publisher does not expose the readers to the fake news stories until after entering into the contract with the ad server, there is no basis to argue that the publisher intended to procure the ad server's entry into the contract by deception. Moreover, as the publisher does not expose the ad server to the false stories, there is no basis to argue that the publisher intended to deprive the ad server of money paid pursuant to the contract by deception.

---

[115] *McNally v United States*, 483 US 360 (1987).
[116] The situation would be different if the law developed to recognise the deprivation of attention as being akin to a deprivation of money or property in certain circumstances such as within online attention markets.

As I explained in Chapters 1 and 4, these difficulties arise because the publishers, ad servers and readers interact via a two-sided market. The situation would be different if the Supreme Court adopted a plain meaning interpretation of the wire fraud statute—i.e. one where the offence may be committed by devising a scheme or artifice that is 'for obtaining money or property by false or fraudulent pretenses' but is not 'to defraud'. On that approach, the specific intent element would require the prosecution to prove that the defendant intended to obtain money or property by false or fraudulent pretenses, not that the defendant intended to defraud—and, perhaps, that the defendant's conduct was attenuated by sufficient moral obloquy to warrant her or his conviction. However, the present interpretation remains an obstacle to my argument that making money by publishing fake news could be prosecuted as wire fraud.

7.5. Whether making money by publishing fake news is dishonest

The test for dishonesty in *Ivey* requires the prosecution to prove that the defendant made the false representation dishonestly according to the 'standards of ordinary decent people'. The first limb of the test for dishonesty in New South Wales requires the prosecution to prove that the defendant obtained the financial advantage dishonestly 'according to the standards of ordinary people'.[117] And, as I explained above, the courts appear to have considered similar standards when deciding whether those charged with mail or wire fraud possessed the requisite 'intent to defraud'.

The tests ask the jury to consider what the defendant did and why and determine whether it was dishonest.[118] The motives and beliefs of the defendant are relevant because it is impossible to judge the honesty of the defendant's behaviour

[117] *Crimes Act 1900* (NSW) s 4B(1).
[118] There may be a difference in honesty standards between 'ordinary decent people' and 'ordinary people'. See Gardner (n 31) 295-296, 299-301; Emily Finch, 'The Elephant in the (Jury) Room: Exploring Mock Jurors' Understanding of Different Approaches to Dishonesty' [2021] *Criminal Law Review* 513, 518-519, 522-523. However, I will presume for the purposes of this analysis that ordinary people are decent, and, therefore, that the tests are substantially the same.

without knowing why and on what basis the defendant acted.[119] However, as I explained earlier, the ultimate question is whether the jury think the defendant acted dishonestly, not whether the defendant thought that her or his own conduct was dishonest. The tests do not afford the defendant an opportunity to set her or his own standard of behaviour.

The core difficulty is identifying the 'standards' of ordinary people. Scholars have argued that the very notion that there is one standard for juries to apply is fanciful.[120] And jurors may struggle not only to identify,[121] but also to apply,[122] the standard. Nevertheless, in both New South Wales and the United Kingdom, the law delegates the task of determining what kind of deceptive conduct warrants punishment to ordinary members of the community, who are usually asked to apply the standard developed from their own lived experience.[123] Moreover, as I explained earlier, it seems fair to assume that the typical juror would consider factors like those considered by philosophers who have grappled with the morality of deception.

Once again, the starting point is the kind of deception. Fake news publishers make false assertions of fact, not true assertions that are misleading. As this kind of conduct is overtly dishonest,[124] I anticipate that a jury would be likely to view the fake news publisher as *prima facie* dishonest unless there was evidence giving rise to a reasonable possibility that the publisher had an adequate excuse or justification for making the false assertions of fact.

The most obvious excuse a publisher could raise would be that he or she believed the false assertion to be true. If the prosecution was unable to prove that

---

[119] Edward Griew, 'Dishonesty—The Objections to Feely and Ghosh' [1985] *Criminal Law Review* 341, 352; Kenneth Campbell, 'The Test of Dishonesty in R. v. Ghosh' (1984) 43 *Criminal Law Journal* 349, 353-354; Anthony Arlidge and Jacques Parry, *Fraud* (Sweet & Maxwell, 1985) [1.04]; Dyson and Jarvis (n 25) 202. Cf *Peters v The Queen* (1998) 192 CLR 493, [15]-[17].
[120] Griew (n 119) 344; Campbell (n 27) 357; Alec Samuels, 'Dishonesty' (2003) 67 *Journal of Criminal Law* 324, 325; Ormerod and Laird (n 25) 395-397. See also *R v Salvo* [1980] VR 401, 428-431.
[121] Ormerod and Laird (n 25) 382.
[122] Richard Spearman, 'Ivey v Genting Casinos and Dishonesty: New Dawn or False Horizon' (2018) 9 *UK Supreme Court Yearbook* 256, 288.
[123] See, eg, Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2021) [5-560] (instructing judges to direct juries: 'You as ordinary members of the community determine what is dishonest conduct in this regard').
[124] Alex Steel, 'Describing Dishonest Means' (2010) 31 *Adelaide Law Review* 7, 10-11.

the publisher knew the assertion was or might be false, it seems uncontroversial to say that a jury would not find the publisher to have acted dishonestly. This creates an additional layer of protection for conspiracy theorists and other publishers who make mistakes. But it does not offer much protection to the publishers I have discussed throughout this thesis—many of whom have admitted to publishing false stories or have disclaimed the falsity of the stories on the websites. There appear to be five arguments available to those kinds of publishers. I will address each in turn.

7.5.1 The divergence between the deception and the deprivation

First, the fake news publisher could argue that obtaining advertising revenue by deceiving readers was not dishonest because the deception was not practised upon the ad server. Such an argument would provide a potential way to work around the fact that section 2 of the Fraud Act and section 192E of the Crimes Act apply to frauds that do not defraud. In effect, the publisher is saying: 'Even if the law does not require me to have deceived the ad server to establish that I obtained the money *by* deception, the fact that I did not deceive the ad server means that I did not obtain the money dishonestly'. It is perhaps best characterised as an attempt to write off the deception of the readers as being trivial or *de minimis* given that the money was obtained pursuant to a *bona fide* transaction.

Whilst it is possible to conceive of jurors forming different opinions as to the merits of this argument, I suspect most jurors would dismiss it as disingenuous trickery. The argument depends upon an artificial distinction—that it is not dishonest to deceive others to obtain money so long as the particular person who provides the money has not been deceived and gets that for which he or she paid. It seeks to segregate the dishonesty of the publisher's conduct by focusing on the interaction with the advertising service and ignoring the interaction with the readers. And whilst such segregation might succeed with lawyers, who are used to making fine (and often artificial) distinctions, I suspect that most jurors would be inclined to view the conduct of the fake news publisher in a holistic fashion. In circumstances where the publishers have deceived tens of thousands of people about important topics for the purpose of turning a profit, it may reasonably be expected that jurors applying ordinary standards would resist any invitation to ignore or minimise the deception.

7.5.2 Motives beyond deceiving readers and making money

Secondly, the fake news publisher could argue that he or she was not dishonest because he or she was driven to publish fake news by motives beyond deceiving readers or turning a profit. The success of this argument would depend upon whether the jury accepted that there was a reasonable possibility that the publisher was driven by other motives, as well as what those other motives were. On the one hand, those who seek to sow discord or confusion would find it hard to rely upon this kind of argument—a jury would probably consider that motive to render the publisher more dishonest, not less. On the other hand, those who publish genuine satire would be likely to have little difficulty relying upon this kind of argument, not just to avoid conviction, but also prosecution. Were a prosecutor to be so imprudent as to charge someone who writes for a publication like *The Onion* or *The Betoota Advocate*, the jury would undoubtedly regard laudable motives like entertaining readers or critiquing (or even ridiculing) the news of the day as negating the dishonesty of the publisher. Alternatively, they may consider the publisher not to have intended to deceive anyone by publishing the stories.[125] Or they may consider that intending to play a prank or joke in and of itself cannot be 'dishonest'.[126] Ordinary people (particularly in democratic countries such as Australia, the United Kingdom and the United States) expect satire to be protected as free speech and may reasonably be expected not to convict a satirist of fraud.

7.5.3 Belief that the readers were not believing the stories

Thirdly, the fake news publisher could argue that he or she was not dishonest because he or she did not think that people would believe the false stories. This argument borders on victim blaming, which, as I explained in Chapter 3, traditionally cannot be relied upon in answer to a charge of fraud. But it also suffers from some inherent flaws. The prosecution could answer any such argument by pointing to the

---

[125] Carson (n 144) 17 ('If I say something that is clearly false as a joke that is not intended to be taken seriously, I am not lying).
[126] See generally Green (n 50) 110 referring to *R v Wilkins* (1965) 2 CCC 189 where the defendant took a bicycle belonging to a police officer as a prank and the court held his intention 'stupid though it was, is incompatible with the evil intent which is inherent in the crime of theft'.

amount of traffic generated by the website, the reactions of social media users, the entry of the stories into the mainstream news cycle and any admissions made by the publisher. Faced with evidence of that kind, a jury might accept that the publisher *initially* did not believe that people would believe the stories. However, unless the publisher could explain why he or she persisted in her or his belief that readers would not believe the stories in the face of obvious evidence to the contrary, a jury would be unlikely to entertain the possibility that the publisher genuinely thought that people would not believe the false stories.

7.5.4 Honest according to the standards of ordinary internet discourse

Fourthly, the fake news publisher could argue that he or she was not dishonest because her or his conduct was not dishonest according to the standards of ordinary internet discourse. This argument invites the jury to find that ordinary people would hold those communicating online to a lower standard of honesty than that which applies in the physical world. There are a few problems with this argument. Whilst a jury conceivably could accept that people are less likely to be honest online, it does not follow that they would stamp their approval upon online dishonesty by judging the defendant by a lower standard. They might very well resent the dishonesty of the internet and characterise fake news as one of its causes.

Moreover, there is authority in the United Kingdom that the standards of 'ordinary decent people' are ordinary decent people in general, not those who belong to a particular group of which the defendant is a member.[127] In *R v Hayes*, for example, the Court of Appeal held that the jury should not ask whether a stockbroker charged with fraud was dishonest according to the standards of ordinary stockbrokers.[128] In response to an argument that the standard of honesty should be set by the market in which the defendant was competing, it said:

> Not only is there is no authority for the proposition that objective standards of honesty are to be set by a market, but such a principle would gravely affect the proper

---

[127] See, eg, *R v Hayes* [2018] 1 Cr App R 10; [2015] EWCA Crim 1944. Cf Palfrey (n 27) 525.
[128] [2018] 1 Cr App R 10; [2015] EWCA Crim 1944.

> conduct of business. The history of the markets have shown that, from time to time, markets adopt patterns of behaviour which are dishonest by the standards of honest and reasonable people; in such cases, the market has simply abandoned ordinary standards of dishonesty.[129]

In the United Kingdom, the applicability of the reasoning underlying *R v Hayes* has been questioned due to the change brought about by *Ivey*.[130] And I have been unable to find any equivalent authority in New South Wales. Nevertheless, so far as the reasoning in *R v Hayes* represents the law, it means that a fake news publisher cannot even argue that he or she was dishonest according to the standards of 'ordinary online content providers'. The only option is to appeal to the standards of ordinary people more generally.

7.5.5 Frivolous stories

Finally, the fake news publisher could argue that he or she was not dishonest because the content of the stories was frivolous. I have included this as a residual category for stories that are not quite satire yet are not as sinister as false stories about politics, healthcare and other important issues—stories like '*Cinnamon Roll Can Explodes Inside Man's Butt During Shoplifting Incident*' and '*Man's Penis Gets Ripped Off After Attempting to Rape a Pit Pull*'.[131] These kinds of stories may be described as hoaxes; and unless they identified a particular person whose butt was exploded or penis was ripped off, they would be highly unlikely to cause any damage in the real world. They are a form of crass but harmless entertainment. Accordingly, whilst those who publish these kinds of stories to make money meet the other elements of fraud, a jury would be highly unlikely to find them to have acted dishonestly simply because the idea of convicting someone for writing something so frivolous is ridiculous. It is also hard to imagine a prosecutor running the case. Making money by publishing these kinds of stories is too trifling to concern the criminal law.

---

[129] Ibid [32].
[130] Dyson and Jarvis (n 25) 203-204; Ormerod and Laird (n 25) 399-400.
[131] Craig Silverman, 'Here Are 50 Of The Biggest Fake News Hits On Facebook From 2016', *BuzzFeed News*, 30 December 2016.

7.6. Whether fake news publishers know they are dishonest

As I explained earlier, the law in New South Wales requires the prosecution to prove that the defendant *knew* that her or his conduct was 'dishonest according to the standards of ordinary people',[132] and the courts in the United States appear to take similar 'badge of guilt' considerations into account when dealing with novel forms of fraud. This provides yet another safety valve for fake news publishers charged with fraud. However, as I have already explained, it does not aid those who personally did not consider their conduct to be dishonest; it aids only those who misunderstood ordinary standards of honesty. In other words, it cannot save a defendant who claims: 'I did not think what I did was dishonest'; but it can save one who claims: 'I did not realise ordinary people would think what I did was dishonest'.[133]

To rely upon the second limb of the test, a fake news publisher would have to convince the jury to doubt that he or she realised that ordinary people would consider making money by publishing fake news to be dishonest. From one perspective, this would appear to be a difficult task. How could anyone possibly fail to realise that ordinary people would consider deceiving thousands about important topics by masquerading as the news for the purpose of personal financial gain to be dishonest? From another, however, some of the prominent fake news publishers appear to exhibit exactly the kind of ignorance about ordinary standards of honesty that the second limb of the test treats as negating dishonesty.[134] The resolution of the issue would depend upon the facts and circumstances of the individual case, although it is possible to make several general points.

7.6.1 Badges of guilt

First, fake news publishers who have taken steps to conceal their identities would be more likely to be found to have known that their conduct was dishonest.

---

[132] *Crimes Act 1900* (NSW) s 4B(1).
[133] Spencer (n 3) 224; Campbell (n 37) 351-352.
[134] Spencer (n 3) 224; Campbell (n 37) 355; Samuels (n 120) 325; David Lusty, 'The Meaning of Dishonesty in Australia: Rejection and Resurrection of the Discredited Ghosh Test' (2012) 36 *Criminal Law Journal* 282, 287; Hale (n 37) 251.

That is because attempting to prevent others from discovering the conduct is a classic 'badge of guilt'.[135] As Lord Coke put it: 'secrecy is a mark of fraud'.[136] At the same time, however, it does not necessarily follow that those who have not concealed their identities do not know that their conduct was dishonest. Take Jestin Coler, for example. After journalists uncovered his identity,[137] Coler went on to appear in radio and TV interviews as an expert on how fake news publishers operate.[138] In some of the interviews, he appeared to express remorse for his actions;[139] and the front page of his personal website once asked: 'If presented with an opportunity to be paid handsomely for a hobby you enjoy (that is totally legal…*questionable from a moral standpoint*, but legal), would you take that opportunity?'[140] Both his remorse and his admission that publishing fake news is morally questionable suggest that he knew what he was doing was dishonest. Like other fake news publishers who have participated in interviews,[141] Coler's willingness to participate may be better characterised as evidence of a desire for attention, fame or recognition, as opposed to his misunderstanding of the ordinary standards of honesty.

7.6.2 Genuine satirists

Secondly, fake news publishers who genuinely (but incorrectly) thought that they were publishing satire are less likely to be found to have known that their conduct was dishonest. As an ordinary jury may reasonably be expected to consider publishing satire to be honest, a misapprehension as to what ordinary people would regard as satire may amount to a misapprehension as to what ordinary people would regard to be dishonest. But the two are not necessarily mutually exclusive. A person may think that he or she is publishing satire yet recognise that ordinary people would consider her or his conduct to be dishonest. And the jury may not accept that the

---

[135] Buell (n 86) 1997.
[136] Ibid quoting *Twyne's Case* (1601) 3 Co Rep 80, 81; 76 ER 809, 814.
[137] Laura Sydell, 'We Tracked Down A Fake-News Creator In The Suburbs. Here's What We Learned', *NPR*, 23 November 2016.
[138] See, eg, Scott Pelley, 'How Fake News Becomes a Popular, Trending Topic', *60 Minutes*, 26 March 2017; NewsWhip, 'A Fireside Chat with the Fake News King', *YouTube*, 16 June 2017.
[139] See, eg, NewsWhip (n 139).
[140] www.jestincoler.com (accessed 15 July 2021).
[141] See Chapter 2.

publisher genuinely considered her or his content to be satire.[142] Christopher Blair is the best example of a publisher who may be able to rely upon this kind of argument. In several interviews, Blair has acted as if deceiving and ridiculing hapless social media users is laudable, not immoral; and he has consistently maintained that *America's Last Line of Defense* publishes satire.[143] Unless he could otherwise be shown to have realised the dishonesty of what he was doing, his misunderstanding of how his conduct is perceived by others could secure him an acquittal.

7.6.3 Juror uncertainty

Thirdly, fake news publishers could benefit from any difficulty the jurors had in deciding whether publishing fake news for profit is dishonest according to the standards of ordinary people. If the jury decided that publishing fake news for profit was dishonest according to those standards, but reached its conclusion after much debate and deliberation, it would be likely to form a reasonable doubt as to the knowledge of the defendant. Why? Because if the jury members themselves had trouble determining whether the conduct was dishonest, they would be likely to give the defendant the benefit of the doubt. As Alex Steel has argued, a person cannot be said to know that something is dishonest according to the standards of ordinary people unless the standards themselves are 'sufficiently static to be knowable'.[144]

7.6.4 Public reaction

Finally, fake news publishers could rely upon the reaction of the public and the media to the fake news phenomenon to support their own mischaracterisation of the dishonesty of publishing fake news for profit. By this I mean that they could argue that the reaction did not indicate that publishing fake news was dishonest and that they based their own perceptions of dishonestly upon that reaction. But this argument would probably fail upon the weakness of its major premise—that the reaction of the media and public was not indicative of publishing fake news being seen as dishonest. Although the media reported upon fake news as if its publication

---

[142] Hale (n 37) 251.
[143] See Chapter 2.
[144] Steel (n 124) 15. See also Palfrey (n 27) 525.

was not illegal, and there is a popular (mis)conception that fake news must be tolerated in the name of free speech, there is scant evidence that publishing fake news is not considered to be *dishonest*. The overwhelming impression given by the countless articles about fake news is that it is seen to be dishonest but that there is disagreement about what (if anything) should be done about it.

7.7 Conclusion

In this chapter, I applied the final element the fraud offences to making money by publishing fake news. The chapter proceeded in five sections. The first section explained the meaning of the phrases ‘dishonestly’ and ‘intent to defraud’. It also argued that a jury would be likely to consider matters that moral philosophers have considered relevant to the wrongfulness of deception when judging whether a defendant acted ‘dishonestly’. The second section argued that a fake news publisher cannot rely upon a ‘claim of right’ because there is no basis for the publisher to claim a pre-existing legal right to the money made by publishing fake news. The third section explained that a fake news publisher cannot be characterised as having ‘intent to defraud’ due to the interpretation of the wire fraud statute adopted in *McNally* and *Cleveland*. The fourth section argued that a jury would be likely to consider making money by publishing fake news to be ‘dishonest’ unless the jury thought there was a reasonable possibility that the publisher believed the stories to be true or published the stories for some more altruistic reason. The final section considered circumstances in which a jury might think there is a reasonable possibility that the publisher did not realise that he or she was acting dishonestly. The next chapter returns to the concept of the ‘fraud that does not defraud’, which I addressed in Chapter 1 and Chapter 4. Its purpose is to advance my broader argument that frauds that do not defraud (like making money by publishing fake news) both are appropriately characterised as ‘fraud’ and warrant criminalisation as much as more conventional forms of fraud.

Part III

8. Fair notice and the fraud that does not defraud

8.1 Introduction

Over the previous five chapters, I have examined the extent to which making money by publishing fake news presently satisfies the elements of section 192E of the Crimes Act, section 2 of the Fraud Act and the wire fraud statute. Although this examination has thrown up novel issues, my findings may be stated succinctly as follows.

In New South Wales and the United Kingdom, the prosecution has strong prospects of proving that the typical fake news publisher intentionally obtained a financial advantage by deception (contrary to section 192E of the Crimes Act) and made a false representation with intent to make a gain for himself (contrary to section 2 of the Fraud Act). The real issue at the trial of any particular fake news publisher would be whether the jury are satisfied beyond a reasonable doubt that that publisher acted 'dishonestly'. I have argued that the typical jury would be likely to find that making money by publishing fake news is 'dishonest'—unless, perhaps, the defendant raised a reasonable possibility that he or she thought the stories were true, thought the readers would realise the stories were false, or intended the stories to be satirical. It is not possible to further generalise given each case inevitably will turn on its own facts. My point is that charging fake news publishers with fraud is *available* as a solution should the fake news problem ever affect New South Wales or the United Kingdom in the way it has affected the United States.

The prosecution enjoys these prospects of success in New South Wales and the United Kingdom because the fraud offences have been interpreted as per their plain meaning: the language used to set out the actus reus of each offence is broad and the dishonesty requirement provides a safety valve for conduct that does not warrant criminal sanction. But the situation in the United States is different. As I

explained in Chapter 4, the Supreme Court in *Cleveland v United States* held that the prosecution is required to prove that the defendant devised a scheme 'to defraud' notwithstanding that the statute on its face permits a person to be convicted for devising only a scheme 'for obtaining money or property by means of false or fraudulent pretenses, representations, or promises'. Charging fake news publishers with wire fraud is (presently) *unavailable* as a solution to the fake news problem in the United States because a scheme to make money by publishing fake news cannot be sensibly characterised as a scheme 'to defraud'.

The differing prospects in each jurisdiction are the product of a significant difference in the scope of the offences. In New South Wales and the United Kingdom, intentionally obtaining something by a false assertion of fact is enough to satisfy all but the dishonesty element of each offence. In the United States, however, at least under the mail and wire fraud statutes, the prosecution must prove also that the defendant schemed 'to defraud' someone. The significance of this difference extends beyond the narrow issue of whether making money by fake news constitutes fraud. It strikes at the heart of the more critical issue of what is or ought to constitute fraud. As I explain below, the question 'What is fraud?' is one for which there has never been a definitive answer.

Fortunately, my ambitions are more modest than coming up with a universal definition of 'fraud' or proposing a perfect fraud offence. I wish only to defend the proposition that obtaining something by making a false assertion of fact in and of itself is appropriately criminalised as 'fraud'—in other words, that the legislatures in the United Kingdom and New South Wales were right not to require proof of loss or deprivation, that the Supreme Court of the United States was wrong to interpret the mail and wire fraud statutes as requiring proof that the defendant devised a scheme 'to defraud', and that critics are wrong to question whether such conduct is properly characterised as 'fraud'.

It is incumbent upon me to defend this proposition because that is the implication of my argument that making money by publishing fake news could and should be prosecuted as fraud. For example, in relation to section 192E of the Crimes Act, if my interpretation is accepted and a person who makes money by publishing fake news may be prosecuted for dishonestly obtaining a financial

advantage by deception (notwithstanding that he or she did not dishonestly cause anyone to suffer a financial disadvantage by the deception), it follows that a person who does the same thing by some other means is also vulnerable to prosecution. I must defend my interpretation of the legislation generally, not only specifically in its application to fake news publishers. I cannot, as the Supreme Court of the United States did with respect to obtaining licences by false pretences in *Cleveland*, adopt an approach to the interpretation of the offences by reference only to one kind of conduct.

In this final part of the thesis, I seek to defend my interpretation of the legislation, and, therefore, the criminalisation of frauds that do not defraud like making money by publishing fake news. The final part comprises this chapter and Chapter 9. In this chapter, I argue that my interpretation gives fair notice as to what does and does not constitute an offence and identify the circumstances in which a person may be said to have committed a 'fraud that does not defraud'. In Chapter 9, I argue that the conduct I have identified in this chapter is both deserving of criminal sanction and 'properly called fraud'.

This chapter is split into three sections. The first addresses the longstanding difficulty of defining 'fraud'. The second argues that broad fraud offences provide 'fair notice' of what constitutes an offence. The third identifies the circumstances in which a person may be said to have committed a 'fraud that does not defraud'. It also emphasises that those circumstances both fall squarely within the language used in the legislation and are likely to be quite limited in practice. The material makes an original contribution to the literature with respect to the scope of the fraud offences. Although others have identified the potential outer limits of the offences or addressed various kinds of frauds that do not defraud, mine is the first attempt of which I am aware to catalogue the circumstances in which a person may dishonestly obtain money or property without dishonestly depriving someone of the money or property by doing so.

8.2 The difficulty of defining fraud

The question 'What is fraud?' is one for which there has never been a clear or conclusive answer. As far back as 1883, Sir James Fitzjames Stephen wrote that

'[t]he difficulty of giving an adequate definition of fraud has been felt *at all times'*.[1] The statement is as true today as it was in Stephen's time.[2] In general terms, fraud arguably may be described as dishonest conduct (such as lying, misleading, or failing to disclose) that has an economic effect (usually gain to the perpetrator or loss to the victim). But there are ongoing differences of opinion about exactly what kind of conduct should be prohibited by the criminal law.[3] Some argue that the law ought to require proof of gain to the perpetrator.[4] Others argue that the law ought to require proof of loss to the victim.[5] And there is controversy as to what kind of dishonesty the offences ought to capture.[6]

Beyond these definitional issues, there is also an arguably greater difficulty involved in 'how to distinguish, in commercial relations, permissible behavior—even if sharp or misleading—from deception that is predatory and should be unlawful'.[7] Buell has argued that this difficulty arises for four reasons. First, 'social inquiry is needed to determine when sharp dealing in commerce crosses over the line to fraud'.[8] Secondly, fraud takes place 'in the midst of activities that are not only unobjectionable but also socially welcome' such as sales and negotiations.[9] Thirdly, fraud offences concern 'issues of autonomy, psychology, and mental states that are

---

[1] James Fitzjames Stephen, *A History of the Criminal Law of England* (London, MacMillan & Co, 1883) vol 1, 83.
[2] See generally Samuel Buell, 'Novel Criminal Fraud' (2006) 81 New York University Law Review 1971, 1972; Chris Monaghan, 'A Critical Commentary on the Fraud Act 2006' in Chris Monaghan and Nicola Monaghan (eds), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (Routledge, 2018) 3; Anthony Arlidge et al, *Arlidge and Parry on Fraud* (5th ed, Sweet & Maxwell, 2016) 1-012 ('The generic term "fraud" is used to cover a wide and imaginative range of criminal activity, reaching into every sphere of economic activity'). Cf Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22 *Law and Philosophy* 393, 417 ('there is no great uncertainty about the actual reach of the law. We seem to have a working understanding of what is truly prohibited and what is not').
[3] See Chapter 4.
[4] See, eg, Samuel Buell, 'Culpability and Modern Crime' (2015) 103 *Georgetown Law Journal* 547, 596 (proposing a definition of fraud as being 'something like intentionally and wrongfully deceiving another person about a material matter, for the purpose of acquiring something of value, knowing that such deception is wrongful in the circumstances'); Flora Page, 'Defining Fraud: An Argument in Favour of a General Offence of Fraud' (1997) 4 *Journal of Financial Crime* 287, 290; David Ormerod, 'The Fraud Act 2006—Criminalising Lying?' [2007] *Criminal Law Review* 193, 203.
[5] See, eg, GR Sullivan, 'Framing an Acceptable General Offence of Fraud' (1989) 53 *Journal of Criminal Law* 92, 97-98.
[6] See Chapter 9 re the use of the mail fraud statute to prosecute breaches of fiduciary duty and corrupt conduct in public office.
[7] Buell (n 4) 554.
[8] Ibid 552.
[9] Ibid 553.

even more difficult to pin down than the matters of the mind that the criminal law routinely encounters' because they involve 'policing distortions of, or interferences with, the decision processes of others'.[10] Finally, what counts as fraud 'can depend upon changing markets and shifting understandings in rapidly evolving economies'.[11]

The United States, the United Kingdom and New South Wales have each addressed the difficulty in 'giving an adequate definition of fraud' in the same way. Rather than introducing multiple offences that capture each individual kind of dishonest gain or loss that is deemed worthy of criminal sanction, or drawing hard lines between different kinds of deceptive commercial conduct, the legislatures have enacted offences drafted in broad terms capable of capturing new forms of fraud as they emerge. Buell characterises these kinds of offences as 'exceedingly open-textured, setting forth conduct rules that usually amount to little more than the declaration, "Do not defraud"'.[12] However, as I explained in Chapter 4, the offences in fact go further: none of them by their plain meaning require proof that the defendant defrauded anyone; proof that the defendant intentionally obtained something of value by making a false assertion of fact appears to be enough on its own.

The enactment of these 'exceedingly open-textured' offences has not been met with universal acclaim. When the Government introduced the Bill that later became the *Fraud Act 2006* (UK), the Solicitor General informed the House of Commons that the new legislation 'should improve the prosecution process by reducing the chance of offences being wrongly charged, and provide greater flexibility to keep pace with the increasing use of technology in crimes of fraud'.[13] The breadth of the new offence was welcomed by some for the way it seemed to have 'sewn up the loopholes'[14] and 'rectif[ied] the problems associated with the

---

[10] Ibid 553.
[11] Ibid 553.
[12] Buell (n 2) 1973.
[13] Monaghan (n 2) 10.
[14] Maureen Johnson and Kevin Rogers, 'The Fraud Act 2006: The E-Crime Prosecutor's Champion or the Creator of a New Inchoate Offence' (2007) 21 *International Review of Law, Computers & Technology* 295, 298-299.

former deception offences'.[15] But it was also criticised. Ormerod, for example, argued that the 'practical advantages' of a general fraud offence ought not 'be allowed to produce a general offence that is overbroad, based too heavily on the ill-defined concept of dishonesty, too vague to meet the obligation under Art.7 of the ECHR, and otherwise deficient in principle'.[16] Similarly, Johnson and Rogers noted that the 'net of the Fraud Act may have been spread so wide that it sweeps into its mesh that which is not properly called fraud at all'.[17] And Kirk predicted that the 'new offence(s) of fraud will lead to more difficulties than they solve'.[18]

Similar criticisms have long been made with respect to the breadth of the mail and wire fraud statutes. Writing in 1980, before the 'intangible rights doctrine' was abolished by the Supreme Court in *McNally* and later reintroduced by the enactment of 18 USC § 1346, Rakoff described the mail fraud statute as follows:

> To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law "darling," but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.[19]

Rakoff's romanticised tribute to the mail fraud statute has been quoted in the academic literature almost as much as the statute itself.[20] Rakoff went on to set out the basis for his bold declaration as follows:

---

[15] Carol Withey, 'The Fraud Act 2006—Some Early Observations and Comparisons with the Former Law' (2007) 71 Journal of Criminal Law 220, 236.
[16] David Ormerod, 'The Fraud Act 2006 – Criminalising Lying?' [2007] Crim LR 193, 194. See also Johnson and Rogers (n 14) 299 re reliance upon 'dishonesty'.
[17] Johnson and Rogers (n 14) 299. The examples they give are of a 'market stall holder shouting that his potatoes are local when he suspects they may not be' and a 'job interviewee who "pads" his CV with a (fictional) stint of charity work. As each of these examples could already have constituted an offence under the Theft Act, they are not truly criticisms of any further breadth created by the enactment of the *Fraud Act 2006* (UK).
[18] David Kirk, 'Fraud trials: a brave new world' (2005) 69 *Journal of Criminal Law* 508, 515-517.
[19] Jed Rakoff, 'The Federal Mail Fraud Statute' (1980) 18 *Duquesne Law Review* 771. See also Daniel Hurson, 'Limiting the Federal Mail Fraud Statute—A Legislative Approach' (1983) 20 *American Criminal Law Review* 422, 432 (describing practicalities of decision making by prosecutors).
[20] See also Ellen Podgor, 'Mail Fraud: Redefining the Boundaries' (1998) 10 *St Thomas Law Review* 557, 558 (quoting other colourful descriptions of the mail fraud statute).

> ... the mail fraud statute, together with its lineal descendent, the wire fraud statute, has been characterized as the "first line of defense" against virtually every new area of fraud to develop in the United States in the past century. Its applications, too numerous to catalog, cover not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, but have extended even to such areas as blackmail, counterfeiting, election fraud, and bribery. In many of these and other areas, where legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.[21]

Rakoff then went on to explain how the recent use of the mail fraud statute to prosecute corruption and bribery had provoked 'outcries from some quarters against what is termed an "unprecedented" expansion of mail fraud and wire fraud jurisdiction'.[22] The outcries at that time primarily concerned how the adoption of the 'intangible rights doctrine' had led to the statute being 'extended further into sensitive areas not previously thought to be subject to the criminal law of fraud'.[23] Coffee, for example, argued that the mail fraud statute 'evolving' to capture breaches of fiduciary duty was 'fundamentally at odds with the principle of fair notice' because of inherent vagueness as to the scope of fiduciary duties and significant differences as to that scope from state to state.[24] Similarly, Hurson described the statute as having been 'expansively interpreted to invite federal prosecution of virtually every type of untoward activity known to man'.[25]

Other criticisms levelled at the breadth of the mail and wire fraud statutes include that '[t]he possible and unpredictable extension of the [statutes] into varied business scenarios injects an immeasurable "cooling" effect on new ventures,

---

[21] Ibid 772.
[22] Ibid 772-773.
[23] John Coffee, 'The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime' (1983) 21 *American Criminal Law Review* 1, 3.
[24] Ibid 27; John Coffee, 'From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics' (1981) 19 *American Criminal Law Review* 117, 122 and 149-150. Cf Alex Hortis, 'Valuing Honest Services: The Common Law Evolution of Section 1346' (1999) 74 *NYU Law Review* 1099, 1112-1115.
[25] Hurson (n 19) 423.

especially those deals at the fringe of standard commercial activity',[26] that different types of crime are inaccurately grouped together as mail fraud,[27] that reliance upon the breadth of the statutes has enabled the legislature to be lax with respect to modernising criminal sanctions,[28] that commercial practices are being regulated by the courts without reasoned debate,[29] and that expansion of the offences might 'increase or decrease the stigma associated with a conviction' in a manner that proves to be counterproductive.[30] There are also a whole host of criticisms of the approaches taken by the courts to the 'mailing' and 'wiring' elements of the statutes that are beyond the scope of this thesis.[31]

These controversies as to the scope of the offences reflect a tension between competing aims.[32] On the one hand, there is recognition that the offences must be drafted in broad enough terms to capture new forms of commercial dishonesty—that it is undesirable to rely upon the legislature continually 'plugging loopholes' by amending the law or enacting new offences.[33] On the other hand, there is concern that the legislation must give clear notice as to what constitutes an offence and avoid overextending the offences beyond what is deserving of criminal sanction or what is 'properly called fraud'[34]—that it is equally undesirable for the person accused of committing a novel 'fraud' to learn whether her or his conduct was in fact 'fraud' only when he or she is acquitted or convicted at trial.[35]

---

[26] Jason Elder, 'Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All' (1998) 77 *Oregon Law Review* 707, 712; Hortis (n 24) 1111.
[27] Elder (n 26) 709.
[28] Ibid 709.
[29] Ibid 728.
[30] Ibid 732.
[31] See generally Geraldine Moohr, 'Mail Fraud Meets Criminal Theory' (1998) 67 *University of Cincinnati Law Review* 1, 6.
[32] ATH Smith, 'Conspiracy to defraud: the Law Commission's Working Paper 104' [1988] *Criminal Law Review* 508, 510.
[33] Johnson and Rogers (n 14) 297.
[34] Smith (n 32) 515.
[35] See generally, Rakoff (n 19) 779; John Coffee, 'The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime' (1983) 21 American Criminal Law Review 1, 3 ('What compromise then is possible between strict construction and infinite expansion?'); Smith (n 32) 515; David Ormerod, 'A bit of a con? The Law Commission's consultation paper on fraud' [1999] Criminal Law Review 789, 796 ('general fraud offences are more likely to offend cherished ideals of minimum criminalisation, fair labelling and fair warning').

8.3 Broad fraud offences and fair notice

The concerns expressed by critics about the extent to which broad fraud offenses give fair notice must be taken very seriously. The principle of fair notice is fundamental to virtually every conception of the rule of law.[36] Sir Tom Bingham, for example, described the first 'ingredient' of the rule of law as being that: '[t]he law must be accessible and so far as possible intelligible, clear and predictable'.[37] He went on to explain that certainty is important, not just for individuals who are 'keen to keep on the right side of the law', but also because 'the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations'.[38] Hayek similarly argued that the 'rules governing the system' must be 'fixed and announced beforehand' so that they 'make it possible to foresee with fair certainty how the [state] will use its coercive powers in given circumstances, and to plan one's affairs on the basis of this knowledge'.[39]

The principle of fair notice is fundamental to the rule of law due to concerns about the fairness and effectiveness of the law. The fairness concerns are almost self-explanatory. As Jeffries puts it: 'the essentiality of notice seems obvious, and the perceived unfairness of punishment without warning requires no explication'.[40] The unfairness arises because, as Buell explains, an accused who 'had no (or at least insufficient) notice that her conduct was criminal' may be characterised as lacking 'sufficient culpability to justify punishment'.[41] In relation to effectiveness, fair notice is necessary to ensure that the criminal law neither under-deters nor over-deters: on the one hand, if people do not realise that conduct is prohibited, they can hardly be expected to avoid engaging in the conduct;[42] and on the other hand, if people believe that more conduct is prohibited than the legislature in fact intended, they may

---

[36] See generally Dyson Heyon, 'What do we mean by Rule of Law?' in Prince and Sackar (eds) *Heydon: Selected Speeches and Papers* (Federation Press, 2018) 426; John Jeffries, 'Legality, Vagueness, and the Construction of Penal Statutes' (1985) 71 *Virginia Law Review* 189, 212-219.
[37] Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 37.
[38] Ibid 37-38.
[39] FA Hayek, *The Road to Serfdom* (Routledge, 1944) 54.
[40] Jeffries (n 36) 205-206.
[41] Buell (n 4) 550.
[42] Buell (n 4) 588.

'steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked'.[43] Neither outcome is desirable.

The enactment of fraud offences drafted in terms broad enough to capture unidentified, unforeseen or presently-impossible conduct at first blush may appear to collide with the fair notice principle. How can the people know what is and is not illegal if the lawmakers themselves do not even know? Critics of broad fraud offences have alluded to the apparent collision. Smith, for example, argued that 'the strongest argument that can be advanced against the enactment of a generalised fraud offence is that we do not know *exactly* what we want to proscribe'.[44]

I disagree with Smith. Whether the *legislators* know in advance 'exactly' what conduct may be captured by a fraud offence elides the real issue. Assuming the legislature is satisfied that conduct described in general terms by the broad fraud offence warrants criminal sanction, the real issue is whether the *people* are likely to know that they are at risk of committing an offence before embarking on a particular course of conduct—whether '[m]en of common intelligence [are] required to guess at the meaning of the enactment'.[45] The resolution of this issue invites consideration of the language used in the legislation. If the fraud offence captures novel frauds by using vague language capable of being stretched to accommodate new situations, there is a 'fair notice' problem: the people may not know when they are at risk of prosecution. However, if the fraud offence captures novel frauds by using understandable language that is capable of being applied to new situations, there is no such problem: the people ought to know when they are at risk of prosecution by reason of the language alone.[46]

---

[43] Paul Robinson, 'Fair Notice and Fair Adjudication: Two Kinds of Legality' (2005) 154 *University of Pennsylvania Law Review* 335, 361 quoting *Grayned v City of Rockford*, 408 US 104, 109 (1972).
[44] Smith (n 32) 515 (emphasis added).
[45] *Winters v New York*, 33 US 507, 515 (1948). See also *Connally v General Construction Company*, 269 US 385, 391 (1926). See generally Robinson (n 43) 356 and 364 ('Fairness requires that an actor have at least an opportunity to find out what the criminal law prohibits').
[46] I have here adopted the entrenched yet obviously unrealistic assumption that people are and should be taken to be aware of the criminal law. See generally Jeffries (n 36) 207-208 and 211 and Buell (n 4) 591-595 for criticism of that assumption.

The reliance upon the first limb of the mail and wire fraud statutes to prosecute novel frauds arguably is an example of capturing new situations by using vague language. Whilst ordinary people might have some idea of what constitutes a 'scheme to defraud', the expression has been given a broader legal meaning that an ordinary person may well be unable to comprehend from simply reading the criminal code.[47] For that reason, the fair notice concerns raised by critics of broad fraud offences appear to be compelling with respect to the first limb of the statutes—at least in its application to novel forms of fraud.[48] It should therefore come as no surprise that several defendants charged with novel frauds have attempted to argue that the mail and wire fraud statutes are 'void for vagueness'—i.e. inconsistent with the due process clause of the Fifth Amendment of the Constitution because they fail to state 'with sufficient definiteness that ordinary people can understand what conduct is prohibited'.[49] However, as my argument does not rely upon the first limb of the wire fraud statute, the extent to which the first limb ought to be regarded as 'void for vagueness' is beyond the scope of this thesis.

In contrast, the language used in the second limb of the wire fraud statute would (but for the Supreme Court's decision in *Cleveland*) be an example of capturing novel frauds using understandable language that is capable of being applied to new situations. The second limb prohibits schemes or artifices 'for obtaining money or property by means of false or fraudulent pretenses, representations, or promises'. Ordinary people know what money is. They know (in general terms) what property is. It seems fair to assume they know *generally* what false pretences are (accepting that the term may be given a more expanded meaning). They certainly know what false representations are. And they can probably work out what false promises are. So ordinary people can get a pretty good idea of what the second limb of the statutes appear to prohibit just by reading the words themselves. Fair notice is not a concern because the second limb is an example of prohibiting what Buell calls conduct that can be 'easily described, and

---

[47] See, eg, Coffee (n 24) 154.
[48] Buell gives the mail fraud statute as an example of the Supreme Court using 'avoidance strategies to interpret criminal statutes in a manner that skirts constitutional notice defects': Buell (n 4) 550.
[49] See, eg, *Skilling v United States*, 561 US 358, 402-403 cf 415-416 (2010); *United States v Nelson*, 712 F 3d 498, 504, 508 (11th Cir, 2013).

proscribed, through *ex ante* conduct rules'.[50] The same may be said with respect to section 192E of the Crimes Act and section 2 of the Fraud Act. The offences have a wide reach. But the crux of what they prohibit is accessible to ordinary people. They are broad, not vague.

8.4 The scope of the fraud that does not defraud

My interpretation of the offences permits the prosecution of those who dishonestly obtain money or property without dishonestly depriving anyone of the money or property in doing so. It involves taking the language used in the legislation at its plain meaning—i.e. reading the legislation like an ordinary person, not a lawyer who thinks 'or' is capable of meaning 'including'.[51] The fact that the legislation may be used to prosecute that kind of conduct should not come as a surprise to the person of 'common intelligence'[52] because the language is clear. And it should not come as a surprise to lawyers because the possibility has been recognised by the courts and the literature.[53] The real vice is that those who have recognised the possibility have not gone further and described the circumstances in which such conduct may occur. Arlidge et al, for example, say in relation to section 2 of the Fraud Act:

> Intent to cause loss, or expose another to a risk of loss, will usually be inseparable from intent to make a gain. They are two sides of the same coin. But they are alternatives. It is clearly possible to defraud another by causing him loss without making any corresponding gain, for example out of spite. More surprisingly, it is theoretically possible to commit the fraud offence by acting with intent to make a gain, even if the making of the gain would not cause loss to another or expose another to a risk of loss. It is difficult to imagine circumstances in which this might actually occur.[54]

[50] Buell (n 2) 1974.
[51] See Chapter 4 at section 4.2.2.10.
[52] *Winters v New York*, 33 US 507, 515 (1948).
[53] See chapter 4.
[54] Anthony Arlidge et al, *Arlidge and Parry on Fraud* (5th ed, Sweet & Maxwell, 2016) 3-017.

It is incumbent upon me to set out the 'circumstances in which this might actually occur' because the implication of accepting my argument that making money by fake news constitutes an offence is that *any* fraud that does not defraud constitutes an offence. However, it is also important to demonstrate that the circumstances fall so plainly within the legislation that perpetrators could hardly be heard to argue that they did not have 'fair notice' that their conduct might constitute an offence. And it is important to emphasise that adopting my interpretation would not bring about an undue expansion of the reach of the offences. For those reasons, I have spent some time imagining the circumstances in which a person may dishonestly obtain something without dishonestly depriving someone else of the thing in doing so. It is convenient to break those circumstances into five categories. I will address each in turn.

8.4.1 Where there is no person to deprive

The first category is where there is no *person* to deprive: if there is no person to deprive, there is no person to defraud. This category encompasses situations in which a person acquires property by dishonest means but the property is not possessed or owned by someone else. In practice, this may include property that has never had an owner or has been abandoned. Consider the following example given by HLA Hart in the course of discussing moral rights:

> Two people walking along both see a ten-dollar bill in the road twenty yards away, and there is no clue as to the owner. Neither of the two are under a "duty" to allow the other to pick it up; each has in this sense a right to pick it up. Of course there may be many things which each has a "duty" not to do in the course of the race to the spot—neither may kill or wound the other—and corresponding to these "duties" there are rights to forbearances.[55]

Now imagine that one of those two people (A) tells the other (B) that he (A) saw the ten-dollar bill first and that B (because she believes A to be telling the truth) does not attempt to 'race to the spot' to claim the ten-dollar bill for herself. As B did not have a pre-existing proprietary right to the ten-dollar bill, A cannot be said to

---

[55] HLA Hart, 'Are There Any Natural Rights' (1955) 64 *The Philosophical Review* 175, 179.

have defrauded B.[56] However, on my interpretation of the offences, A may be charged on the basis that he nevertheless *obtained* the ten-dollar bill by making a false assertion of fact—i.e. that he had seen the note first when in fact he had not.

The criminalisation of this kind of conduct would not bring about an undue expansion of the law because examples are likely to be rare in real life. Moreover, if A was later charged with fraud—for example, under section 2 of the Fraud Act on the basis that he dishonestly made a false representation intending to make a gain in the form of money—he could hardly be heard to argue that he could not have realised that he was at risk of committing an offence when he lied to B. His lie about having seen the ten-dollar note first was obviously a 'false representation' made with intent to 'make a gain'.

8.4.2 Where the property acquired did not exist prior to its acquisition

The second category is where the property did not exist prior to its acquisition. If a person acquires property that did not *exist* prior to the acquisition, the property cannot be said to have been *taken* from anyone else, and nobody can be said to have been deprived of the property.

It is difficult to imagine these circumstances arising in relation to physical property. There is authority to the effect that a person may obtain property by false pretences despite the property not existing at the time the false pretences were made. For example, in *R v Martin*,[57] the defendant was convicted for pretending to be an agent of the Steam Laundry Company at Aston and by that false pretence induced a wheelwright to construct for him a 'spring van'. However, the property not existing at the time the false pretences were made is not the same as the property not existing prior to its acquisition by the defendant. The former concerns property that is created and then handed over to the defendant. The latter concerns property that comes into existence in the hands of the defendant.

---

[56] Dennis Baker, 'The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation' (2008) 33 *Australian Journal of Legal Philosophy* 66, 78.
[57] *R v Martin* (1867) 10 Cox CC 383, 387.

However, it is possible to imagine these circumstances arising in relation to intangible property—in particular, to choses in action. A chose in action is an intangible property right that can be enforced only by taking legal action, not by taking physical possession.[58] Examples of choses in action include the right to receive payment of a debt,[59] the right to the benefits of a contract,[60] the rights arising under shares in a company,[61] and, in some cases, rights arising under licenses issued by governmental authorities.[62] Where a person obtains a new chose in action, as opposed to the assignment of a pre-existing chose in action, the person arguably obtains something that did not exist prior to its acquisition.[63] That is because (arguably) the rights forming the chose in action were not held by A and transferred to B but rather were brought into existence in the hands of B. If this approach is correct, a person who by deception obtains a *new* chose in action commits a fraud that does not defraud.

The recognition of this kind of conduct as a form of fraud would bring about an expansion of the scope of the offences. In the United States, it would mean that, contrary to *Cleveland*, obtaining a licence by false pretences may constitute mail or wire fraud notwithstanding that the issuing body is not deprived of the licence. However, the expansion is likely to be modest because there are often other ways to prosecute the same conduct without relying upon the obtaining of the chose in action as the relevant transaction. For example, if a person obtains rights under a contract

---

[58] *Sheldon v Sill*, 49 US 441, 449-450 (1850); *Colonial Bank v Whinney* (1885) 30 Ch D 261, 285-290; *Torkington v Magee* [1902] 2 KB 427, 430; *Fuller v Beach Petroleum NL* (1993) 43 FCR 60, 73; *Sprint Communications Co LP v APCC Services Inc*, 554 US 269, 275-277 (2008).

[59] *Sheldon v Sill*, 49 US 441, 450 (1850); *Colonial Bank v Whinney* (1885) 30 Ch D 261, 286-287; *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, 26.

[60] *Sheldon v Sill*, 49 US 441, 449 (1850); *Torkington v Magee* [1902] 2 KB 427, 431-432; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 144.

[61] *Humble v Mitchell* (1839) 11 Ad & E 205, 208; 113 ER 392, 395; *Colonial Bank v Whinney* (1885) 30 Ch D 261, 286-290; *Colonial Bank v Whinney* (1886) LR 11 App Cas 426, 439-440, 447-448; *First National Bank v Maine*, 284 US 312, 327-328 (1932); *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143, 157.

[62] A licence is not a form of property per se. See *Frank Warr & Co Ltd v London City Council* [1904] 1 KB 713. But there are cases in which rights conferred by licences have been held to be proprietary in nature. See, eg, *Cleveland v United States*, 531 US 12, 25 (2000); *Jabetin Pty Limited v Liquor Administration Board* (2005) 63 NSWLR 602; [2005] NSWCA 92. Cf *Jack v Smail* (1905) 2 CLR 684, 705-707; *Boreland v Docker* [2007] NSWCA 94, [89], [106]-[108].

[63] This was the approach taken by the Supreme Court of the United States in *Cleveland*: the licences to operate the poker machines were not 'property' in the hands of the issuing body.

by deception, the person may be charged with obtaining, by the same deception, any money or property obtained pursuant to the rights.[64] A simple example is a contract of employment. The courts in each jurisdiction have held that a person who obtains employment by false pretences may be charged with obtaining her or his salary by the same false pretences notwithstanding the work he or she performed to earn the salary.[65]

Again, each of these scenarios, the defendant could hardly be heard to say that he or she was not aware that her or his conduct might constitute an offence. If a person who was about to file electronically a licence application containing false information were shown the wire fraud statute, he or she could not plausibly fail to recognise that filing the form to obtain the licence might constitute devising a scheme 'for obtaining … property by means of … false … representations'. The same may be said about a person on the verge of posting a CV full of false work experience. How could that person fail to comprehend that posting the CV might be characterised as a scheme 'for obtaining money … by means of false … representations' within the meaning of the mail fraud statute? Again, the potential criminality of the conduct is clear from the words of the statutes.

8.4.3 Where the property acquired is capable of being wholly possessed by more than one person at the same time

The third category of fraud that does not defraud is where the property acquired is capable of being wholly possessed by more than one person at the same time. If the property is capable of being wholly possessed by more than one person

---

[64] See, eg, *R v Kenrick* (1843) 5 QB 49, 64-65; 114 ER 1166, 1172; *R v Martin* (1867) 10 Cox CC 383, 387; *R v Moreton* (1913) 23 Cox CC 560, 561-562; *R v Lambassi* [1927] VLR 349, 354. Cf *Prosser v Fox* (1898) 24 VR 151; *Hansen v Archdall* (1930) 44 CLR 625.

[65] See, eg, *Bacon v Salamane* (1965) 112 CLR 85; *United States v Doherty*, 867 F 2d 47 (1st Cir, 1989); *United States v Granberry*, 908 F 2d 278 (8th Cir, 1990); *R v Haboub* [2007] EWCA Crim 3320; *R v Dziruni* [2008] EWCA Crim 677; *United States v Aldissi*, 758 Fed Appx 694 (11th Cir, 2018); *R v Andrewes* [2020] EWCA Crim 1055. See generally JW Cecil Turner, *Kenny's Outlines of Criminal Law* (18th ed, Cambridge University Press, 1962) 347-348; David Lanham et al, *Criminal Fraud* (Law Book Co, 1987) 84.

at the same time, a person may come into possession of the property without depriving anyone else of possession of the property in doing so.

These circumstances could arise with respect to information such as stock tips,[66] news stories,[67] and recipes,[68] as well as access to digital products such as computer programs and online subscription services.[69] However, they could only arise to the extent that the rights associated with the information and access are characterised as *proprietary* in nature.[70] It does not seem that they could arise with respect to physical property.

The recognition of dishonestly obtaining information or access to digital products as a form of fraud would bring about only a modest expansion of the scope of the offences. That is because there are often other ways to prosecute the same conduct without relying upon the obtaining of the information or access. For example, if the person who owns the rights to the information or access usually charges others for the information or access, the person who obtained the information or access by false pretences could be convicted for obtaining what he or she ought to have paid the owner rather than the information or access per se. Moreover, a person considering obtaining free access to a subscription news website or program by false pretences could hardly say that he or she did not realise that doing so *might* constitute a scheme 'to defraud' if not one 'for obtaining money … by means of false … representations' (accepting that the person does not literally obtain money but rather a 'financial advantage' or 'gain' being the avoidance of the access charge).

---

[66] *Carpenter v United States*, 484 US 19, 28 (1987).
[67] *International News Service v Associated Press*, 248 US 215, 240-241, 263-67 (1918).
[68] Geraldine Moohr, 'Federal Criminal Fraud and the Development of Intangible Property Rights in Information' [2000] *University of Illinois Law Review* 683, 692-93.
[69] Ibid 728.
[70] See, eg, *Carpenter v United States*, 484 US 19 (1987) (characterising a scheme to obtain confidential information as a scheme to defraud notwithstanding nobody was deprived of the confidential information).

8.4.3 Where the property was already possessed by the person at the time of the dishonest conduct

The fourth category of fraud that does not defraud is where the property was already possessed by the person at the time of the dishonest conduct. If the person came into possession of the property prior to the dishonest conduct, the dishonesty could not have had any bearing upon the deprivation of the person from whom the property was acquired. The dishonesty would be immaterial to the original deprivation.

A person may dishonestly retain property that is already in her or his possession where he or she obtained the property by *bona fide* means but relied on dishonest conduct to avoid giving it back. The clearest example is a person who engages in deception to avoid paying a debt. The person does not *deprive* the lender of the money but still places her or himself in an advantageous position by retaining the money for a longer period.

Recognition of this kind of conduct as fraud would not expand the reach of the law in the UK, as section 5 of the Fraud Act defines 'gain' as including '*keeping what one has*, as well as a gain by getting what one does not have'. It would not expand the reach of the law in New South Wales, as delaying repayment of a debt has been held to constitute a 'financial advantage' within the meaning of section 192E of the Crimes Act.[71] And it would not expand the reach of wire fraud in the United States, as there are examples of schemes to avoid making payments being held to constitute mail or wire fraud—the simplest involving tax frauds.[72] In other words, these kinds of frauds that do not defraud are already long established as constituting each offence. The perpetrators could hardly plead ignorance—whether generally or having regard to the language of the offences.

---

[71] *Pratten v The Queen* [2014] NSWCCA 117, [90]; *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143, [354].
[72] *Pasquantino v United States*, 544 US 349, 355-358 (2005); *United States v Yusuf*, 536 F 3d 178, 189 (3rd Cir, 2008).

8.4.5 Where the acquisition but not the deprivation is dishonest

The final category of fraud that does not defraud occurs where the *acquisition* but not the *deprivation* is dishonest: if the deprivation is not dishonest, there is no dishonest deprivation. This category requires at least three parties. It occurs where the perpetrator deceives one person to obtain something from another pursuant to a *bona fide* transaction. Publishing fake news for profit is the pre-eminent example, as the publishers deceive readers to obtain money from ad servers. It may help to provide some others.

(a) *Other online content providers*. If a website purported to offer a cure for an illness, but the cure was bogus and had been debunked by all credible sources, the website operator would have deceived the readers to obtain money from the ad server that hosted ads on the website.

(b) *Television networks*. If a network promoted a particular narrative on its news and current affairs programming, but the narrative was known by the network to be false and promoted for the purpose of improving ratings and therefore advertising revenue, the network would have deceived the viewers to obtain money from advertisers.

(c) *Search engines*. If a search engine marketed itself as providing the most objective search results, but in fact displayed search results wholly based upon how much the companies appearing in the results were willing to pay for their search ranking, the search engine would have deceived the users to obtain money from the businesses who paid for the rankings.

(d) *Planning approval*. If a person stated that a development would have minimal environmental impact to secure planning approval from the local council, but in fact knew that the development would cause significant environmental damage, the developer would have deceived the council to obtain money from the eventual purchasers of the buildings constructed during the development (but see below).

(e) *Blagging*. If a freelance journalist lied to a person to convince the person to participate in an interview, for the purpose of selling the interview to a

publisher, the journalist would have deceived the person to obtain money from the publisher.

(f) *Inside information*. If a person attended an interview for a job at a company but did so only to obtain information about the company to sell to another person, the first person would have deceived the company by pretending to be interested in the job to obtain money from the other person.

(g) *Kickbacks*. If an employee persuaded her or his employer into agreeing to a contract with a third party by misrepresenting the benefits of contracting with the third party for the purpose of securing a kickback, the employee would have deceived the employer by misrepresenting the merits of the deal to obtain money from the third party.

Each example detailed above involves two parties benefitting from the deception of a third party. The first three involved online content providers, television networks and search engines. Each of these businesses makes use of a two-sided market. On one side are the readers, viewers and users, who provide attention. On the other are advertisers who pay for exposure to the readers, viewers and users. The attention is not money or property, which means the content providers, television networks and search engines may deceive the readers, viewers and users without defrauding them. However, this deception may be construed as fraud pursuant to my argument, as the content providers, television networks and search engines nevertheless obtain money by means of the deception. Their conduct self-evidently falls within the language used in the legislation.

The fourth example was a person who made a misrepresentation to a local council to obtain planning approval for a development. This *could* be construed as fraud pursuant to my argument on the basis that the profit made via the development was obtained by means of the misrepresentation. As I explained in Chapter 4, the Law Commission gave this as an example of conduct that should fall within its proposed general fraud offence,[73] and Sullivan responded by arguing that to

[73] Law Commission, *Conspiracy to Defraud* (Working Paper 104, October 1987) [12.8].

'designate such conduct fraudulent … takes the concept into the amorphous realm of public mischief'.[74] I understand Sullivan's point but do not agree with his reasoning. Sullivan argued that it was not 'apt to designate the developer's gain as fraudulent' because the developer did not cause any economic loss.[75] However, as I also explained in Chapter 4, even conventional fraud offences are not concerned solely with economic loss. If there is a problem with the example, it is one of causation. Although the misrepresentation to the council is a 'but for' cause of the profit made via the development, the more proximate causes are the planning, construction, marketing and sale of the properties. For that reason, I do not consider this to be a true example of a fraud that does not defraud. The deception is too remote from the gain. Nevertheless, the applicant could hardly say that he or she was not aware that there was a *risk* of her or his conduct constituting an offence, as the case against the applicant is at least arguable.

The fifth example was a freelance journalist who induced a person to participate in an interview by deception and obtained money by selling the interview to a publisher. This example is based upon BBC journalist Martin Bashir deceiving Earl Spencer and Princess Diana to persuade Diana to agree to a televised interview in 1997.[76] It changes the situation by stipulating that the journalist procures the interview by deception *for the purpose of selling the interview to a publisher.* Much like the perpetrators in the first three examples, the journalist competes in a two-sided market. On one side are people of interest who may participate in interviews. On the other are publishers who may pay for content. The participation in the interview is not money or property, which means that the journalist may deceive the person without defrauding the person. However, this deception may be construed as fraud pursuant to my argument, assuming the journalist may be characterised as having obtained the money *by* means of the deception. The connection between the journalist's deception and the journalist's obtaining of the money is less direct than that of the fake news publisher but more direct than that of the developer in the

[74] GR Sullivan, 'Framing an Acceptable General Offence of Fraud' (1989) 53 *Journal of Criminal Law* 92, 97.
[75] Ibid.
[76] Robert Size, 'R v. Bashir? The Case For Charging Martin Bashir With Fraud' [2021] *Criminal Law Review* 774.

fourth example. However, as is the case with the developer, the journalist ought to be aware at least of the risk of her or his conduct falling within the broad language of the offences.

The sixth example was a person who obtained information about a company's operations by deception and sold the information to another person. This example provides a good illustration of the limits of the fifth category of fraud that does not defraud. In these kinds of frauds, the first party usually provides *something*—just not something that constitutes an object of fraud, which usually means money or property. In the first five examples, the party provided attention, permission and participation in an interview, not money or property. In this example, however, the first party provided information, which may be characterised as a form of property in certain circumstances. In *Carpenter v United States*, for example, the Supreme Court held that confidential information was a form of property, such that a scheme to obtain confidential information was a scheme 'to defraud' within the meaning of the mail fraud statute.[77] Therefore, if the information constituted property, perhaps because it was confidential, the person would have perpetrated a conventional fraud; however, if the information did not constitute property, the obtaining of it by deception for personal financial gain would constitute a fraud that does not defraud within the third category.

The final example was an employee who deceived her or his employer for the purpose of obtaining a kickback from a third party. In the United States, this example already constitutes mail fraud or wire fraud on the basis that the employee may be charged with devising a scheme to defraud the employer of its 'intangible right of honest services' under 18 USC § 1346: '[t]he statutory harm is the loss of honest services, but the actor's gain is likely to be some monetary award from a third party who was not deceived'.[78] Accepting my argument would do away with the need to rely upon the strange notion that a person may defrauded of something as ephemeral as 'the intangible right of honest services'. The employee could be

[77] 484 US 19, 26-27 (1987).
[78] Moohr (n 31) 25.

charged with and convicted of simply devising a scheme to obtain the kickback by false pretenses.

8.5 Conclusion

In this chapter, I explained that frauds that do not defraud occur in the following circumstances:

(a) Where A dishonestly obtains something that was not possessed by someone else.

(b) Where A dishonesty obtains something that did not exist prior to its acquisition.

(c) Where A dishonestly obtains something that may be possessed by more than one person at the same time.

(d) Where A dishonestly retains something that A honestly obtained.

(e) Where A obtains something from B pursuant to a bona fide transaction brought about by dishonesty directed at C.

In the course of setting out the circumstances in which frauds that do not defraud occur, I argued that those who perpetrate these kinds of frauds could hardly be heard to argue that they could not have known that their conduct could constitute an offence—that the application of the legislation to conduct of this kind is too straightforward for there to be any compelling concerns about fair notice. I also explained that some of the circumstances may already constitute wire fraud via the application of doctrines that work around the absence of anyone being defrauded of money or property (the most blatant being the intangible rights doctrine). The upshot of accepting my argument is that dishonest finders, licence applicants, subscribers, content providers, television networks, search engines, journalists, interviewees, employees and licence applicants could potentially be charged with and convicted of fraud offences. Accordingly, it is the criminalisation of that kind of conduct that I must defend. I turn to that issue in Chapter 9.

9. Justification for criminalisation of frauds that do not defraud

9.1 Introduction

In the previous chapter, I explained that one of the primary concerns expressed by critics of broad fraud offences is that they may capture conduct that is either not worthy of criminal sanction or not 'properly called fraud'. Much like the concerns expressed about the extent to which broad fraud offences provide 'fair notice', these concerns must be taken seriously.

It is trite to say that the state should not criminalise conduct unless there is an appropriate justification for doing so. This fundamental principle is essential, not only to ensure fairness to those accused of breaching the criminal law, but also to ensure the criminal law is effective. Most scholars agree that the criminal law's power to deter and stigmatise conduct depends upon the law having 'moral credibility'—that the law 'needs to have earned a reputation for accurately representing what violations do and do not deserve moral condemnation from the community'.[1]

It is also trite to say that 'distinctions among offences should reflect distinctions in the nature and seriousness of the wrongdoing that they criminalise'[2]—that the labels applied by the criminal law should be applied fairly.[3] The label applied to an offence carries a particular stigma the suffering of which forms part of both the punishment for and deterrent created by the offence.[4] Accordingly, if the fraud

---

[1] Stuart Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press, 2012) 53 quoting Paul Robinson and John Darley, 'Intuitions of Justice: Implications for Criminal Law and Justice Policy' (2007) 81 *Southern California Law Review* 1, 21.
[2] Andrew Cornford, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42 *Oxford Journal of Legal Studies* 985, 985.
[3] Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 *Cambridge Law Journal* 85; James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217, 226-228 (offence names must not 'create a false or misleading impression of the nature or magnitude of the offender's wrongdoing or encourage an inaccurate conclusion to be drawn'); Stuart Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press, 2012) 52-54; Cornford (n 2) 987.
[4] Harold Grasmick and Lynn Appleton, 'Legal Punishment and Social Stigma: A Comparison of two Deterrence Models' (1977) 58 *Social Science Quarterly* 15, 15-17; Eric Rasmusen, 'Stigma and Self-

offences are drafted or interpreted so as to capture conduct that is not 'properly called fraud', it may lead to those whose conduct does not warrant the stigma suffering the indignity of being branded a 'fraudster'.[5] Alternatively, it may lead to the stigma itself being 'diluted' by its application to conduct less serious than what is conventionally understood to constitute 'fraud'.[6] Neither outcome is desirable.[7]

It is easy to imagine a critic of my argument contending that my interpretation stretches the fraud offences beyond their proper limits. It is easy to imagine such a critic asking, rhetorically: 'How can conduct that *does not defraud* be criminalised as *fraud*?' In this chapter, I answer this question by arguing that frauds that do not defraud (like making money by publishing fake news) are 'properly called fraud' because they warrant prosecution for the same reasons as conventional frauds—in other words, that conventional frauds and frauds that do not defraud are not only as bad as each other but also are bad for the same reasons. I do so by demonstrating that the criminalisation of frauds that do not defraud may be justified for the same reasons as the criminalisation of lossless frauds—that is, conventional frauds where the victim suffers no net financial loss. My purpose in doing so is to appeal to the common-sense proposition that, if the rationales underlying the criminalisation of conventional frauds apply equally (or perhaps more so) to frauds that do not defraud, both consistency and the imperatives that drive the criminalisation of conventional frauds demand, not only that frauds that do not defraud be prohibited, but also that they are appropriately prohibited by the fraud offences.

The material in this chapter is split into four sections. The first section describes the inadequacy of the justifications for the criminalisation of lossless frauds proffered by the courts and the legislatures. The remaining sections each address

---

Fulfilling Expectations of Criminality' (1996) 39 *Journal of Law and Economics* 519, 520; Jason Elder, 'Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All' (1998) 77 *Oregon Law Review* 707, 732; Daniel Schwarcz, 'Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law' (2003) 116 *Harvard Law Review* 2186, 2194-2195.

[5] Cornford (n 2) 993-994.

[6] Murat Mungan, 'Stigma Dilution and Over-Criminalization' (2016) 18 *American Law and Economics Review* 88, 89, 91, 113.

[7] Green, *Thirteen Ways to Steal a Bicycle* (n 1) 53. The application of the stigma to those who do not deserve the application is particularly problematic given those who are stigmatised may be less likely to be deterred by the threat of stigma in the future: Rasmusen (n 4) 536; Mungan (n 6) 92.

one potential rationale for the criminalisation of lossless frauds and apply that rationale to frauds that do not defraud using making money by publishing fake news as the primary example. The rationales are: first, harm to non-financial interests of individual victims; secondly, exploitation of individual victims; and finally, harm to public interests. The material throughout the chapter makes an original contribution to the literature with respect to the rationales underpinning the fraud offences. Although others have identified rationales for the criminalisation of fraud (including those that are lossless), mine is the first attempt of which I am aware to catalogue the rationales for the criminalisation of 'lossless frauds' and apply those rationales to frauds that do not defraud.

9.2 Inadequacy of justification for criminalisation of lossless frauds

In section 4.3 of Chapter 4, I explained that the courts in Australia, the United Kingdom and the United States traditionally have not interpreted fraud offences as requiring the prosecution to prove that the defendant caused the victim to suffer a net economic loss. I also explained that the Law Commission specifically rejected the proposition that net economic loss ought to be an element of the proposed general fraud offence that later became section 2 of the Fraud Act. And I outlined the two kinds of 'lossless fraud'—those where the fraud is *in the factum* because the deception relates to the nature of the consideration; and those where the fraud is *in the inducement* because the deception relates to a collateral matter but nevertheless induces the victim to agree to the transaction.

The fact that the courts and legislatures have not imposed a requirement for the prosecution to prove that the victim suffered a net economic loss means that the rationales underlying the fraud offences must extend beyond preventing or punishing the dishonest infliction of economic losses upon individual victims. By this I mean that, in circumstances where the defendant's conduct did not cause the victim to suffer a net economic loss, there must be *something else* about the conduct that warrants criminal sanction—something else that makes the defendant's conduct worthy of punishment notwithstanding that the financial interests of the 'victim' were not harmed.

Exactly what this 'something else' is has not been adequately explained by the courts or the legislatures. Consider again *Balcombe v De Simoni*.[8] The defendant induced his victim to buy a cooking book by pretending to be a student participating in a competition to win a trip overseas. A majority of the High Court of Australia held that the defendant had 'intent to defraud' notwithstanding there was no suggestion that he 'did not think the book to be really worth the asking price, or that he did not intend when he received the money to pass it to the proper destination to procure delivery of that book, or that he did not believe that the book would be duly delivered'.[9] McTiernan J said: 'the crucial characteristic of an intention to defraud is not the economic loss which may or may not result to the purchaser but the element of dishonesty'.[10] And Gibbs J (with whom Menzies J agreed) said '[w]hat is essential is that he should have intended to obtain the property by means of a deception', as opposed to, for example, making a false assertion 'in jest' or otherwise not intending to obtain the property.[11]

Similar statements have been made by influential judges in other jurisdictions. For example, in *United States v Rowe*,[12] Judge Learned Hand said with respect to the mail fraud statute:

> Civilly of course the action would fail without proof of damage, but that has no application to criminal liability. A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed.[13]

And in *United States v Gregory*,[14] Judge Brown said:

---

[8] (1972) 126 CLR 576.
[9] Ibid 581.
[10] Ibid 588.
[11] Ibid 593 and 595-596.
[12] 56 F 2d 747 (2nd Cir, 1932).
[13] Ibid 749.
[14] 253 F 2d 104, 109 (5th Cir, 1958).

> The aspect of the scheme to 'defraud' is measured by nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.

In each of these examples, the judges considered the presence of dishonesty in the transaction to be the feature warranting the punishment of the defendant.[15] But they did not explain why the presence of dishonesty warranted criminal sanction. Nor did they identify the other ingredients necessary to transform simply being dishonest (which is regrettable, not criminal) into fraud (which is a serious offence). The same may be said of the following statement made by the Law Commission in the course of proposing the general fraud offence that later became section 2 of the Fraud Act:

> If the new offence extended to the making of any gain by deception, it would catch the obtaining of a valuable service which costs the victim nothing to provide and for which the victim does not expect to be paid. We believe that there is no reason why such conduct should not be criminal, and that the greater simplicity of this approach is ample justification for the marginal widening of liability that it would entail.[16]

The Law Commission said they believed there was 'no reason why such conduct should not be criminal'. But they never advanced a clear reason as to why such conduct *should* be criminal. The closest they came was the following:

> The fact that the defendant has dishonestly made a gain is not itself the *reason* for criminalising the defendant's conduct. It is, however, the obvious and visible symptom of conduct which, on closer inspection, proves to be anti-social in less obvious ways.[17]

It is easy to sympathise with criticism of the Fraud Act in circumstances where the Law Commission's justifications for proposing an offence that captured dishonest gains alone amounted to little more than 'Why not?' and that making dishonest gains is 'anti-social'. In particular, the reliance on anti-sociability tends to support Sullivan's

---

[15] See further John Coffee, 'From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics' (1981) 19 *American Criminal Law Review* 117, 119 (describing jury instruction as seeming to 'equate dishonesty with the criminal offense of mail fraud').
[16] Law Commission, *Fraud* (Report No 276, July 2002) 68-69 [7.47].
[17] Ibid 69 [7.49] (emphasis in original).

argument (made in relation to the earlier Law Commission's proposed general fraud offence) that '[t]o designate such conduct fraudulent … takes the concept into the amorphous realm of public mischief'.[18] It also lends credibility to Ormerod's characterisation of the new offence as appearing to 'criminalise lying'.[19]

As matters stand, there is a striking absence of justification in the authorities and legislative history as to why dishonestly making a gain ought to constitute an offence in the absence of any net economic loss to the victim. To say that the 'crucial characteristic' is dishonesty or to rely upon making the gain being 'anti-social' is not good enough.[20] There must be something identifiable at stake beyond the financial interests of the 'victim' to warrant criminalising the conduct of the perpetrator. If there is not, it may be that the offences have been drafted or interpreted in a manner that is unjustifiably broad—as some critics have alleged.

In the absence of guidance from the courts or legislature, I have reviewed the academic literature in search for rationales for the criminalisation of fraud that are not founded upon actual or potential losses inflicted upon individual victims. My research has yielded specific rationales such as George Fletcher's 'commercial autonomy theory'. It has also yielded more general rationales for the imposition of criminal sanction drawn from the work of scholars like Joel Feinberg and Richard Posner, which may be applied to the criminalisation of lossless frauds. As noted in the introduction, I have grouped these rationales into three categories concerning: (1) non-financial harm suffered by individual victims; (2) exploitation of individual victims; and (3) harm inflicted upon public interests. I will address each of them in turn.

9.3 The non-financial harm inflicted upon the individual victim

The first potential rationale for the prohibition of lossless frauds is the interest in preventing the infliction of some non-financial harm upon individual victims. The difficulty with this rationale is identifying an *appropriate* harm. Whilst lossless frauds

---

[18] Ibid 97-98. The better answer to the example may be that the gain of the developer was too remote from his deception of the planning committee to render the deception fraudulent.
[19] David Ormerod, 'The Fraud Act 2006 – Criminalising Lying?' [2007] *Criminal Law Review* 193, 197.
[20] Coffee (n 15) 127 ('the governing standards seems to be that of fair play, an obviously elusive standard upon which to make the question of criminal liability turn').

cause their victims to suffer inconvenience, embarrassment and resentment, not every experience that causes inconvenience, embarrassment or resentment involves the kind of 'harm' that is worthy of prohibition by the criminal law. Moreover, many of the unpleasant consequences of lossless frauds are simply consequences of being deceived, as opposed to being induced by deception to agree to a transaction. Therefore, to avoid the untenable argument that a person is 'harmed' any time he or she is deceived, which undoubtedly would stretch the scope of the criminal law far beyond its acceptable limits, it is necessary to identify something about lossless frauds that inflicts harm of a kind worthy of prohibition. This requires consideration of the 'harm principle'.

9.3.1 The harm principle

The expression the 'harm principle' was first used to describe an argument made by John Stuart Mill—namely, that the 'only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'.[21] The harm principle built upon Mill's argument may be used to demonstrate both the legitimacy of a law that prevents some kind of harm to others and the illegitimacy of a law that does not.[22] It has had a powerful influence upon the criminal law. Today it is routine to characterise offences by reference to the harms they seek to redress.[23] It is also routine to question the legitimacy of offences that do not address cognizable harms.[24]

Nevertheless, the expression 'the harm principle' is vague in several senses.[25] Whilst some use it to describe the principle articulated by Mill, others, most notably Joel Feinberg,[26] use it to describe a more inclusive principle—that preventing harm

---

[21] John Stuart Mill, *On Liberty and Other Essays* (Oxford University Press, 2008) 14.
[22] James Edwards, 'Harm Principles' (2014) 20 *Legal Theory* 253, 256-258.
[23] Joel Feinberg, *Harm to Others* (Oxford University Press, 1984) 13; Bernard Harcourt, 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109, 109-112; Antony Duff and Sarah Marshall, "Abstract Endangerment', Two Harm Principles, and Two Routes to Criminalisation' (2015) 3(2) *Bergen Journal of Criminal Law and Criminal Justice* 132; Meir Dan-Cohen, 'Defending Dignity' in UC Berkeley Public Law and Legal Theory Research Paper Series (2002) 151 ('Liberal criminal law theory has long been dominated by the harm principle').
[24] Harcourt (n 23) 134-138.
[25] Duff and Marshall (n 23) 135, 148.
[26] Joel Feinberg, *Harm to Others* (n 23).

to others is *an* acceptable reason to prohibit conduct, not the *only* acceptable reason. This version of the principle leaves open the possibility that there might be legitimate reasons to enact laws beyond preventing harm to others. Moreover, as Duff and Marshall have demonstrated, the principles articulated by Mill and Feinberg may be interpreted in two distinct senses—first, as narrowly permitting laws that prohibit conduct that is itself harmful to others; and secondly, as more broadly permitting laws that prohibit conduct, which itself may or may not be harmful to others, where the *prohibition* will prevent harm to others.[27]

There is also disagreement about what constitutes 'harm'.[28] One reason for the disagreement is that Mill himself never provided a definition.[29] Another is that conduct may be harmful in one sense or to one person but beneficial in or to another.[30] Yet another is that there are forms of harmful conduct that do not warrant prohibition. Think of a boxer who gets hit during a fight. In a literal sense, the boxer has been harmed. However, as the boxer entered the fight knowing that he would probably get hit, it seems proper to conclude that the other boxer should not be subjected to criminal penalty—assuming, of course, that he did not cheat, for example, by placing a hard object inside his glove, or taking a shot after the bell had rung.[31]

The boxing example demonstrates the need to confine the meaning of the 'harm' that the harm principle seeks to prevent. If an overly broad approach is taken, almost any form of conduct may be prohibited in reliance on some version of the harm principle.[32] On the other hand, however, an unduly narrow approach may place many forms of harmful conduct beyond the reach of the law. Accordingly, for the

---

[27] Duff and Marshall (n 23) 134-135. See also Victor Tadros, 'Harm, Sovereignty and Prohibition' (2011) 17 *Legal Theory* 35, 37.
[28] See generally Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2007) 70-71.
[29] C Edwin Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 *UCLA Law Review* 964, 1013; Harcourt (n 23) 114; Alex Steel, 'The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31 *UNSW Law Journal* 712, 713; Andrew Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th ed, Hart Publishing, 2019) 686.
[30] Harcourt (n 23) 114, 119-120, 182-183.
[31] Feinberg, *Harm to Others* (n 23) 220.
[32] Harcourt (n 23) 113.

harm principle to provide a reliable basis upon which to justify criminal laws, there must be a way to differentiate between different kinds and levels of harm.

Feinberg dealt with these problems in his seminal work titled *The Moral Limits of the Criminal Law*. He put forward an inclusive version of the harm principle, pursuant to which preventing harm is a *good reason* to prohibit conduct, but not the *only good reason*. According to Feinberg:

> It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.[33]

Feinberg dealt with the problem of over-inclusiveness by defining the 'harm' prevented by his harm principle as encompassing only 'harms' that were also 'wrongs'.[34] He took a broad approach by defining a 'harm' as a 'thwarting, setting back, or defeating of an interest'.[35] But he narrowed the scope of the principle by defining a 'wrong' as an act that is 'morally indefensible' and in 'violation' of another person's 'moral right'.[36] Thus, according to Feinberg's version of the harm principle: '*B* is *A*'s victim if and only if *A* … both sets back [*B*'s] interests and wrongs [*B*]'.[37] In the boxing example, the boxer is not the victim of his opponent because, although his interests have been set back by the punch, he has not been wronged.

Feinberg's analysis of the harm principle is regarded as seminal. Ormerod and Laird, for example, refer to it as '[b]y far the most refined examination' of the principle.[38] More importantly, however, Feinberg's splitting up of the analysis into 'harms' and 'wrongs' provides a useful tool by which to examine the nature of the

---

[33] Feinberg, *Harm to Others* (n 23) 26.
[34] Feinberg, *Harm to Others* (n 23) 36 ('only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense'). See also Joel Feinberg, *Harmless Wrongdoing* (Oxford University Press, 1990) xxvii-xxix. See also Duff and Marshall (n 23) 140.
[35] Feinberg, *Harm to Others* (n 23) 33.
[36] Feinberg, *Harm to Others* (n 23) 105-106, 110-111, 219.
[37] Feinberg, *Harmless Wrongdoing* (n 34) xxix.
[38] David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th ed, Oxford University Press, 2018) 11. See also Husak (n 28) 71; Harcourt (n 23) 135; Green, *Thirteen Ways to Steal a Bicycle* (n 1) 72-73.

conduct involved in a lossless fraud. It is appropriate to start by considering whether the perpetrator of a lossless fraud wrongs her or his victim.

9.3.2 The wrongs of lossless frauds

For conduct to be wrongful, Feinberg required the conduct to: (a) violate a 'moral right' belonging to another person; and (b) do so in a way that is 'morally indefensible'.[39] He described a 'moral right' as 'a claim backed by valid reasons and addressed to the conscience of the claimee or to public opinion'.[40] And he described the phrase 'morally indefensible' as 'the most generic term for actions and omissions that have no adequate justification or excuse'.[41]

Although Feinberg's approach is regarded as seminal, his two requirements have been criticised.[42] The main reason why is that they require there to be a pre-existing system of moral rights upon which to build the harm principle. By this I mean that they require conduct to be immoral before it can be considered to be harmful.[43] This criticism may be potent in relation to conduct the immorality of which is questionable. However, the criticism is less concerning where the immorality of the conduct in question is well-established, as it is with respect to lying.

In relation to Feinberg's first requirement—that the conduct violate a 'moral right' belonging to another person—those who perpetrate lossless frauds may be characterised as violating the moral right of their victims not to be deceived. This moral right is reflective of a moral duty not to deceive others that is recognised by moral philosophers.

Moral philosophers tend to agree that there is a moral presumption against lying—that lies carry 'an initial negative weight'.[44] The reasons given for this moral

---

[39] Feinberg, *Harm to Others* (n 23) 108.
[40] Feinberg, *Harm to Others* (n 23) 110.
[41] Feinberg, *Harm to Others* (n 23) 108.
[42] See, eg, Hamish Stewart, 'Harms, Wrongs, and Set-Backs in Feinberg's Moral Limits of the Criminal Law' (2001) 5 *Buffalo Criminal Law Review* 47, 52.
[43] Stewart (n 43) 56.
[44] Joseph Kupfer, 'The Moral Presumption Against Lying' (1982) 36 *Review of Metaphysics* 103, 103 quoting Sissela Bok, *Lying: Moral Choice in Public and Private Life* (Harvester Press, 1978) 32. See also Arnold Isenberg, "Deontology and the Ethics of Lying" (1964) 24 *Philosophy and*

presumption are varied.[45] From the deontological perspective, lying is wrong because it 'interferes with its victim's rational deliberation',[46] 'robs a person of her prospects for making certain rational choices about what to do or what to believe',[47] and thereby treats the person as a 'mere means, a thing, a tool'[48] or 'disrespectfully, even with contempt'.[49] From a more practical perspective, lying infects the person's decision-making process by fostering the creation of false beliefs.[50] Those who are deceived may act in ways in which they would not have acted had they known the truth—as Kupfer puts it, '[u]nwarranted inferences are made; barren plans of action laid; irrelevant courses of inquiry opened'.[51] From a relationship perspective, lying involves 'the creation, and simultaneous breach, of a relationship of trust between speaker and listener'.[52] From an emotional perspective, lying causes the person to 'feel both resentment and disappointment' and may cause the person to 'become more suspicious of information provided by others in the future'.[53] And lying even has a negative impact upon the liar—not only a loss of credibility and integrity,[54] but also a restriction of freedom brought about by having to devote energy to keeping lies from being discovered.[55]

In relation to Feinberg's second requirement—that the violation of the moral right be done in a way that is 'morally indefensible'—the situation is not so straightforward. The notion that the violation of a moral right must be morally

---

Phenomenological Research 463, 475-479; Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22 *Law and Philosophy* 393, 394 and 431.

[45] Alexander and Sherwin (n 44) 395 ('Lying in this sense is widely condemned as wrong, but opinions differ as to why').

[46] Alan Strudler, 'Incommensurable Goods, Rightful Lies and the Wrongness of Fraud' (1998)146 *University of Pennsylvania Law Review* 1529, 1546.

[47] Ibid.

[48] Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge University Press, 1996) 140-141; Paul Faulkner, 'What is Wrong with Lying' (2007) 55 *Philosophy and Phenomenological Research* 535 ('one thing wrong with lying is that it involves manipulation'); Cass Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford University Press, 2021) 31.

[49] Sunstein (n 48) 31; Alexander and Sherwin (n 44) 397.

[50] Alexander and Sherwin (n 44) 395.

[51] Kupfer (n 44) 106-107; Thomas Carson, *Lying and Deception: Theory and Practice* (Oxford, 2010) 98; Alexander and Sherwin (n 44) 395.

[52] Stuart Green, 'Lying, Misleading, and Falsely Denying' (2001) 53 *Hastings Law Journal* 157, 166. See also Bok (n 44) 28-30; Falkner (n 48) 538-539; Sunstein (n 48) 27.

[53] Bok (n 44) 20-21.

[54] Bok (n 44) 24.

[55] Kupfer (n 44) 119.

indefensible recognises that some violations of moral rights may be morally *defensible*. Accordingly, to apply Feinberg's second requirement to lossless frauds, it is necessary to consider whether there are circumstances in which deceiving someone for the purpose of personal financial gain is morally defensible.

Apart from absolutists like Immanuel Kant, who argued that it would be wrong to lie even to a murderer looking for his next intended victim,[56] moral philosophers generally recognise that the moral presumption against lying may be displaced in certain circumstances. The primary circumstance arises where lying is necessary to prevent harm—to oneself;[57] or even more so to someone else.[58] Kupfer referred to these kinds of lies as 'defensive lies' and likened them to using force against another person in self-defence.[59] Other circumstances may include false pleasantries, false gratitude, false excuses and other social devices, which may be roughly described as 'white lies'.[60] But they do not tend to include self-interest.[61]

A utilitarian might argue that lying out of self-interest could be morally defensible where the happiness brought about by the lie outweighs the unhappiness the lie might cause—not just to the liar, but to anyone affected by the lie.[62] An obvious example would be a homeless person who lies to obtain money to buy food from someone too wealthy to notice the loss of the money. However, even a utilitarian would be cautious about sanctioning that kind of deception. Most utilitarians still recognise the moral presumption against lying because the consequences of deception are so hard to predict.[63] The net benefits of the lie would

---

[56] Immanuel Kant, 'On a Supposed Right to Lie Because of Philanthropic Concerns' in Kevin DeLapp and Jeremy Henkel (eds), *Lying and Truthfulness* (Hackett, 2016) 81. See also Strudler (n 46) 1546.
[57] Lisa Griffin, 'Criminal Lying, Prosecutorial Power, and Social Meaning' (2009) 97 *California Law Review* 1515, 1551-1552.
[58] Green (n 52) 168-169.
[59] Kupfer (n 44) 110. See also Sunstein (n 48) 25-26.
[60] Bok (n 44) 57-58; Kupfer (n 44) 108-113; Sunstein (n 48) 25.
[61] Sunstein (n 48) 32 (concluding that '[p]urely self-interested lying is a moral wrong'); Strudler (n 46) 1547 ('There is no suggestion that it might be morally permissible—consistent with respect for individual autonomy—to lie for personal gain').
[62] Charles Fried, *Right and Wrong* (Harvard University Press, 1978) 62; Bok (n 44) 48; Carson (n 51) 89; Sunstein (n 75) 26; Alexander and Sherwin (n 44) 399 (giving the example of David Nyberg's argument that truth telling is 'morally overrated').
[63] Carson (n 51) 89-95 quoting John Stuart Mill, *Utilitarianism* (Hackett, 1979) 22-25; Sunstein (n 75) 27-28 ('From the utilitarian standpoint, it is almost certainly good to have a strong ethical taboo on

have to be clear and overwhelming before the telling of the lie was worth the risk of its potentially negative consequences.

In these circumstances, it seems fair to conclude that lying for financial gain is prima facie 'wrongful' according to Feinberg's conception of the word because lying for financial gain involves violating a moral right in a way that is usually morally indefensible. However, consistent with fact that the fraud offences contain safety value elements that require proof of dishonesty or intent to defraud, there may be circumstances in which lying for financial gain is morally defensible notwithstanding the strength of the presumption against lying.

9.3.3 The difficulty in identifying individual harm inflicted by lossless frauds

For conduct to inflict harm, Feinberg argued that the conduct has to cause a 'setback to interests'. He differentiated between two kinds of interests. The first he labelled 'welfare interests'. These are the most basic interests upon which all others depend: 'achieving and maintaining that minimum level of physical and mental health, material resources, economic assets, and political liberty that is necessary if we are to have any chance at all of achieving our higher goals or well-being'.[64] The second kind he labelled 'ulterior interests'. These are less basic interests that differ from person to person—buying a yacht, winning glory or fame, advancing a cause, or acquiring political power, for example.[65] According to Feinberg, the criminal law can protect both kinds of interests, but should only do so by protecting welfare interests, not ulterior interests:

> If I have an interest in making an important scientific discovery, creating valuable works of art, or other personal achievements, the law will protect that interest by guarding my welfare interests that are essential to it. But given that I have my life, health, economic adequacy, liberty and security, there is nothing more that the law (or anyone else, for that matter) can do for me; the rest is entirely up to me.[66]

---

lies, which often create a great deal of harm') and 35; Alexander and Sherwin (n 44) 398 ('even avowed consequentialists are apt to recommend a strong rule or presumption against lying').
[64] Feinberg, *Harm to Others* (n 23) 57.
[65] Ibid 60.
[66] Ibid 62.

The ‘setbacks’ to which Feinberg referred were those forms of conduct that reverse or turn away a person’s interests.[67] But he also grouped in conduct that *defeats* an interest by destroying the conditions necessary for its fulfilment, *thwarts* an interest by blocking or frustrating its progress but not necessarily putting it in reverse, or *impedes* an interest by slowing its progress but not reversing or stopping it. Feinberg was also careful to differentiate between setbacks to interests, which may constitute being harmed, and merely being hurt or offended, which may not. Of these unhappy states, he said:

> They come to us, are suffered for a time, and then go, leaving us as whole and undamaged as we were before. The unhappy mental states they produce are motley and diverse. They include unpleasant sensations (evil smells, grating noises), transitory disappointments and disillusionments, wounded pride, hurt feelings, aroused anger, shocked sensibility, alarm, disgust, frustration, impatient restlessness, acute boredom, irritation, embarrassment, feelings of guilt and shame, physical pain (at a readily tolerable level), bodily discomfort, and many more. In all but exceptional circumstances … people do not have as ulterior focal aims, interests simply in the avoidance of these states as such. And like various pleasures of the moment, these passing unpleasantnesses are neither in nor against one’s interests. For that reason, they are not to be classified as harms.[68]

For lossless frauds to fall within Feinberg’s version of the harm principle, the fraud must bring about a setback to interests in the sense just described: a setback to a welfare interest, not an ulterior interest; a harm, not a hurt. The most obvious setback brought about by fraud is financial. The victim loses money, which sets back her or his welfare interest in financial security. Indeed, Feinberg himself grouped fraud with larceny and robbery in the category of crimes that involve ‘depletions of one’s material resources’.[69] But this setback is not present in a lossless fraud. If there is harm in a lossless fraud, it must lie elsewhere.

Although the victim of a lossless fraud suffers no financial harm, he or she is nevertheless placed in an unenviable position. In cases of fraud in the factum, the

---

[67] Ibid 53.
[68] Ibid 45.
[69] Ibid 62.

victim is subjected to great inconvenience. The victim has acquired property that he or she did not really want. To recoup the loss, the victim must go to the trouble (and possibly expense) of finding a new purchaser and selling the property. Moreover, to acquire property of the kind that he or she did actually want—i.e. to put her or himself in the position he or she would have been in had the perpetrator been telling the truth—the victim must go through the process of finding and purchasing the property all over again. None of this time and effort would have been required if the perpetrator had not misrepresented the nature of the consideration.

Furthermore, in cases of *both* fraud in the factum *and* fraud in the inducement, the victim is led to make a deal that he or she did not really want to make and suffers the emotional consequences of being deceived. Scholars have identified the emotional toll of deception as one of the unique features of fraud compared to other property offences. The person who is robbed or extorted may feel anger or shock or fear. But only victims of fraud suffer the embarrassment, resentment and loss of self-esteem that accompanies being made to feel like a fool.[70] As Adler has argued in relation to deception more generally:

> Depending on the nature of the deception, the victim feels anything from foolish or tricked to corroded. Not only has he been misled, but the embarrassment or horror of it is that he has been duped into collaborating on his own harm. Afterward, he cannot secure the relief of wholly locating blame externally.[71]

From this perspective, it is easy to sympathise with the victim of a lossless fraud. Nobody likes to be inconvenienced. Nobody likes to be deceived. And nobody likes to feel used or manipulated. The problem is identifying within this infliction of inconvenience and hurt feelings 'harm' of a kind that is worthy of prohibition by the criminal law. For lossless frauds to fall within Feinberg's version of the harm principle, it is necessary to identify some *welfare interest* set back by the perpetrator. Otherwise, the lossless fraud is best described as a form of 'harmless wrongdoing'.

---

[70] Stuart Green, Lying, Cheating, and Stealing: *A Moral Theory of White Collar Crime* (Oxford, 2006) 154 quoting Peter Allridge, 'Sex, Lies and the Criminal Law' (1993) 44 *Northern Ireland Legal Quarterly* 250, 251.
[71] Jonathan Adler, 'Lying, Deceiving, or Falsely Implicating' (1997) 94 *Journal of Philosophy* 435, 442

9.3.4 Fletcher's commercial autonomy theory

The best argument that lossless frauds involve a setback to welfare interests appears to be that the harm is inherent in the interference with the victim's decision-making process. George Fletcher made an argument of this kind in his influential work *Rethinking Criminal Law*.[72] Fletcher argued that Anglo-American law prohibits lossless frauds because it treats 'the freedom to dispose of one's property as one sees fit … as an end in itself'.[73] He described this freedom as 'commercial autonomy'.[74]

Fletcher's 'commercial autonomy theory' is Kantian in approach. He developed the theory by comparing Anglo-American Law with the law in Germany. Unlike Anglo-American law, German law does require proof that the victim suffered an economic loss.[75] Fletcher argued that the Anglo-American approach reflects a 'deeply rooted … aversion to making substantive judgments about the comparative value of exchanged goods'.[76] He characterised that aversion as a consequence of the faith placed by Anglo-American culture in 'the market as the arbiter of commercial justice'.[77]

> A culture that puts its faith in the market is not inclined to second-guess a buyer's judgment to determine whether he received value when he would not have not made the deal had he known the true nature of the goods. Yet the market can work only so far as commercial autonomy is unrestricted, and therefore the task of the criminal law becomes the protection of this autonomy rather than the safeguarding of substantive commercial justice.[78]

In support of his argument that Anglo-American law does not concern itself with the relative value of any exchange to either party, Fletcher relied on the principle of contract law that nominal consideration is good consideration.[79] By 'faith in the

---

[72] George Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000)
[73] Ibid 53.
[74] Ibid.
[75] Ibid.
[76] Ibid 54.
[77] Ibid.
[78] Ibid.
[79] Ibid.

market' he meant faith that the parties to the transaction can be trusted to act according to their own interests—that if a person agrees to a bargain that seems imprudent to the rest of the world, the person must have had reasons for doing so, and the conduct of the other person cannot be impugned just because those reasons happened to be wrong.

Other scholars have suggested similar rationales for the criminalisation of fraud more generally, as opposed to lossless frauds per se. For example, Stephen Shute and Jeremy Horder argued that the wrongfulness of obtaining property by deception 'centres on the abuse of what should have been an autonomy enhancing transaction'.[80] According to Shute and Horder: '[t]he fraudster abuses the control that he or she has over the information on which victims make their decisions about an admittedly voluntary transfer: the victim's chances of making an authentic choice are deliberately or recklessly undermined by the fraudster'.[81] Likewise, Simester et al described fraud offences as prohibiting 'an attack upon the victim's entitlement to dispose of his property by his own full and informed choice … an attack upon the victim's rights of free will and autonomy, and upon his freedom to exercise control over his own situation'.[82] Finally, according to Alex Steel: 'if a person engages in deceptive conduct … it is appropriate to prohibit such behaviour on the basis that there is clear harm to [the victim's] interests and ability to function as a member of society and the ability to make informed choices'.[83]

According to these rationales, the law prohibits fraud because one purpose of the fraud offences is to safeguard the 'commercial autonomy' or 'chances of making an authentic choice' or 'free will and autonomy' or 'ability to make informed choices' of individual members of society. The law is not concerned with whether the victim suffered an economic loss or made an economic gain. Nor is it concerned with the gain or loss to the perpetrator. The gravamen of the offence is the interference with the ability of the victim to make a commercial decision free from the influence of false

---

[80] Stephen Shute and Jeremy Horder, 'Thieving and Deceiving: What is the Difference?' (1993) 56 *Modern Law Review* 548, 553.
[81] Ibid.
[82] Simester et al (n 29) 646.
[83] Steel (n 29) 728. See also Arthur Ripstein, 'Beyond the Harm Principle' (2006) 34 *Philosophy & Public Affairs* 216, 234.

information—to adopt the language used by Judge Learned Hand, to protect the victim's 'chance to bargain with the facts before him'.[84] It reflects two of the core reasons why moral philosophers recognise a moral presumption against lying—namely, respect for the autonomy and personhood of the victim, and impact upon the victim's decision-making process.

The problem with this approach is that interference with commercial autonomy is difficult to characterise as a 'setback'. For interfering with commercial autonomy to constitute a 'setback', inducing a person to make a commercial decision he or she would otherwise not have made must fit the description of a 'setback' irrespective of the consequences. To put it more bluntly, inducing a person to make a commercial decision he or she would otherwise not have made must constitute a setback even if the person suffers no financial loss or other negative consequences; and, more importantly, it must constitute a setback even if the person makes a significant financial gain. This approach does not sit well with the ordinary meaning of the word 'setback'. If A tricks B into agreeing to a transaction that (for whatever reason) leads to B making a gigantic profit, nobody would say that B has suffered a 'setback' just because B was deceived—the good consequences would outweigh whatever was bad about their cause.[85]

When these realities are taken into account, Fletcher's commercial autonomy theory seems to provide an explanation as to why lossless frauds are *wrong* rather than why they are harmful.[86] From this perspective, to treat the interference with commercial autonomy as a form of harm may be an example of stretching of the harm principle criticised by scholars like Bernard Harcourt and Meir Dan-Cohen—i.e. adopting a broad definition of 'harm' to make harmless conduct fit within the harm

---

[84] 56 F 2d 747 (2nd Cir, 1932).
[85] Dennis Baker, 'The Harm Principle v Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation' (2008) 33 *Australian Journal of Legal Philosophy* 66, 78 (referring to Feinberg's example of a wrongly broken promise that 'redounds by fluke to the promisee's advantage' as being wrong but not harmful). One possible exception may be where the victim was deprived of property that was of significant sentimental or other non-financial value: Green, *Thirteen Ways to Steal a Bicycle* (n 1) 76.
[86] See also Baker (n 85) 84 (making the same point with respect to Kant's categorial imperative).

principle.[87] Alternatively, Fletcher's theory may be better characterised as falling within alternatives to the harm principle such as Ripstein's 'sovereignty principle',[88] Dan-Cohen's 'dignity principle'[89] or Feinberg's 'exploitation principle'.[90] Whatever the answer, the reality that lossless frauds cannot readily be characterised as inflicting individual *harm* suggests that the rationale underlying the prohibition of lossless frauds may be better characterised as lying elsewhere.

9.3.5 Application of Fletcher's theory to frauds that do not defraud

Notwithstanding the difficulty involved in characterising the interference with 'commercial autonomy' as a form of harm, the bulk of the literature relevant to the fraud offences is broadly consistent with Fletcher's commercial autonomy theory.[91] For that reason, it is appropriate to consider whether the theory provides a justification for the criminalisation of frauds that do not defraud like making money by publishing fake news. There appear to be several ways in which to approach the issue.

From one perspective, Fletcher's commercial autonomy theory does not support the criminalisation of frauds that do not defraud. Fletcher described 'commercial autonomy' as 'the freedom to dispose of one's *property* as one see's fit'[92] and frauds that do not defraud do not necessarily undermine that freedom. Take the fake news publisher, for example. The publisher deceives the readers, who make up the attention side of the two-sided market for online news. However, the deception does not interfere with the freedom of the readers to dispose of their *property* as they see fit. The readers provide *attention*, not property. Nor does the

---

[87] Bernard Harcourt, 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109, 113; Meir Dan-Cohen, 'Defending Dignity' in *UC Berkeley Public Law and Legal Theory Research Paper Series* (2002) 152 ('it has proved remarkably easy to dress up moral objections to various forms of conduct ... in their alleged harmful consequences'). See also Steel (n 29) 716-717.
[88] Ripstein (n 83).
[89] Meir Dan-Cohen (n 87) 150 ('the view that the main goal of the criminal law is to defend the unique moral worth of every human being').
[90] See section 9.4.2 above.
[91] See above.
[92] Fletcher (n 72) 53.

publisher interfere with the freedom of the ad server. The ad server gets exactly that for which it paid—namely, exposure to the readers. But that is just one perspective.

From another perspective, Fletcher's theory does support the criminalisation of frauds that do not defraud. Fletcher said that Anglo-American law protects the freedom to dispose of one's assets as one sees fit 'as an *end in itself*'.[93] And he argued that it takes this approach because of the faith that Anglo-American culture puts 'in the market as the arbiter of commercial justice'.[94] But his reasoning on this point was incomplete. First, Fletcher said that the prohibition of lossless frauds reflects the faith of Anglo-American culture in the market. Secondly, he said that a culture that puts faith in the market is not inclined to second-guess the victim's judgment. Thirdly, he said that the market can only work so far as commercial autonomy is unrestricted. But he did not go the next step. He did not say *why* the market cannot work unless commercial autonomy is unrestricted. Taking this next step requires consideration of the impact of the lossless fraud upon the victim.

As I explained earlier, the victim of a lossless fraud suffers no financial setback, but does suffer the inconvenience, embarrassment, resentment, loss of self-esteem and loss of trust that accompanies being deceived by another person who is acting for the purpose of personal financial gain. Fletcher's theory posits that the market would not work if its participants were not protected from this kind of unpleasantness. However, as these unpleasant experiences are really symptoms of being deceived and exploited, it seems that his theory is really that the working of the market depends upon participants not being subjected to deceptive economic exploitation. If this is correct, it means that the law protects 'commercial autonomy' because it either seeks to prevent deceptive economic exploitation for its own sake, or to ensure participation and efficiency in commercial dealings. I address these rationales below.[95] For present purposes, it suffices to say that, from this perspective, if frauds that do not defraud also involve deceptive economic exploitation, or undermine participation and efficiency in commercial dealings, they

[93] Ibid 53.
[94] Ibid 54.
[95] See section 9.5 below.

may be prohibited for the same reasons underlying why Fletcher characterised the current law as seeking to protect commercial autonomy.

From yet another perspective, it is worth considering broader meaning of 'commercial autonomy' as a concept. Fletcher's theory assumes that the interest in 'commercial autonomy' is linked to the interest to dispose of property. But Fletcher developed this theory by reasoning backwards from the existing law. He did not develop a theory of 'commercial autonomy' and then argue that the law should prohibit conduct in accordance with his theory. Rather, he examined the conduct prohibited by the law and then developed the commercial autonomy theory to explain why the law prohibited the conduct. Of course, there is nothing wrong or unusual about this approach. It just means that it may not be appropriate to treat Fletcher's conception of 'commercial autonomy' as the last word on the concept.

Fletcher himself recognised that there is more to the so-called 'property offences' than the endangerment of property interests.[96] In the introduction to his analysis of the interests protected by theft offences, for example, he said that '[s]omething seems to have been lost in the modern reduction of theft offences to parallel attacks on [that] single interest'.[97] And there are good reasons to construe the concept of commercial autonomy as being concerned with more than deprivation of property.

New methods of obtaining money or property have become prominent since Fletcher wrote *Rethinking Criminal Law*. The most significant for present purposes are those that rely upon two-sided markets. Online content providers, for example, deprive internet users of attention to make money from advertisers. The content providers, advertisers *and the readers* participate in the market for attention. For the content providers and the advertisers, the attention of the readers is a valuable commodity. Much like more conventional forms of property, the attention of the readers is commodifiable (in the sense that it is capable of being bought and sold) and rivalrous (in the sense that consumption of it by one person will prevent

[96] Ibid 31.
[97] Ibid.

simultaneous consumption of it by another).[98] Accordingly, the interest of the readers in the deprivation of their attention arguably may be characterised as an element of their 'commercial autonomy'. On this approach, fake news publishers deceiving readers to profit from advertisers undermines the 'commercial autonomy' of the readers because, even though they do not provide money or property, they do provide another valuable commodity.

In summary, although Fletcher developed his commercial autonomy theory to explain why the law prohibited procuring transfers of property by deception, both the underlying rationale of the theory and changes in modern business structures may warrant taking a broader approach to the concept. The interest in 'commercial autonomy' appears in reality to be an interest in not being deceptively exploited for the personal financial gain of another—a very Kantian interest against being used as a 'mere means'. Moreover, as modern businesses may turn a profit by deceiving people without depriving them of property, the commercial autonomy of the modern consumer may be appropriately characterised as encompassing the interest of being free from deceptive economic exploitation even where the consumer is not deprived of money or property. On either of these approaches, Fletcher's theory supports the criminalisation of frauds that do not defraud.

9.3.6 Note on Ciminelli v United States

Until relatively recently, the federal appellate circuit courts in the United States adopted an approach to the mail and wire fraud statutes reminiscent of Fletcher's commercial autonomy theory (albeit without referring to Fletcher's work or the theory itself). When conceptualising the 'actual harm or injury' the prosecution had to identify to establish that the defendant's scheme was 'to defraud', the courts defined 'actual harm or injury' as including the denial of the victim's 'right to control its assets by depriving it of information necessary to make discretionary economic decisions'.[99] This *right to control theory* drew from older cases in which the courts spoke of people

[98] Green, *Thirteen Ways to Steal a Bicycle* (n 1) 74, 208-211.
[99] *United States v Rossomando*, 144 F 3d 197, 201 n 5 (2nd Cir, 1998).

possessing a 'right of open and fair dealing',[100] of having lost the 'chance to bargain with the facts',[101] or of 'property' in a thing including 'the aggregate of the owner's rights to control and dispose of that thing'.[102] According to the theory, which had been adopted by a majority of federal appellate courts in the United States,[103] the 'right to control' was a property right, not an intangible right like the right to 'honest services' considered in *McNally v United States*.[104]

However, in *Ciminelli v United States*,[105] the Supreme Court of the United States disapproved decades of appellate circuit court decisions by holding that the 'right-to-control theory could not form the basis for a conviction under the federal fraud statutes'.[106] The appellant in that case was convicted of wire fraud for paying an associate of New York Governor Andrew Cuomo to ensure that the appellant's

---

[100] *Wilson v United States*, 190 F 427, 433 (2nd Cir, 1911).

[101] *United States v Rowe*, 56 F 2d 747, 749 (2nd Cir, 1932).

[102] *Crane v Commissioner*, 331 US 1, 6 (1947).

[103] Courts that approved the right to control theory: First Circuit: *United States v Doherty*, 867 F 2d 47, 60 (1st Cir, 1989); Second Circuit: *United States v Binday*, 804 F 3d 558, 570 (2nd Cir, 2015); Fourth Circuit: *United States v Gray*, 405 F 3d 227, 234 (4th Cir, 2005); Fifth Circuit: *United States v Fagan*, 821 F 2d 1002, 1010 (5th Cir, 1987); Seventh Circuit: *United States v Kelerchian*, 937 F 3d 895, 909-914 (7th Cir, 2019); Eighth Circuit: *United States v Shyres*, 898 F 2d 647, 652 (8th Cir, 1990); Tenth Circuit: *United States v Welch*, 327 F 3d 1081, 1108 (10th Cir, 2003); Eleventh Circuit: *United States v Maxwell*, 579 F 3d 1282, 1302-1303 (11th Cir, 2009); DC Circuit: *United States v Madeoy*, 912 F 2d 1486, 1492 (DC Cir, 1990). Courts where the authorities conflicted: Third Circuit: *United States v Zauber*, 857 F 2d 137, 147 (3rd Cir, 1988) cf *United States v Baroni*, 909 F 3d 550, 566-567 (3rd Cir, 2018); Sixth Circuit: *United States v Kerkman*, 866 F 3d 877, 880 (6th Cir, 1989) cf *United States v Sadler*, 750 F 3d 585, 591 (6th Cir, 2014); Ninth Circuit: *United States v Bruchhausen*, 977 F 2d 464, 468 (9th Cir, 1992) cf *United States v Treadwell*, 593 F 3d 990, 997-998 (9th Cir, 2010).

[104] 483 US 350 (1987). See Chapter 4. The right to control theory was unusual in that it referred to the *deprivation* of necessary information, as opposed to the *provision* of false information. The use of this language suggested that merely withholding information constituted fraud, which appeared to collide with the maxim *caveat emptor*—i.e. buyer beware. But the courts did not interpret the 'right to control' theory as requiring parties to make full disclosure to each other. The unusual language appears to have taken hold because the theory developed across a series of cases in which employees who had positive duties of disclosure withheld information from employers to make kickbacks. See, eg, *United States v Fagan*, 816 F 2d 1002, 1009 (5th Cir, 1987); *United States v Matt*, 838 F 2d 1356, 1358 (5th Cir, 1988); *United States v Kerkman*, 866 F 2d 877, 880 (6th Cir, 1989); *United States v Shyres*, 898 F 2d 647, 653 (8th Cir, 1990). In cases where the defendant did not have a duty to the victim, the courts used the 'deprivation of necessary information' language to construe misrepresentations made by the defendant as violating the victim's right to control, but apparently did not recognise that that language was inapposite in circumstances where there was no duty to provide information. See, eg, *United States v Dinome*, 86 F 3d 277 (2nd Cir, 1996). See generally Tai Park, 'The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime' (2021) 43 *Cardozo Law Review* 135.

[105] 598 US 306 (2023); 143 SCt 1121.

[106] Ibid 1128.

company received lucrative contracts from a government controlled non-profit organisation. The prosecution alleged that the appellant had deprived the non-profit organisation of 'potentially valuable economic information'—namely, the fact that the bidding had been rigged in the appellant's favour. The Supreme Court held that such information was not 'property' for the purposes of the wire fraud statute: 'Because the theory treats *mere* information as the protected interest, almost any deceptive act could be criminal'.[107]

Despite the similarities between the right to control theory and Fletcher's commercial autonomy theory, the Supreme Court's rejection of the right to control theory in *Ciminelli* does not undermine the argument that Fletcher's commercial autonomy theory provides a rationale for the criminalisation of lossless frauds. The weakness in *Ciminelli* was that the prosecution characterised the *object* of the fraud as 'potentially valuable economic information' rather than money or property. Fletcher did not go so far as to suggest that a person who dishonestly deprives someone of 'potentially valuable economic information' may be convicted of a fraud offence. Rather, he developed the commercial autonomy theory to provide a rationale for the criminalisation of frauds where the object was money or property, but the victim received consideration of equal value in return.

9.4 The exploitation of the individual victim

The second rationale for the prohibition of lossless frauds is the interest in preventing the perpetrator from making a financial gain by dishonestly exploiting the victim. This interest has received less attention in the academic literature,[108] although some scholars have suggested that a dishonest scheme is not fraudulent

[107] Ibid 1127 (emphasis added).
[108] Some retributivists have argued that offenders must be punished to nullify their gains and restore equilibrium to the distribution of benefits and burdens. See, eg, Herbert Morris, 'Persons and Punishment' (1968) 52 *Monist* 475; Jeffrie Murphy, *Retribution, Justice, and Therapy* (Reidel, 1979). But these accounts seek to justify the punishment of offenders—to explain why those who break the law should be made to suffer penalties; they do not seek to justify the criminalisation of conduct by which a person makes an improper gain. In other words, they address "*why* we punish" not "what *entitles* us to punish". See David Dolinko, 'Some Thoughts about Retributivism' (1991) 101 *Ethics* 537, 541.

unless its purpose is to make an unjustified gain.[109] The prevailing approach in difficult cases appears to be to stretch the meaning of the 'harm' that the harm principle seeks to prevent, not to appeal to some other principle.[110] The other reason is that most ways of dishonestly making a financial gain entail dishonestly causing someone to suffer a financial loss. This reason is practical. As the circumstances in which a person may dishonestly make a financial gain without causing someone else to suffer a financial loss are relatively rare, there has been little need to develop a rationale for their criminalisation. Nevertheless, the decided cases demonstrate that the gain made by the perpetrator is itself a relevant consideration in relation to the criminalisation of fraud.

9.4.1 The significance of the gain made by the perpetrator

The courts often refer to the intent to gain by the defendant as indicative of her or his 'intent to defraud' or 'dishonesty'. In the United States, for example, several appellate courts define 'intent to defraud' as something akin to acting 'willfully, and with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another, *or bringing about some financial gain to oneself*'.[111]

The gain made by the perpetrator is also often an underlying feature of lossless frauds. For example, in *United States v Schwartz*,[112] the defendant paid the market price for the night vision goggles, which meant the supplier suffered no financial loss. However, as the defendants on-sold the goggles to buyers in Argentina, they made a financial gain along the way. Similarly, in *Balcombe v De Simoni*,[113] the defendant sold the cooking book for what it was worth, which meant

---

[109] See, eg, GR Sullivan, 'Framing an Acceptable General Offence of Fraud' (1989) 53 *Journal of Criminal Law* 92, 97; Flora Page, 'Defining Fraud: An Argument in Favour of a General Offence of Fraud' (1997) 4 *Journal of Financial Crime* 287, 290; David Ormerod, 'The Fraud Act 2006—Criminalising Lying?' [2007] *Criminal Law Review* 193, 203.
[110] Harcourt (n 23) 113.
[111] *United States v Cloud*, 872 F 2d 846 (9th Cir, 1989). See also *United States v Austin*, 774 F 2d 99 (5th Cir, 1985); *United States v Ellington*, 774 F 2d 1164 (6th Cir, 1985); *United States v Sims*, 985 F 2d 326, 329 (7th Cir, 1990); *United States v Simpson*, 950 F 2d 1519, 1524 (10th Cir, 1991); *United States v Maxwell*, 579 F 3d 1282, 1304 (11th Cir, 2009); *United States v Rubashkin*, 655 F 3d 849, 862 (8th Cir, 2011); *United States v LaPlante*, 714 F 3d 641, 644 (1st Cir, 2013).
[112] 924 F 2d 410 (2nd Cir, 1991). See section 4.3.3 of Chapter 4.
[113] (1972) 126 CLR 576.

the buyer suffered no loss. However, as the defendant was entitled to obtain a commission from the sale, he also made a financial gain along the way. Although the judges in neither case identified the gain made by the defendants as a reason for characterising their conduct as fraudulent, it seems safe to assume that they may have been more hesitant had the defendants not been acting for the purpose of personal financial gain.

From a jurisprudential point of view, the rationale based upon preventing the perpetrator from dishonestly making a financial gain suffers from one flaw. The flaw is that consideration of the gain made by the perpetrator is beyond the scope of the harm principle. Leaving aside harm to public interests, which I address in the next part, the harm principle seeks to justify the criminalisation of wrongful conduct that sets back the interests of individual members of society. It does not seek to justify the criminalisation of wrongful conduct by which individuals advance their own interests whilst leaving others behind. Fortunately, however, the harm principle is not the only liberty-limiting principle available.

All but the staunchest libertarians support an inclusive version of the harm principle: preventing harm to others is *a* good reason to enact a criminal law, not the *only* good reason. Feinberg, for example, took the view that it is appropriate to use penal legislation to prevent harm *or offense* to others.[114] He rejected outright the proposition that it is appropriate to use penal legislation to prevent people from harming themselves—i.e. paternalism.[115] And, for the most part, he rejected the proposition that it is appropriate to use penal legislation to prevent people from acting in a manner that is immoral but not harmful or offensive to others, which he described as 'harmless wrongdoing'.[116]

Feinberg was confident that laws prohibiting pornography, bawdy houses, obscene books, homosexuality, prostitution, private gambling, soft drugs and the like were unjustifiable attempts to impose one kind of morality upon society as a

---

[114] Feinberg, *Harmless Wrongdoing* (n 34) ix-x.
[115] Ibid xvi-xix.
[116] Ibid 318-320.

whole.[117] But he was tentative about other, less defensible so-called immoralities—in particular, those involving exploitation. For the purposes of his analysis, he put forward an 'exploitation principle'. His principle provides an appropriate means by which to characterise the dishonest gain made by the perpetrator of a lossless fraud as the justification for its criminalisation.

9.4.2 The exploitation principle

Feinberg devoted two chapters of the fourth volume of his overall work to exploitation. The 'exploitation principle' he introduced was as follows: 'it is always a good reason in support of a proposed criminal prohibition that it will prevent unjust gain, even when that wrongful gain is not accompanied by any unfair loss'.[118] Although Feinberg rejected the general proposition that 'harmless wrongdoing' should be criminal, he revealed his tentativeness about exploitation when he said that the exploitation principle 'makes stronger claims to our acceptance … than most other forms of legal moralism and must therefore be taken very seriously'.[119] Later, he went even further, describing it as 'legal moralism's last best hope'.[120]

The essential point about Feinberg's exploitation principle is that it provides a rationale for the criminalisation of conduct by which the perpetrator makes a gain without causing any harm.[121] There are definitions of 'exploitation' that require the infliction of harm.[122] There are also definitions of 'exploitation' that do not require the making of a gain.[123] But these definitions are not relevant to Feinberg's principle. The principle contemplates one person (the exploiter) taking advantage of another (the exploitee) to make some kind of gain (financial, sexual, political, etc). The exploitation may lead to the exploitee suffering harm. But it is the gain to the exploiter and the taking advantage of the exploitee, not the harm or possibility of

---

[117] Ibid 131.
[118] Feinberg, *Harmless Wrongdoing* (n 34) 213. See also Joel Feinberg, 'The Paradox of Blackmail' (1988) 1 *Ratio Juris* 83, 83 n 2 ('that it is always a good reason in support of penal legislation that it will prevent wrongful (unjust) gain even when there is no corresponding wrongful loss (harm)').
[119] Feinberg, *Harmless Wrongdoing* (n 34) 176.
[120] Ibid 210. See also Harcourt (n 23) 131.
[121] Ibid 179.
[122] See generally Alan Wertheimer, *Exploitation* (Princeton University Press, 1996) 10-13.
[123] See, eg, Lynn Jansen and Steven Wall, 'Rethinking Exploitation: A Process-Centered Account' (2013) 23 *Kennedy Institute of Ethics Journal* 381.

harm to the exploitee, that the principle seeks to prohibit.[124] It exists to provide an alternative to the harm principle, not to identify a kind of harmful conduct.

The primary difficulty with relying upon 'exploitation' as a justification for criminal laws is differentiating between wrongful and non-wrongful exploitation. There are many kinds of exploitation that are not wrongful. The forager who exploits the natural resources of a forest does not wrong the forest.[125] And the conductor who exploits the talents of an orchestra does not wrong the musicians in the orchestra.[126] Feinberg described these kinds of exploitation as 'utilization'.[127] He conceived the degree to which criminal sanction is justified as dependent upon the *unfairness* of the act of exploitation.[128] Utilization deserves no sanction because it is not unfair. However, beyond obvious instances of legitimate exploitation, the position becomes murky. Fairness is a difficult concept. What seems fair to one person, or from one perspective, may seem unfair to, or from, another.

Feinberg conceptualized the level of unfairness by reference to the means of exploitation, the traits and circumstances of the exploitee exploited by the exploiter, and the discrepancy between the effect of the exploitation as between the exploitee and exploiter.[129] He suggested: (1) coercion and deception are more unfair than other means of exploitation such as manipulation or the making of non-deceptive offers;[130] (2) exploiting virtues, misfortunes and weaknesses is more unfair than exploiting moral flaws or 'undeserved good fortune';[131] and (3) the more the exploiter gains relative to the exploitee, the more unfair the exploitation.[132]

---

[124] Feinberg, *Harmless Wrongdoing* (n 34) 192.
[125] Jansen and Wall (n 123) 387.
[126] Feinberg, *Harmless Wrongdoing* (n 34) 177.
[127] Ibid 199.
[128] Wertheimer (n 122) 10 ('A exploits B when A takes unfair advantage of B').
[129] Feinberg, *Harmless Wrongdoing* (n 34) 179.
[130] Ibid 201 ('It would surely seem that the coercive uses have the greatest tendency to be unfair'), 202 ('the clearest of all examples of unfairness are those in which A takes advantage of B's trust by cheating or freeloading, and thus achieves a dishonest gain for himself').
[131] Ibid 202 ('This puts the moral universe out of joint: untrustworthiness is rewarded and honesty is penalized (or at least unrewarded)').
[132] Ibid 203-204. See also Wertheimer (n 122) 16-28 (considering the benefit to the exploiter, the effect on the exploitee and the process adopted by the exploiter). See also Alan Bogg and John Stanton-Ife, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23 *Legal Studies* 402, 416 (adopting Feinberg's conception of wrongfulness).

The need to consider something as nebulous as 'unfairness' led Jennifer Collins to criticise Feinberg's conception on account of its 'imprecision'.[133] But Feinberg did not intend his conception of exploitation to provide a definition of the concept. Nor did he intend to lay down any hard and fast rules as to when exploitative conduct should be criminalised. As Collins recognised in her critique,[134] Feinberg conceded that it may not be possible to give accurate answers to questions concerning exploitation 'in the absence of a complete normative moral theory'.[135] Accordingly, his conception should be viewed as a tool for analysing the unfairness of exploitative conduct, not a substitute for a normative moral theory he never intended to provide.

More importantly, however, any weakness inherent in having to consider the 'unfairness' of the exploitation is a weakness that is characteristic of any liberty-limiting principle, including the harm principle. The harm principle suggests that conduct should be prohibited where it causes 'harm' to others. But it does not define 'harm'.[136] It leaves what constitutes 'harm' open to interpretation. Feinberg defined the harm contemplated by the harm principle as a wrongful setback to interests. '*B* is *A*'s victim if and only if *A* … both sets back [*B*'s] interests and wrongs [*B*]'.[137] As I explained earlier, this limitation is not radical: it excludes setbacks that are legitimate, such as pain endured by a boxer or losses sustained by an investor. Without it, the harm principle would be over-inclusive.

The harm principle and the exploitation principle both propose that certain kinds of *wrongful* conduct may be prohibited. The harm principle proposes that the law may be used to prevent one person setting back the interests of another where the setback is wrongful. The exploitation principle proposes that the law may be used to prevent a person advancing her or his own interests where the advance is

---

[133] Jennifer Collins, 'Exploitation of Persons and the Limits of the Criminal Law' [2017] *Criminal Law Review* 167, 180.
[134] Ibid 180.
[135] Feinberg, *Harmless Wrongdoing* (n 34) 201.
[136] Bernard Harcourt, 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109, 120 (arguing that the harm principle 'provides no guidance to compare harm arguments').
[137] Feinberg, *Harmless Wrongdoing* (n 34) xxix.

wrongful. The principles are really two sides of the same coin. The person who harms gets ahead by putting others behind. The person who exploits puts her or himself ahead and *leaves others behind*. Both principles seek to prevent unfair adjustment of one person vis-à-vis other members of society. And they are both capable of providing a rationale for the criminalisation of lossless frauds.

9.4.3 The exploitation inherent in lossless frauds

Scholars often describe fraud as involving exploitation. Simester et al, for example, said that fraud 'is a crime *partly* because it entails the manipulation or exploitation of another'.[138] And moral philosophers often treat fraud as an example of wrongful exploitation. Jansen and Wall, for example, said that 'if one person defrauds another and gains from the transaction, then we can say that the person gained excessively, since it is wrong for him to gain at all from the transaction'.[139] So there is no doubt that fraud is recognised as a form of exploitation. But that is not the issue at hand. The issue is whether the exploitation inherent in fraud is the *reason* why it is a crime, not just one of its symptoms.

Simester et al described exploitation as '*partly'* the reason why fraud is a crime. However, in circumstances where the fraud is lossless, the exploitation may in fact be the *only* reason. Whether that is so depends upon the view one takes of the harm involved in the lossless fraud. If one takes the view that the victim has been harmed despite suffering no loss, which entails accepting that the setback to the victim's interest in 'commercial autonomy' is a form of 'harm', then that is the end of the inquiry: the harm principle provides the rationale. However, if one rejects the view that the setback to the interest in 'commercial autonomy' constitutes 'harm', or if one is not convinced that it provides the complete rationale, the exploitation principle provides a compelling alternative rationale for the criminalisation of lossless frauds.[140]

---

[138] Simester (n 29) 646. See also Samuel Buell, 'Novel Criminal Fraud' (2006) 81 *New York University Law Review* 1971, 1974.
[139] Jansen and Wall (n 123) 386.
[140] Another alternative is Arthur Ripstein's 'sovereignty principle'. See Ripstein (n 83). This principle posits that the law may be used to prohibit people from interfering with the ability of people to decide

Lossless frauds are the exact kind of conduct that Feinberg viewed as most worthy of prohibition pursuant to the exploitation principle. Recall the three criteria that Feinberg introduced to gauge the unfairness of an act of exploitation. First, Feinberg said that coercion and deception are worse than other forms of exploitation.[141] Lossless frauds fit within this criterion because they involve deception, or, at least, some form of dishonest conduct. Secondly, Feinberg said that taking advantage of virtues, weaknesses and misfortunes is more unfair than taking advantage of moral flaws or undeserved good fortune; and he explicitly said that taking advantage of trust was 'the clearest of all examples of unfairness'.[142] Lossless frauds fit this criterion because fraud inherently involves taking advantage of the trust the victim places in the truth of the perpetrator's deceptive conduct. They may also involve taking advantage of virtues. For example, in *Balcombe v De Simone*, the defendant took advantage of the victim's generosity: she only bought the cooking book to help him win the competition.[143] And they usually involve taking advantage of weaknesses. In some cases, the weakness is nothing more than credulity or gullibility. In others, however, the weakness may be real vulnerability—many frauds are perpetrated upon the elderly, those with cognitive impairments, and those who are otherwise not financially literate, for example. Thirdly, Feinberg said that the asymmetry in outcome is indicative of unfairness.[144] In a lossless fraud, the victim sustains no economic loss. However, as I explained earlier, the perpetrator usually makes a gain. Whereas before the fraud the perpetrator and victim were at a relative equilibrium, after the fraud the perpetrator has advanced her or his position.

If the exploitation principle is a legitimate liberty-limiting principle, the case for characterising the criminalisation of lossless frauds as being based upon the prevention of the exploitation of the victim is strong. Moreover, the long-standing

---

how to use their powers. It is well-suited to supporting Fletcher's commercial autonomy theory. However, like Fletcher's theory, it takes no account of the consequences of the interference with autonomy. See Dennis Baker, 'The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation' (2008) 33 *Australian Journal of Legal Philosophy* 66. In my opinion, this makes it less suitable than the exploitation principle as a rationale for the criminalisation of fraud.

[141] Feinberg, *Harmless Wrongdoing* (n 34) 204.

[142] Ibid 202.

[143] (1972) 126 CLR 576.

[144] Feinberg, *Harmless Wrongdoing* (n 34) 203-204.

criminalisation of lossless frauds may itself lend legitimacy to the exploitation principle. If the harm principle cannot supply the rationale for the prohibition of lossless frauds, or is incapable of doing so on its own, the exploitation principle is the liberty-limiting principle best suited to filling the gap. In other words, the criminalisation of lossless frauds may demonstrate that the existing law has already acted upon the exploitation principle, at least insofar as it seeks to prohibit deceptive economic exploitation.

9.4.4 Application of exploitation principle to frauds that do not defraud

Feinberg's exploitation principle seeks to prohibit one person from making a gain by exploiting another person in an unfair way. I have already shown that Feinberg conceptualised the 'unfairness' of an act of exploitation by reference to three criteria and argued that lossless frauds are unfair according to each criterion. Similar points may be made in relation to frauds that do not defraud.

First, Feinberg said that coercion and deception are worse than other forms of exploitation.[145] Frauds that do not defraud fit this criterion. Like lossless frauds, they involve deception, or, at least, some form of dishonest conduct.

Secondly, Feinberg said that taking advantage of virtues, weaknesses and misfortunes is more unfair than taking advantage of moral flaws or undeserved good fortune; and he explicitly said that taking advantage of trust was 'the clearest of all examples of unfairness'.[146] Those who perpetrate frauds that do not defraud take advantage of trust, as well as weaknesses like credulity and gullibility. But there is also greater scope for them to take advantage of moral flaws of a kind that usually irrelevant in conventional frauds. For example, whilst perpetrators of conventional frauds may take advantage of flaws like greed, fake news publishers have demonstrated that those who perpetrate frauds that do not defraud are able to take advantage of racist attitudes, close-mindedness, rabid political partisanship, and scepticism of science.

---

[145] Joel Feinberg, *Harmless Wrongdoing* (Oxford University Press, 1990) 204.
[146] Ibid 202.

Thirdly, Feinberg said that the asymmetry in outcome is indicative of unfairness.[147] In a fraud that does not defraud, the person deceived suffers no economic setback, although he or she may suffer other setbacks that follow from forming false beliefs. However, as the perpetrator makes an economic gain, there is nevertheless an asymmetry of outcome. This asymmetry may even be more severe than that involved in a lossless fraud. In theory, the perpetrator of a lossless fraud may be convicted in circumstances where he or she deprived the victim of something but provided consideration of equal value—in other words, the fraud may be both lossless and gainless. Moreover, the perpetrator of a lossless fraud may be convicted in circumstances where the victim made an overall gain—the perpetrator could be the one to suffer a loss, or the transaction could be a "win-win" in which both perpetrator and victim profit. In contrast, in a fraud that does not defraud, whilst the person deceived may remain neutral from an economic point of view, the perpetrator always makes a gain. For example, in relation to fake news, the readers remain neutral because they do not pay to read the stories, but the publisher always makes a gain by selling exposure to the readers to the ad server. From this perspective, frauds that do not defraud may be a more unfair form of exploitation than lossless frauds, as they may involve an asymmetry of outcome that is lacking in some lossless frauds.

In summary, frauds that do not defraud are an unfair form of exploitation according to Feinberg's criteria and may be even more unfair than some lossless frauds. Accordingly, if the exploitation principle is a legitimate liberty-limiting principle, or there are other cogent reasons to prohibit deceptive economic exploitation, such as the harm it inflicts upon public interests, the case for the prohibition of frauds that do not defraud is as strong or stronger than the case for the prohibition of lossless frauds. This rationale underlying the existing law supports the criminalisation of frauds that do not defraud.

---

[147] Ibid 203-204.

9.5 The harm to the public

The third rationale for the prohibition of lossless frauds is the prevention of harm to the public—or, to adopt Feinberg's language, the wrongful setback to public interests. The protection of public interests is one of the underlying justifications for the existence of the criminal law. Offences against the criminal law are traditionally viewed as public rather than private wrongs.[148] And criminal punishment is traditionally 'justified solely by reference to the end of maintaining a peaceful system of ordered liberty'.[149]

At the same time, however, scholars have recognised that relying upon the 'public interest' as a rationale for the criminalisation of conduct can be 'problematic'.[150] Feinberg, for example, argued that the 'public interest is so very vague a conception that there is no way of applying it to nonobvious cases'.[151] In circumstances where there is no identifiable victim, he noted that proponents of criminalisation may be 'tempted to use the elasticity of the "public interest" to stretch the harm principle so that it will justify criminal prohibition of disapproved conduct that is at first sight harmless'.[152] Accordingly, where conduct is said to be against the

---

[148] See, eg, Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th ed, Oxford University Press, 2013) 29; Moohr (n 31) 23-24; Grant Lamond, 'What is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609, 614.

[149] Dennis Baker, 'The Harm Principle v Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation' (2008) 33 *Australian Journal of Legal Philosophy* 66, 68 quoting Jeffrie Murphy, 'Does Kant Have a Theory of Punishment' (1987) 87 *Columbia Law Review* 516.

[150] Ashworth and Horder (n 148) 30.

[151] Feinberg, *Harm to Others* (n 34) 222.

[152] Ibid. Simester and Sullivan's argument in relation to *de minimis* thefts is an example of this kind of stretching. See AP Simester and GR Sullivan, 'On the Nature and Rationale of Property Offences' in Antony Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of Criminal Law* (Oxford University Press, 2005) 171-175. The authors argue that the law prohibits trivial interferences with property rights to safeguard 'the regime of property law more generally'. On this approach, the law prohibits thefts with no real impact upon any victim because theft is an attack on the 'practices of creating and exchanging property rights' and property 'facilitates the creation of forms of welfare and human flourishing that would be unattainable should the institution be lost'. Whilst the authors make several persuasive points about the value of the regime of property, their argument suffers from a fatal flaw. Alex Steel described the flaw as follows: 'a justification of property offences on the basis that there is a need to protect the general property rights regime in a society fails to clearly articulate how enforcement of all rules per se is necessary to avoid failure of the regime'. See Steel (n 29) 721. Steel's critique is persuasive. The regime of property can hardly be so fragile that any theft, no matter how trifling, exposes the regime of property to collapse. See also Ripstein (n 83) 226.

'public interest', those arguing in favour of prohibition must clearly identify the 'public interest' at stake and convincingly explain why it requires the prohibition.

Fortunately, however, the public interests at stake in relation to fraud are not one of the controversial interests that scholars are likely to worry about. The fraud offences may be characterised as preventing and punishing at least three kinds of harm to public interests. I will address each in turn.

9.5.1 Financial harm inflicted upon unidentifiable victims

The first kind of harm to public interests that the fraud offences prevent and punish is the infliction of losses upon those who but for the fraud would have made a gain. By 'those who but for the fraud would have made a gain', I do not mean the individual victims who entered into transactions with the perpetrators. I mean the other members of the public who would have transacted with the victims had the perpetrators not procured the transactions by dishonest means—the honest merchants who lose business because fraudsters have used dishonest means to procure deals with those who would otherwise have been their customers.

This aspect of the harm to public interests is consistent with one justification given by the Law Commission for its recommendation that the law prohibit the making of dishonest gains—namely, that dishonest gains are an 'obvious and visible symptom' of losses that are 'hard to identify'.[153] Consider the examples of lossless frauds I gave earlier. The victim in *Balcombe v Di Simoni* paid for a cooking book that she would not have bought but for the defendant's false pretences. Her decision to buy the cooking book may well have prevented her from buying something else from someone else. It is impossible to say what or who that something or someone else might have been. The point is that the defendant procuring the sale of the cooking book by false pretences may well have prevented the occurrence of another transaction that would have brought about a gain to another member of the public.

[153] Law Commission, *Fraud* (Report No 276, July 2002) 69 [7.49].

These kinds of losses are also present in frauds that do not defraud. Consider making money by publishing fake news. As I explained in Chapter 1, the publisher competes online in a two-sided market for attention: on one side are the ad servers who exchange money for the exposure of users to ads; on the other are the readers who exchange attention for content. Every second a reader spends on a fake news website might otherwise have been spent on a website that publishes legitimate content. It would be impossible to identify the owners of those websites for the purposes of a prosecution. However, the owners of those websites may properly be characterised as 'victims' given the indirect way the fake news publisher sets back their interests. They lose the money they would have gained had the readers not been reading fake news.

The same point may be made about the other examples of frauds that do not defraud I gave earlier. For example, the journalist who deceives someone to obtain an interview does not inflict a dishonest loss upon that person. However, any other journalist who might have obtained the interview by honest means loses the chance to do so along with whatever money he or she might have obtained along the way. This is what the Law Commission meant when it said that dishonest gains cause losses that are 'hard to identify' but 'none the less real'.[154] The examples show that, for every winner, there is always a loser. From this perspective, there is in truth no such thing as a 'lossless fraud'. Someone always loses. Nor is there in truth such thing as a 'fraud that does not defraud'. Someone is always defrauded. These phrases exist only because those who lose or are defrauded are not always readily identifiable. But they are out there—doing worse than they would have been doing, but for the fraud. The offences exist to protect their interests just as much as those of the individual victims who may be directly identified.

9.5.2 Harm to the health of the market

The second kind of harm to public interests that the fraud offences prevent and punish is harm to the health of the market. Fraud offences have long been viewed as concerned with this particular public interest. In *Gulliver's Travels*, for

[154] Law Commission, *Fraud* (Report No 276, July 2002) 69 [7.49].

example, Jonathan Swift depicted Gulliver discovering that the people of Lilliput 'look upon Fraud as a greater Crime than Theft, and therefore seldom fail to punish it with Death'.[155] And he explained why:

> For they alledge, that Care and Vigilance, with a very common understanding, may preserve a Man's Goods from Thieves; but Honesty hath no Fence against superior Cunning: And since it is necessary that there should be a perpetual intercourse of buying and selling, and dealing upon Credit; where Fraud is permitted or connived at, or hath no Law to punish it, the honest Dealer is always undone, and the Knave gets the Advantage.[156]

Swift was writing in 1726—a time when victim-blaming in fraud was at its apogee. Roughly twenty years earlier in *R v Jones*, Holt CJ had refused to 'indict one man for making a fool of another'.[157] His decision was treated as limiting the common law offence of cheating to frauds that were beyond the detection of a man of 'ordinary capacity'.[158] Its effect was undone by the enactment of the False Pretences Act of 1757.[159] However, prior to the enactment of that statute, the courts regularly dismissed cheating prosecutions for reasons like 'it was the prosecutor's fault to repose such confidence in the defendant'.[160]

In the short passage set out above, Swift both criticised the refusal of the English courts to hold the dishonest to account and contrasted it with the seemingly illogical enthusiasm with which they prosecuted theft, which he characterised as easier to prevent than fraud. But he also hit upon an important rationale underlying the criminalisation of fraud: that laws prohibiting fraud are necessary to protect the public interest in the 'perpetual intercourse of buying and selling'—an economic interest that should perhaps be described as the interest in the health of the market.[161]

---

[155] Jonathan Swift, *Gulliver's Travels* (Oxford University Press, 2008) 52.
[156] Ibid.
[157] *R v Jones* (1703) 1 Salk 379; 91 ER 330. See Chapter 3.
[158] William Hawkins, *A Treatise of the Pleas of the Crown* (Eliz Nutt, 1716) vol 1, 187-188
[159] See Chapter 3.
[160] *R v Nehuff* (1706) 1 Salk 151; 91 ER 139.
[161] See generally Green, *Thirteen Ways to Steal a Bicycle* (n 1) 78; Lindsay Farmer, *Making the Modern Criminal Law* (Oxford University Press, 2016) 228.

In capitalist nations like Australia, the United Kingdom and the United States, the public interest in the health of the market is almost self-evident. Economic prosperity is dependent upon the market. Everyone has an interest in there being broad participation. And everyone has an interest in market efficiency. At the same time, however, the nature of the public interest in the market is multifaceted, and the ways in which it may be harmed are similarly multifaceted. The following sections draw upon economic analysis of the criminal law by addressing three ways in which frauds, those that cause losses and those that do not, undermine the public interest in the health of the market.

Market participation

First, fraud undermines market participation. By 'market participation' I mean the extent to which people engage in commercial dealings. There is a public interest in participation in the market and the reason it exists is very simple. The market is made up of people. If people are not willing to deal with each other, there is no market. Fraud undermines this interest by reducing the trust that people have in each other, increasing the risks that people perceive in dealing with each other, and thereby deterring people from participating in commercial dealings. As Stuart Green emphasized in his work on the moral underpinnings of white-collar crime, fraud 'can result in a loss of confidence in the system of free and fair enterprise'.[162] This loss of confidence often arises because of the emotional consequences of being deceived, as opposed to any economic loss. Consider the following hypothetical given by Simester et al:

> Suppose, for instance, that V will happily provide funds for D to buy books for his studies but not to bet on dogs and horses. It may be that V is very well off and is in no sense perturbed by the loss of her money. What does make her angry is that she realises she has been lied to when she discovers the betting slips in D's pockets.[163]

[162] Stuart Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 153.
[163] Simester and Sullivan (n 152) 189.

Simester and Sullivan described the experience of being deceived as the 'gravamen' of the wrong involved in fraud.[164] Unlike the victim from whom property is stolen, the victim in their scenario is likely to have suffered the 'loss of self-esteem consequent upon feeling responsible by reason of having been duped'.[165] She is angry at D. But she is also angry at *herself*. She *allowed* D to take advantage of her. Moreover, if D were a relative or friend, she is also likely to have suffered the unique pangs of being betrayed by someone she thought she could trust. The lesson V would be likely to take from this experience should be obvious: she must be less trusting of D, and, perhaps, others, in the future.[166]

V's experience would have devastating effects upon the intercourse of buying and selling if felt by members of society more generally. If ordinary members of society were repeatedly to suffer the feelings of disappointment, resentment and anger that go with being defrauded, they would become reluctant to deal with those whom they have no good reason to trust—i.e. most of the market at large. This would be significant problem when one considers the extent to which modern economies involve 'large scale and impersonal transactions between relative strangers'.[167] It is no coincidence that laws prohibiting fraud developed alongside the Commercial Revolution—a time when people came to rely on strangers, both in cities and when trading across large distances, more than ever before.[168] As the market depends upon people interacting with those whom they do not know and often cannot scrutinise, it is 'especially important that the law provide some guarantee of, and some incentive to, trustworthiness in commercial dealings'.[169]

These concerns apply equally to frauds that do not defraud. Fake news is an apt example. Those who discover that they have been deceived by fake news may be reluctant to trust articles shared on social media in the future. Whilst some might

---

[164] Ibid.
[165] Peter Allridge, 'Sex, Lies and the Criminal Law' (1993) 44 *Northern Ireland Legal Quarterly* 250, 251. See also Bok (n 44) 20.
[166] See also Steel (n 29) 724-725.
[167] Neil MacCormick, 'What is Wrong with Deceit?' (1982) 10 *Sydney Law Review* 5, 16. See also Farmer (n 161) 210-211, 227.
[168] Jerome Hall, *Theft, Law and Society* (Little, Brown and Company, 1935) 24-36; Farmer (n 161) 210, 227; Steel (n 29) 727.
[169] MacCormick (n 167) 16.

be willing to double-check stories shared by on social media by scrutinising the websites, visiting fact-checkers, and searching to see if the stories have been published by credible news outlets, others might simply give up on articles shared on social media altogether. This would set back the interests of those who participate in the online market for attention—legitimate news providers, social media platforms, search engines, advertising services and advertisers.

Productive efficiency

Secondly, fraud undermines productive efficiency. In its simplest sense, the phrase 'productive efficiency' refers to minimising the cost involved in the production of a good or delivery of a service.[170] There is a public interest in productive efficiency because of the benefits to both suppliers and consumers. If a supplier can provide a good or service for a cheaper price, he or she may enjoy a greater profit per transaction or pass the reduction in price along to consumers. If the supplier passes the reduction in price along to consumers, there will be more consumers who can afford to purchase the good or service, and those who could already afford it will be able to spend their money on other goods and services. Fraud undermines this interest because it imposes additional costs. If there were no criminal laws prohibiting fraud, those who participate in commercial dealings would have to expend money, time and energy, first, to avoid being deceived by others, and, secondly, to seek remedies under the civil law to recover property or damages.

Prior to the enactment of the False Pretences Act, the refusal of the courts to indict 'one man for making a fool of another' had precisely this effect. For example, in *R v Wheatly*, the seminal case on cheating at common law, the defendant agreed to deliver eighteen gallons of beer to a man named Richard Webb, but knowingly delivered only sixteen before taking payment.[171] After he was convicted of defrauding Webb, the King's Bench arrested the judgment. Mansfield CJ said that it was Webb's 'own negligence and carelessness in not measuring the liquor, upon

---

[170] See generally Barak Orbach, 'The Antitrust Consumer Welfare Paradox' (2010) 7 *Journal of Competition Law & Economics* 133, 141 ('optimal productive efficiency exists where the economy utilizes resources in the least expensive way possible'); Albert Foer, 'On the Inefficiencies of Efficiency as the Single-Minded Goal of Antitrust' (2015) 60 *Antitrust Bulletin* 103, 106-107.
[171] *R v Wheatley* (1761) 1 Black W 273, 275; 96 ER 151, 152.

receiving it'.[172] Wilmot J said that Webb 'might have measured the liquor, before he accepted it: and it was his own indolence and negligence if he did not'.[173] And Denison J asked: 'What is it to the public whether Richard Webb has, or has not, his eighteen gallons of amber?'[174]

The judges in *R v Wheatly* apparently expected every publican to take the time to measure out every drop of ale upon delivery to avoid being cheated. The only alternative they recognised was commencing proceedings for breach of contract. These methods of preventing and prosecuting fraud were highly inefficient and inconvenient. Neither provided any real deterrent to other would-be perpetrators. And each would have led to an increase in the cost to the consumer or a reduction in profit for the publican. It is little wonder that the victim-blaming doctrine of the first half of the eighteenth century was so unpopular. It made life worse, not only for individual victims, but also for society as a whole.

Frauds that do not defraud also impose these kinds of additional costs. Again, fake news provides an apt example. Like anyone who wishes to avoid being deceived in commercial dealings, those who wish to avoid being deceived by fake news must invest time and attention to detecting false stories. They must carefully scrutinise the stories and websites, visit fact-checkers or search to see if the stories have been reported by reputable publishers. In an environment where fake news is prevalent, readers must do this in relation to both fake *and real* stories—anything that sounds unusual or suspicious requires further investigation.

In other words, the general confusion caused by fake news requires readers to expend effort and energy on both confirming the truth of true stories and detecting the falsity of false stories. As the fake news readers are participants in the market for attention, the diversion of their attention to these other tasks undermines productive efficiency. The readers expose themselves to fewer advertisements per minute because they must spend time scrutinising the accuracy of content instead of moving

---

[172] *R v Wheatly* (1761) 2 Burr 1124, 1127-1128; 97 ER 746, 748.
[173] *R v Wheatly* (1761) 2 Burr 1124, 1130; 97 ER 746, 749.
[174] *R v Wheatley* (1761) 1 Black W 273, 275; 96 ER 151, 152.

on to the next story of interest. As a unit producing attention, they are not performing at full capacity.

Allocative efficiency

Thirdly, fraud undermines allocative efficiency. Fraud offences are 'allocation rules' because they determine how people may deal with finite resources.[175] The phrase 'allocative efficiency' refers to the extent to which the resources are assigned in a way that is most beneficial to the parties involved in a transaction.[176] There is a public interest in allocative efficiency because more efficient allocation leads to greater wealth across society. As Richard Posner has explained, the voluntary transactions that occur in the market are inherently more efficient than transactions procured by conversion, deception or extortion, as both parties to a voluntary transaction end up better off than they were before. According to Posner:

> If A sells a tomato to B for $2 and no one else is affected by the transaction, we can be sure that the utility to A of $2 is greater than the utility of the tomato to him, and vice versa for B, even though we do not know how much A's and B's utility has been increased by the transaction.[177]

In contrast, if B had stolen the tomato from A, both parties would not have ended up better off than they were before. B would be better off. But A would be down one tomato. More importantly, however, if B had stolen the tomato, B would have avoided accumulating the $2 purchase price via a legitimate method—for example, by working. The cost of the theft would include both the personal cost to A and the loss of any benefits that would have resulted from B engaging in productive activity.[178] To use Posner's language, B has 'bypassed' the market in two ways: first, by stealing the tomato; and secondly, by avoiding the legitimate exchanges by which he could have accumulated $2 to purchase the tomato from A.

---

[175] C Edwin Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 *UCLA Law Review* 964, 1015.
[176] See generally, Orbach (n 170) 141 ('Maximum allocative efficiency is attained when the cost of resources used in production is equal to the consumer's willingness to pay'); Foer (n 170) 107-108.
[177] Richard Posner, *The Economics of Justice* (Harvard University Press, 1983) 88.
[178] Posner, *The Economics of Justice* (n 177) 66; Richard Posner, 'An Economic Theory of the Criminal Law' (1985) 85 *Columbia Law Review* 1193, 1196.

This second bypassing of the market is particularly relevant to lossless frauds because it focuses upon the consequences of the perpetrator making an illegitimate gain, as opposed to the effect upon the victim. According to Posner:

> The role of the criminal law in discouraging market bypassing is obscured by the fact that the market transaction that the criminal bypasses is usually not a transaction with his victim. If someone steals my car, normally it is not because he wants that car and would have bought it from me if the criminal law had deterred him from stealing it. He steals to get money to use in buying goods and services from other people. The market transaction that he bypasses is the exchange of his labour for money in a lawful occupation but it is still market bypassing.[179]

Posner argued that the substantive doctrines of the criminal law exist to promote 'wealth maximisation' by seeking to prevent people from bypassing the market.[180] His point was that the criminal who acquires wealth in an illegitimate fashion does not participate in the legitimate activities that otherwise would have enabled the acquisition of the wealth. This sets back society because:

> lawfully obtained wealth is created by doing things for other people—offering them advantageous trades. The individual may be completely selfish but he cannot, in a well-regulated market economy, promote his self-interest without benefiting others as well as himself.[181]

Posner's argument may be applied to frauds that do not defraud. Making money by publishing fake news again is a good example. By making money by publishing fake news, the publisher provides something of no benefit to others, avoids engaging in honest activities to earn the money he obtains in return, and thereby deprives society of whatever else he would have had to do to earn that money. From this perspective, prohibiting frauds that do not defraud like making

---

[179] Posner, *An Economic Theory of the Criminal Law* (n 178) 1196. See also Centro Veljanovski, *Economic Principles of Law* (Cambridge University Press, 2007) 243.
[180] Posner, *An Economic Theory of the Criminal Law* (n 178) 1194-1195. See also Farmer (n 161) 228.
[181] Posner, *The Economics of Justice* (n 177) 83.

money by publishing fake news is simply a matter of properly regulating the economy—i.e. adopting efficient 'rules' for the 'game'.

9.5.3 Harm to public order

The third kind of harm to public interests that the fraud offences prevent and punish is the effect that allowing dishonesty in commercial dealings would have on public order. Fraud offences have not traditionally been characterised as concerned with public order in the same way as other property offences such as larceny, robbery and burglary.[182] However, compelling analogies may be drawn between the interests served by fraud offences and the public order rationale recognised as traditionally underlying theft offences.

Fletcher's paradigm of 'manifest criminality'

The public order rationale for theft offences was first advanced by George Fletcher in *Rethinking Criminal Law*. Fletcher argued that the law relating to theft offences was originally organised around what he described as the paradigm of 'manifest criminality'.[183] He noted that in the 'early stages of history there were no clearly marked boundaries' between the offences and that '[a]ll were collapsed in the single image of the thief coming at night, breaking the close and endangering the security of the manor'.[184] He then argued that it was 'obvious that there was no single interest jeopardized by this invasion, but rather a multitude of interests, including the security and well-being of the community'.[185]

Similarly, Steel emphasised that 'in its original form, larceny was primarily an offence that acted to protect the King's peace, that is, a public order offence'.[186] Larceny required a taking by stealth or force, so there was potential for violence in the taking. In cases of robbery, where the thief takes the property forcibly, the

---

[182] Green (n 1) 130 (arguing that 'Stealing by deception was viewed as less threatening to society than stealing by other means').
[183] Fletcher (n 72) 76-90, 115-118; Farmer (n 161) 205.
[184] Fletcher (n 72) 31.
[185] Fletcher (n 72) 31. See also Green, *Thirteen Ways to Steal a Bicycle* (n 1) 77.
[186] Alex Steel, 'The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31 *UNSW Law Journal* 712, 726. See also Farmer (n 161) 205, 226.

potential for violence is obvious. But even in other cases there is potential for violence in the detection and apprehension of thieves. The owner might seek to apprehend or detain the thief by violent means. Or the thief might seek to resist apprehension and detention by violent means.[187] Therefore, according to Steel, the potential for and fear of violence was the 'essence' of the harm implicit in thefts of tangible property.[188]

Re-conceptualisation of Fletcher's argument

The arguments advanced by Fletcher and Steel have attracted general acceptance among legal scholars.[189] However, the scholarship appears to have overlooked one weakness in the arguments—namely, that there are already offences that prevent and punish violence with which thieves who perpetrate violence may be prosecuted. I will give some obvious examples. A highway robber who attacks a resisting victim with a knife could be charged with assault occasioning grievous bodily harm or wounding. And a burglar who resists the force used by the owner of a dwelling attempting to remove the burglar from the premises could be charged with common assault.

The existence of offences like assault and wounding means that the prevention of violence *alone* cannot be the real 'essence' of theft. The real essence of theft must account for what distinguishes the risk of violence in theft from the risk of violence in conduct not involving property. Here the traditional public order analysis of property offences may benefit from drawing upon the economic analysis of law's emphasis on the way in which the criminal law regulates incentives.[190]

The primary difference between the risk of violence in offences like theft and the risk of violence in offences like assault is that the thief is usually motivated by an

[187] Ibid 728.
[188] Ibid 728.
[189] See, eg, Green (n 1) 10 (describing Fletcher's account as 'the traditional view').
[190] See, eg, Gary Becker, 'Crime and Punishment: An Economic Approach' in D Whitman, *Economic Analysis of the Law: Selected Readings* (Wiley & Sons, 2002) 257; Isaac Ehrlich, 'Crime, Punishment, and the Market for Offenses' (1996) 10 *Journal of Economic Perspectives* 43, 43; Veljanovski (n 179) 246; Talia Fisher, 'Economic Analysis of Criminal Law' in M Dubber and Tatjana Hornle (eds) The *Oxford Handbook of Criminal Law* (Oxford University Press, 2014) 39 and 45.

economic incentive to perpetrate or risk the violence.[191] Accordingly, even if the harm at stake in theft offences is the prevention of violence within the community, the real gravamen of the offence must be the elimination of the economic incentive to perpetuate or risk violence, as opposed to the prevention of violence per se. No doubt that is one reason why robbery tends to carry a much higher punishment than assault: there is a need for additional deterrence to offset the economic incentive underlying the motivations of the robber.[192]

From this perspective, by making an offence of theft, the law may be characterised as promoting 'public order' by removing violence from the class of conduct in which people may legitimately engage to increase their wealth. The reasons why it does so ought to be obvious. It is bad enough that people may be tempted to violence out of anger, prejudice or other unwholesome tendencies. But it would be much worse if people were tempted to engage in violence by the promise of economic prosperity. If violence were a legitimate means of economic mobility, the world would be a much more violent place. Appreciation for values like civility, creativity and industry would decline. People would be less safe. They would become accustomed to pursing violent solutions. And the system of voluntary exchange, so beneficial to everyone, would collapse, dragging down other institutions and ideas with it.

Significance of economic incentive to deceive

A similar argument may be made in relation to deception. By making an offence of fraud, the law may be characterised as promoting 'public order' by removing deception from the class of conduct in which people may legitimately engage to increase their wealth. The reasons why it does so ought also to be obvious. It is bad enough that people may be tempted to deceive others to further their own social or political or romantic ends. But it would be much worse if people came to see deception as a legitimate path to economic prosperity. Many of the negative consequences of deception would become fuelled by the profit motive.

---

[191] Green (n 1) 151.
[192] Ehrlich (n 190) 46.

There would be a boom in anger, resentment and the loss of self-esteem that accompanies being deceived. The prevalence of those unpleasant experiences would make people reluctant to trust or deal with each other. Those exposed to deception at the worst would make decisions that they otherwise would not have made; at the best they would spend time and money attempting to detect deception that could be better spent elsewhere. The world would become a less friendly and less trusting place.[193] And the system in place today, which, despite its imperfections, at least attempts to align economic advancement with contribution to society, would give way to something worse.

This conception of the purpose of the theft and fraud offences is consistent with Lindsay Farmer's argument that property offences 'are best understood in terms of changes in the underlying social functions of property and their link to trust and civil order'.[194] Farmer characterised the changes brought about by the enactment of the Fraud Act as evidence that:

> ... the criminal law is pulling away from definitions of property in the civil law. It is not always concerned with the precise nature of property rights or the formal legality of contracts but with permissibility of modes of acquisition. As a consequence, civil law does not necessarily define a boundary or limit to the scope of the criminal law, as conduct which is judged to be fraudulent or dishonest or exploitative runs the risk of falling foul of the criminal law irrespective of the status of the transaction in civil law.[195]

Farmer's observation that the offences are concerned with 'permissibility of modes of acquisition' offers a simple yet compelling rationale for property offences: they define the 'rules of the game' by establishing which methods of bringing about an economic change are legitimate. The methods of trespass and violence are made impermissible by theft offences. The methods of deception or other forms of overt dishonesty are made impermissible by fraud offences. The method of betraying trust

---

[193] See generally Bok (n 44) 18.
[194] Farmer (n 161) 203. It is also consistent with Susan Dimock's more ambitious argument that the criminal law's purpose is to respond to acts which 'if performed by any sizable minority with any frequency, would undermine basic trust between members of a community': Susan Dimock, 'Retributivism and Trust' (1997) 16 *Law & Philosophy* 37, 44.
[195] Farmer (n 161) 223.

is made impermissible by embezzlement offences. The method of threatening to damage reputation is made impermissible by blackmail. And so on.[196] In each case, the particular offence exists to suppress the financial incentive that would otherwise drive people to engage in conduct that is generally regarded as unpleasant to experience and against good conscience. As Veljanovski has argued, the label 'crime' is attached to 'those actions which society or the law regard as illegitimate sources of utility or gain'.[197]

Application to frauds that do not defraud

Perhaps more-so than any of the previous rationales for the criminalisation of conventional frauds, this rationale supports the criminalisation of frauds that do not defraud. That is because the potential disruption to 'public order' posed by frauds that do not defraud is greater than that of conventional frauds. I will explain why returning to fake news as an example.

In conventional frauds, where one person seeks to induce another to hand over money or property by deception, the perpetrator must employ deception about *something that relates to a particular transaction*. In cases of fraud in the factum, the perpetrator misrepresents something about the consideration—the distance travelled by a car, or the elemental composition of some jewellery, for example. In cases of fraud in the inducement, the perpetrator makes some other misrepresentation—about the reason he or she can offer the deal, or her or his qualifications or intentions, for example. But the perpetrator of a conventional fraud cannot induce a person to agree to hand over money or property by pretending, for example, that Pope Francis has endorsed Donald Trump for President, or that the police have found nineteen white female bodies in freezers with 'Black Lives Matter' carved into their skin. 'That's nice', the prospective purchaser might say. 'But what does it have to do with the car?'

The perpetrator of a fraud that does not defraud is not limited in this way. Due to the emergence of the massive low-barrier-to-entry market for attention on the

[196] See generally Green, *Thirteen Ways to Steal a Bicycle* (n 1) 78.
[197] Veljanovski (n 179) 244.

internet, the perpetrator of a fraud that does not defraud may employ deception about *anything likely to attract attention*. The fake news phenomenon has demonstrated the real-world 'public order' consequences of the economic incentive created by this market remaining unchecked—people voting in ways in which they otherwise would not have voted, people declining medical treatment they otherwise would not have declined, and all kinds of other misdirected conduct brought about by belief in false news stories. These harmful consequences are substantially more severe than those brought about by conventional frauds. Accordingly, if fraud offences exist to preserve 'public order', it does not make sense to prohibit one but not the other.

9.6 Conclusion

In this chapter, I identified three rationales for the criminalisation of lossless frauds and argued that those rationales also support the criminalisation of frauds that do not defraud like making money by publishing fake news.

First, I considered what appears to be the best argument that lossless frauds are prohibited to prevent or punish the infliction of non-financial harm—namely, Fletcher's theory that the offences exist to prevent and punish interference with the victim's 'commercial autonomy'. I explained that Fletcher's theory is difficult to reconcile with the 'harm principle' because the harms inflicted by lossless frauds appear to be no more than the unpleasant consequences of being deceived rather than any substantial setback to the victim's interests. Nevertheless, I argued that frauds that do not defraud also may be characterised as interfering with the 'commercial autonomy' on one of two bases. The first was that the deception employed in frauds that do not defraud also has the potential to interfere with the workings of the market. The second was that the 'commercial autonomy' of the modern citizen may appropriately be characterised as extending beyond the interest in her or his property and including other commercialised interests such as the interest in her or his attention.

Secondly, I considered what appears to be the best alternative to relying upon the harm principle to support the criminalisation of lossless frauds—namely, that lossless frauds are prohibited, not to prevent and punish the infliction of non-financial

harm, but to prevent and punish dishonest economic exploitation. I explained that lossless frauds are exactly the kind of conduct that Feinberg envisaged could be criminalised via the application of his 'exploitation principle'. I then argued that the exploitation-based case for the criminalisation of frauds that do not defraud is as strong if not stronger than the case for the criminalisation of lossless frauds: although both forms of fraud are lossless, the potential asymmetry in the outcome of a fraud that does not defraud appears to be greater than that of a conventional fraud where the victim suffers no net economic loss.

Finally, I considered three ways in which lossless frauds may be characterised as inflicting harm upon three kinds of public interests. The first encompassed the interests of members of the public who could have transacted with the victim but for the perpetrator's fraud: the honest but unidentifiable merchants who are deprived of an opportunity to further their own interests. The second encompassed the interest in preventing fraud deterring people from participating in commercial dealings, influencing people to expend resources attempting to avoid deception instead of engaging in more productive endeavours, and enabling perpetrators to avoid the legitimate transactions in which they would otherwise have had to engage to advance their economic interests. The final encompassed the extent to which fraud offences exist to preserve public order—something I argued is more pressing in relation to frauds that do not defraud perpetrated within the online market for attention in which fake news publishers operate.

My purpose throughout this chapter was to demonstrate that adopting my interpretation does not stretch the offences beyond what is deserving of criminal sanction or capture conduct that is not 'properly called fraud'. I have sought to do so by showing that each of the rationales for the criminalisation of lossless frauds applies equally or more so to frauds that do not defraud—in other words, that the two kinds of fraud are not only as bad as each other but also are bad for the same reasons. My argument has been an appeal to the common-sense proposition that, if the rationales for the criminalisation of lossless frauds are appropriate rationales for the imposition of criminal sanction, consistency demands the criminalisation of frauds that do not defraud like making money by publishing fake news. This chapter

completes my argument that making money by publishing fake news *should* constitute fraud. I turn now to the conclusion of the thesis.

10. Conclusion

10.1 Fake news has been fraud for a long time

In 1678 a man named Titus Oates returned to England from Spain carrying a tale of a Jesuit conspiracy to murder King Charles II and restore Roman Catholicism as the state religion. Oates made accusations against many prominent Catholics. His claims led to hysteria and a boiling-over of pre-existing religious tensions. The Pope was burned in effigy.[1] More than a dozen of those accused by Oates were tried and executed for treason on his evidence. But the entire 'Popish Plot' he promulgated was an elaborate fabrication.[2] Oates was convicted of perjury and sentenced to endure punishments so harsh that they later inspired the provision against cruel and unusual punishments in the English Bill of Rights.[3]

There are striking similarities between the Popish Plot and the modern fake news phenomenon. Like the fake news publishers active in 2016, Oates was not a credible source. He had been expelled from school, expelled from Cambridge for attempting to cheat a tailor out of a coat, and charged with perjury for falsely accusing a schoolmaster of sodomy.[4] Moreover, whilst Oates created the story about the Plot, he did not whip up the public hysteria on his own. Just months after news of the Plot became public, the Printing Act,[5] which had imposed restrictions on who could own and operate a printing press, lapsed.[6] In the same way that the internet enabled anyone to publish their own websites, the lapse of the Printing Act enabled anyone with a press to publish their own books and pamphlets. The number of titles

---

[1] Sheila Williams, 'The Pope-Burning Processions of 1679, 1680 and 1681' (1958) 21 *Journal of the Warburg and Courtauld Institutes* 104.
[2] John Pollock, *The Popish Plot: A Study in the History of the Reign of Charles II* (Duckworth, 1903); Peter Hinds, *The Horrid Popish Plot* (Oxford University Press, 2010) 71-86.
[3] John Bessler, 'A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment' (2019) 27 *William & Mary Bill of Rights Journal* 989, 1020-1022.
[4] Hinds (n 2) 25-26.
[5] *Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Books and Pamphlets and for Regulating of Printing and Printing-Presses*, 14 Car 2, c 33.
[6] Raymond Astbury, 'The Renewal of the Licensing Act in 1693 and its Lapse in 1695' (1978) 33 *The Library* 296, 296 n 1.

printed in London almost doubled in the two years from its lapse.[7] Many of the new titles concerned the Plot. To use the words of the licenser Roger L'Estrange, the Plot 'set all *Tongues* and *Pens* agoing'.[8]

L'Estrange wanted to reimpose restrictions to prevent booksellers and authors from peddling sensational interpretations of the Plot.[9] As one of the few voices speaking out against its credibility, he argued that the '*Plying* of the *Multitude* perpetually with *Allarms*, and *Terrors*, does in a manner turn their very *Brains*, take away their *Judgements*; and render them fit *Instruments* for the *boldest*, and most *Unwarrantable Undertakings*'.[10] L'Estrange did not have faith in the ability of the 'multitude' to discern fact from fiction: 'they never take themselves to be so *Clear-sighted*, as in those cases where they are *Stark-blind*'.[11] And he was not the only one to attribute the success of the Plot to the ease with which the people could be misled by appeals to their emotions. John Dryden, England's first Poet Laureate, alleged that the Plot had credence because it was: 'Not weigh'd or winnow'd by the multitude / But swallow'd in the Mass unchew'd and Crude'.[12]

The similarity between those who consume fake news today and those of Dryden and L'Estrange's time is self-evident. And L'Estrange's warning that plying people with terror may encourage them to undertake bold and unwarranted actions is as prescient today as it was in the seventeenth century. Consider again the 'Pizzagate' hoax spread by multiple fake news websites in 2016. The hoax suggested that members of the Democratic Party were operating a child-sex ring in the basement of a pizza restaurant in Washington DC.[13] Prudent and intelligent people recognised the story to be false. But Edgar Welch armed himself and drove two hundred miles from North Carolina to Washington to liberate the children from

---

[7] Hinds (n 2) 9.
[8] Roger L'Estrange, *Lestrange's Narrative of the Plot* (Henry Brome, 1680) 4.
[9] Hinds (n 2) 130.
[10] L'Estrange (n 8) 13.
[11] Roger L'Estrange, *The Case Put Concerning the Succession of His Royal Highness the Duke of York* (Henry Brome, 1679) 3.
[12] Hinds (n 2) 132.
[13] Craig Silverman, 'How the Bizzare Conspiracy Theory Behind "Pizzagate" Was Spread', *BuzzFeed News*, 6 December 2016; Daniel Funke, 'Fact-Checkers Have Debunked This Fake News Site 80 Times. It's Still Publishing on Facebook', *Poynter*, 20 July 2018.

the restaurant.[14] The same may be said about the thousands of people who stormed the Capitol on the faith of the 'Big Lie' that the 2020 Election was stolen.

One of the books which fuelled hysteria about the Plot 'An Appeal from the Country to the City' by Charles Blount. The book alleged that the Plot was real and presented a dire account of things to come should it succeed: 'amongst the distracted Crowd, you behold Troops of Papists, ravishing your Wives and your Daughters, dashing your little Childrens brains out against the walls, plundering your Houses, and cutting your own throats, by the Name of Heretick Dogs'.[15] A bookseller named Benjamin Harris was prosecuted for selling the book. The Crown alleged that Harris sold the book to scandalise the King and Government. His defence relied upon the same excuse advanced by several fake news publishers active prior to the 2016 Election—namely, that he sold the book 'only as a common thing to get money'.[16]

The Lord Chief Justice, Sir William Scroggs, rejected the argument. He said:

> ... that all writers of news, though not scandalous, seditious, nor reflective upon the government of the state; yet if they are writers (as there are few others) of false news, they are indictable and punishable upon that account. So that your hopes of anything of that kind will be in vain; for all the judges have declared this offence, at the common law, to be punishable in the seller, though in the way of his trade: the books may be seized, and the person punished.[17]

Harris was sentenced to be fined 500 shillings, to be pilloried for an hour and to find sureties for his good behaviour for three years.[18] His conviction was possible notwithstanding that he had not committed a predefined crime because the judiciary in 1680 had not yet ceded the power to create new offences to the legislature. For the judges presiding at that time, the obvious harm brought about by Harris selling

---

[14] Mark Fisher, John Woodrow Cox and Peter Hermann, 'Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.', *Washington Post*, 6 December 2016.
[15] Charles Blount, *An Appeal from the Country to the City, for the Preservation of his Majesty's Person, Liberty, Property and the Protestant Religion* (Harris, 1680).
[16] *R v Harris* (1680) 7 St Tr 925, 928.
[17] Ibid.
[18] Ibid 932. The report states further that 'had it not been for Mr. Justice Pemberton, the Chief Justice would have added, that he should be publicly whipt'.

the book was enough to warrant convicting him; and the fact that he sold the book 'only as a common thing to get money' was hardly an adequate excuse.

Several treatises on the criminal law later relied upon the decision in *R v Harris* to characterise the publication of false news as constituting the common law fraud offence known as 'cheating'.[19] Sir William Russell, for example, said in his chapter on cheats: 'probably at this day the fabrication of news, likely to produce any public detriment, would be considered criminal'.[20]

For all that I have claimed to be making an 'original contribution' in this thesis, the characterisation of *R v Harris* as an example of 'cheating' shows that making money by publishing fake news has been considered fraud for a long time. The judges punished Harris for the harm he inflicted upon the public in a way that lawyers today would characterise as inconsistent with the rule of law's insistence upon fair notice. The point I have painstakingly attempted to make in this thesis (and the real basis for my claim to originality) is that modern day fake news publishers may be prosecuted without any violation of their right to fair notice because their conduct already falls within the plain meaning of the existing fraud offences.

10.2 Summary of thesis

In this thesis, I have shown that making money by publishing fake news may be prosecuted as fraud in the United Kingdom and New South Wales because section 2 of the Fraud Act and section 192E of the Crimes Act have been interpreted as per their plain meaning: with the exception of publishers entitled to be acquitted because there is a reasonable possibility that they were (or thought that they were) publishing truth, opinion or satire, the typical fake news publisher is likely to be found guilty on the basis that he or she dishonestly made a false representation intending to make a gain (Fraud Act s 2) or dishonestly obtained a financial advantage by deception (Crimes Act s 192E).

---

[19] William Oldnall Russell, *A Treatise on Crimes & Misdemeanors* (1st American ed, Wells & Lilly 1824) vol 1, 1367; Humphry Woolrych, *A Practical Treatise on Misdemeanors* (Shaw & Sons, 1842) 23; Francis Wharton, *A Treatise on the Criminal Law of the United States* (Kay & Brother, 1846) 445.
[20] Russell (n 19) 1367.

I have also shown that making money by publishing fake news presently may not be prosecuted as wire fraud in the United States because the wire fraud statute has not been interpreted as per its plain meaning. As I explained in Chapter 4, the Supreme Court adopted a strained interpretation of the mail fraud statute primarily to avoid characterising the obtaining of state-issued licences by false pretences as a federal offence. Had the Supreme Court been more orthodox in its approach by applying traditional canons of statutory construction, the United States could have had an offence already on the books almost tailor made for the prosecution of those who schemed to make money by publishing fake news stories in the lead up to the 2016 Presidential Election and beyond. However, as the situation stands, fake news publishers are beyond the reach of the wire fraud statute unless the Supreme Court reconsiders its interpretation or Congress intervenes.

My examination of the extent to which making money by publishing fake news constitutes fraud in New South Wales, the United Kingdom and the United States has exposed a significant difference between the scope of the offences in these jurisdictions. In the New South Wales and the United Kingdom, it is possible for a person to be convicted under section 192E of the Crimes Act or section 2 of the Fraud Act for dishonestly obtaining something irrespective of whether he or she dishonestly deprives anyone of the thing by doing so. In contrast, in the United States, a person cannot be convicted of wire fraud unless he or she devised or intended to devise a ‘scheme or artifice to defraud’. The consequence of this difference is that a person in New South Wales or the United Kingdom but not the United States may be convicted for perpetrating what I have described as a ‘fraud that does not defraud’.

As part of my argument that making money by publishing fake news could and should be prosecuted as fraud, I have sought to justify the criminalisation of frauds that do not defraud. My purpose has been to both defend the approach taken in New South Wales and the United Kingdom and critique the limitations of the approach taken in the United States. I have identified the circumstances in which frauds that do not defraud occur. I have argued that the plain meaning of the legislation provides ample notice that frauds that do not defraud are criminal. I have attempted to show that they warrant criminalisation for the same reasons as conventional frauds. And

throughout I have used the conduct of the typical fake news publisher as my primary example.

The conduct of the typical fake news publisher has much in common with that of the conventional fraudster. By misdirecting the readers' attention, the typical fake news publisher interferes with what George Fletcher would perhaps have described as the readers' 'commercial autonomy'. By exploiting the readers trust and gullibility to obtain money without offering anything in return, the typical fake news publisher engages in conduct that falls squarely within Joel Feinberg's exploitation principle. By directing the attention of the readers away from content published by other content providers, by deterring people from consuming news online, and by causing people to devote time and effort to checking the accuracy of news rather than consuming content, the typical fake news publisher causes real news and other content providers to suffer financial losses. By making money from lying, the typical fake news publisher avoids engaging in more productive endeavours ordinarily required to generate income. Finally, by influencing people to form false beliefs about significant topics such as politics and health, the typical fake news publisher undermines public order.

My argument has to some extent been an appeal to consistency: if certain features of conventional frauds warrant criminalisation and frauds that do not defraud like making money by publishing fake news share those features, it does not make sense to criminalise one but not the other. However, my argument has also been a response to the inadequacy of the other proposed 'solutions' to the fake news problem. As I explained in Chapter 2, relying upon platforms to self-censor, ad serves to abandon revenue streams, fact checkers to expose false stories, news literacy efforts to educate the public, and victims of defamation to commence proceedings all share a serious flaw—namely, that they do not hold the publishers responsible for their conduct. Using the fraud offences to prosecute fake news publishers does not share this flaw. Rather, it provides a conventional means by which society may express its disapprobation of the conduct, deter others from engaging in the conduct, and reinforce the norm of truthfulness that is crucial for any well-functioning society.

10.3 Consequences of my argument

Throughout the thesis, I have focused on advancing the argument that making money by publishing fake news could and should be prosecuted as fraud without addressing the consequences of accepting the argument. Before concluding the thesis, it is appropriate to address briefly three of the potential consequences.

First, if my argument is correct, it may be applied to real news networks that knowingly broadcast false content for the purpose of generating greater advertising revenue. Here I have in mind the Fox News Network's promulgation of the 'Big Lie' that the 2020 Presidential Election was 'stolen'. In evidence given during defamation proceedings brought by Dominion Voting Systems, Rupert Murdoch reportedly admitted that hosts 'endorsed' the 'false notion of a stolen election' and that he could have but did not attempt to stop them.[21] If Fox could be shown to have done so for the purpose of increasing its viewership and therefore advertising revenue, its conduct would appropriately be characterised as a 'fraud that does not defraud' under my argument.

Secondly, if my argument is correct, those whose services are relied upon by fake news publishers may be held liable as accessories. Here I have in mind platforms who provide the means by which fake news publishers spread the links to the false stories. I also have in mind ad servers who provide the means by which fake news publishers monetise the stories. Putting to one side limitations on the liability of platforms,[22] if platforms and ad servers could be shown to have known that their services were being used to generate revenue from false content, their conduct would be appropriately characterised as aiding and abetting the frauds perpetrated by the fake news publishers.

Finally, if my argument is correct, it will have significant implications on the extent to which fake news deserves protection as 'free speech'. As I explained in Chapter 1, the Supreme Court in *United States v Alvarez* confirmed that the First

---

[21] David Folkenflik, 'Rupert Murdoch says Fox stars 'endorsed' lies about 2020. He chose not to stop them', *NPR*, 28 February 2023.
[22] See, eg, *Communications Decency Act 1996* (US) s 230.

Amendment prohibits laws that 'target falsity and nothing more' but not laws prohibiting falsehoods made for particular purposes such as 'effect[ing] a *fraud* or secur[ing] moneys or other valuable considerations'.[23] Accordingly, if publishing fake news stories to make money is actually *fraud*, the prosecution of the publishers ought to be permissible under the existing free speech jurisprudence. It should just be that simple. There should be nothing more to it.

However, things are rarely so simple. In response to me making a similar point in an article published in the *Santa Clara Law Review*,[24] a Twitter user accused me of waving 'a magic wand over the First Amendment'.[25] The user probably thought that the fake news publishers' predilection for false stories about politics warranted being more cautious as to the effect of the First Amendment. After all, laws aimed at political speech are said to be notoriously vulnerable to attack on First Amendment grounds.[26] And the political nature of the fake news phenomenon has led several scholars to treat any regulation of fake news as subject to the 'strict scrutiny' requirement that applies to political speech.[27]

At risk of further breaking convention by including more fresh content in the conclusion, it seems necessary for me to respond to this kind of argument before concluding the thesis. I have four points in response.

First, the fact that fake news publishers publish false stories about politics does not warrant concluding that the publishers engage in 'political speech'. As I explained in Chapter 2, the publishers are motivated by financial gain and false stories about politics just so happen to generate a lot of revenue. If anything, fake news publishers are better characterised as engaging in 'commercial speech' rather

---

[23] *United States v Alvarez*, 567 US 709, 722-723 (2012).
[24] Robert Size, 'Publishing Fake News for Profit Should be Prosecuted as Wire Fraud' (2020) 60 *Santa Clara Law Review* 29.
[25] @wolmanj (Twitter, 17 March 2021, 12:16AM AEST) https://twitter.com/thewolflawyer/status/1371813336057147392.
[26] Brittany Vojak, 'Fake News: The Commoditization of Internet Speech' (2017) 48 *California Western International Law Journal* 123, 146-149.
[27] See, eg, Joel Timmer, 'Fighting Falsity: Fake News, Facebook, and the First Amendment' (2017) 35 *Cardozo Arts and Entertainment Law Journal* 669, 679.

than 'political speech'.[28] Not only is it fallacious to characterise speech as 'political' in circumstances where the publisher has no interest in conveying any sort of political message,[29] but to do so would allow the publishers to misappropriate the protections afforded to political speech to further their own financial ends. In contrast, to characterise fake news as commercial speech would be to call the publishers' bluff—to treat fake news as what it really is, not what it pretends to be.

Secondly, using the wire fraud statute to prosecute fake news publishers would be highly unlikely to violate the 'strict scrutiny' requirement in any event. The test for strict scrutiny requires the government to prove that a restriction '*furthers a compelling interest* and is *narrowly tailored to achieve that interest*'.[30] Were the test to be applied to the wire fraud statute, the relevant 'compelling interest' would comprise the various rationales for the criminalisation of fraud that I identified in Chapter 9; and the following features would show that the statute is 'narrowly tailored to achieve that interest':

(a) as I explained in Chapter 3, the statute requires proof that the defendant's scheme involved making false or fraudulent pretenses, representations or promises, which excludes those who state the truth, express ideas or opinions or make assertions that cannot reasonably be taken to be factual in nature;

(b) as I explained in Chapter 4 and Chapter 5, the statute as per its plain meaning applies to schemes or artifices 'for obtaining money or property', which excludes those who act without financial motivations;

(c) as I explained in Chapter 6, the statute requires proof that the defendant made the false assertion of fact knowingly or recklessly, which excludes those who make false assertions of fact by mistake;

---

[28] On the difference in protections afforded to the two, see *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, 425 US 748, 771 n 24 (1976).
[29] John Riggins, 'Law Student Unleashes Bombshell Allegation You Won't Believe!: "Fake News" as Commercial Speech' (2017) 52 *Wake Forest Law Review* 1313, 1315, 1319. On the overlap between political and commercial speech, see Frederick Schauer, 'Facts and the First Amendment' (2010) 57 *UCLA Law Review* 897, 915.
[30] *Citizens United v Federal Election Commissioner*, 558 US 310, 340 (2010) (emphasis added).

(d) as I explained in Chapter 7, the statute requires proof that the defendant acted with 'intent to defraud', which creates an additional safety net—even where the prosecution proves that the publisher knowingly made a false assertion of fact to make money, the jury may acquit on the basis that the publisher's conduct does not warrant criminal punishment;

(e) as the statute requires the prosecution to prove its case *beyond a reasonable doubt* to the satisfaction of a *jury* under the direction of a *judge*, it does not confer on the 'government' the ability to 'define truth'[31] in the sense in which most scholars use that expression—i.e. the *executive* or *legislative* branches deciding which facts, opinions or ideas are valid and/or are able to be expressed;[32] and

(f) finally, as the statute applies to any false pretenses, it is not 'content-based' in the sense that it does not prohibit the dissemination of particular facts, opinions or ideas determined in advance.[33]

Thirdly, were a court to characterise the wire fraud statute as failing the test for 'strict scrutiny' in its application to fake news publishers, it would have to read down the statute so as to avoid its application to political speech.[34] This would be tantamount to holding that: 'Making money by lying is fraud (unless the lies are about politics)'. To adopt such a position would entirely miss a significant point that I have made in this thesis—namely, that making money by publishing fake news is a pernicious form of fraud precisely because misuse of two-sided attention markets enables the publishers to profit from stories about controversial topics like politics. To exclude political speech from the scope of the fraud offences would leave the profit motive attached to false political speech in circumstances where it has been detached from virtually every other form of false speech. In contrast, to include

---

[31] C Edwin Baker, 'Scope of the First Amendment Freedom of Speech' (1978) *25 UCLA Law Review* 964, 987.
[32] Ibid; Steven Gey, 'The First Amendment and the Dissemination of Socially Worthless Untruths' (2008) 36 Florida State University Law Review 1, 21-22. See also *Sorrell v IMS Health Inc*, 564 US 552, 566 (2011).
[33] Gey (n 32) 19; Clay Calvert et al, 'Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine' (2018) 86 *University of Cincinnati Law Review* 99, 108.
[34] *United States v Jin Fuey Moy*, 241 US 394, 401 (1916).

political speech would treat those who profit by lying about politics just like those who profit by lying about anything else—i.e. to focus on the making of money by the telling of lies, not the content of the lies told.

Finally, courts in the United States have already permitted prosecutors to rely upon fraud offences with respect to other forms of protected speech. The best example is perhaps *United States v Ballard*.[35] The defendants there claimed to be divine messengers with supernatural healing powers conferred upon them by Jesus and Saint Germain. They built a movement and solicited payments in return for memberships, books, charts, pamphlets and magazines. They were charged with mail fraud on the basis that they 'well knew' that they were not divine messengers and did not have supernatural healing powers.[36] The trial judge instructed the jury to consider whether the defendants 'honestly and in good faith' believed the claims they made.[37] In other words, he instructed them in a way that reflects the conventional distinction between a question of opinion (i.e. religious belief) and a question of fact (i.e. whether the defendants *actually believed* the religious belief).[38] The Supreme Court upheld this aspect of his instructions on appeal.[39]

The Supreme Court in *United States v Ballard* recognised the distinction between those who genuinely engage in protected speech and those who fraudulently attempt to misappropriate the protections afforded to speech to shield their dishonest gains from legal scrutiny. The argument I have advanced throughout this thesis is similarly built upon recognition of this important distinction. The conduct of the typical fake news publisher is in no way deserving of the protections afforded to political speech. The in-built limitations of the fraud offences ensure that those publishers who are so deserving—those who publish (or intend to publish) truth, opinion or satire—cannot be convicted. For the rest of them, prosecution under

---

[35] 322 US 78 (1944). See also *Village of Schaumburg v Citizens for a Better Environment*, 444 US 620, 636-639 (1980); *United States v Gronowicz*, 764 F 2d 983 (3rd Cir, 1985); *Riley v National Federation of the Blind of North Carolina Inc*, 487 US 781, 795 (1988); *Illinois ex rel Madigan v Telemarking Association*, 538 US 600, 601 (2003).
[36] Ibid 80.
[37] Ibid 81.
[38] See further Chapter 3.
[39] *United States v Ballard*, 322 US 78, 85 (1944).

section 192E of the Crimes Act, section 2 of the Fraud Act and the wire fraud statute is not only available as a solution to the ‘fake news problem’ but is in fact the solution that best reflects what fake news really is—fraud.

Bibliography

A Articles/Books/Reports

Abrams, Abigal, ‘Here’s What We Know So Far About Russia’s 2016 Meddling’, *Time*, 18 April 2019

Adler, Jonathan, ‘Lying, Deceiving, or Falsely Implicating’ (1997) 94 *Journal of Philosophy* 435

Ahmad, Wajeeha, et al, ‘Companies Inadvertently Fund Online Misinformation Despite Consumer Backlash’ (2024) 630 *Nature* 123

Alexander, Larry, and Emily Sherwin, ‘Deception in Morality and Law’ (2003) 22 *Law and Philosophy* 393

Allcott, Hunt, and Matthew Gentzkow, ‘Social Media and Fake News in the 2016 Election’ (2017) 31 *Journal of Economic Perspectives* 211

Allcott, Hunt, et al, ‘Trends in the Diffusion of Misinformation on Social Media’, *Research & Politics*, 9 May 2019

Alldridge, Peter, ‘The Doctrine of Innocent Agency’ (1990) 2 *Criminal Law Forum* 45

Allridge, Peter, ‘Sex, Lies and the Criminal Law’ (1993) 44 *Northern Ireland Legal Quarterly* 250

Al-Shathir, Hadi, ‘And into the Maelstrom steps the United States Supreme Court: Licences are not “Property” for the Purposes of the Mail Fraud Statute’ (2003) 68 *Missouri Law Review* 179

Appleton, Kirsten, and Veronica Stracqualursi, ‘Here’s What Happened the Last Time the Government Shut Down’, *ABC News*, 19 November 2014

Arlidge, Anthony, and Jaques Parry, *Fraud* (Sweet & Maxwell, 1985)

Arlidge, Anthony, et al, *Arlidge and Parry on Fraud* (5th ed, Sweet & Maxwell, 2016)

Arthur Ripstein, ‘Beyond the Harm Principle’ (2006) 34 *Philosophy & Public Affairs* 216

Ashworth, Andrew, and Jeremy Horder, *Principles of Criminal Law* (7th ed, Oxford University Press, 2013)

Associated Press, ‘“Pizzgate” Conspiracy Theorist gets Four Years in Prison’, *The Guardian*, 23 June 2017

Astbury, Raymond, ‘The Renewal of the Licensing Act in 1693 and its Lapse in 1695’ (1978) 33 *The Library* 296

Baker, C Edwin, ‘Scope of the First Amendment Freedom of Speech’ (1978) 25 *UCLA Law Review* 964

Bastick, Zach, ‘Would you notice if fake news changed your behavior? An experiment on the unconscious effects of disinformation’ (2021) 116 *Computers in Human Behavior* 106633

Beale, Joseph, ‘The Proximate Consequences of an Act’ (1920) 33 *Harvard Law Review* 633

Becker, Gary, ‘Crime and Punishment: An Economic Approach’ in D Whitman, *Economic Analysis of the Law: Selected Readings* (Wiley & Sons, 2002)

Becker, Lawrence, ‘Criminal Attempts and the Theory of the Law of Crimes’ (1974) 3 *Philosophy & Public Affairs* 262

Beckett, Lois, ‘Millions of Americans think the election was stolen. How worried should we be about more violence?’, *The Guardian*, 16 April 2021

Benkler, Yochai, Robert Faris and Hal Roberts, *Network Propaganda* (Oxford University Press, 2018)

Berkowitz, Ellen, ‘The Rise and Fall of the Right to Honest Government’ (1988) 22 *Loyola of Los Angeles Law Review* 325

Berman, Mitchell, ‘“Blameworthiness” and “Culpability” are not Synonymous: A Sympathetic Amendment to Simester’, *Criminal Law and Philosophy*, 21 March 2024

Bessler, John, ‘A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution’s Eighth Amendment’ (2019) 27 *William & Mary Bill of Rights Journal* 989

Bibas, Stephanos, ‘The Need for Prosecutorial Discretion’ (2010) 19 *Temple Political & Civil Rights Law Review* 369

Binder, Guyora, ‘The Rhetoric of Motive and Intent’ (2002) 6 *Buffalo Criminal Law Review* 1

Bingham, Tom, *The Rule of Law* (Penguin Books, 2011)

Binkowski, Brooke, ‘Van Full of ‘Illegals’ Shows up to Vote Clinton at Six Polling Places’, *Snopes*, 8 November 2016

Blount, Charles, *An Appeal from the Country to the City, for the Preservation of his Majesty’s Person, Liberty, Property and the Protestant Religion* (Harris, 1680)

Bogg, Alan, and John Stanton-Ife, ‘Protecting the Vulnerable: Legality, Harm and Theft’ (2003) 23 *Legal Studies* 402

Bok, Sissela, *Lying: Moral Choice in Public and Private Life* (Harvester Press, 1978)

Botkin, Alex, David Watson and William Bynum, *Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States* (Government Printing Office, 1901)

Boulianne, Shelley, and Christian Hoffmann, ‘Perceptions and Concerns About Misinformation on Facebook in Canada, France, the US, and the UK’ (2024) 36 *International Journal of Public Opinion Research* edae048

Bozarth, Lia, and Ceren Budak, ‘Market Forces: Quantifying the Role of Top Credible Ad Servers in the Fake News Ecosystem’ (2021) 15 *Proceedings of the Fifteenth International AAAI Conference on Web and Social Media* 83

Bracton, Henry, *De Legibus et Consuetudinibus Angliae*, tr Samuel E Thorne (Harvard Law School Library, 2003)

Bradley, Craig, ‘Mail Fraud after McNally and Carpenter: The Essence of Fraud’ (1988) 79 *Supreme Court Review* 573

Bronitt, Simon, and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 4th ed, 2017)

Bronstein, Michael, et al, ‘Belief in Fake News is Associated with Delusionality, Dogmatism, Religious Fundamentalism, and Reduced Analytic Thinking’ (2019) 8(1) *Journal of Applied Research in Memory and Cognition* 108

Brown, David, et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 2020)

Buchanan, Tom, ‘Why do people spread false information online?’ (2020) 15 *PLoS ONE* 1

Buell, Samuel, ‘Culpability and Modern Crime’ (2015) 103 *Georgetown Law Journal* 547

Buell, Samuel, ‘Novel Criminal Fraud’ (2006) 81 *New York University Law Review* 1971

Bump, Philip, ‘A blockbuster document purportedly from the Kremlin raises lots of questions — about itself’, *Washington Post*, 15 July 2021

Butler, Andrea, ‘Protecting the Democratic Role of the Press: A Legal Solution to Fake News’ (2018) 96 *Washington University Law Review* 419

Calvert, Clay, et al, ‘Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine’ (2018) 86 *University of Cincinnati Law Review* 99

Campbell, Kenneth, ‘The Test of Dishonesty in R. v. Ghosh’ (1984) 43 *Criminal Law Journal* 349

Carpenter, Charles, ‘Workable Rules for Determining Proximate Cause’ (1932) 20 *California Law Review* 229

Carson, Thomas, *Lying and Deception: Theory and Practice* (Oxford University Press, 2010)

Cartwright, John, *Misrepresentation* (Sweet & Maxwell, 2002)

Chalmers, James, and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217

Chisholm, Roderick, and Thomas Feehan, 'The Intent to Deceive' (1977) 74 *Journal of Philosophy* 143

Coffee, John, 'From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics' (1981) 19 *American Criminal Law Review* 117

Coffee, John, 'The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime' (1983) 21 *American Criminal Law Review* 1

Coler, Jestin, 'A Former Fake News Creator on Covering Fake News', *Nieman Foundation*, 1 May 2017

Collins, Dave, 'Sandy Hook families offer to settle Alex Jones' $1.5 billion legal debt for a minimum of $85 million', *Associated Press*, 28 November 2023

Collins, Jennifer, 'Exploitation of Persons and the Limits of the Criminal Law' [2017] *Criminal Law Review* 167

Coltoff, Paul, 'False Pretenses' (2020) 35 *Corpus Juris Secundum* § 26

Cornford, Andrew, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42 *Oxford Journal of Legal Studies* 985

Criminal Law Revision Committee, *Theft and Related Offences* (Report No 8, 1966)

Crofts, Penny, et al, *Waller & Williams Criminal Law* (13th ed, LexisNexis Butterworths, 2016)

Crosby, Cath, 'Recklessness—The Continuing Search for a Definition' (2008) 72 *Journal of Criminal Law* 259

Cutler, Christopher, 'McNally Revisited: The "Misrepresentation Branch" of the Mail Fraud Statute a Decade Later' (1998) 13 *BYU Journal of Public Law* 77

Dan-Cohen, Meir, ‘Defending Dignity’ in *UC Berkeley Public Law and Legal Theory Research Paper Series* (2002)

Daro, Ishmael, ‘The Toronto Sun Fell For An Obvious Hoax About Paid Anti-Trump Protesters’, *Buzzfeed News*, 28 February 2017

Daro, Ishmael, and Craig Silverman, ‘Fake News Sites Are Not Terribly Worried About Google Kicking Them Off AdSense’, *Buzzfeed News*, 16 November 2016

David Ormerod and Karl Laird, *Smith, Hogan and Ormerod’s Criminal Law* (15th ed, Oxford University Press, 2018)

Debusmann Jr, Bernd, ‘Alex Jones concedes Sandy Hook school shooting was '100% real'', *BBC*, 3 August 2022

Dennis Baker, ‘The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation’ (2008) 33 *Australian Journal of Legal Philosophy* 66

Dewey, Caitlin, ‘“I will get the people to buy into my works just to rip their hearts out.” A Q&A with a professional Internet troll.’, *Washington Post*, 22 August 2014

Dewey, Caitlin, ‘Facebook fake-news writer: ‘I think Donald Trump is in the White House because of me’, *Washington Post*, 17 November 2016

Dewey, Caitlin, ‘On the Internet, every day is April Fools’ day’, *Washington Post*, 30 March 2014

Dewey, Caitlin, ‘This is not an interview with Banksy’, *Washington Post*, 23 October 2014

Di Iorio, Olivia, ‘The misinformation bill was axed. How else can we combat the ‘biggest global risk’?’, *SBS*, 3 December 2024

Diamond, John, ‘Reviving Lenity and Honest Belief at the Boundaries of Criminal Law’ (2010) 44 *University of Michigan Journal of Law Reform* 1

Dimock, Susan, ‘Retributivism and Trust’ (1997) 16 *Law & Philosophy* 37

Dolinko, David, ‘Some Thoughts about Retributivism’ (1991) 101 *Ethics* 537

Drobnic Holan, Angie, ‘Why do so many people think Obama is a Muslim?’, *PolitiFact*, 26 August 2010

Duff, Antony, and Sarah Marshall, “Abstract Endangerment’, Two Harm Principles, and Two Routes to Criminalisation’ (2015) 3(2) *Bergen Journal of Criminal Law and Criminal Justice* 132

Dwoskin, Elizabeth, ‘How Facebook is trying to stop its own algorithms from doing their job’, *Washington Post*, 10 April 2019

Dyson, Matthew, and Paul Jarvis, ‘Poison Ivey or Herbal Tea Leaf?’ (2018) 134 *Law Quarterly Review* 198

East, Edward Hyde, *A Treatise of the Pleas of the Crown* (P Byrne, 1806)

Eburn, Michael, Roderick Howie and Paul Sattler, *Criminal Law and Procedure in New South Wales* (LexisNexis, 4th ed, 2014)

Edelson, Laura, et al, ‘Far-right news sources on Facebook more engaging’, Medium, 4 March 2021

Edgerton, Henry, ‘Legal Cause’ (1924) 72 *University of Pennsylvania Law Review* 211

Edwards, James, ‘Harm Principles’ (2014) 20 *Legal Theory* 253

Ehrlich, Isaac, ‘Crime, Punishment, and the Market for Offenses’ (1996) 10 *Journal of Economic Perspectives* 43

Elder, Jason, ‘Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All’ (1998) 77 *Oregon Law Review* 707

Emery, David, ‘Three Million Votes in Presidential Election Cast by 'Illegal Aliens'?’, *Snopes*, 16 November 2016

Emory, David, ‘No, Obama Did Not Confirm He Will Refuse to Leave Office if Trump Wins’, *Snopes*, 8 September 2016

Epstein, Ziv, et al, ‘Developing an accuracy-prompt toolkit to reduce COVID-19 misinformation online’ (2021) 3 *Harvard Kennedy School Misinformation Review* 1

Evans, David, and Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Harvard Business Review Press, 2016)

Evon, Dan, ‘Russia Put Black Lives Matter on Official Terror List’, *Snopes*, 13 July 2016

Evon, Dan, ‘Tens of Thousands of Fraudulent Clinton Votes Found in Ohio Warehouse’, *Snopes*, 30 September 2016

Evon, Dan, ‘Two White Men Doused with Gasoline, Set on Fire by BLM’, *Snopes*, 30 September 2016

FA Hayek, *The Road to Serfdom* (Routledge, 1944)

Farmer, Lindsay, *Making the Modern Criminal Law* (Oxford University Press, 2016)

Faulkner, Paul, ‘What is Wrong with Lying’ (2007) 55 *Philosophy and Phenomenological Research* 535

Feinberg, Joel, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, 1970)

Feinberg, Joel, ‘The Paradox of Blackmail’ (1988) 1 *Ratio Juris* 83

Feinberg, Joel, *Harm to Others* (Oxford University Press, 1984)

Feinberg, Joel, *Harmless Wrongdoing* (Oxford University Press, 1990)

Filistrucchi, Lapo, Damien Geradin and Eric van Damme, ‘Identifying Two-Sided Markets’ (2013) 36 *World Competition* 33

Finch, Emily, ‘The Elephant in the (Jury) Room: Exploring Mock Jurors’ Understanding of Different Approaches to Dishonesty’ [2021] *Criminal Law Review* 513

Fisher, Mark, John Woodrow Cox and Peter Hermann, ‘Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.’, *Washington Post*, 6 December 2016

Fisher, Talia, ‘Economic Analysis of Criminal Law’ in M Dubber and Tatjana Hornle (eds) *The Oxford Handbook of Criminal Law* (Oxford University Press, 2014)

Fletcher, George, *Rethinking Criminal Law* (Oxford University Press, 2000)

Flew, Terry, *Regulating Platforms* (Polity Books, 2021)

Foer, Albert, ‘On the Inefficiencies of Efficiency as the Single-Minded Goal of Antitrust’ (2015) 60 *Antitrust Bulletin* 103

Folkenflik, David, ‘Rupert Murdoch says Fox stars ‘endorsed’ lies about 2020. He chose not to stop them’, *NPR*, 28 February 2023

Fowler, Geoffrey, ‘Twitter and Facebook warning labels aren’t enough to save democracy’, *Washington Post*, 9 November 2020

Fried, Charles, *Right and Wrong* (Harvard University Press, 1978)

Funke, Daniel, ‘Facebook expands fact-checkers’ ability to debunk false photos and videos’, *Poynter*, 13 September 2018

Funke, Daniel, ‘Facebook’s fact-checking project sometimes forces hoaxes to change their content’, *Poynter*, 13 March 2019

Funke, Daniel, ‘Fact-Checkers Have Debunked This Fake News Site 80 Times. It’s Still Publishing on Facebook’, *Poynter*, 20 July 2018

Funke, Daniel, ‘How a disinformation network exploited satire to become a popular source of fake news on Facebook’, *PolitiFact*, 23 January 2020

Funke, Daniel, ‘Should we stop saying fake news?’, *Poynter*, 14 December 2017

Funke, Daniel, ‘Want to get away with posting fake news on Facebook? Just change your website domain’, *Poynter*, 30 January 2019

Gardner, John, ‘Ordinary Decent Honesty’ (2018) 9 UK *Supreme Court Yearbook* 290

Garrett, R Kelly, and Robert Bond, ‘Conservatives’ susceptibility to political misperceptions’ (2021) 7(23) *Science Advances* eabf1234

Gey, Steven, ‘The First Amendment and the Dissemination of Socially Worthless Untruths’ (2008) 36 *Florida State University Law Review* 1

Gilbert, Hannah, ‘The UK Company Spreading Russian Fake News to Millions’, *BBC*, 4 April 2023

Gillies, Peter, *Criminal Law* (Law Book Co, 1985)

Gillin, Joshua, ‘If you’re fooled by fake news, this man probably wrote it’, *PolitiFact*, 31 May 2017

Gillin, Joshua, ‘Secret Service Agent Says Obama Is Muslim & Gay In New Tell-All Book’, *PolitiFact*, 27 December 2016

Gillin, Joshua, ‘Story of 19 white women killed by Black Lives Matter supporter is fake news’, *PolitiFact*, 6 April 2017

Godwin, Richard, ‘Sean Adl-Tabatabai on being in the eye of the ‘fake news’ storm’, *Evening Standard*, 16 February 2017

Gore, D’Angelo, ‘Eight Years of Trolling Obama’, *FactCheck.org*, 19 January 2017

Graham, Megan, and Jennifer Elias, ‘How Google’s $150 billion advertising business works’, *CNBC*, 18 May 2021

Grasmick, Harold, and Lynn Appleton, ‘Legal Punishment and Social Stigma: A Comparison of two Deterrence Models’ (1977) 58 *Social Science Quarterly* 15

Green, Leon, ‘Are There Dependable Rules of Causation’ (1929) 77 *University of Pennsylvania Law Review* 601

Green, Stuart, ‘Lying, Misleading and Falsely Denying’ (2001) 53 *Hastings Law Journal* 157

Green, Stuart, *Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime* (Oxford, 2006)

Green, Stuart, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press, 2012)

Greenberg, Jon, 'PAC claims Obama would force sharia law on courts', *PolitiFact*, 26 September 2012

Griew, Edward, 'Dishonesty—The Objections to Feely and Ghosh' [1985] *Criminal Law Review* 341

Griffin, Lisa, 'Criminal Lying, Prosecutorial Power, and Social Meaning' (2009) 97 *California Law Review* 1515

Grinberg, Nir, et al, 'Fake News on Twitter during the 2016 U.S. Presidential Election' (2019) 363 *Science* 374

Guess, Andrew, Brendan Nyhan and Jason Reifler, 'Exposure to Untrustworthy Websites in the 2016 US Election' (2020) 4 *Nature Human Behaviour* 472

Guess, Andrew, Jonathan Nagler and Joshua Tucker, 'Less than you think: Prevalence and predictors of fake news dissemination on Facebook' (2019) 5 *Science Advances* 4586

Gunther, Richard, Paul Beck and Erik Nisbet, '"Fake news" and the defection of 2012 Obama voters in the 2016 presidential election' (2019) 61 *Electoral Studies* 102030

Haag, Matthew, and Waya Salam, 'Gunman in "Pizzagate" Shooting is Sentenced to 4 Years in Prison', *New York Times*, 23 June 2017

Hadden, Tom, 'The Origin and Development of Conspiracy to Defraud' (1967) 11 *American Journal of Legal History* 25

Hale, Brenda, 'Dishonesty' (2018) 9 *UK Supreme Court Yearbook* 243

Hale, Matthew, *Historia Placitorum Coronæ* (1736)

Hall, Jerome, *General Principles of Criminal Law* (2nd ed, Bobbs-Merrill Co, 1960)

Hall, Jerome, *General Principles of Criminal Law* (Lawbook Exchange, 1947)

Hall, Jerome, *Theft, Law and Society* (Little, Brown and Company, 1935)

Hao, Karen, 'How Facebook got addicted to spreading misinformation', *Technology Review*, 11 March 2021

Harcourt, Bernard, 'The Collapse of the Harm Principle' (1999) 90 *Journal of Criminal Law and Criminology* 109

Hart, HLA, 'Are There Any Natural Rights' (1955) 64 *The Philosophical Review* 175

Hart, HLA, and Tony Honoré, *Causation in the Law* (2nd ed, Clarendon Press, 1985)

Hautamaki, Edward, 'The Element of Mens Rea in Recklessness and "Criminal Negligence"' (1951) 2 *Duke Bar Journal* 56

Havey, Nicholas, 'Partisan public health: how does political ideology influence support for COVID-19 related misinformation?' (2020) 3 *Journal of Computational Social Science* 319

Hawkins, William, *A Treatise of the Pleas of the Crown* (Eliz Nutt, 1716)

Heyon, Dyson, 'What do we mean by Rule of Law?' in Prince and Sackar (eds) *Heydon: Selected Speeches and Papers* (Federation Press, 2018)

Higgins, Andrew, Mike McIntire and Gabriel Dance, 'Inside a Fake News Sausage Factory: "This Is All About Income"', *New York Times*, 25 November 2016

Hinds, Peter, *The Horrid Popish Plot* (Oxford University Press, 2010)

Horner, Paul, 'Obama Uses Own Money To Open Muslim Museum Amid Government Shutdown', *National Report*, 2 October 2013

Hortis, Alex, 'Valuing Honest Services: The Common Law Evolution of Section 1346' (1999) 74 *NYU Law Review* 1099

House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and 'Fake News': Final Report*, 14 February 2019

Hsu, Spencer, ‘‘Pizzagate’ gunman says he was foolish, reckless, mistaken — and sorry’, *Washington Post*, 14 June 2017

Hundley, Annie, ‘Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas’ (2017) 92 *Tulane Law Review* 497

Hurson, Daniel, ‘Limiting the Federal Mail Fraud Statute—A Legislative Approach’ (1983) 20 *American Criminal Law Review* 422

Husak, Douglas, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2007)

Hutchinson, Roland, ‘Facebook wants you to read articles before sharing them’, *Geeky Gadgets*, 11 May 2021

Isenberg, Arnold, ‘Deontology and the Ethics of Lying’ (1964) 24 *Philosophy and Phenomenological Research* 463

Jacobs, Leslie, ‘Freedom of Speech and Regulation of Fake News’ (2022) 70 *American Journal of Comparative Law* i278

Jacobson, Louis, ‘No, someone wasn’t paid $3,500 to protest Donald Trump; it’s fake news’, *PolitiFact*, 17 November 2016

Jamieson, Amber, and Olivia Solon, ‘Facebook to begin flagging fake news in response to mounting criticism’, *The Guardian*, 16 December 2016

Jansen, Lynn, and Steven Wall, ‘Rethinking Exploitation: A Process-Centered Account’ (2013) 23 *Kennedy Institute of Ethics Journal* 381

Jed Rakoff, ‘The Federal Mail Fraud Statute’ (1980) 18 *Duquesne Law Review* 771

Jeffrey Dean and Doye Green, ‘McNally v United States and its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals get a Break?’ (1988) 39 *Mercer Law Review* 697

Jeffries, John, ‘Legality, Vagueness, and the Construction of Penal Statutes’ (1985) 71 *Virginia Law Review* 189

Jennifer Saul, *Lying, Misleading & What is Said* (Oxford University Press, 2012)

Johnson, Maureen, and Kevin Rogers, 'The Fraud Act 2006: The E-Crime Prosecutor's Champion or the Creator of a New Inchoate Offence' (2007) 21 *International Review of Law, Computers & Technology* 295

Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2021)

Kant, Immanuel, 'On a Supposed Right to Lie Because of Philanthropic Concerns' in Kevin DeLapp and Jeremy Henkel (eds), *Lying and Truthfulness* (Hackett, 2016)

Kaplan, Joel, 'More Speech and Fewer Mistakes', *Meta*, 7 January 2025

Kessler, Glenn, 'The Fact Checker's Guide for Detecting Fake News', *Washington Post*, 22 November 2016

Killelea, Erica, 'Alex Jones Custody Trial: 10 WTF Moments', *Rolling Stone*, 28 April 2017

Kirk, David, 'Fraud trials: a brave new world' (2005) 69 *Journal of Criminal Law* 508

Klein, David, and Joshua Wueller, 'Fake News: A Legal Perspective' (2017) 20 *Journal of Internet Law* 5

Knobe, Joshua, and Scott Shapiro, 'Proximate Cause Explained: An Essay in Experimental Jurisprudence' (2021) 88 *University of Chicago Law Review* 165

Koetke, Jonah, Karina Schumann and Tenelle Porter, 'Intellectual Humility Predicts Scrutiny of COVID-19 Misinformation', *Social Psychological and Personality Science*, 18 January 2021

Korsgaard, Christine, *Creating the Kingdom of Ends* (Cambridge University Press, 1996)

Krings, Mike, 'Study Examines What Makes People Susceptible to Fake Health News', *University of Kansas News Service*, 31 January 2021

Kupfer, Joseph, 'The Moral Presumption Against Lying' (1982) 36 *Review of Metaphysics* 103

L'Estrange, Roger, *Lestrange's Narrative of the Plot* (Henry Brome, 1680)

L'Estrange, Roger, *The Case Put Concerning the Succession of His Royal Highness the Duke of York* (Henry Brome, 1679)

LaCapria, Kim, 'Did a Study Determine 25 Million Fraudulent Votes Were Cast for Hillary Clinton?', *Snopes*, 30 January 2017

LaCapria, Kim, 'ISIS Leader Calls for American Muslim Voters to Support Hillary Clinton, *Snopes*, 21 October 2016

LaCapria, Kim, 'WikiLeaks Confirms Hillary Clinton Sold Weapons to ISIS?', *Snopes*, 13 October 2016

LaFave, Wayne, *Criminal Law* (5th ed, 2010)

Laird, Karl, 'Dishonesty: Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)' [2018] *Criminal Law Review* 395

Lamond, Grant, 'What is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609

Lanham, David, et al, *Criminal Fraud* (Law Book Co, 1987)

Larry Alexander and Emily Sherwin, 'Deception in Morality and Law' (2003) 22 *Law and Philosophy* 393

Lautman, Olga, 'We're Winning, Say Russia's Fake News Manufacturers', *Centre for European Policy Analysis*, 16 October 2024

Law Commission, *Conspiracy to Defraud* (Working Paper No 104, October 1987)

Law Commission, *Fraud* (Report No 276, July 2002)

Lee, Jessica, 'Does Biden Want Fraudulent Ballots To Count in the 2020 Election?', *Snopes*, 9 November 2020

Leetaru, Kalev, 'Should We Fight Fake News By Banning Gullible People From The Internet', *Forbes*, 17 December 2016

Levi, Lili, ‘Real “Fake News” and Fake “Fake News”’ (2018) 16 *First Amendment Law Review* 232

Levin, Bess, ‘Nation’s Imbeciles Lose their Minds over Fake News Biden is Taking their Read Meat Away’, *Vanity Fair*, 26 April 2021

Loomba, Sahil, ‘Measuring the impact of COVID-19 vaccine misinformation on vaccination intent in the UK and USA’ (2021) 5 *Nature Human Behaviour* 337

Love, Julia, and Kristina Cooke, ‘Google, Facebook move to restrict ads on fake news sites’, *Reuters*, 15 November 2016

Lunsford, Lauren, ‘Fraud, Fools, and Phishing: Mail Fraud and the Person of Ordinary Prudence in the Internet Age’ (2011) 99 *Kentucky Law Journal* 379

Lusty, David, ‘Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67: Test for Dishonesty in the United Kingdom Brought Into Line With Australian Common Law’ (2017) 41 *Criminal Law Journal* 281

Lusty, David, ‘The Meaning of Dishonesty in Australia: Rejection and Resurrection of the Discredited Ghosh Test’ (2012) 36 *Criminal Law Journal* 282

Lyons, Benjamin, et al, ‘Overconfidence in news judgments is associated with false news susceptibility’ (2021) 118 *PNAS* e2019527118

MacCormick, Neil, ‘What is Wrong with Deceit?’ (1982) 10 *Sydney Law Review* 5

Marshall, Sandra, and Antony Duff, ‘Criminalization and Sharing Wrongs’ (1998) 11 *Canadian Journal of Law & Jurisprudence* 7

Martel, Cameron, Gordon Pennycook and David Rand, ‘Reliance on emotion promotes belief in fake news’ (2020) 5 *Cognitive Research: Principles and Implications* 47

Marvin, Ginny, ‘Google posts its new policy against fake news & ‘misrepresentative’ sites’, *MarTech*, 15 November 2016

McCoy, Terrence, ‘Inside a Long Beach Web Operation That Makes up Stories about Trump and Clinton: What They Do for Clicks and Cash’, *Los Angeles Times*, 22 November 2016

McDonough, John, and Karen Egolf, *The Advertising Age Encyclopaedia of Advertising* (Taylor & Francis, 2003)

Medlow, Gabriel, ‘Why is it Wrong to Punish Thought?’ (2018) 127 *Yale Law Journal* 2342

Melber, Ari, ‘Capitol Report: Regulating Fraud News’, *New Jersey Law Journal*, 30 January 2017

Messenger, Ashley, ‘The Epistemic and Moral Dimensions of Fake News and the First Amendment’ (2018) 16 *First Amendment Law Review* 328

Mikkelson, David, ‘Are Harry Potter Books Sparking a Rise in Satanism Among Children?’, *Snopes*, 2 December 2001

Mikkelson, David, ‘FBI Agent Suspected in Hillary Email Leaks Found Dead in Apparent Murder-Suicide’, *Snopes*, 5 November 2016

Mikkelson, David, ‘Obama Uses Own Money to Open Muslim Museum Amid Government Shutdown’, *Snopes*, 5 October 2013

Miles, Thomas, ‘Dupes and Losers in Mail Fraud’ (2010) 77 *University of Chicago Law Review* 1111

Mill, John Stuart, *On Liberty and Other Essays* (Oxford University Press, 2008)

Mill, John Stuart, *Utilitarianism* (Hackett, 1979)

Model Criminal Code Officers Committee, Chapter 3: Theft, Fraud, Bribery and Related Offences (Australian Government Printing Service, 1995)

Monaghan, Chris, ‘A Critical Commentary on the Fraud Act 2006’ in Chris Monaghan and Nicola Monaghan (eds), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (Routledge, 2018)

Moohr, Geraldine, ‘Federal Criminal Fraud and the Development of Intangible Property Rights in Information’ [2000] *University of Illinois Law Review* 683

Moohr, Geraldine, ‘Mail Fraud Meets Criminal Theory’ (1998) 67 *University of Cincinnati Law Review* 1

Moore, Michael, *Causation and Responsibility* (Oxford University Press, 2009)

Moore, Michael, *Placing Blame* (Oxford University Press, 1997)

Morris, Herbert, ‘Persons and Punishment’ (1968) 52 *Monist* 475

Mosleh, Mohsen, ‘Perverse Downstream Consequences of Debunking’, *Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems*, 6 May 2021

Mungan, Murat, ‘Stigma Dilution and Over-Criminalization’ (2016) 18 *American Law and Economics Review* 88

Murphy, Jeffrie, ‘Does Kant Have a Theory of Punishment’ (1987) 87 *Columbia Law Review* 516

Murphy, Jeffrie, *Retribution, Justice, and Therapy* (Reidel, 1979)

Murray, Alex, ‘How to spot a fake US election claim’, *BBC News*, 2 November 2016

Napoli, Philip, ‘What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble’ (2018) 70 *Federal Communications Law Journal* 55

Nelson, Jacob, ‘Is “Fake News” a Fake Problem’, *Columbia Journalism Review*, 31 January 2017

NewsGuard, *Special Report: Top Brands are Sending $2.6 Billion to Misinformation Websites Each Year* (2021)

NewsWhip, ‘A Fireside Chat with the Fake News King’, *YouTube*, 16 June 2017

Nice, Randall, ‘Reviving the Lost Tort of Defamation: A Proposal to Stem the Flow of Fake News’ (2019) 61 *Arizona Law Review* 205

Nielsen, Rasmus, and Lucas Graves, ‘What do ordinary people think fake news is? Poor journalism and political propaganda’, *Columbia Journalism Review*, 24 October 2017

Nikolov, Dimitar, Alessandro Flammini and Filippo Menczer, ‘Right and left, partisanship predicts (asymmetric) vulnerability to misinformation’ (2021) 1(7) *Harvard Kennedy School Misinformation Review* 1

Norrie, Alan, *Crime, Reason, and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 1993)

Nossel, Suzanne, ‘The Pro-Free Speech Way to Fight Fake News’, *Foreign Policy*, 12 October 2017

Oldnall Russell, William, *A Treatise on Crimes & Misdemeanors* (1st American ed, Wells & Lilly 1824)

Orbach, Barak, ‘The Antitrust Consumer Welfare Paradox’ (2010) 7 *Journal of Competition Law & Economics* 133

Ormerod, David, ‘A bit of a con? The Law Commission’s consultation paper on fraud’ [1999] *Criminal Law Review* 789

Ormerod, David, ‘The Fraud Act 2006—Criminalising Lying?’ [2007] *Criminal Law Review* 193

Ormerod, David, and Karl Laird, ‘Ivey v Genting Casinos – Much Ado About Nothing?’ (2018) 9 *UK Supreme Court Yearbook* 380

Orr, Kristen, ‘Fencing in the Frontier: A Look into the Limits of Mail Fraud’ (2007) 95 *Kentucky Law Journal* 789

Osmundsen, Mathias, et al, ‘Partisan Polarization is the Primary Psychological Motivation behind Political Fake News Sharing on Twitter’ (2021) 115 *American Political Science Review* 999

Oxman, Peter, ‘The Federal Mail Fraud Statute After McNally v United States’ (1988) 25 *American Criminal Law Review* 743

Page, Flora, ‘Defining Fraud: An Argument in Favour of a General Offence of Fraud’ (1997) 4 *Journal of Financial Crime* 287

Palfrey, Terry, ‘Is Fraud Dishonest? Parallel Proceedings and the Role of Dishonesty’ (2000) 64 *Journal of Criminal Law* 518

Papadogiannakis, Emmanouil, et al, ‘Who Funds Misinformation? A Systematic Analysis of the Ad-related Profit Routines of Fake News Sites’, *Proceedings of the ACM Web Conference 2023*, 30 April 2023

Park, Ahran, and Kyu Ho Youm, ‘Fake News from a Legal Perspective: The United States and South Korea Compared’ (2019) 25 *Southwestern Journal of International Law* 100

Park, Michael, ‘Separating Fact from Fiction: The First Amendment Case for Addressing “Fake News” on Social Media’ (2018) 46 *Hastings Constitutional Law* Quarterly 1

Park, Tai, ‘The “Right to Control” Theory of Fraud: When Deception Without Harm Becomes a Crime’ (2021) 43 *Cardozo Law Review* 135

Parkinson, Hannah, ‘Click and elect: how fake news helped Donald Trump win a real election’, *The Guardian*, 14 November 2016

Pelley, Scott, ‘How Fake News Becomes a Popular, Trending Topic’, *60 Minutes*, 26 March 2017

PEN America, *Faking News: Fraudulent News and the Fight for Truth*, 12 October 2017

Pennycook, Gordon, and David Rand, ‘Lazy, not biased: Susceptibility to partisan fake news is better explained by lack of reasoning than by motivated reasoning’ (2019) 188 *Cognition* 39

Pennycook, Gordon, and David Rand, ‘The Psychology of Fake News’ (2021) 25(5) *Trends in Cognitive Sciences* 388

Pennycook, Gordon, et al, ‘Predictors of attitudes and misperceptions about COVID-19 in Canada, the U.K., and the U.S.A.’ [2021] *Personality and Social Psychology Bulletin* 1

Pennycook, Gordon, et al, ‘Shifting attention to accuracy can reduce misinformation online’ (2021) 592 *Nature* 590

Perkins, Rollin, ‘The Law of Homicide’ (1946) 36 *Journal of Criminal Law and Criminology* 391

Perkins, Rollin, *Perkins on Criminal Law* (2nd ed, Foundation Press, 1969)

Peters, Jeremy, and Katie Robertson, ‘Fox Stars Privately Expressed Disbelief About Election Fraud Claims’, *New York Times*, 16 February 2023

Podgor, Ellen, ‘Mail Fraud: Redefining the Boundaries’ (1998) 10 *St Thomas Law Review* 557

Pollock, John, *The Popish Plot: A Study in the History of the Reign of Charles II* (Duckworth, 1903)

Posner, Richard, ‘An Economic Theory of the Criminal Law’ (1985) 85 *Columbia Law Review* 1193

Posner, Richard, *The Economics of Justice* (Harvard University Press, 1983)

Preston, Stephanie, et al, ‘Detecting fake news on Facebook: The role of emotional intelligence’ (2021) 16(3) *PLoS One* 0246757

Qiu, Linda, ‘Donald Trump’s baseless claims about the election being ‘rigged’’, *PolitiFact*, 15 August 2016

Rasmusen, Eric, ‘Stigma and Self-Fulfilling Expectations of Criminality’ (1996) 39 *Journal of Law and Economics* 519

Read, Max, ‘Donald Trump Won because of Facebook’, *New York Magazine*, 9 November 2016

Rhodan, Maya, ‘President Trump’s Favorite Conspiracy Theorist Is Just “Playing a Character,” His Lawyer Says’, *Time*, 17 April 2017

Rhodes, Samuel, ‘Filter Bubbles, Echo Chambers, and Fake News: How Social Media Conditions Individuals to Be Less Critical of Political Misinformation’ (2022) 39 *Political Communication* 1

Riggins, John, ‘Law Student Unleashes Bombshell Allegation You Won’t Believe!: “Fake News” as Commercial Speech’ (2017) 52 *Wake Forest Law Review* 1313

Ripstein, Arthur, ‘Beyond the Harm Principle’ (2006) 34 *Philosophy and Public Affairs* 216

Ritchie, Hannah, ‘Read all about it: The biggest fake news stories of 2016’, *CNBC*, 30 December 2016

Robinson, Paul, ‘Fair Notice and Fair Adjudication: Two Kinds of Legality’ (2005) 154 *University of Pennsylvania Law Review* 335

Robinson, Paul, and John Darley, ‘Intuitions of Justice: Implications for Criminal Law and Justice Policy’ (2007) 81 *Southern California Law Review* 1

Rochet, Jean-Charles, and Jean Tirole, ‘Platform Competition in Two-Sided Markets’ (2003) 1 *Journal of the European Economic Association* 1

Roozenbeek, Jon, et al, ‘Susceptibility to misinformation about COVID-19 around the world’ (2020) 7(10) *Royal Society Open Science* 201199

Rose, Flemming, and Jacob Mchangama, ‘Shutting Down Fake News Could Move Us Closer to a Modern-Day ‘1984’’, *Washington Post*, 10 February 2017

Royster, Lee, ‘Fake News: Potential Solutions to the Online Epidemic’ (2017) 96 *North Carolina Law Review* 270

Ryu, Paul, ‘Causation in Criminal Law’ (1958) 106 *University of Pennsylvania Law Review* 773

Sakuma, Amanda, ‘Alex Jones blames “psychosis” for his Sandy Hook conspiracies’, *Vox*, 31 March 2019

Samuels, Alec, ‘Dishonesty’ (2003) 67 *Journal of Criminal Law* 324

Saslow, Eli, ‘‘Nothing on This Page Is Real’: How Lies Become Truth in Online America’, *Washington Post*, 18 November 2018

Saul, Jennifer, ‘Just Go Ahead and Lie’ (2012) 72 *Analysis* 3

Saul, Jennifer, *Lying, Misleading & What is Said* (Oxford University Press, 2012)

Scalia, Antonin, and Bryan A Garner, *Reading Law* (West, 2012)

Schaedel, Sydney, ‘Did the Pope Endorse Trump?’, *FactCheck.org*, 24 October 2016

Schauer, Frederick, ‘Facts and the First Amendment’ (2010) 57 *UCLA Law Review* 897

Schwarcz, Daniel, ‘Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law’ (2003) 116 *Harvard Law Review* 2186

Serwe, Adam, ‘Birtherism of a Nation’, *The Atlantic*, 14 May 2020

Shane, Scott, ‘From Headline to Photograph, a Fake News Masterpiece’, New York *Times*, 18 January 2017

Shao, Chengcheng, et al, ‘The spread of low-credibility content by social bots’ (2018) 9 *Nature Communications* 4787

Shute, Stephen, and Jeremy Horder, ‘Thieving and Deceiving: What is the Difference?’ (1993) 56 *Modern Law Review* 548

Silverman, Craig, ‘Here Are 50 Of The Biggest Fake News Hits On Facebook From 2016’, *BuzzFeed News*, 30 December 2016

Silverman, Craig, ‘Here's Why Facebook's Trending Algorithm Keeps Promoting Fake News’, *BuzzFeed News*, 26 October 2016

Silverman, Craig, ‘How the Bizzare Conspiracy Theory Behind “Pizzagate” Was Spread’, *BuzzFeed News*, 6 December 2016

Silverman, Craig, ‘This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook’, *BuzzFeed News*, 16 November 2016

Silverman, Craig, and Jeremy Singer-Vine, ‘Most Americans who see fake news believe it, new survey says’, *BuzzFeed News*, 6 December 2016

Silverman, Craig, et al, ‘How Google’s Ad Business Funds Disinformation Around the World’, *ProPublica*, 29 October 2022

Silverman, Craig, Jane Lytvynenko and Scott Pham, ‘These Are 50 Of The Biggest Fake News Hits On Facebook In 2017, *BuzzFeed News*, 28 December 2017

Simester, Andrew, et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (7th ed, Hart Publishing, 2019)

Simester, AP, and GR Sullivan, ‘On the Nature and Rationale of Property Offences’ in Antony Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of Criminal Law* (Oxford University Press, 2005)

Size, Robert, ‘Publishing Fake News For Profit Should Be Prosecuted As Wire Fraud’ (2020) 60 *Santa Clara Law Review* 29

Size, Robert, ‘R v. Bashir? The Case For Charging Martin Bashir With Fraud’ [2021] *Criminal Law Review* 774

Sjouwerman, Stu, ‘How Disinformation Is Fueling A Fresh Wave Of Phishing Scams’, *Forbes*, 13 November 2020

Slater, Joanna, ‘Alex Jones ordered to pay nearly $1 billion to Sandy Hook families’, *Washington Post*, 12 October 2022

Smith, ATH, ‘Conspiracy to defraud: the Law Commission’s Working Paper 104’ [1988] *Criminal Law Review* 508

Smith, ATH, ‘Reforming section 16 of the Theft Act’ [1977] *Criminal Law Review* 259

Solon, Olivia, ‘Facebook’s fake news: Mark Zuckerberg rejects “crazy idea” that it swayed voters’, *The Guardian*, 11 November 2016

Spearman, Richard, ‘Ivey v Genting Casinos and Dishonesty: New Dawn or False Horizon’ (2018) 9 *UK Supreme Court Yearbook* 256

Spencer, JR, ‘Dishonesty: What the Jury Thinks the Defendant Thought the Jury Would Have Thought’ (1982) 41 *Cambridge Law Journal* 222

Spiegel, James, ‘Open-mindedness and intellectual humility’ (2012) 10(1) *Theory and Research in Education* 27

Stanley, Matthew, et al, ‘Analytic-thinking predicts hoax beliefs and helping behaviors in response to the COVID-19 pandemic’ (2020) 27 *Thinking & Reasoning* 464

Stanton, John, and Michelle Broder Van Dyke, ‘"Pizzagate" Conspiracy Theory Brought Armed Man To DC, Police Say’, *BuzzFeed News*, 7 December 2016

Steel, Alex, ‘Describing Dishonest Means’ (2010) 31 *Adelaide Law Review* 7

Steel, Alex, ‘Dishonesty Outside of England and Wales: Ivey in International Comparison’ (2018) 9 *UK Supreme Court Yearbook* 341

Steel, Alex, ‘Money for Nothing, Cheques for Free? The Meaning of ‘Financial Advantage’ in Fraud Offences’ (2007) 31 *UNSW Law Journal* 201

Steel, Alex, ‘The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft’ (2008) 31 *UNSW Law Journal* 712

Steel, Alex, ‘The Meanings of Dishonesty in Theft’ (2009) 38 *Common Law World Review* 103, 134

Stephen, James Fitzjames, *A History of the Criminal Law of England* (London, MacMillan & Co, 1883)

Stern, Simon, ‘R v Jones (1703)’ in Handler et al, *Landmark Cases in Criminal Law* (Hart Publishing, 2017)

Stewart, Hamish, ‘Harms, Wrongs, and Set-Backs in Feinberg’s Moral Limits of the Criminal Law’ (2001) 5 *Buffalo Criminal Law Review* 47

Stone-Erdman, Jessica, ‘Just the (Alternative) Facts, Ma’am: The Status of Fake News Under the First Amendment’ (2018) 16 *First Amendment Law Review* 410

Strudler, Alan, ‘Incommensurable Goods, Rightful Lies and the Wrongness of Fraud (1998)146 *University of Pennsylvania Law Review* 1529

Subedar, Anisa, ‘The Godfather of Fake News’, BBC, 27 November 2018

Sullivan, GR, ‘Framing an Acceptable General Offence of Fraud’ (1989) 53 *Journal of Criminal Law* 92

Sunstein, Cass, ‘Defamation Law Can Slow the Plague of Fake News’, *Bloomberg*, 23 December 2020

Sunstein, Cass, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford University Press, 2021)

Swift, Jonathan, *Gulliver’s Travels* (Oxford University Press, 2008)

Swire-Thompson, Briony, Joseph DeGutis and David Lazer, ‘Searching for the Backfire Effect: Measurement and Design Considerations’ (2020) 9(3) *Journal of Applied Research in Memory and Cognition* 286

Sydell, Laura, ‘We Tracked Down A Fake-News Creator In The Suburbs. Here’s What We Learned’, *NPR*, 23 November 2016

Tadros, Victor, ‘Harm, Sovereignty and Prohibition’ (2011) 17 *Legal Theory* 35

Tadros, Victor, *Criminal Responsibility* (Oxford University Press, 2005) 174-175.

Tan, Shell, Youjin Shin and Danielle Rindler, ‘How one of America’s ugliest days unraveled inside and outside the Capitol’, *Washington Post*, 9 January 2021.

Tien Vu, Hong, and Magdalena Saldaña, ‘Chillin’ Effects of Fake News: Changes in Practices Related to Accountability and Transparency in American Newsrooms Under the Influence of Misinformation and Accusations Against the News Media’, *Journalism & Mass Communication Quarterly*, 4 January 2021

Timmer, Joel, ‘Fighting Falsity: Fake News, Facebook, and the First Amendment’ (2017) 35 *Cardozo Arts and Entertainment Law Journal* 669

Timsit, Annbelle, Leo Sands and Joanna Slater, ‘Will Alex Jones pay Sandy Hook families $1B? What to know about the huge award’, *Washington Post*, 13 October 2022

Törnberg, Petter, ‘Echo chambers and viral misinformation: Modeling fake news as complex contagion’ (2018) 13(9) *PLoS One* e0203958

Townsend, Tess, ‘Google has banned 200 publishers since it passed a new policy against fake news’, *Vox*, 26 January 2017

Townsend, Tess, ‘The Bizarre Truth Behind the Biggest Pro-Trump Facebook Hoaxes’, *Inc*, 21 November 2016

Turner, JW Cecil, *Kenny’s Outlines of Criminal Law* (18th ed, Cambridge University Press, 1962)

van der Linden, Sander, Jon Roozenbeek and Josh Compton, ‘Inoculating Against Fake News About COVID-19’, *Frontiers in Psychology*, 23 October 2020

Veljanovski, Centro, *Economic Principles of Law* (Cambridge University Press, 2007)

Vincent, James, ‘Twitter is bringing its “read before you retweet” prompt to all users’, The Verge, 25 September 2020

Vojak, Brittany, ‘Fake News: The Commoditization of Internet Speech’ (2017) 48 *California Western International Law Journal* 123

Vosoughi, Soroush, Deb Roy and Sinan Aral, ‘The spread of true and false news online’ (2018) 359 *Science* 1146

Wallace, Caroline, ‘Obama Did Not Ban the Pledge’, *FactCheck.org*, 2 September 2016

Wardle, Claire, ‘6 types of misinformation circulated this election season’, *Columbia Journalism Review*, 18 November 2016

Wardle, Claire, ‘Information Disorder: The Essential Glossary’, *First Draft*, 9 July 2018

Wardle, Claire, and Hossein Derakhshan, ‘One year on, we’re still not recognizing the complexity of information disorder online’, *First Draft*, 31 October 2017

Warren, James, ‘The real problem with fake news? Citizen stupidity’, *Poynter*, 2 December 2016

Watts, Duncan, and David Rothschild, ‘Don’t blame the election on fake news. Blame it on the media’, *Columbia Journalism Review*, 5 December 2017

Weeks, Brian, and R Kelly Garrett, ‘Electoral consequences of political rumors’ (2014) 26 *International Journal of Public Opinion Research* 401

Welling, Sarah, et al, *Federal Criminal Law and Related Actions* (West, 1998)

Wendling, Mike, ‘The (almost) Complete History of “Fake News”’, *BBC*, 22 January 2018

Wertheimer, Alan, *Exploitation* (Princeton University Press, 1996)

Wharton, Francis, *A Treatise on the Criminal Law of the United States* (Kay & Brother, 1846

Wharton, Francis, *A Treatise on the Criminal Law of the United States* (7th ed, Kay & Brother, 1874)

Williams, CJ, ‘What is the Gist of the Mail Fraud Statute?’ (2014) 66 *Oklahoma Law Review* 287

Williams, Glanville, ‘Convictions and Fair Labelling’ (1983) 42 *Cambridge Law Journal* 85

Williams, Glanville, ‘Innocent Agency and Causation’ (1992) 3 *Criminal Law Forum* 289

Williams, Glanville, ‘Recklessness in Criminal Law’ (1953) 16 *Modern Law Review* 234

Williams, Sheila, ‘The Pope-Burning Processions of 1679, 1680 and 1681’ (1958) 21 *Journal of the Warburg and Courtauld Institutes* 104

Withey, Carol, ‘The Fraud Act 2006—Some Early Observations and Comparisons with the Former Law’ (2007) 71 *Journal of Criminal Law* 220

Woolrych, Humphry, *A Practical Treatise on Misdemeanors* (Shaw & Sons, 1842)

Yang, Maya, ‘Alex Jones ordered to pay Sandy Hook families $965m over hoax claims’, *The Guardian*, 13 October 2022

Yang, Maya, ‘Judge blocks Sandy Hook families’ settlement over Alex Jones bankruptcy’, *The Guardian*, 6 February 2025

Zimdars, Melissa, ‘Viral “Fake News” Lists and the Limitations of Labeling and Fact-Checking’ in Melissa Zimdars and Kembrew McLeod (eds), *Fake News: Understanding Media and Misinformation in the Digital Age* (MIT Press, 2020)

Zingale, Mark, ‘Fashioning a Victim Standard in Mail and Wire Fraud’ (1999) 99 *Columbia Law Review* 795

‘Donald Trump Protester Speaks Out: “I Was Paid $3,500 to Protest Trump’s Rally”’, *Snopes*, 6 June 2016

‘Fact-checking on Facebook’, *Facebook for Business* <https://www.facebook.com/business/help/2593586717571940>

‘Harry Potter Books Spark Rise In Satanism Among Children’, *The Onion*, 26 July 2000

‘How WordPress Changed the Internet’, *BroadbandSearch* (Blog Post) <https://www.broadbandsearch.net/blog/facts-about-wordpress-changed-the-internet>

‘Managing the COVID-19 infodemic: Promoting healthy behaviours and mitigating the harm from misinformation and disinformation’, *World Health Organisation*, 23 September 2020

‘Permanent Suspension of @realDonaldTrump’, *Twitter Inc*, 8 January 2021

B Cases

Allred v State, 605 So 2d 758 (Miss, 1992)

Anderson v State, 27 Wyo 345 (Wyo, 1921)

Anderson v State, 738 So 2d 253 (Miss Ct App, 1998)

Ankenbrandt v Richards, 504 US 689 (1992)

Apex Hosiery Co v Leader, 310 US 469 (1940)

Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW) (1948) 77 CLR 143

Arnold v State, 210 Ga App 843 (Ga Ct App, 1993)

Atlantic Cleaners & Dyers v United States, 286 US 427 (1932)

Aubrey v The Queen (2017) 260 CLR 305

Bacon v Salamane (1965) 112 CLR 85

Balcombe v De Simoni (1972) 126 CLR 576

Baskerville v State, 23 Md App 439 (Md Ct Spec App, 1974)

Berkoff v Burchill [1996] 4 All ER 1008

Bishop v State, 223 Ga App 285 (Ga Ct App, 1996)

Blackwell v The Queen (2011) 81 NSWLR 119

Bob Jones Univ v United States, 461 US 574 (1983)

Boggeln v Williams [1978] 1 WLR 873

Boreland v Docker [2007] NSWCA 94

Bruce v State, 217 Miss 368 (Miss, 1953)

Buntian v State, 15 Tex App 515 (Tex Ct App, 1884)

Burrage v United States, 571 US 204 (2014)

Busch v United States, 52 F 2d 79 (8th Cir, 1931)

Byford v State, 352 P 3d 898 (Ala Ct App, 2015)

Cacy v United States, 298 F 2d 227 (9th Cir, 1961)

Cardtoons LC v Major League Baseball Players Association, 95 F 3d 959 (10th Cir, 1996)

Carpenter v United States, 484 US 19 (1987)

Carter v State, 386 So 2d 1102 (Miss, 1980)

Chapman v Commonwealth, 239 SW 2d 974 (Ky, 1951)

Charles v Commissioner of Police for the Metropolis [1977] AC 177

Ciminelli v United States, 598 US 306 (2023)

Citizens United v Federal Election Commissioner, 558 US 310 (2010)

Clarke v Norton [1910] VLR 494

Cleveland v United States, 531 US 12 (2000)

Cleveland v United States, 951 F Supp 1249 (ED La, 1997)

Coleman v John Fairfax Publications Pty Ltd [2003] NSWSC 564

Colonial Bank v Whinney (1885) 30 Ch D 261

Colonial Bank v Whinney (1886) LR 11 App Cas 426

Commonwealth v Burdick, 2 Barr 163 (Pa, 1845)

Commonwealth v Burnette, 875 SW 2d 865 (Ky, 1994)

Commonwealth v Coe, 115 Mass 481 (Mass, 1874)

Commonwealth v Ferguson, 135 Ky 32 (Ky Ct App, 1909)

Commonwealth v Hutchinson, 2 Penn LJ 241 (1843)

Commonwealth v Lincoln, 83 Mass 233 (Mass, 1865)

Commonwealth v Tenney, 97 Mass 50 (Mass, 1867)

Commonwealth v Wilgus, 21 Mass 177 (Mass, 1826)

Connally v General Construction Company, 269 US 385 (1926)

Consumer Product Safety Commission v GTE Sylvania Inc, 447 US 102 (1980)

Cooper v Phibbs (1867) LR 2 HL 149

Crane v Commissioner, 331 US 1 (1947)

Cunliffe v Goodman [1950] 2 KB 237

Deaver v United States, 155 F 2d 740 (DC Cir, 1946)

Derry v Peek (1889) 14 App Cas 437

Director of Public Prosecutions v Patterson [2017] EWHC 2820 (Admin)

DPP v Logan-Pye [2007] NSWSC 1492

DPP v Patterson [2018] 1 Cr App R 28

Duncan v Independent Commission Against Corruption [2016] NSWCA 143

Durland v United States, 16 US 306 (1896)

Elias v DPP (NSW) (2012) 222 A Crim R 286

Entienne Pty Ltd v Festival City Broadcasters Pty Ltd (2001) 79 SASR 19

Environmental Defense v Duke Energy Corporation, 549 US 561 (2007)

Ex parte Day, 481 So 2d 1169 (Ala, 1985)

First National Bank v Maine, 284 US 312 (1932)

Fisher v State, 161 Ark 586 (Ark, 1923)

Foster v United States, 178 F 165 (6th Cir, 1910)

Fowler v Padget (1798) 7 TR 508; 101 ER 1103

Frank Warr & Co Ltd v London City Council [1904] 1 KB 713

Freedlander v Edens Broadcasting Inc, 734 F Supp 221 (ED Va, 1990)

Fuller v Beach Petroleum NL (1993) 43 FCR 60

Gardiner v John Fairfax & Sons Pty Ltd (1942) 42 SR (NSW) 171

Gardner v Commonwealth, 262 Va 18 (Va, 2001)

Grayned v City of Rockford, 408 US 104 (1972)

Greebel v FTP Software Inc, 194 F 3d 185 (1st Cir, 1999)

Greek Herald Pty Ltd v Nikolopoulos (2002) 54 NSWLR 165

Griffin v Oceanic Contractors, 458 US 564 (1982)

Gusow v United States, 347 F 2d 755 (10th Cir, 1965)

Hales v Petit (1565) 1 Plowden 253; 75 ER 387

Hammerschmidt v United States, 265 US 182 (1924)

Hansen v Archdall (1930) 44 CLR 625

Harrell v State, 192 Ga App 876 (Ga Ct App, 1989)

Harris v Harrison [1963] Crim LR 497

Harrison v United States, 200 F 665 (6th Cir, 1912)

Hartford Underwriters Insurance Co v Union Planters Bank, 530 US 1 (2000)

Haupt v United States, 330 US 631 (1947)

He Kaw Teh v The Queen (1985) 157 CLR 565

Hibbs v Winn, 542 US 88 (2004)

Higgins v State, 141 Ark 633 (Ark, 1920)

Hoover v State, 262 Ark 856 (Ark, 1978)

Hormel Foods Corp v Jim Henson Production Inc, 73 F 3d 497 (2nd Cir, 1996)

Humble v Mitchell (1839) 11 Ad & E 205; 113 ER 392

Hustler Magazine Inc v Falwell, 485 US 46 (1988)

Illinois ex rel Madigan v Telemarking Association, 538 US 600 (2003)

International News Service v Associated Press, 248 US 215 (1918)

Irwin v United States, 338 F 2d 770 (9th Cir, 1964)

Ivey v Genting Casinos (UK) Ltd [2018] AC 391; [2017] UKSC 67

Jabetin Pty Limited v Liquor Administration Board (2005) 63 NSWLR 602; [2005] NSWCA 92

Jack v Smail (1905) 2 CLR 684

Jama v Immigration and Customs Enforcement, 543 US 335 (2005)

John v Guardian News & Media Ltd [2008] EWHC 3066 (QB)

Jules v State, 85 Md 305 (Md Ct App, 1897)

Knickerbocker Merchandising Co v United States, 13 F 2d 544 (2nd Cir, 1926)

Kreuter v United States, 218 F 2d 532 (5th Cir, 1955)

La Moyne v State, 53 Tex Crim 221 (Tex Ct App, 1908)

Lane v State, 60 Md App 412 (Md Ct Spec App, 1984)

Leidholt v LFP Inc, 860 F 2d 890 (9th Cir, 1988)

Lewis v Daily Telegraph Ltd [1964] AC 234

Linden v United States, 254 F 2d 560 (4th Cir, 1958)

LL Bean Inc v Drake Publishers Inc, 811 F 2d 26 (1st Cir, 1987)

London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Sinfield [2018] EWHC 51 (QB)

Lorillard v Pons, 434 US 575 (1978)

Loughrin v United States, 573 US 351 (2014)

MacDonald v State, 124 Neb 332 (Neb, 1933)

Macleod v The Queen (2003) 214 CLR 230

Maine v Estes, 46 Me 150 (1858)

Martin v State, 200 Miss 142 (Miss, 1946)

Matthews v Fountain [1982] VR 1045

McGuiness v JT Publishing Australia Pty Ltd [1999] NSWSC 471

McNally v United States, 483 US 350 (1987).

Milkovich v Lorain Journal Co, 497 US 1 (1990)

Milner v Department of the Navy, 562 US 562 (2011)

Mink v Knox, 613 F 3d 995 (10th Cir, 2010)

Mitchell v United States, 142 F 2d 480 (10th Cir, 1944)

Monessen SW Ry v Morgan, 486 US 330 (1988)

Montclair v Ramsdell, 107 US 147 (1883)

Moore v United States, 2 F 2d 839 (7th Cir, 1924)

Moss v State, 194 Ark 524 (Ark, 1937)

Muscarello v United States, 524 US 125 (1998)

Neder v United States, 527 US 1 (1999)

Norman v Federal Commissioner of Taxation (1963) 109 CLR 9

Ollman v Evans, 750 F 2d 970 (DC Cir, 1984)

Palsgraf v Long Island Railroad Company, 248 NY 339 (NY Ct App, 1928)

Pasquantino v United States, 544 US 349 (2005)

Patterson v New York, 432 US 197 (1977)

Paulk v State, 344 So 2d 304 (Fla Dist Ct App, 1977)

People ex rel McGovern v Weisbard, 139 Misc 385 (Magis Ct, 1931)

People v Bartels, 77 Colo 498 (Colo, 1925)

People v Benevento, 239 NYS 2d 761 (NY App Div, 1963)

People v Brady, 275 Cal App 2d 984 (Cal Ct App, 1969)

People v Bryant, 119 Cal 595 (Cal, 1898)

People v Haissig, 976 NE 2d 1121 (Ill App Ct, 2012)

People v Harden, 2005 WL 957420 (Mich Ct App, 2005)

People v Headley, 37 Misc 3d 815 (KC Sup Ct, 2012)

People v Jones, 36 Cal 2d 373 (Cal, 1950)

People v Katzman, 258 Cal App 2d 777 (Cal Ct App, 1968)

People v Lennox, 106 Mich 625 (1895)

People v Lintz, 251 Mich 367 (Mich, 1930)

People v Randono, 32 Cal App 3d 164 (1973)

People v Ross, 25 Cal App 3d 190 (Cal Ct App, 1972)

People v Weiger, 100 Cal 352 (Cal, 1893)

People v Wynn, 44 Cal App 2d 723 (Cal Dist Ct App, 1941)

Peters v The Queen (1998) 192 CLR 493

Pierce v Underwood, 487 US 552 (1988)

Pinkstone v The Queen (2004) 219 CLR 444; [2004] HCA 23

Polk v Commonwealth, 2013 Va App Lexis 200 (Va Ct App, 2013)

Polygram Records Inc v Superior Court, 170 Cal App 3d 543 (Cal App, 1985)

Pratten v The Queen [2014] NSWCCA 117

Pring v Penthouse International Inc, 695 F 2d 438 (10th Cir, 1983)

Prosser v Fox (1898) 24 VR 151

Quidley v Commonwealth, 221 Va 963 (Va, 1981)

R v Airey (1801) 2 East 30; 102 ER 279

R v Andrewes [2020] EWCA Crim 1055

R v Andrewes [2022] UKSC 24

R v Barnard (1837) 7 Car & P 784; 173 ER 342

R v Bedford (2007) 98 SASR 514

R v Bernhard [1938] 2 KB 264

R v Bonollo [1981] VR 633

R v Brown & Brown (1847) 2 Cox CC 348

R v Bulmer (1864) 9 Cox CC 492

R v Burke [1991] 1 AC 135

R v Burton (1886) 17 Cox CC 62

R v Butcher (1858) 8 Cox CC 77

R v Button [1900] 2 QB 597

R v Carpenter (1911) 22 Cox CC 618

R v Clarke [1996] Crim LR 824

R v Clarkson [1987] VR 962

R v Clayton (1920) 15 Cr App R 45

R v Clucas [1949] 2 KBD 226

R v Cooper (1877) 12 Cox CC 617; 2 QBD 510

R v Copeland (1842) Car & M 516; 174 ER 615

R v Davis (1868) 11 Cox CC 181

R v De Berenger (1814) 3 M & S 67; 105 ER 536

R v Denning [1962] NSWR 173

R v Dent (1843) 1 Cox CC 15

R v Dudley and Stephens (1884) 14 QBD 273

R v Dziruni [2008] EWCA Crim 677

R v Feely [1973] QB 530

R v Field [2021] EWCA Crim 380

R v Freeth (1807) Russ & Ry 127; 168 ER 718

R v Fuge (2001) 123 A Crim R 310

R v G [2004] 1 AC 1034

R v Gardner (1856) 7 Cox CC 136

R v Ghosh [1982] QB 1053

R v Giles (1865) 10 Cox CC 44; Le & Ca 502; 169 ER 1490

R v Gilks [1972] 1 WLR 1341

R v Gilson and Cohen (1944) 29 Cr App R 174

R v Greathead (1878) 14 Cox CC 108

R v Greenstein [1975] 1 WLR 1353

R v Haboub [2007] EWCA Crim 3320

R v Hallett [1969] SASR 141

R v Hamilton (1845) 1 Cox CC 244

R v Hammerson (1914) 10 Cr App R 121

R v Hancock [1986] AC 455

R v Harris (1680) 7 St Tr 925

R v Hayes [2018] 1 Cr App R 10; [2015] EWCA Crim 1944

R v Hensler (1870) 11 Cox CC 570

R v Holden [1991] Crim LR 478

R v Howarth (1870) 11 Cox CC 588

R v Jeevarajah [2012] EWCA Crim 1299

R v Jeff (1966) 51 Cr App R 28

R v Jones (1703) 1 Salk 379; 91 ER 330

R v Kennedy (No 2) [2008] AC 269

R v Kenrick (1843) 5 QB 49; 114 ER 1166

R v Kovacs [1974] 1 WLR 370

R v Kritz [1950] 1 KB 82

R v Kylsant [1932] 1 KB 442

R v Lambassi [1927] VLR 349

R v Landy [1981] 1 WLR 355

R v Langham (1984) 36 SASR 48

R v Leppard (1864) 4 F & F 51; 176 ER 462

R v Light (1915) 24 Cox CC 718

R v Love (1989) 17 NSWLR 608

R v Martin (1867) 10 Cox CC 383

R v McIvor [1982] 1 WLR 409

R v Michael (1840) 9 C & P 356; 173 ER 867

R v Mills (1857) 7 Cox CC 270

R v Moloney [1985] AC 905

R v Moreton (1913) 23 Cox CC 560

R v Murphy [1987] Tas R 178

R v Nehuff (1706) 1 Salk 151; 91 ER 139

R v Nundah (1916) 16 SR (NSW) 482

R v Pabon [2018] EWCA Crim 420

R v Perera [1907] VLR 240

R v Petkova [2011] EWCA Crim 109

R v Potger (1970) 55 Cr App R 42

R v Rebelo [2021] EWCA Crim 306

R v Reed (1843) Car & M 306; 174 ER 519

R v Royle [1971] 1 WLR 1764

R v Salvo [1980] VR 401

R v Steane [1947] KB 997

R v Stevens (1844) 1 Cox CC 83

R v Story (1805) Russ & Ry 81; 168 ER 695

R v Stratford [2011] EWCA Crim 888

R v Vasic [2005] 11 VR 380

R v Vella [2015] NSWCCA 148

R v Wade (1869) 11 Cox CC 549

R v Wakeling (1823) Russ & Ry 504; 168 ER 920

R v Wallace [2018] EWCA Crim 690

R v Walsh (1990) 52 A Crim R 80

R v Waterfall [1970] 1 QB 148

R v Wheatley (1761) 1 Black W 273; 96 ER 151; 2 Burr 1124; 97 ER 746

R v White [2011] EWCA Crim 1927

R v Wilkins (1965) 2 CCC 189

R v Williams (1836) 7 C & P 354; 173 ER 158

R v Woolley (1850) 1 Den 559; 169 ER 372

R v Woolven (1983) 77 Crim App Rep 231

R v Young (1788) 1 Leach 505; 168 ER 354; 3 TR 98; 100 ER 475

Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460

Re Burton [2021] NSWCCA 87

Re London and Globe Finance Corporation Ltd [1903] 1 Ch D 728

Re Rudebeck, 95 Wash 433 (Wash, 1917)

Rewis v United States, 401 US 808 (1971)

Riley v National Federation of the Blind of North Carolina Inc, 487 US 781 (1988)

Robinson v State, 141 Tex Crim 318 (Tex Ct App, 1941)

Robinson v United States, 42 App DC 186 (1914)

Rosengarten v State, 171 So 2d 591 (Fla Dist Ct App, 1965)

S & K Holdings Ltd v Throgmorton Publications Ltd [1972] 1 WLR 1036

Salomone v Macmillan Publishing Co Inc, 411 NYS 2d 105 (NY, 1978)

Sebelius v Cloer, 569 US 369 (2013)

Shaw v United States, 137 S Ct 462 (2016)

Sheldon v Sill, 49 US 441 (1850)

Sherras v De Rutzen [1895] 1 QB 918

Simmons v State, 160 Miss 582 (Miss, 1931)

Skilling v United Sates, 561 US 358 (2010)

Sorrell v IMS Health Inc, 564 US 552 (2011)

Spies v The Queen (2000) 201 CLR 603; [2000] HCA 43

Sprint Communications Co LP v APCC Services Inc, 554 US 269 (2008)

State v Armstrong, 183 NW 2d 205 (Iowa, 1971)

State v Aurgemma, 116 RI 425 (RI, 1976)

State v Barnes, 177 W Va 510 (W Va, 1987)

State v Bouchard, 881 A 2d 1130 (Me, 2005)

State v Brantingham, 66 Mont 1 (Mont, 1923)

State v Cogle, 182 NC App 71 (NC Ct App, 2007)

State v Croland, 54 NJ Super 594 (NJ Super Ct App Div, 1959)

State v Estes, 46 Me 150 (1858)

State v George, 161 Wash 2d 203 (Wash, 2007)

State v Gruber, 132 NH 83 (NH, 1989)

State v Hendon, 170 La 488 (La, 1930)

State v Hines, 36 NC App 33 (NC Ct App, 1978)

State v Hooker, 99 Wash 661 (Wash, 1918)

State v Huckins, 212 Iowa 283 (Iowa, 1931)

State v Hurst, 507 NW 2d 918 (SD, 1993)

State v Jahns, 133 Ariz 562 (Ariz Ct App, 1982)

State v Kaufman, 31 NJ Super 225 (NJ Super Ct App Div, 1954)

State v Kennedy, 105 Wis 2d 625 (Wis, 1981)

State v Lone, 361 NW 2d 854 (Minn, 1985)

State v McCall, 1983 NM App Lexis 779 (NM Ct App, 1983)

State v Mills, 96 Ariz 377 (Ariz, 1964)

State v Quinn, 623 NW 2d 36 (SD, 2001)

State v Rivenbark, 509 So 2d 1047 (Miss, 1987)

State v Roberts, 711 P 2d 235 (Utah, 1985)

State v Sargent, 2 Wash 2d 190 (Wash, 1940)

State v Sharma, 216 Ariz 292 (Ariz Ct App, 2007)

State v Spitko, 2 Conn Cir Ct 99 (Conn Cir Ct, 1963)

State v Stanley, 116 Kan 449 (Kan, 1924)

State v Stephens, 263 Kan 658 (Kan, 1998)

State v Switser, 63 Vt 604 (Vt, 1891)

State v Wellington, 34 Wash App 607 (Wash, 1983)

Stewart v State, 256 Ark 619 (Ark, 1974)

Stolz v People, 59 Colo 342 (Colo, 1915)

Stratacos v State, 293 Ga 401 (Ga, 2013)

Sutherland v Stopes [1925] AC 47

Swan v The Queen (2020) 94 ALJR 385; [2020] HCA 11

Sweet v Parsley [1970] AC 132

Taylor v The Queen [2019] VSCA 162

Ten Group Pty Ltd v Cornes (2012) 114 SASR 46

Terrell v State, 237 So 3d 717 (Miss, 2018)

Torkington v Magee [1902] 2 KB 427

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107

Triggs v Sun Printing and Publishing Association, 71 NE 739 (NY Ct App, 1904)

Twyne's Case (1601) 3 Co Rep 80; 76 ER 809

United States v Akinyoyenu, 201 F Supp 3d 82 (DDC, 2016)

United States v Aldissi, 758 Fed Appx 694 (11th Cir, 2018)

United States v Alvarez, 567 US 709 (2012)

United States v Amrep Corporation, 560 F 2d 539 (2nd Cir, 1977)

United States v Ashley, 905 F Supp 1146 (EDNY, 1995)

United States v Austin, 774 F 2d 99 (5th Cir, 1985)

United States v Ballard, 322 US 78 (1944)

United States v Bankston, 182 F 3d 296 (5th Cir, 1999)

United States v Baroni, 909 F 3d 550 (3rd Cir, 2018)

United States v Bermes, 9 Fed Appx 207 (4th Cir, 2001)

United States v Berroa, 856 F 3d 141 (1st Cir, 2017)

United States v Binday, 804 F 3d 558 (2nd Cir, 2015)

United States v Black, 625 F 3d 386 (7th Cir, 2010)

United States v Blumeyer, 114 F 3d 758 (8th Cir, 1997)

United States v Bonnett, 877 F 2d 1450 (10th Cir, 1989)

United States v Boyer, 694 F 2d 58 (3rd Cir, 1982)

United States v Brown, 540 F 2d 364 (8th Cir, 1976)

United States v Bruchhausen, 977 F 2d 464 (9th Cir, 1992)

United States v Bryza, 522 F 2d 414 (7th Cir, 1975)

United States v Carruthers, 152 F 2d 512 (7th Cir, 1945)

United States v Christopher, 142 F 3d 46 (1st Cir, 1998)

United States v Cloud, 872 F 2d 846 (9th Cir, 1989)

United States v Coffman, 94 F 3d 330 (7th Cir, 1996)

United States v Colton, 231 F 3d 890 (4th Cir, 2000)

United States v Computer Sciences Corporation, 689 F 2d 1181 (4th Cir, 1982)

United States v Cooper, 677 F Supp 778 (Del, 1988)

United States v Cronic, 900 F 2d 1511 (10th Cir, 1990)

United States v Dial, 757 F 2d 163 (7th Cir, 1985)

United States v Dinome, 86 F 3d 277 (2nd Cir, 1996)

United States v Doherty, 867 F 2d 47 (1st Cir, 1989)

United States v Donahue, 539 F 2d 1131 (8th Cir, 1976)

United States v Edwards, 458 F 2d 875 (5th Cir, 1972)

United States v Ellington, 774 F 2d 1164 (6th Cir, 1985)

United States v Evans, 844 F 2d 36 (2nd Cir, 1988)

United States v Fagan, 816 F 2d 1002 (5th Cir, 1987)

United States v Feldman, 136 F 2d 394 (2nd Cir, 1943)

United States v Feldman, 711 F 2d 758 (7th Cir, 1983)

United States v Feldman, 931 F 3d 1245 (11th Cir, 2019)

United States v Frankel, 721 F 2d 917 (3rd Cir, 1983)

United States v George, 477 F 2d 508 (7th Cir, 1973)

United States v Gole, 158 F 3d 166 (2nd Cir, 1998)

United States v Granberry, 908 F 2d 278 (8th Cir, 1990)

United States v Gray, 405 F 3d 227 (4th Cir, 2005)

United States v Greenberg, 835 F 3d 295 (2nd Cir, 2016)

United States v Gregory, 253 F 2d 104 (5th Cir, 1958)

United States v Gronowicz, 764 F 2d 983 (3rd Cir, 1985)

United States v Halbert, 640 F 2d 1000 (9th Cir, 1981)

United States v Hathaway, 798 F 2d 902 (6th Cir, 1986)

United States v Helmsley, 941 F 2d 71 (2nd Cir, 1991)

United States v Henderson, 446 F 2d 960 (8th Cir, 1971)

United States v Hoffa, 205 F Supp 710 (SD Fla, 1962)

United States v Hoffman, 901 F 3d 523 (5th Cir, 2018)

United States v Horman, 118 F 780 (SD Ohio, 1901)

United States v Isaacs, 493 F 2d 1124 (7th Cir, 1974)

United States v Jin Fuey Moy, 241 US 394 (1916)

United States v Kelerchian, 937 F 3d 895 (7th Cir, 2019)

United States v Keller, 14 F 3d 1051 (5th Cir, 1994)

United States v Kerkman, 866 F 2d 877 (6th Cir, 1989)

United States v Kreimer, 609 F 2d 126 (5th Cir, 1980)

United States v LaPlante, 714 F 3d 641 (1st Cir, 2013)

United States v Lew, 875 F 2d 219 (9th Cir, 1989)

United States v Loring, 91 F 881 (ND Ill, 1884)

United States v Madeoy, 912 F 2d 1486 (DC Cir, 1990)

United States v Margiotta, 688 F 2d 108 (2nd Cir, 1982)

United States v Masten, 170 F 3d 790 (7th Cir, 1999)

United States v Matt, 838 F 2d 1356 (5th Cir, 1988)

United States v Maxwell, 579 F 3d 1282 (11th Cir, 2009)

United States v Maze, 414 US 395 (1974)

United States v McClellan, 794 F 3d 743 (7th Cir, 2015)

United States v McMillan, 600 F 3d 434 (5th Cir, 2010)

United States v Morris, 80 F 3d 1151 (7th Cir, 1996)

United States v Nelson, 712 F 3d 498 (11th Cir, 2013)

United States v New South Farm & Home Co, 241 US 64 (1916)

United States v Novak, 443 F 3d 150 (2nd Cir, 2006)

United States v Painter, 314 F 2d 939 (4th Cir, 1963)

United States v Pepper, 51 F 3d 469 (5th Cir, 1995)

United States v Philip Morris USA Inc, 566 F 3d 1095 (DC Cir, 2009)

United States v Pollack, 534 F 2d 964 (DC Cir, 1976)

United States v Ratcliff, 488 F 3d 639 (5th Cir, 2007)

United States v Regent Office Supply Co, 421 F 2d 1174 (2nd Cir, 1970)

United States v Reicin, 497 F 2d 563 (7th Cir, 1974)

United States v Ron Pair Enterprises Inc, 489 US 233 (1989)

United States v Rossomando, 144 F 3d 197 (2nd Cir, 1998)

United States v Rowe, 56 F 2d 747 (2nd Cir, 1932)

United States v Rubashkin, 655 F 3d 849 (8th Cir, 2011)

United States v Sadler, 750 F 3d 585 (6th Cir, 2014)

United States v Sawyer, 799 F 2d 1494 (11th Cir, 1986)

United States v Sawyer, 85 F 3d 713 (1st Cir, 1996)

United States v Schwartz, 924 F 2d 410 (2nd Cir, 1991)

United States v Scott, 701 F 2d 1340 (11th Cir, 1983)

United States v Seidling, 737 F 3d 1155 (7th Cir, 2013)

United States v Shyres, 898 F 2d 647 (8th Cir, 1990)

United States v Simpson, 950 F 2d 1519 (10th Cir, 1991)

United States v Sims, 985 F 2d 326 (7th Cir, 1990)

United States v Sorich, 523 F 3d 702 (7th Cir, 2008)

United States v States, 488 F 2d 761 (8th Cir, 1973)

United States v Steffen, 687 F 3d 1104 (8th Cir, 2012)

United States v Svete, 556 F 3d 1157 (11th Cir, 2009)

United States v Takhalov, 827 F 3d 1307 (11th Cir, 2016)

United States v Tarnopol, 561 F 2d 466 (3rd Cir, 1977)

United States v Treadwell, 593 F 3d 990 (9th Cir, 2010)

United States v Walters, 997 F 2d 1219 (7th Cir, 1993)

United States v Weimert, 819 F 3d 351 (7th Cir, 2016)

United States v Welch, 327 F 3d 1081 (10th Cir, 2003)

United States v Young, 232 US 155 (1914)

United States v Yusuf, 536 F 3d 178 (3rd Cir, 2008)

United States v Zauber, 857 F 2d 137 (3rd Cir, 1988)

Utility Air Regulatory Group v EPA, 573 US 302 (2014)

Village of Schaumburg v Citizens for a Better Environment, 444 US 620 (1980)

Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc, 425 US 748 (1976)

Walden v Hensler (1987) 163 CLR 561

West v United States, 68 F 2d 96 (10th Cir, 1933)

Williams v State, 77 Ohio St 468 (Ohio, 1908)

Wilson v United States, 190 F 427 (2nd Cir, 1911)

Winters v New York, 33 US 507 (1948)

Woolmington v DPP (1935) AC 462

Yrissari v Clement (1826) 3 Bing 432; 130 ER 579

Zuni Pub Sch Dist No 89 v Department of Education, 550 US 81 (2007)

C Legislation

Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Books and Pamphlets and for Regulating of Printing and Printing-Presses, 14 Car 2, c 33

An Act for the more effectual Punishment of Persons who shall attain, or attempt to attain Possession of Goods or Money, by false or untrue Pretences (etc) 1757, 30 Geo 2, c 24

An Act To Codify, Revise, and Amend the Penal Laws of the United States, ch 321, § 215, 35 Stat 1088 (1909)

Communications Decency Act 1996 (US) s 230

Crimes Act 1900 (NSW) ss 4B, 192B, 192E

Crimes Act 1958 (Vic) s 82

Crimes Amendment Act 1979 (NSW)

Criminal Code 2002 (ACT) s 300

Criminal Law Consolidation Act 1935 (SA) s 131

Defamation Act 2005 (NSW) ss 25, 31

Defamation Act 2013 (UK) ss 2, 3

Fraud Act 2006 (UK) ss 2, 5

Larceny Act 1916 (UK) s 32(1)

Theft Act 1968 (UK) ss 15, 16

18 USC § 1341-1346

D Other

Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024 (Cth)

EU Code of Practice on Disinformation

Explanatory Memorandum, Crimes (Theft) Bill 1973 (Vic)

Explanatory Notes, Crimes Amendment (Fraud, Identity and Forgery Offences) Bill 2009 (NSW)

Explanatory Notes, Fraud Bill 2006 (UK)

Second Restatement of Torts (American Law Institute, 1977) § 558