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Gutter Politics and the First Amendment

GUTTER POLITICS AND THE FIRST AMENDMENT

INTRODUCTION

"Dirty" election tactics have been a feature of American political life almost from the beginning:[1] Jefferson was called an immoral atheist, Lincoln a drunkard.[2] This tradition has continued; violent anti-Catholic propaganda was an unfortunate part of the 1960 presidential campaign.[3] Mudslinging, smears and outright falsehoods are a feature of far too many campaigns.[4]

All states have laws regulating the conduct of elections; contained in these statutes are provisions which relate directly to the issue of "dirty" campaign tactics. The constitutionality of many of these provisions has been placed in question in the light of a decade of Supreme Court decisions expanding the scope of protection of freedom of speech and press.[5] To focus the discussion, the following description of events in a fictional election campaign is presented both to illustrate the scope of the legislation in question and to establish the real-life context from which a judicial contest would arise.

The Thirteenth Ward Elects an Alderman

The aldermanic election in Gotham City's Thirteenth Ward was one of the most viciously fought campaigns in the history of that city's politics. Incumbent Alderman Mac Kinley was challenged by William Bryan Jennings. During the campaign, Jennings charged that the incumbent had voted in favor of increasing real estate taxes. He accused Kinley of having taken a bribe to vote in favor of granting a liquor license

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1. B. FELKNOR, DIRTY POLITICS 18 (1966).
2. *Id.* at 26. Mr. Felknor further states:

> The coarse epithets applied to Mr. Lincoln were remarkable both in volume and in viciousness. . . . The quickest summary is a negative one: Lincoln was not called a ladies' man and none of the slanderous smear words that gained wide circulation throughout the Union began with the letters Q, X, Y or Z.
>
> Otherwise every letter of the alphabet was called into play against the wartime President.

Id.

3. T. WHITE, THE MAKING OF THE PRESIDENT 1960 251 (1961).
4. Bruce Felknor is the former Executive Secretary of the Fair Campaign Practices Committee. His book, *Dirty Politics,* is a valuable source for anyone interested in this subject.
5. The primary cases of importance for this discussion are *Mills v. Alabama,* 384 U.S. 214 (1966); *New York Times v. Sullivan,* 376 U.S. 254 (1964); and *Talley v. California,* 362 U.S. 116 (1960).

and of being a tool of the downtown business interests. Finally, he charged that the Alderman had been "hauled into court for beating his wife." As a matter of fact, Kinley had voted *against* the tax increase. He had never taken any bribes and had never been charged with "beating his wife." Naturally, he vigorously denied that he was anyone's "tool."

Mike Hanna, Kinley's campaign manager, responded to these charges by stating at a League of Women Voters candidates' meeting that Jennings' charges were absolutely false and probably "the product of a desperate and deranged mind." Hanna further charged that if Jennings were elected he would be the Mayor's puppet because "he can't even decide whether to have eggs or pancakes for breakfast without asking for someone else's permission."

During the week preceding the election, a circular was distributed in two blue-collar precincts that had given a large number of votes to George Wallace in 1968. The circular praised Kinley for his sponsorship of open housing legislation and for his civil rights work. The circular was prepared as if it were a Kinley campaign piece intended to be distributed in black precincts only. The circular, which was unsigned, had been prepared and distributed by the Jennings campaign committee.

On election day, an editorial appeared on the front page of the *Westside Shopper* (a weekly newspaper which was delivered free in the Thirteenth Ward and which normally consisted primarily of advertisements for local businesses). The editorial urged the voters to elect Jennings (who was the editor's brother-in-law) and stated that if Kinley were reelected he would vote in favor of moving 700 low income black families into the ward.

On election day, the Jennings campaign committee was out in full force. Two or three workers were in front of every polling place with placards saying "Jennings for Alderman." They distributed a circular which claimed in large print: "Alderman Kinley has just been indicted for income tax fraud!" This charge, like many others, was false.

After the votes were counted, Jennings was declared the winner with a margin of seventeen votes out of a total of six thousand cast.[6] The defeated incumbent promptly brought a suit contesting the results of

6. The hypothetical election was made deliberately close so that any of the incidents described could have changed the outcome. Close elections, especially on the local level, are quite common in many areas. In 1969, Minneapolis Alderman Richard Curtin was reelected by nine votes. In 1962, Minnesota's gubernatorial election was finally decided 133 days after the election when a recount of every ballot cast gave the winner a 91 vote margin out of a total vote cast of 1,267,507. The margin, stated as a percentage, was .007 percent. For a description of the recount see R. STINNET & C. BACKSTROM, RECOUNT (1964).

the election, claiming that Jennings and his campaign committee had violated three separate provisions of the state's Corrupt Campaign Practices Act by distributing anonymous campaign literature, making false and libelous charges and by soliciting votes on election day. In addition to the election contest, misdemeanor charges were brought against the incumbent's campaign manager for having made false statements during the campaign and against the editor of the *Westside Shopper* for soliciting votes on election day.

Kinley's campaign manager contended that his statements did not violate the state law because he was merely expressing an opinion. The newspaper editor and Jennings argued that the state laws they were charged with violating were an unconstitutional abridgement of freedom of speech and press.

The issues presented by these defenses could be analyzed as an abstract, rarefied constitutional question. However, an election campaign is far from being an unlimited marketplace of ideas. A campaign is an attempt to sell a candidate to the voters in a tightly circumscribed time frame. The campaign comes to an abrupt end on election day; when a ballot is cast, the marketplace is closed. It will be suggested that the constitutionality of state election laws must be considered in the real-life context of a close and bitterly fought campaign. Provisions which might be considered restrictions on free speech in a theoretical marketplace of ideas may well serve to encourage responsible public debate in the context of a campaign.

Election Laws—An Overview

Before beginning consideration of the questions presented above, it is necessary to place the discussion in a further context: the peculiarly local nature of election campaigns and election laws. Each state has its own political traditions, myths and customs.[7] Election laws reflect these local differences. Each state, as well as the federal government, has undertaken by legislation to regulate the conduct of elections and campaigns. Some of these provisions might seem to be capricious or unreasonable when considered in the abstract, but they are usually quite reasonable responses to local problems. For example, Minnesota, whose political history is characterized by third party political movements and mergers between parties,[8] has a law which prohibits a new political

7. *See generally* J. FENTON, MIDWEST POLITICS (1966); J. FENTON, POLITICS IN THE BORDER STATES (1957); D. LOCKARD, NEW ENGLAND POLITICS (1959); POLITICS IN THE AMERICAN WEST (F. Jonas ed. 1969).

8. G.T. MITAU, POLITICS IN MINNESOTA 64 (2d ed. 1970). For example, the

party from adopting as its name any part of the name of an existing political party.[9] Other examples could be given by any observer familiar with the politics of his own home state.

Laws regulating the conduct of campaigns are generally responses to local problems and a reflection of community standards. Such statutes are usually entitled "Corrupt" or "Unfair Campaign Practice Acts." While it is difficult to generalize about the content of these acts, three types of provisions are common: 1) regulation of financial contributions and expenditures; 2) prohibition of what might best be termed "corrupt practices;" and 3) regulation of what can be categorized as unfair campaign practices.

The financial provisions, which are vitally important to the candidate, have been discussed at great length elsewhere.[10] Statutes governing "corruption" (bribery, misconduct of election officials, vote fraud, etc.) might best be considered as "true crimes." These statutes raise problems which are common to criminal law and procedure in general and are outside the scope of this discussion.

Unfair campaign practice statutes incorporate restrictions on a variety of campaign activities and tactics. It is restrictions of this type which were illustrated in the hypothetical which forms the basis for this note. All states have provisions regulating election day activities. Most have provisions requiring that political advertising be labeled and some have provisions regulating the content of such advertising. These laws are a reaction to local experience with "gutter" politics. It will be suggested that, for the most part, these provisions place only minimal restrictions on freedom of expression and serve an important function by protecting the individual voter and by encouraging responsible public debate.

Election Day Campaign Activities

All states have laws regulating what kind of campaigning can be

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Democratic Party in Minnesota is known as the Democratic-Farmer-Labor Party or DFL. It came into existence as the result of a merger in 1944.

9. Minn. Stat. § 203.32(2) (1962). Thus, the political party which is known nationally as the Socialist Labor Party appears on the ballot in Minnesota as the Industrial Government Party because another "Socialist" party pre-existed them in the state.

10. *See, e.g.*, D. Adamny, Financing Politics (1969); H. Alexander, Regulation of Political Finance (1966); Committee for Economic Development, Financing a Better Election System (1968); A. Heard, The Costs of Democracy (1960); Lobel, *Federal Control of Campaign Contributions*, 51 Minn. L. Rev. 1 (1966); Mitau, *Selected Aspects of Centralized and Decentralized Control over Campaign Finance: A Commentary on S. 636*, 23 U. Chi. L. Rev. 620 (1956); Rodgers, *A Model Bill on the Reporting of Campaign Contributions and Expenditures*, 23 Vand. L. Rev. 293 (1970).

done on election day. These laws range in strictness from those which simply prohibit the solicitation of votes within a polling place to those which absolutely prohibit any election day campaign activity. These laws reflect the varying community standards for campaigning. In some states, advertising on behalf of political candidates is heard constantly throughout election day on every radio and television station without significant community protest. In contrast, in Minnesota, a rather innocuous "get-out-the-vote" message sponsored by the Democratic National Committee on national television in 1964 created a substantial controversy when it was broadcast inadvertently on a Minneapolis television station.[11]

The most restrictive form of these laws is represented by a North Dakota statute:

> Any person asking, soliciting, or in any manner trying to induce or persuade, any voter on election day to vote or refrain from voting for any candidate or the candidates of any political party or organization, or any measure submitted to the people shall be punished by a fine of not less than five dollars nor more than one hundred dollars for the first offense.[12]

Three other states have statutes which absolutely prohibit election day campaign activities.[13]

These statutes, one of which has already been declared unconstitutional in part,[14] raise substantial first amendment questions. However, even the least restrictive form of state regulation in this area can be the subject of controversy. For example, a provision of the Arizona election law prohibits campaigning on election day within fifty feet of the polling place.[15] In *State v. Robles*,[16] the Arizona Supreme Court upheld the constitutionality of this statute and stated that the purpose of the provision was

> to prevent interference with the efficient handling of the voters by the election board and to prevent delay or intimidation of voters entering the polling place by political workers seeking a last chance to change their votes.[17]

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11. Minneapolis Star, Nov. 3, 1964, § B, at 4, col. 3.
12. N.D. CENT. CODE § 16-20-19 (1960).
13. ALA. CODE tit. 17, § 260.350 (1959); MONT. REV. CODES ANN. § 94-1453 (1969); ORE. REV. STAT. § 260.350 (1969).
14. The Alabama statute was declared unconstitutional in part in *Mills v. Alabama*, 384 U.S. 214 (1966). *See* note 23 *infra* and accompanying text.
15. ARIZ. REV. STAT. ANN. § 16-862 (1956).
16. 88 Ariz. 253, 355 P.2d 895 (1960).
17. *Id.* at 256-57, 355 P.2d at 897.

In a later case, *Fish v. Redeker,*[18] a violation of the same provision by a candidate for Republician Precinct Committeewoman was the basis for challenging her election to the position under a separate provision providing for contesting elections.[19] The court cited *Robles* upholding the constitutionality of this provision and held that Mrs. Fish's conduct did violate the statute. The court, however, refused to void her election, stating that "while appellant's conduct at the polling place is not to be condoned, it does not come within the statutory definition of grounds for any election contest."[20] According to the court's interpretation of the election contest statute, this offense was not one that could be used to bar a successful candidate from office. It is clear, however, that since Arizona law does make this offense a misdemeanor,[21] the new committeewoman could have been prosecuted for this violation.

Restrictions on campaigning in or near polling places are designed to promote more efficient handling of elections and perhaps to allow the voter to make his choice in peace. Polling place restrictions seem to be a reasonable and necessary part of a state election code. They do not raise the constitutional issues that are presented by statutes such as the North Dakota statute quoted above[22] which prohibits all election day campaign activities. For example, the Alabama Corrupt Practices Act, in part, forbids a person "to do any electioneering or to solicit any votes . . . on the day on which the election . . . is being held."[23] In 1962, a newspaper editor was convicted of violating this provision for having published an election day editorial urging the voters of Birmingham to vote in favor of a proposal for a mayor-council form of government. The Alabama Supreme Court upheld the conviction,[24] ruling that publication of the editorial clearly violated the law and that the statute was not unconstitutional because "the restriction, everything considered, is within the field of reasonableness."[25] The United States Supreme Court reversed in *Mills v. Alabama,*[26] stating that "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper to do no more than urge the

18. 2 Ariz. App. 602, 411 P.2d 40 (1966).
19. ARIZ. REV. STAT. ANN. § 16-1201 (1956).
20. 2 Ariz. App. at 606, 411 P.2d at 44.
21. "Any person violating any provision of the fifty-foot limit notice is guilty of a misdemeanor." ARIZ. REV. STAT. ANN. § 16-862(c) (1956).
22. *See* note 12 *supra* and accompanying text.
23. ALA. CODE tit. 17, § 285 (1959).
24. State v. Mills, 278 Ala. 188, 176 So. 2d 884 (1965).
25. *Id.* at 195, 176 So. 2d at 890.
26. 384 U.S. 214 (1966).

people to vote one way or another in a publicly held election."[27]

The Court does not give a clear indication of how far its ruling extends. It could be used to strike down all restrictions on election day activities.[28] However, even if the holding is limited to newspaper editorials on election day, certain real-life problems are ignored. Advertisements and campaign literature must be prepared by campaign committees before the day on which they are to be printed or distributed. The newspaper editor is not restricted in this way. Having the shortest press deadline, the editor has the right to make the last charge, comment or rebuttal.[29] It is obvious that a partisan editor in a one newspaper town could take unfair advantage of this special privilege.

The *Mills* case, however, is probably not limited to newspaper editorials. It is clear that the absolute prohibition type statutes do suffer from a problem of overbreadth[30] and from the possibility of selective enforcement. Such statutes would seem to prohibit the informal "friends and neighbors" type of campaigning that is natural on election day. They raise the possibility of prosecution arising out of an innocent conversation between two voters or between a candidate and a voter. Strict observance of the letter of the law might require all bumper stickers to be removed on election evening. The "absolute prohibition" statutes, therefore, do seem to have the chilling effect on first amendment freedoms that the Court in *Mills* was concerned with.

The effect of *Mills* on other election day restrictions is not clear. The Court did seem to recognize that the polling place restrictions were valid, commenting that "[t]his question in no way involves the extent of the state's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there."[31]

The question of what restrictions can be placed on election day campaign activities beyond mere polling place restrictions remains open. Four states[32] have more than mere polling place restrictions but stop short of prohibiting all election day activities.[33] All prohibit electioneering

27. *Id.* at 220.

28. The Wisconsin Attorney General is of the opinion that *Mills* does strike down all prohibitions on election day activities. 55 WIS. ATT'Y GEN. OP. 133 (1966).

29. If this is indeed the case, it might be relevant to paraphrase George Orwell's *Animal Farm* and say, "All citizens are equal, except newspaper editors, who are more equal."

30. For a fuller discussion of this doctrine see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

31. 384 U.S. at 218.

32. Kansas, Minnesota, South Dakota and Wisconsin.

33. In addition to these four, Florida has a statute prohibiting the distribution of literature "against a candidate" on election day. FLA. STAT. ANN. § 104.35 (1960).

within a certain distance of the polling place.[34] In addition, all four prohibit any paid newspaper, radio or television advertising,[35] and Minnesota prohibits a candidate or his committee from distributing literature on election day.[36] It should be pointed out that none of these statutes would prohibit a newspaper editorial or any newsgathering functions of the press. The Minnesota statute states:

> Any person who shall at any place on the day of any primary or election broadcast by television or radio any material intended or which tends to influence the voting at any election or to circulate or distribute, or cause to be distributed any candidates' cards, campaign cards, placards or campaign literature of any kind shall be guilty of a misdemeanor.[37]

This provision has been interpreted to prohibit newspaper *advertising* on election day,[38] but apparently the question of editorials has never been raised. It has been held that this section does not prohibit a candidate or his campaign committee from soliciting votes in person or by telephone as long as the solicitation is done more than one hundred feet from the polling place.[39]

Prohibiting literature *distribution,* as the Minnesota statute does, raises a question discussed by the Supreme Court in *Lovell v. City of Griffin.*[40] In that case, a Griffin, Georgia, city ordinance prohibited distribution of circulars or pamphlets without a license from the city manager. The Court held that the ordinance was void on its face as an abridgement of freedom of the press which "necessarily embraces pamphlets and leaflets."[41] The Court further stated:

> The ordinance cannot be saved because it relates to distribution and not to publication. "Liberty of circulation is as essential to that freedom as liberty of publishing; indeed without circulation, the publication would be of little value."[42]

A broad reading of *Mills* and *Lovell* would strike down the "intermediate"

34. KAN. STAT. ANN. § 25-179 (1964); MINN. STAT. § 211.15(1) (1962); S. D. CODE § 12-18-3 (1967); WIS. STAT. ANN. § 12.13 (1967).
35. KAN. STAT. ANN. § 25-1702 (1964); MINN. STAT. § 211.15(2) (1962); S.D. CODE § 12-25-10 (1967); WIS. STAT. ANN. § 12.13 (1967).
36. MINN. STAT. § 211.15(2) (1962).
37. *Id.*
38. 1948 MINN. ATT'Y GEN. OP. 627-K-5.
39. 1929 MINN. ATT'Y GEN. OP. 627-H.
40. 303 U.S. 444 (1938).
41. *Id.* at 452.
42. *Id., quoting Ex parte* Jackson, 96 U.S. 727, 733 (1877).

statutes such as Minnesota's as well as those statutes which absolutely prohibit election day campaigning. Careful consideration of the policy underlying these statutes indicates that they serve a valid function and the "intermediate" type, at least, should be upheld. It would seem that these statutes arise from a legislative intent to prohibit formal campaigning on election day.[43] Three reasons can be advanced in support of such a prohibition. The first is to lessen the likelihood that last minute charges and countercharges will determine the outcome of the election by providing the voter with a "cooling off" period before he casts his vote. The second is to lessen the likelihood of undue influence on the voter on election day. The third is to promote the dignity of the election process and decorum in election day activities. These reasons will be discussed individually in detail.

The "Cooling Off" Period

It is probably impossible to know with absolute certainty what effect the last minute "smear" has on the results of an election. It has been observed that "[t]he explanations offered for electoral results are astonishingly varied; they depend typically on the slenderest evidence, and disagreements are commonplace even among knowledgeable observers."[44] Nevertheless, it is certain that the "smear" will affect some voters, and less well-known candidates for local officers are particularly vulnerable. This is true because the voter is perhaps only vaguely aware of the local candidate and has not been able to form a definite impression of the candidate from television or radio appearances.

The Alabama Supreme Court, in upholding the conviction of the newspaper editor in *State v. Mills,*[45] reasoned that the purpose of the statute was to protect "the public from confusive [*sic*] last-minute charges and counter-charges."[46] The United States Supreme Court felt that this argument had a fatal flaw.

> The state statute leaves people free to hurl their campaign charges up to the last minute of the day before the election . . . then goes on to make it a crime to answer those last charges on election day, the only time that they can be effectively answered.[47]

43. Legislative histories for most state statutes are non-existent, of course. The reasons advanced are a synthesis from the state court cases that are cited in this section.

44. A. CAMPBELL, P. CONVERSE, D. STOKES & W. MILLER, THE AMERICAN VOTER 523 (1960).

45. 278 Ala. 188, 176 So. 2d 884 (1965).

46. *Id.* at 195-96, 176 So. 2d at 890.

47. Mills v. Alabama, 384 U.S. 214, 218 (1966).

It is obvious that, as a practical fact, there is a cut-off point. A rebuttal after the polls have closed is worthless to the candidate and of very little value to the voter. The problem with the Court's view that forbidding electioneering forbids rebuttal which should be allowed is the difficulty of drafting a statute which will allow *only* rebuttal on election day. It would be almost impossible to allow rebuttal without allowing new charges and countercharges. It is difficult in any case to answer a charge made on election eve and impossible to answer one made on election day. Since campaign literature and advertisements must be printed or prepared before the day on which they are to be distributed, the "Monday night smear" can *only* be answered in the news columns of the daily paper or on radio and television news programs. This can, in fact, be done, since none of these statutes prohibits the news media from reporting the news on election day. If new charges are made on election day, no rebuttal is possible. Therefore, prohibiting election day electioneering still provides an avenue for rebuttal while preventing new and unanswerable charges.

The Supreme Court, however, felt that a legislative motive in enacting this type of statute—a desire to prevent last-minute smears—was irrelevant to the constitutionality of the law.[48] It is submitted that, as a practical matter, it should be relevant. The last-minute charge cannot be prevented, but its impact can be lessened. The distinguished political scientist, V. O. Key, Jr., wrote:

> [V]oters are not fools. To be sure, many individual voters act in odd ways indeed; yet in the large the electorate behaves about as rationally and responsibly as we should expect, given the clarity of the alternatives presented to it.[49]

It is probable that most voters suspect last-minute charges. A brief time of reflection will allow this suspicion to take effect. The charge will be placed in its proper perspective.

The "intermediate" type statute does not, in any substantive sense, supress freedom of expression, but simply requires a one-day moratorium on formal political campaigning. It would seem entirely reasonable for a state legislature to decide that the electorate should have a short "cooling off" period in which to make its decision. It may not affect many votes, but it should be apparent that last-minute smears are most

48. *Id.*
49. V.O. KEY, JR., THE RESPONSIBLE ELECTORATE 7 (1966). The same point was made in a more colloquial manner by Scammon and Wattenberg. "Voters are not Nitwits." R. SCAMMON & B. WATTENBERG, THE REAL MAJORITY 205 (1970).

common in close elections where a few votes may decide the issue.

Returning for a moment to the hypothetical presented at the beginning of this article will serve to illustrate this point. The voter reads, just before walking into the polling place, that the incumbent has been indicted for income tax fraud. He may be persuaded to vote against the incumbent for that reason alone. On the other hand, if he had read the same charge on the night before the election, it may not be the deciding factor. If he watches the news on television and no mention is made of the alleged indictment or there is no story about it in the morning paper, he may well decide that the charge was a fraud. Perhaps his natural distrust of last-minute charges will assert itself. At any rate, the voter has time to view the charge in some perspective. Indeed, the voter is *not* a fool and should be allowed the right to make up his mind in a brief period of privacy without being bombarded by propaganda.

Undue Influence of Voters

Prohibition of formal campaign activities on election day will tend to lessen the possibilities of bribery, intimidation and undue influence of voters. Two examples may be helpful in illustrating this point. Columnist Mike Royko has reported the following election day incident:

> On the third floor of a sagging building he [the Republican precinct captain] found a couple who had not yet voted. "I'd appreciate it if you voted for Friedman [a candidate for Mayor of Chicago in 1971]" he said, offering a piece of campaign literature.
>
> The man hardly glanced at it and asked: "You givin' dollars?"
>
> "No," Godbald [the precinct captain] said.
>
> "The other fellows, they givin' dollars" the man said.
>
> Stomping angrily down the steps, Godbald said, "See? You know how many times I've heard that? Six or seven times today."[50]

The second illustration comes from Edward Costikyan's account[51] of his campaign for reelection as a New York Assembly District Leader as a "reform" Democrat. On the day of the election, the "regulars" flooded the district with campaigners from other areas. Every street corner was filled with literature distributors. The district "took on the

50. Royko, *Daley Election Machine Grinds Fine,* Minneapolis Star, Apr. 8, 1971, § D, at 3, col. 1.

51. E. COSTIKYAN, BEHIND CLOSED DOORS 339-43 (1966).

aura of occupied territory."[52] Costikyan reports that it was the only time in his political life that he was really frightened.

> By eight o'clock it was quite dark, and the doorways of closed shops were filled with silent huddling figures. Walking to the polls was a scary experience for the voters, as many of them told me.[53]

Certainly, all states have laws prohibiting bribery and intimidation of voters. But these offenses are hard to prove. How could anyone be arrested for "intimidating a voter" while merely standing on a street corner handing out campaign literature? How many people will testify that they were bribed?

A prohibition of formal campaign activities will not prevent such incidents, but it will make them less likely to happen. Most campaign workers will not go out campaigning without literature.[54] To effectively influence voters, the worker will have to be visibly "soliciting votes"—intimidation or bribery may not be as easy to see. In any case, a state legislature should have the discretion to decide that the individual voter has the right to go to the polls on election day without being harassed or intimidated by political workers.

Dignity and Decorum in the Electoral Process

Prohibition of formal campaigning on election day would tend to promote the dignity and decorum of the process of electing our public officials. Elections are the fundamental basis for a democratic society. It has been observed that

> [p]residential elections constitute decisions of fundamental significance in the democratic process. The trooping of millions to the polls symbolizes self-rule and legitimatizes the authority of government. But beyond such mystical functions of the electoral process, elections are pivotal decisions which in turn control many lesser determinations made in the name of the people.[55]

Although this observation was made of presidential elections, it can be

52. *Id.* at 339.
53. *Id.* at 340.
54. Any experienced campaigner can testify to the difficulty of campaigning without literature. One can walk up to a stranger on the street or knock on a stranger's door to give him a piece of literature and then start a conversation. It is almost impossible just to walk up to someone and say, "Vote for my man."
55. V.O. KEY, JR., POLITICS, PARTIES & PRESSURE GROUPS 542-43 (5th ed. 1964).

applied with equal validity to any election. The process by which the American people legitimatize their government has two phases, the campaign and the casting of ballots.

As to the first phase, the "three-ring circus" aspects of American campaigns are unmatched anywhere in the world. The hurly-burly of the campaign is an entertaining spectacle that is perhaps a reflection of the American character.[56] Many observers feel that it serves an important function. "There is great value in a system that somehow demands that a candidate get sweaty and dirty and exhausted. . . . The successful candidate in America must *touch* the people, figuratively and literally."[57]

In contrast to the campaign, however, election day is a day of decision. Polling place restrictions alone cannot be entirely effective in preventing disruption of the electoral process. Campaign workers can harass voters just as well outside the polling place as within it. Sound trucks can make a political message penetrate into the voting booth itself. Fifty or one hundred foot limits only move the harassment back from the door of the polling place and, as a practical matter, enforcement of these limitations requires having someone outside the polling place "shooing" campaign workers back across the statutory line. The voter should not be forced to battle his way through competing groups of campaign workers and poll watchers to get into the polling place.

Once election day has arrived, the formal phase of the election ritual has begun. It would seem entirely proper, therefore, for a state legislature to attempt to give a sense of dignity to the process of casting a vote by silencing for a few hours the roar of the three-ring circus.

Prohibiting Formal Campaigning on Election Day

The state does have a compelling interest in preserving the integrity of the electoral process. To this end, it should be able to prohibit formal campaigning on election day.[58] For the reasons advanced above, these restrictions should be allowed to extend not only to activities near the polling place but also to the distribution of literature as well as to radio,

56. R. SCAMMON & B. WATTENBERG, THE REAL MAJORITY 218 (1970).

57. *Id.* at 217.

58. This would mean, as it does in Minnesota, that election day activities would be limited to "get out the vote" telephone campaigns.

It should be noted that these laws do not affect voter turnout. In the 1960 Presidential election, three of the top ten states in percentage of eligible voters participating in the election had either absolute or intermediate prohibition type laws. All of the non-southern states with these provisions had more than a 70 percent turnout—which is above the national average. R. Scammon, *The Electoral Process,* 27 LAW & CONTEMP. PROB. 303 (1962). Most observers feel that high turnout is associated with high interest, involvement and information. W. FLANIGAN, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 25 (1968).

televison and newspaper advertising. Such restrictions, enacted to protect the individual voter and to foster a more orderly and dignified electoral process, would appear to be reasonable and to have no chilling effect on freedom of expression.

Anonymous Campaign Literature

Forty-one states and the federal government[59] have laws, frequently referred to as disclosure statutes, which prohibit the distribution of anonymous campaign literature. The Oregon disclosure statute is representative:

> No person shall write, print, publish, post or circulate or cause to be written, printed, published, posted or circulated through the mails or otherwise any letter, circular, bill, placard, poster or other publication relating to any election unless it bears on its face the name and address of the author and publisher thereof.[60]

Other statutes require that the literature bear "the name of the candidate in whose behalf the same is published"[61] or that of the "person"[62] who is responsible for it. These statutes are designed to prevent the "gutter flyer" which has been defined as "the lowest variety of political literature, vicious and not traceable, always disavowed."[63]

Disclosure statutes have been held constitutional by state courts in the past.[64] Their current status, however, may be in question as the result of the United States Supreme Court decision in *Talley v. California*.[65] *Talley* did not specifically involve election literature, but rather was concerned with a Los Angeles City Ordinance which prohibited circulation of *any* handbills that did not have the name and address of the author printed on them. The Court reasoned that "there can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression,"[66] and therefore held that the ordinance was unconstitutional.

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59. 18 U.S.C. § 612 (1966).
60. Ore. Rev. Stat. § 260.360 (1969).
61. Minn. Stat. Ann. § 211.08 (Supp. 1971).
62. Cal. Elections Code § 12047 (West Supp. 1971).
63. W. Safire, The New Language of Politics (1968).
64. *See, e.g.*, Finley v. State, 28 Ala. App. 151, 181 So. 123 (1922); State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1936); Commonwealth v. Evans, 156 Pa. Super. 321, 40 A.2d 137 (1944).
65. 362 U.S. 60 (1960).
66. *Id.* at 64.

In *United States v. Scott*,[67] a federal district court held that *Talley* did not apply to anonymous election campaign literature. In upholding the federal disclosure statute,[68] the court said that it was valid for Congress to pass this statute so that

> the electorate would be informed and make its own appraisal of the reason or reasons why a particular candidate was being supported or opposed by individuals or groups. Is there anything sinister in requiring disclosure of identity to the end that voters may use their ballots intelligently?[69]

State courts have also considered whether *Talley* is applicable to election laws. In *Canon v. Justice Court*,[70] the California Supreme Court held that *Talley* did not apply to election literature. The court reasoned that the California legislature passed the disclosure statute to achieve three ends, to enable the electorate to evaluate the competence and credibility of the source, to deter irresponsible attacks and to enable candidates to effectively rebut and refute charges. The court stated: "It is clear that the integrity of elections, essential to the very preservation of a free society, is a matter 'in which the state may have a compelling regulatory concern.' "[71] The Idaho Supreme Court also considered *Talley* in its examination of the Idaho disclosure statute[72] in *State v. Barney*.[73] The court held that the statute in question was "subject to several varying and conflicting constructions"[74] and was therefore unconstitutionally vague. At the same time, however, the court distinguished *Talley*[75] and recognized the "important policy considerations behind"[76] disclosure statutes. It would seem, therefore, absent a Supreme Court decision extending *Talley*, that the Idaho court would uphold a more concisely drawn statute.

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67. 195 F. Supp. 440 (D.N.D. 1961).
68. 18 U.S.C. § 612 (1966).
69. 195 F. Supp. at 443.
70. 61 Cal. 2d 446, 393 P.2d 428, 39 Cal. Rptr. 228 (1964).
71. *Id.* at 452-53, 393 P.2d at 431, 39 Cal. Rptr. at 231, *quoting* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963). It should be noted that the court in *Canon* did find that the California disclosure statute (CAL. ELECTIONS CODE § 12047 (West 1961)) was unconstitutional because it discriminated against non-voters by requiring the name and address of a "voter." The California legislature promptly changed "voter" to "person" to remedy this failing. *See* CAL. ELECTIONS CODE § 12047 (West Supp. 1971).
72. IDAHO CODE ANN. § 34-104 (1963).
73. 92 Idaho 581, 448 P.2d 195 (1968).
74. *Id.* at 584, 448 P.2d at 198.
75. *Id.* at 586 n.6, 448 P.2d at 200 n.6.
76. *Id.* at 586, 448 P.2d at 200.

One court has held that *Talley* was applicable to anonymous election campaign literature. In *Zwickler v. Koota,*[77] a three-judge federal district court struck down the New York disclosure statute[78] as an unconstitutional abridgement of freedom of speech. The court's reasoning seemed clearly to be based on the theory that speech is an absolute and that *no* restriction on it could be valid. The court said "[t]he tide of judicial thinking floods too strongly today in the estuary of First Amendment freedom for any tributary of government power in its exercise to overbear it."[79]

This decision was reversed by the Supreme Court on the ground that the case was moot.[80] The Court, however, was very careful to state that no comment was being made on the merits of the case.[81]

So far only the *Zwickler* court has held that disclosure statutes per sese are unconstitutional. *Talley,* despite its broad language, made no mention of election laws or election campaign literature. The ordinance involved in that case prohibited all anonymous circulars. When limited to the context of election campaigns, the disclosure requirement is a very minimal restriction on freedom of speech, considering that the policy arguments in favor of such restrictions are strong. In *Canon v. Justice Court,*[82] Judge Peters argued

> [i]t was not the aim of the legislature to hinder the communication of ideas, and there is nothing to indicate that the disclosure requirement . . . would in fact substantially inhibit expression, even in the limited area to which the statute is applicable. It was intended to deter the scurrilous hit and run smear attacks which are all too common in the course of political campaigns. The primary concern is not for the candidate . . . . The chief harm is suffered by all the people.[83]

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77. 290 F. Supp. 244 (E.D.N.Y. 1968).

78. This provision is now found as N.Y. ELECTION LAW § 457 (McKinney Supp. 1970).

79. 290 F. Supp. at 257.

80. Golden v. Zwickler, 394 U.S. 103 (1969).

81. *Id.* at 106. Mr. Zwickler wanted to distribute anonymous campaign literature directed against a Congressman who retired from office while the suit was still pending. Zwickler spent a considerable amount of time in court fighting this law. Chronologically the cases are People v. Zwickler, 16 N.Y.2d 1069, 213 N.E.2d 140, 213 N.E.2d 467 (1964); Zwickler v. Koota, 261 F. Supp. 1985 (E.D.N.Y. 1965), *rev'd,* 389 U.S. 241 (1966); Zwickler v. Koota, 290 F. Supp. 244 (E.D.N.Y. 1968), *rev'd sub nom.* Golden v. Zwickler, 394 U.S. 103 (1969).

82. 61 Cal. 2d 446, 393 P.2d 428, 39 Cal. Rptr. 228 (1964). *See* note 70 *supra* and accompanying text.

83. *Id.* at 453, 393 P.2d at 431-32, 39 Cal. Rptr. at 231-32.

Disclosure provisions do not regulate the content of expression nor do they prevent the dissemination of ideas. The basic requirement (although it is phrased differently in various statutes) is that campaign literature identify the person who is responsible for it. In an election campaign the candidate must identify himself, and the campaign worker cannot be anonymous as he passes out campaign literature. Why then should the person responsible for literature claim a unique right to be anonymous? It is difficult to see how disclosure statutes infringe in any real sense on anyone's rights.

In the hypothetical that began this note, a circular was distributed which, on its face, might be considered to be highly complimentary to the incumbent. But because of the neighborhood in which it was distributed, it could have been damaging to his candidacy. This is precisely the kind of attack that a disclosure statute is designed to prevent. The *content* of the circular was legitimate but the form was not. Should not the voters who received the circular be informed of the source of the information? Should not the candidate know the source in order to make some reply to it?

It is difficult to imagine why an individual would object to putting his name on a *legitimate* piece of campaign literature. The anonymous circular in most instances will be a "gutter flyer"—a smear attack. Such smear attacks will be less likely to be circulated and will be less effective if the sponsor must identify himself.

In the context of an election campaign, disclosure statutes may well tend not to restrict, but to *aid* in the dissemination of ideas. By knowing its source, the voter may be better able to evaluate and question the content of literature. The candidate will be better able to respond to the charges contained in the literature. Therefore, the statutes act to improve the overall quality of ideas advanced in the campaign "marketplace" to the ultimate benefit of the voter.

Thus, a state should be allowed to require that all election campaign literature and advertising bear, at least, the name of the individual or committee responsible for it. The name of the candidate in whose behalf the advertising is being circulated should also be contained in all campaign literature. To further strengthen such provisions, the use of fictitious names or "dummy" committees should be proscribed. These are minimal restrictions supported by strong policy considerations.

False Campaign Statements

Fifteen states have sections in their election laws providing penalties

for making false campaign statements.[84] There are substantial variations from state to state, but they can be broken down into two main classifications. The first type simply prohibits "false campaign statements," while the second type is concerned with attacks on the morality, honesty or integrity of a candidate.

Wisconsin's statute is an example of the first type:

> No person, firm or corporation shall knowingly make or cause to be published, any false statement in relation to any candidate, which statement is intended or tends to affect the voting at any primary or election.[85]

Five states[86] (two of which also have statutes of the first type[87]) have "Political Criminal Libel" statutes. Four of these statutes make such offense a felony.[88] An example is Oregon's statute:

> No letter, circular, poster, bill, publication or placard shall contain any false statement or charges reflecting on any candidate's character, morality or integrity. The author and every person knowingly assisting in the circulation of the matter described in this section shall be guilty of a felony.[89]

The two types of statutes cited above are intended to control criticism of public officials and political candidates during political campaigns. Although the Supreme Court has not dealt with a case arising out of one of these statutes, the general subject of criticism of public officials has been dealt with in the Court's recent decisions concerning libel suits brought by public officials.

The New York Times Doctrine

In *New York Times v. Sullivan*,[90] the Supreme Court reversed a civil libel judgment. The Court said that "debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on public

84. It should be noted that some states do have criminal libel statutes as part of their penal codes. The constitutionality of these statutes is questionable at the present time. *See* Ashton v. Kentucky, 384 U.S. 195 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964).

85. WIS. STAT. ANN. § 12.17 (1967).

86. Alaska, Michigan, Mississippi, Montana and Oregon.

87. Alaska and Oregon.

88. Michigan makes it a misdemeanor. MICH. STAT. ANN. § 168.915 (1967).

89. ORE. REV. STAT. § 260.370 (1969).

90. 376 U.S. 254 (1964).

officials."[91] The Court held that a public official could not recover damages for "defamatory falsehoods relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[92] Justice Black would have gone even further. "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."[93] The *New York Times* holding has been extended to statements made about minor appointive officeholders[94] and other "public figures,"[95] and has been applied in criminal libel prosecutions.[96]

St. Amant v. Thompson[97] involved a civil libel suit arising out of a campaign speech. The defendant was a candidate for public office who allegedly libeled another public official. In reversing the state court judgment for plaintiff, the Supreme Court held that the *New York Times* formula of reckless disregard for truth

> is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must have been sufficient evidence to permit the conclusion that the defendant entertained serious doubts as to the truth or falsity of his publication.[98]

Justices Black and Douglas have suggested eliminating the law of libel entirely with regard to public figures.[99] The present state of the law would still permit a candidate for public office to win a libel suit if he can somehow convince a jury that the defendant entertained "serious doubts" about the truth or falsity of his statement.

The New York Times Doctrine Questioned[100]

Although most observers agree that *New York Times* was a

91. *Id.* at 270.
92. *Id.* at 279-80.
93. *Id.* at 297 (Black, J., concurring).
94. Rosenblatt v. Baer, 383 U.S. 75 (1966).
95. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
96. Garrison v. Louisiana, 379 U.S. 64 (1964).
97. 390 U.S. 727 (1968).
98. *Id.* at 731.
99. See the concurring opinions in *New York Times v. Sullivan*, 376 U.S. 254, 293 (1964) and *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966).
100. Most of the ideas in this section were taken from A. ROSE, LIBEL AND ACADEMIC FREEDOM 106-28 (1969). This very thoughtful book concerns a libel suit brought by Professor Rose. It has particular relevance to this discussion because Rose was both a University of Minnesota professor of sociology and a practicing politician. He was a liberal member of the Minnesota State House of Representatives (whose members are elected without party designation). He won his libel suit at the trial

necessary decision, doubts have been expressed as to whether the Court may have gone too far.

> [H]ave we reached the wisest balance between the interest in reputation and the interest in free debate? To be sure the press must be protected against half-million dollar libel judgments for minor inaccuracies that cause no demonstrable harm, as in the *New York Times* case. But full and free public discussion is a two-way street; those who contemplate entering the arena of political debate may themselves be deterred if the law leaves them virtually remediless against personal calumny.[101]

It has been argued that *New York Times* went far beyond protection of speech and stripped the public official of the capacity to defend himself against any sort of a false accusation. It has always been difficult to win a libel suit, and *New York Times* has made it virtually impossible.

Justice Fortas dissented in *St. Amant v. Thompson,* stating that

> [t]he First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator. . . . The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season.[102]

While *New York Times* does pose a threat to the public official, it poses a further threat to the public. First, as has been indicated above,[103] responsible citizens may be deterred from entering the political arena. Secondly, the wording of the decision does not encourage investigation. To the contrary, *New York Times* clearly rewards *lack* of investigation, since someone who has never bothered to check his story will probably not entertain "serious doubts" about its accuracy. Thus, *responsible* debate may be curtailed. Thirdly, the corrupt public official who is criticized by an opponent can hide behind the law, saying, "These attacks are absolutely false and libelous; but the Supreme Court has made it

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court level, but the Minnesota Supreme Court reversed in *Rose v. Koch,* 278 Minn. 235, 154 N.W.2d 409 (1967), on the basis of *New York Times.* Many observers felt that this case should have been appealed to the United States Supreme Court with the hope that some balance could be restored to the law of libel. Unfortunately, Professor Rose died before further appeal could be commenced.

101. Freund, *Foreword* to A. ROSE, LIBEL AND ACADEMIC FREEDOM at vii (1969).

102. 390 U.S. at 734 (Fortas, J., dissenting).

103. *See* note 101 *supra* and accompanying text.

impossible for me to sue." No longer can such an official be told to "put up or shut up." It would seem, at the very least, that a full-dress court trial would enhance free and open debate on public issues far more than would a slugging match in the columns of the daily newspaper.

Finally, attention should be given to the "absolutist" view that has been advanced by Justice Black. He has written: "I simply believe that 'Congress shall make no law' means Congress shall make no law."[104] In his concurring opinion in *New York Times,* he stated that he believes that the Constitution grants "the press an *absolute immunity* for criticism of the way public officials do their public duty."[105] It has been argued that the flaw in the "absolutist" position is that it may well destroy the right that it seeks to protect. One critic argues that "[a]ny absolute right—which is so extreme as to permit of no exception under any circumstances —will eventually destroy itself, for it is open to absolute abuse."[106] Another writer has observed that the old cliche about the corrupting influence of power is not completely accurate.

> It is immunity that corrupts; absolute immunity corrupts absolutely. I need very little power to be a force for unlimited destruction—if I am absolutely immune.[107]

The underlying belief of both writers is that an absolute right will destroy itself because of abuse. However, only time and future decisions of the Court will determine whether the trend toward absolute immunity to say what one desires will result in abuses so flagrant that the basic freedom of speech is placed in jeopardy.

New York Times and Election Campaign Laws

Totally apart from policy considerations of whether *New York Times* and its progeny are headed in the wisest direction, it is suggested that the general law of libel not be applied to election laws forbidding false campaign statements. Different interests are involved in these two situations. Only the individual parties are directly concerned with the outcome of a libel suit. The public's interest in honest elections should be of primary consideration where violations of election laws are concerned.

In an election campaign it is vital that there be "uninhibited, robust

104. H. BLACK, A CONSTITUTIONAL FAITH 45 (1969).
105. 376 U.S. at 717 (Black, J., concurring) (emphasis added).
106. A. ROSE, LIBEL AND ACADEMIC FREEDOM 115 (1969).
107. J. CAMPBELL, *Constitution for Utopia,* in COLLECTED EDITORIALS FROM ANALOG 187 (1966).

and wide-open" debate on the issues. It is obvious that in the course of a heated election campaign attacks will get "caustic" and "vehement." But the public interest demands that debate be responsible—that campaign statements discuss the issues honestly. This interest, more than any other, must be protected.

As stated previously, the Supreme Court has not yet considered a case arising from a violation of one of the statutes providing penalties for using false campaign statements. Federal courts have, however, upheld legislation requiring high standards of accuracy in two types of "campaign" situations not involving elections to public office, corporate proxy fights[108] and union representation elections.[109] Recently, the Supreme Court rejected an employer's claim that the National Labor Relations Board regulations violated the employer's right of free speech. In *NLRB v. Gissell Packing Co.*,[110] the Court said that an employer's right of free speech "cannot outweigh the equal rights of the employees to associate freely."[111] Applying this reasoning to a political campaign, it might be argued by analogy that an individual's right of free speech cannot outweigh the voter's right to an honest and responsible discussion of the issues. The Court might not accept this analogy, however, since in *Gissell* a union election was distinguished from a public election because of the employer-employee relationship.[112] Although it is not clear what value *Gissell* would have as a precedent in a case arising out of a public election, it is interesting to note that Justice Black (despite his absolutist views) did not dissent from the decision.[113]

Most of the statutes prohibiting false campaign statements do comply either expressly or by implication with the current *New York Times* doctrine. For example, the Wisconsin statute[114] has three elements: 1) the statement must have been false; 2) the person making the statement must have known it was false; and 3) the statement must have been intended to or did influence voting at an election. Washington's statute uses the phrase "knowingly and willfully making false statements."[115] North Carolina uses the *New York Times* formula: "knowing such

108. 2 F. Loss, Securities Regulation 916-24 (2d ed. 1961).

109. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38 (1964).

110. 395 U.S. 575 (1969).

111. *Id.* at 617.

112. *Id.* at 617-18.

113. For further discussion of this point see Case Comment, 5 Val. U.L. Rev. 178, 183 (1970).

114. *See* note 85 *supra* and accompanying text.

115. Wash. Rev. Code Ann. § 29.85.070 (1965).

report to be false or with reckless disregard of its truth or falsity."[116] The element of knowledge is also implicit in the Oregon Political Criminal Libel statute.[117]

The Montana Political Criminal Libel statute,[118] however, appears to be in conflict with the standard announced in *St. Amant v. Thompson.*[119] In *St. Amant,* the Court held that the defendant must have had serious doubts about the truth of his statement in order for that statement to be actionable. The Montana statue requires the defendant to show that he had reasonable grounds to believe that his statement was true. The Mississippi statute goes beyond this and places the burden on the defendant to prove the truth of his statement.[120]

Other than the Mississippi statute, the provisions discussed in this section are reasonable attempts to require a factual basis for campaign statements rather than an infringement on freedom of expression. The Wisconsin Supreme Court has held that the statement must be false and that it must be a statement "of fact, not conclusions or opinions."[121] The Minnesota Supreme Court, in interpreting that state's statute,[122] has stated:

> The corrupt practices statute is directed against false statements of fact. It does not forbid criticism of a candidate, even though unfair and unjust, if based on facts which are not false.[123]

These statutes *do* allow the "uninhibited, robust and wide-open" debate that the Supreme Court wanted to encourage with *New York Times.* Criticism of a candidate and expression of strong opinions are not forbidden. The statutes simply require a minimum standard of factual accuracy.

Applying these considerations in the context of the introductory hypothetical election, it is clear that these statutes do not prohibit "vehement" or "caustic" attacks. The charges that the incumbent was a "tool" of the downtown business interests and that the challenger could not make his own decisions are clearly opinions. While the criticism in both cases may have been unfair, it would not have violated the law.

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116. N.C. GEN. STAT. § 163-274(8) (Supp. 1969).
117. *See* note 89 *supra* and accompanying text.
118. MONT. REV. CODES ANN. § 94-1454 (1965).
119. 390 U.S. 727 (1968).
120. MISS. CODE ANN. § 3174 (1956).
121. State *ex rel.* Skibinski v. Tadych, 31 Wis. 2d 189, 193, 142 N.W.2d 838, 840 (1966).
122. Currently MINN. STAT. ANN. § 210.11 (Supp. 1971).
123. Bank v. Egan, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953).

Should the Candidate Have a Duty to Investigate?

Perhaps the practical flaw in these statutes is not that they are too restrictive, but that they do not go far enough. Under these statutes, an individual is prohibited from making statements that he knows are false, but he is not required to make any investigation before making a charge. It is submitted that the candidate and his campaign committee should be held to a higher standard. They should be required to make a reasonable investigation before making a statement or printing a campaign brochure.

The need for this requirement arises from the nature of the American voter. He is not primarily concerned with politics.[124] He cannot be expected to make an independent investigation of every candidate and every issue. To an extent, he must rely on the presentations of the candidates. For example, the challenger in the hypothetical election claimed that the incumbent had voted in favor of a real estate tax increase. As a practical matter, few voters would have access to city council records to find out how Alderman Kinley actually did vote. Considering another of the charges, the average voter would not know how to find out whether Alderman Kinley had been "hauled into court for beating his wife." It is submitted that because a voter usually has neither the resources nor the time to investigate campaign statements, he should be able to rely on them to have at least some basis in fact. The candidate and his campaign committee, therefore, should be required to make a reasonable investigation before making a campaign statement.

Creating An Informed Electorate

The candidate's primary purpose in waging his campaign is to win. But an election campaign should be something more than a mud-slinging brawl or a beauty contest. Responsible debate during a campaign can serve to inform and educate the voter. Each voter, therefore, has a vital interest in clean elections. He has a right to expect that debate be "uninhibited, robust and wide-open." He has an equally important right to demand that the debate be responsible, for only then can he make a rational choice. Statutes of the kind discussed in this section cannot guarantee a clean, hard-fought campaign, but they can help to create an atmosphere in which the electorate expects and demands one.

SANCTIONS

Generally, violations of the statutes discussed in this note are made

124. R. SCAMMON & B. WATTENBERG, THE REAL MAJORITY 225-29 (1970).

misdemeanors.[125] The penalties provide for fines or for forfeiture of the office to which the violator was elected. Under some statutes, the candidate may also be barred from running for election to the vacancy created by his being ousted from office. Obviously, the real "teeth" in the the law are not the fines but the forfeiture provisions.[126]

The constitutionality of barring a successful candidate from taking office because of violations of election law has not been questioned. While the Supreme Court has considered the problem of whether an elected official can be barred from office, in *Bond v. Floyd*[127] and *Powell v. McCormick*,[128] in neither of those cases was the official barred because of violations of election laws. Therefore, though the subject matter of the cases suggests that they might be applicable to the problem at hand, consideration of the basis for the decisions indicates otherwise.[129]

Each state has its own procedure for handling a challenged election. The Oregon statute provides that the nomination or election of any person to office may be challenged by any person who was a candidate for that office or by "any elector entitled to vote for such person."[130] The grounds for such a contest are as follows:

> (1) Deliberate and material violations of any provision of the election laws in connection with such nomination,

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125. Occasionally, a situation might arise where there is a continuing violation. In California, a court has issued a restraining order and injunction to stop an unfair campaign practice under a statute that authorized the issuance of an injunction to prevent an act amounting to unfair competition. Democratic State Central Committee v. Committee for the Preservation of the Democratic Party in California, No. 526150 (Super. Ct. San Francisco, California). This case is discussed in G. O'Gara, *Unfair Election Campaign Practices* in 15 AM. JUR. TRIALS 1, 20-21 (1968).

126. In England the penalties are even more severe. When British laws similar to American corrupt campaign practice acts are violated, the candidate (if elected) forfeits his office, and both he and his agent (campaign manager) are barred from any participation in political campaigns for five years! R. HOLT & J. TURNER, POLITICAL PARTIES IN ACTION 41 (1968).

127. 385 U.S. 116 (1966).

128. 395 U.S. 486 (1969).

129. Julian Bond was refused his seat in the Georgia legislature because of his anti-war views and because other members of the Georgia legislature doubted his loyalty. The Supreme Court held that the legislature could not refuse to seat Bond on those grounds. His criticism of national foreign policy was protected by the first amendment, and, therefore, his views could not be used as grounds for barring him from his seat.

Congressman Adam Clayton Powell was "excluded" from his position because of misconduct in office. The basis of the Court's decision in *Powell* was that Congress did not have the power to "exclude" a duly elected congressman. Congress has the power to "expel" a member by a two-thirds vote, according to the Court, but not to "exclude" him by a majority vote.

Thus, neither *Bond* nor *Powell* dealt with the question of a court or legislature barring an individual from taking office because of violations of election laws.

130. ORE. REV. STAT. § 251.025 (1969).

election, approval or rejection.

(2) Ineligibility of the person elected to hold the office at the time of his election.

(3) Illegal votes.

(4) Mistake or fraud in the canvas of votes.

(5) Fraud in the count of votes.[131]

Under Oregon law, an election contest must be begun by filing a "petition of contest with the clerk of the circuit court" not later than ten days after the final canvas of votes is completed.[132] The statute further provides that the judge will hear the case without a jury, but otherwise the practice and procedure is the same as in a normal civil case.[133] Wisconsin's procedure is similar to Oregon's except that the defendant may have a jury trial.[134]

The procedures indicated above are the normal way that an election contest is handled unless the contest is over a legislative office. Most state constitutions have provisions that make the legislature judge of its own elections,[135] similar to the constitutional provisions that make Congress judge of its own elections.[136] Probably the most common procedure applying to legislature contests is that used by Wisconsin and Minnesota.[137] A regular court proceeding is held, but the judge makes no findings of fact. He simply transmits the entire record to the legislature which then determines whether the candidate should be barred from office. Thus, the court is used as a fact-finding agency, while the ultimate power of judgment is reserved by the legislature.

Courts (and presumably legislatures) have generally taken the position that forfeiture of office should be reserved for *serious* violations of election laws.

> A violation . . . must be deliberate, willful and substantial. The remedy of ouster is not available for insubstantial or technical violations which would not affect the result of the election, nor is the law intended to be a trap for the innocent or unwary candidate.[138]

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131. *Id.*
132. *Id.* at § 251.045.
133. *Id.* at § 251.070.
134. State v. Markham, 160 Wis. 431, 152 N.W. 161 (1915).
135. Annot., 17 L. Ed. 2d 911, 915 (1967).
136. U.S. CONST. art. I, § 5.
137. MINN. STAT. ANN. § 209.02 (1962); WIS. STAT. ANN. § 12.23 (1967).
138. State *ex rel.* Skibinski v. Tadych, 31 Wis. 2d 189, 193, 142 N.W.2d 838, 840 (1966).

Forfeiture of office may be a drastic penalty, but it is a necessary one. In the first place, the threat of a small fine, or even of a large one, will not serve as much of a deterrent to unfair campaign practices when public office is at stake. A fine would just be considered another campaign expense. Secondly, an election which has been preceded by serious violations of election laws must have been affected in some way by those violations. To an extent, it does not, therefore, represent the free choice of the voters and should be voided.

CONCLUSION

The 1844 Presidential election between Democrat James K. Polk and Whig Henry Clay added a new term to the political lexicon. Just before the election, the Ithaca, New York, *Chronicle* published an extract from an account by one Baron Roorback entitled "A Tour Through the Western and Southern States."

> The good baron told of watching the purchase of forty-three slaves by James K. Polk, "the present Speaker of the House of Representatives, the mark of the branding iron and the initials of his name, on their shoulders distinguishing them . . . ."
>
> Though the election was at hand, other newspapers that shared the *Chronicle's* Whig leanings found time to reprint this report of the Democrat's inhumanity. In actual fact, the sale was never made, the branding scene never took place, and there was no Baron Roorback. Polk won, but the deception hurt his cause. The word Roorback became a common noun, known to generation after generation of political practitioners and students: roorback, noun, any false or damaging story about a political candidate published too late in a campaign to permit effective rebuttal.[139]

The term "roorback" has faded from common usage, but the tactic, along with the "gutter flyer,"[140] political "dynamiting"[141] and other forms of "dirty" politics, is still very much present on the political scene.

While the statutory provisions that have been discussed in this note do serve to protect the candidate, they serve in a much more important way as a "consumer protection" device for the voter. V. O. Key, Jr. has written:

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139. B. FELKNOR, DIRTY POLITICS 25 (1966).

140. *See* note 63 *supra* and accompanying text.

141. *See* F. Jonas, *The Art of Political Dynamiting*, 10 WEST. POL. Q., June, 1957, at 388.

> The voice of the people is but an echo. The output of the echo chamber bears an inevitable and invariable relation to the input. As candidates and parties clamor for attention and vie for popular support, the people's verdict can be no more than a selective reflection from among the alternatives and outlooks presented to them. Even the most discriminating popular judgment can reflect on ambiguity, uncertainty, or even foolishness if those are the qualities of the input into the echo chamber.[142]

State election laws reflect the values of the electorate. If one state's electorate demands a higher standard of accuracy and fair play from politicians, it should be their right to do so. As Justice Clark wrote: "No civil right has a greater claim to constitutional protection or calls for more rigorous safeguarding than voting rights."[143] These statutes, however imperfect, are a valid means of protecting that right.

142. V.O. KEY, JR., THE RESPONSIBLE ELECTORATE 2-3 (1966).
143. Talley v. California, 362 U.S. 60, 70 (1960) (Clark, J., dissenting).