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The Use of Adverse Publicity to Regulate Campaign Speech

"The purification of politics is an iridescent dream,"

John James Ingalls

The regulation of election campaigns has undergone rapid growth during the past decade. Since 1972, 40 states have enacted new laws regulating campaign financing. The amount of money that an individual can contribute to campaigns is presently limited in 23 states. Forty-nine states now require disclosure reports relating to campaign contributions and expenditures. Independent commissions enforce these regulations in more than half of the states.

Campaign finance regulations deal with only one aspect of the political selection process. A second and equally persistent problem is the use of deceptive and misleading campaign appeals. In 1974, a survey of state election laws indicated that only 17 states had enacted statutes concerning false and misleading campaign speech. While California statutes do not ban false appeals generally, state law does prohibit false claims of party endorsement or support, false claims of incumbency, and misleading or unauthorized fund-raising appeals.

One reason for the relative lack of legislation in this area is the stringent first amendment protection traditionally afforded political speech. Regulations affecting campaign speech are likely to receive the strictest scrutiny. Such regulations will be tested not only by their application to the parties before the court but by their potential appli-

2. COMMON CAUSE, CAMPAIGN REFORM IN THE STATES 10 (January, 1979) [copy on file at Pacific Law Journal].
4. Id. at 10-11. Only North Dakota does not require any disclosure reporting.
5. Id. at 11.
7. See CAL. ELECT. CODE §11707.
8. See id. §29450.
9. See id. §§12301, 12302, 12303.
10. See generally Election Law Developments, supra note 6, at 1272-86.
Furthermore, cases discussing sanctions applicable to public debate indicate that the *New York Times v. Sullivan* standard may be a prerequisite to regulation in many instances.\(^{14}\)

A recent enactment by the Orange County Board of Supervisors brings into focus the problems involved in promoting truth and accuracy in campaign communications. This measure, the Orange County Fair Campaign Practices Ordinance,\(^{15}\) establishes a five-member commission\(^{16}\) empowered to conduct hearings and issue determinations as to whether local campaign literature or broadcasts contain false or misleading statements.\(^{17}\) All candidates are required to submit copies of literature and broadcasts at the time of distribution,\(^{18}\) and the Commission is free to conduct hearings by request or upon its own initiative.\(^{19}\) But the sole sanction available in cases of false or misleading advertising is the adverse publicity generated by an unfavorable Commission finding.

This unique approach to the regulation of false campaign speech merits careful consideration for several reasons. By relying on adverse publicity to discourage false and misleading statements, the ordinance raises the question of whether a relatively indirect sanction, such as an unfavorable press release, can be an impermissible deterrent to free discussion. Through the establishment of the Commission, the ordinance provides for an administrative body with the novel role of adjudicating the veracity of campaign statements. Finally, and perhaps most importantly, the early operation of the ordinance has indicated that the Orange County approach can be an effective and workable deterrent to false and misleading campaign advertising.\(^{20}\) In short, the ordinance

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12. When first amendment interests are at stake, a regulation will be subjected to the overbreadth doctrine. Under this doctrine the courts may invalidate a statute that primarily regulates unprotected expression if the statute reaches protected expression in the process. Although the statute may not be invalid as applied to the parties before the court, the doctrine allows a party to challenge the statute on the basis that it may be susceptible of application to protected expression under circumstances not before the court. Thus, the statute may be invalidated on its face based entirely upon an analysis of its language and potential application. *See generally* Lewis v. City of New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).
14. The *New York Times* malice standard prohibits a public official or public figure from recovering damages for defamatory statements concerning his conduct absent a showing that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). *See* Garrison v. Louisiana, 379 U.S. 64, 73-75 (1964); *Election Law Developments*, supra note 6, at 1275-83. For cases extending the malice standard beyond ordinary defamation actions, *see generally* Pickering v. Board of Educ., 391 U.S. 563 (1968); Vanasco v. Schwartz, 401 F. Supp. 87 (S.D.N.Y. 1975).
15. ORANGE COUNTY, CAL., COUNTY ELECTION REGULATIONS, (Feb. 6, 1979) [copy on file at Pacific Law Journal].
16. *Id.* art. 3, §1-7-30.
17. *Id.* art. 3, §1-7-42(b), (e).
18. *Id.* art. 2, §1-7-23 (ordinance no. 3131, enacted June 1, 1979).
19. *Id.* art. 2, §1-7-42(b).
20. See notes 50-56 and accompanying text *infra*. 
institutes an innovative, effective, and arguably constitutional scheme to alleviate a problem that long has plagued democratic government. Whether the ordinance actually can withstand the dictates of the first amendment is the focus of this comment.

To answer this question the comment will analyze the key first amendment problems surrounding the regulation of false speech in a political context. This analysis will show that adverse publicity issued prior to election day can be a powerful deterrent to the free exchange of information in the campaign process and that this deterrent is sufficient to invalidate the Orange County ordinance under the first and fourteenth amendments. The major part of the comment will address the campaign falsity provisions of the ordinance. To the extent necessary to examine the measure thoroughly, the comment also will discuss provisions in the ordinance limiting the distribution of anonymous literature and the use of third party endorsements. Because of the unique character of the ordinance, a more detailed analysis of its provisions and operation is an appropriate starting point.

THE ORANGE COUNTY FAIR CAMPAIGN PRACTICES ORDINANCE

The Orange County Fair Campaign Practices Ordinance was adopted in early 1978 by the Orange County Board of Supervisors in response to a series of scandals which saw the indictment of 43 Orange County political figures. It is the only enactment of its kind in California.

The scope of the ordinance is limited to campaigns for county offices and county ballot measures. Focusing on campaign broadcasts and literature prepared for mass distribution, the ordinance regulates deceptive communications in several ways. Persons using another person's name in support of or in opposition to a candidate or ballot measure must obtain written permission from that person prior to using his or her name. A broadcast which "aids in the defeat of any candidate" must indicate whether or not the contents have been authorized by any candidate. All literature and broadcasts must clearly bear the name of at least one person who is responsible for its distribution. Finally, copies of all broadcasts and literature intended for mass distribution must be filed with the Registrar of Voters no later than three

22. Id.
23. ORANGE COUNTY, CAL., COUNTY ELECTION REGULATIONS, art. 1, §1-7-5 (1979).
24. Id. art. 2, §1-7-20.
25. Id. art. 2, §1-7-21.
26. Id.
27. Id. art 2, §1-7-22.
hours after the initial distribution is begun.28

To implement these requirements, the ordinance creates the Orange County Fair Campaign Practices Commission.29 The Commission is composed of five members.30 Each member of the Board of Supervisors may nominate a person to fill one of the seats and appointment is made by a majority vote of the Board.31

The Commission does not have broad enforcement powers. It is authorized to examine reports of candidate contributions and expenditures for the purpose of determining compliance with state and county law.32 The Commission is also responsible for monitoring compliance with the Fair Campaign Practices Ordinance33 and, upon a determination of probable cause, the Commission may conduct hearings to determine whether a violation has occurred.34 If the Commission does determine that a violation has taken place, it must report this finding to the District Attorney for enforcement.35 A conviction for violating the ordinance may result in a fine of up to $1000 or a maximum of six months in the county jail, or both.36

The primary function of the Commission, however, has nothing to do with criminal sanctions. The ordinance provides that it is the duty of the Commission to “[e]xamine all pieces of campaign literature and copies of paid political advertisements intended for broadcast”37 to determine if there is reasonable cause to believe that they contain “false or misleading statements.”38 Upon a finding of reasonable cause the Commission may conduct hearings,39 and upon reaching a determination may “take such steps as it deems appropriate to inform the public of its findings with respect to such statements.”40 Presumably, this action would primarily consist of issuing press releases.

The Commission’s authority to review campaign communications does not extend to the personal comments and speeches of candidates, insofar as they are not incorporated in literature or broadcasts.41 “Campaign literature” is defined as “any matter which is distributed to

28. Id. art. 2, §1-7-23.
29. Id. art. 3, §1-7-30.
30. Id. art. 3, §1-7-13.
31. Id.
32. Id. art. 3, §1-7-41.
33. Id.
34. Id. art. 3, §1-7-42.
35. Id.
36. Id. art. 4, §1-7-50.
37. Id. art. 3, §1-7-41.
38. Id.
39. Id. art. 3, §1-7-42.
40. Id.
41. See id. art. 1, §1-7-5; art. 3, §1-7-41.
persons by whatever means for the purpose of influencing the action of voters for or against" a publicly announced candidate for county office or "the passage or defeat of any measure which has qualified for the ballot." Only literature distributed in quantities of 500 or more is subject to the review. Also subject to review are paid political broadcasts prepared for radio or television.

The ordinance apparently has had a significant impact on the Orange County election process. Initial passage of the ordinance occurred in time to allow the Commission to monitor the 1978 election for four county offices. The Commission’s effect on that election was assessed in a report prepared at the direction of the Board of Supervisors by the Orange County Citizens Direction Finding Commission.

The report indicated that the Fair Campaign Practices Commission had not acted on its own initiative in identifying deceptive advertising but had responded to a number of complaints by other candidates. During both the primary and general elections, the Commission heard a total of 21 complaints regarding the veracity of campaign ads. In seven of those cases, the Commission issued determinations that the communications contained false or misleading statements. The significance of these actions, however, was small in comparison to evidence of the Commission’s deterrent effect.

According to the report, polls conducted by campaign consultants indicated that “an unusually large number of voters would vote against a candidate who was adjudged as having violated fair campaign practices.” Press coverage of Commission actions was “substantial” and adverse findings against candidates were assured of “widespread exposure.” Candidates made effective use of Commission rulings including reprinting adverse findings in campaign ads. One consultant even went so far as to say that all advertising was prepared “with an eye to how the Commission would view it” and that the Commission “cle-

42. Id. art. 1, §1-7-5 (campaign literature does not include bumper stickers, windshield stickers, or official ballots).
43. Id. art. 1, §1-7-5, art. 2, §1-7-23.
44. Id.
45. ORANGE COUNTY CITIZENS’ DIRECTION FINDING COMMISSION, THE ORANGE COUNTY FAIR POLITICAL PRACTICES COMMISSION REPORT AND RECOMMENDATIONS (March 27, 1979) [copy on file at Pacific Law Journal].
46. Id. at 1.
47. Id. at 2.
48. Id.
49. See id.
50. Id.
51. Id. at 3.
52. Id.
53. Id.
54. Id.
aned up our act.” A number of the consultants interviewed were of the opinion that an adverse ruling by the Commission could determine the outcome in a close race.

The findings of the report should be viewed with some caution since the report was written in a highly conclusionary form and did not document its findings with quantitative support. But the report confirms what common sense suggests: the fear of pre-election adverse publicity will deter deceptive campaign speech. But measures which deter false speech in the political arena may also discourage speech protected by the first amendment. Whether this chilling effect is permissible under the Constitution depends on an analysis of the competing interests affected by the regulation.

FIRST AMENDMENT CONSIDERATIONS

A. The Permissible Limits of Regulation

The starting point in determining first amendment limitations on the regulation of campaign speech is the traditional protection afforded to speech relating to our governmental processes. Governmental actions which restrict the expression of views concerning public issues are inherently suspect, especially when the election process is affected. As the United States Supreme Court stated in Monitor Patriot v. Roy, the first amendment “has its fullest and most urgent application” in speech by candidates for public office.

The courts have been equally clear, however, in stating that “there is no constitutional value in false statements of fact.” Deceptive and misleading statements belong to “the category of utterances which are no essential part of any exposition of ideas.” Nevertheless, the interest in a vigorous public debate may require the protection of some falsehood “in order to protect speech that matters.” In a case affirming the government’s interest in regulating deceptive commercial advertising, it was emphasized that where speech contains ideas it may

55. Id.
56. Id.
57. See generally id.
63. 418 U.S. at 341.
be protected "even if it contains inaccurate assertions of fact." 64

How much falsity must be tolerated in the campaign context is unclear. The primary danger posed by this kind of regulation is that in the process of discouraging deceptive expression, protected expression may also be deterred. In this sense the problem of false campaign communications raises issues closely related to those involved in defamation actions against public figures.

In New York Times v. Sullivan 65 the Court stated that the interest in an unrestricted discussion of public issues requires the protection of negligent defamation directed at public officials. 66 Where a defamation action against a public official is not based on a finding that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not," 67 the action would "dampen the vigor and limit the variety of public debate." 68

The New York Times standard has not been extended to all instances where false speech is regulated in a public context. In Gertz v. Robert Welch, Inc. 69 the Court refused to extend the malice standard to an action against a news outlet that published defamatory statements against a person who was neither a public official nor a public figure. 70 In deciding that a private individual could bring an action based on false statements negligently made, the Court emphasized the importance of the balancing process in determining what standard is required. Stating that the New York Times case represents an accommodation between the need for a vigorous and uninhibited public press and the "limited state interest present in the context of libel actions brought by public persons," 71 the Court went on to conclude that the greater interest in affording redress to private citizens outweighed the need for press protection in this instance. 72

This balancing process has been traditionally employed where otherwise legitimate regulations have an inhibiting impact on free expression. 73 In such instances the regulatory scheme may be constitutionally justified where the regulation advances sufficiently compelling state in-

66. Id. at 279-80.
67. Id.
68. Id. at 279.
70. Id. at 343-44.
71. Id. at 343.
72. Id. at 345-46.
terests. The first consideration is, of course, the degree to which the regulations may deter or discourage protected speech. This impact, the "chilling effect," raises the first amendment problem but is by no means dispositive. When an important public interest is advanced by the regulation, the chilling effect may be constitutionally supported. Regulations chilling free expression have been justified by a variety of state interests including the interest in an informed electorate, the interest in protecting private reputation, and the interest in deterring government corruption.

While closely related to the interests considered in *New York Times* and *Gertz*, the considerations involved in evaluating campaign speech regulation raise slightly different issues. Traditional first amendment concerns for protecting a vigorous discussion of public matters have a more urgent meaning in the campaign context. But the interests advanced also appear more compelling. Campaign falsity regulations seek to protect the election process by encouraging accurate information upon which the voters may base their choices. To the extent that the electorate is misinformed, the quality of the selection process and the government itself stand to suffer. Thus it can be argued that the interest in an informed electorate is significantly greater than the state interest in protecting private citizens from defamation-related injury. Furthermore, to the extent that regulations effectively limit false campaign appeals they encourage public confidence in the election process.

The determination of what standard will limit the application of publicity sanctions to false campaign speech will depend upon a balancing of the state's interest in accurate information in the election process against the chilling effect on legitimate speech created by such sanctions. The balancing process, in this instance, is particularly delicate because on both sides of the scale the interests advanced promote a better informed public and encourage a political environment that will facilitate a search for truth. How this problem is resolved should depend in large part upon how effectively the new regulations enhance the truth-seeking process.

74. See note 72 supra.
78. 424 U.S. at 67-68.
79. See note 11 supra.
B. Vanasco v. Schwartz: The Limits Applied

The regulation of campaign speech has received little attention in the courts. The United States Supreme Court has never directly discussed the problem of state proscriptions on deceptive campaign speech. Perhaps the only federal case which directly discusses the standard applicable to sanctions on false campaign speech is *Vanasco v. Schwartz*, in which a three-judge panel of the United States District Court for the Southern District of New York invalidated several provisions of the New York Fair Campaign Code.

The New York Fair Campaign Code was enacted for the purpose of "stimulating just debate" in election campaigns. Under the Code candidates were prohibited from making various misrepresentations during the course of their campaigns. A candidate was prohibited from misrepresenting party endorsement, candidate qualifications, or candidate positions on the issues. Other provisions of the Code attempted to regulate the subject matter of campaign appeals.

Enforcement of the Code rested with the State Board of Elections. The Board could hear complaints, issue determinations, impose fines, and initiate judicial proceedings to enforce its orders. Orders could require correction of communications in violation of the Code.

The three-judge panel, in a decision affirmed without opinion by the United States Supreme Court, held that the Code was in violation of the first amendment because misrepresentation provisions did not incorporate the *New York Times* malice standard. In finding that the Code creates a substantial chill on speech protected under the first amendment, the opinion emphasized that, even apart from the authority to impose fines, "any adverse finding by the Board ... will be highly publicized by the respondent's opponent." Considering this prospect and the possibility of fines or imprisonment, "it is not difficult to see how a political candidate might be deterred from making protected statements when he must consider the consequences of a Board.

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82. 9 N.Y. Codes, Rules and Regulations, §6201.1, cited in Vanasco v. Schwartz, 401 F. Supp. at 101. These regulations have been extensively rewritten since the Vanasco decision.
83. Id. §6201.1(d). This provision was eliminated subsequent to the Vanasco decision.
84. Id. §6201.1(d). This provision was eliminated subsequent to the Vanasco decision.
85. Id. §6201.1(e). This provision was eliminated subsequent to the Vanasco decision.
86. In addition to regulating campaign misrepresentations, the Code proscribed attacks on race, sex, religion, or ethnic background of a candidate. See id. §6201.1(c). This provision was eliminated subsequent to the Vanasco decision.
88. Id.
91. Id. at 98.
Pacifc Law Journal / Vol 12

Vanasco makes clear that any statute imposing monetary sanctions on deceptive campaign speech must be premised upon a finding of actual malice under the New York Times standard. However, the opinion leaves unanswered questions surrounding the use of adverse publicity to discourage false campaign appeals. This problem is confronted directly in the Orange County Fair Campaign Practices Ordinance.

PROBLEMS WITH THE ORANGE COUNTY FAIR CAMPAIGN PRACTICES ORDINANCE

A. Extent of Sanctions

The fundamental problem raised by the Orange County ordinance is whether or not the use of adverse publicity to deter deceptive campaign speech requires the application of the malice standard. This determination will require the use of the balancing approach similar to that employed in Gertz v. Robert Welch, Inc. There the Court sought to balance the interest in protecting private reputation against the interest of the press in immunity from liability. In the present case the courts will first look to the impact of the regulation in deterring or chilling a free and vigorous election debate. This impact will then be weighed against the state interests in facilitating voter access to accurate information and in promoting confidence in the election process.

The essential difference between the Orange County regulations and those employed under the New York Code lies in the sanctions imposed. In eschewing fines, imprisonment, and injunctive relief, the Orange County approach seeks to regulate through information issued in the form of Commission determinations. But this information is in itself a sanction. A candidate publicly branded for distributing false or misleading literature may have his election prospects seriously damaged. In jeopardizing election victory, the decisions of the Commission may silence a candidate much more quickly than the fear of more conventional remedies.

When monetary sanctions or damages have been sought based upon false statements regarding public officials, the courts consistently have held that non-malicious false statements must be protected to preserve the vigor of public debate. If this same standard is applied to public-

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92. Id.
94. Id. at 339-45.
95. See note 75 and accompanying text supra.
96. See note 50 and accompanying text supra.
97. See note 14 supra.
ity sanctions created by the Orange County ordinance, the ordinance would be unconstitutional for failure to limit its determinations to cases of malicious falsity.

There would appear to be little basis for distinguishing publicity sanctions under the Orange County ordinance from fines and damages invalidated in other instances. There is very good reason to believe that the ordinance creates a powerful deterrent against the use of statements that the speaker knows could prove false or misleading. As indicated in the report of the Citizens Direction Finding Commission, candidate polling showed that an adverse determination from the Fair Campaign Practices Commission would affect the decisions of a large percentage of the voters.98 Candidates made use of Commission determinations, even to the point of reprinting them in their own advertising.99 Consultant interviews indicated that the existence of the Commission affected campaign decisions100 and that the Commission could determine the outcome in a close race.101

These findings are not surprising. While the point can be argued that the Commission determinations are merely corrective in nature, this argument overlooks the inflated impact that these determinations are likely to have in the election context. In an era when much of the candidate exchange is viewed with significant voter skepticism, the effect of an “official” determination is likely to be strong. Because no other formal fact-finding processes are available to assist the voter, the electorate may exaggerate the importance of these determinations. Delicate distinctions concerning what is or is not misleading may be perceived by the voter as adjudications of truth. Considering the echo effect of candidates using Commission rulings for their own purposes,102 it is hard to argue that the ordinance could not be effectively exploited for partisan ends.

The important point about the ordinance is that its most potent chill is the prospect of election defeat. While monetary damages or fines may hurt a candidate, the adverse publicity of a Commission determination may cost him the election.103 Commission determinations reflect directly on the reputation of the candidate for honesty, and voter feelings about a candidate’s character and integrity may be as important as any particular stand on policy-related issues. Vanasco, perhaps recognizing this point, refers to the impact of adverse publicity as a

98. See note 50 and accompanying text supra.
99. See note 53 and accompanying text supra.
100. See note 54 and accompanying text supra.
101. See note 56 and accompanying text supra.
102. See note 53 and accompanying text supra.
103. See note 56 and accompanying text supra.
factor in requiring the employment of the malice standard in the New York Code.\textsuperscript{104}

If monetary damages for negligent misrepresentation offer a chill likely to reach protected expression, certainly the threat of election defeat reaches further. Campaign deficits are a common feature of politics\textsuperscript{105} and the candidate's personal financial investment may be high even when contributions are plentiful.\textsuperscript{106} Against the accelerating costs of modern campaigning the thousand-dollar fine invalidated in \textit{Vanasco} appears small in significance. In deciding whether or not the malice standard is applicable to publicity sanctions applied in Orange County, it is important to remember that the state interests in voter information and confidence in the election process are distinguishable and probably stronger than the interest in protecting personal reputation advanced in \textit{Gertz} and \textit{New York Times}. But on the chill side of the equation it is difficult to contend that the risk of a post-election fine will stifle candidate discussion to a greater degree than the prospect of a potential election defeat.

Before concluding this discussion of the chill raised by the ordinance, it is important to note that the ordinance does not address all campaign speech. In limiting Commission review to literature and broadcasts prepared by the candidates, the ordinance excludes most extemporaneous campaign speech. Live broadcasts would, of course, be subject to Commission review. But most campaign advertising is prepared through a deliberative process during which the content of all statements is subjected to the review of the candidate, the candidate's advisors and, often, the candidate's advertising agency. Usually, this process should allow time for research and investigation. The risk of negligent misrepresentation is diminished\textsuperscript{107} and the deterrent effect of the ordinance touches a more limited category of appeals. When an important issue requires discussion, a candidate need not refrain from making statements in public appearances that are not incorporated into literature or paid broadcasts.

No doubt campaign advertising is still a broad category and certainly situations will arise late in the campaign in which the need for an immediate response may result in particularly undeliberative advertising. But the ordinance's limitation does lessen the character of its intrusion

\textsuperscript{104} See note 91 and accompanying text supra.


on free expression and for this reason its reach is important to note.\textsuperscript{108}

In \textit{New York Times} and \textit{Vanasco} the prospect of fines and damages was sufficient to invalidate regulations reaching non-malicious speech. If the chill created by the ordinance is equal to that created by monetary sanctions, then the ordinance must fail unless the state interests advanced are sufficient to justify the chill.

\textbf{B. The State Interests}

There is no question that the ordinance advances important state interests. Previous cases relating to the defamation of public officials have referred to the interest in protecting personal reputation.\textsuperscript{109} The ordinance no doubt advances this interest. But in reaching beyond personal defamation to include all false or misleading statements contained in campaign advertising, the regulation touches broader interests. By furnishing information regarding the veracity of campaign statements, the ordinance seeks to protect our process of selecting leaders.\textsuperscript{110} If the voter must rely on inaccurate information, the quality of his decisions will suffer. The state, therefore, has an important interest in facilitating the voter's access to accurate information that may be relevant to his choice of candidates.\textsuperscript{111} In the sense that this interest has an impact on the decisions of the electorate, it goes to the core of our self-government process. To the extent that candidate communications avoid false or misleading statements, voter confidence in the process is likely to result. Thus, the state interest in accurate voter information would appear much stronger than the interest in individual reputation.\textsuperscript{112}

The determination of truth in the political arena has traditionally been achieved through the free exchange of competing viewpoints in the marketplace of ideas.\textsuperscript{113} Regarding statements similar to those addressed in the ordinance, the United States Supreme Court has said that "counter-argument and education are the weapons available to expose these matters."\textsuperscript{114} But in the context of an election campaign the voter may not be able to wait for counter-argument to expose the falsity of a matter upon which he may base his vote. In the latter stages of a

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{108} See note 75 and accompanying text supra.
\item\textsuperscript{109} See note 77 supra.
\item\textsuperscript{110} See note 80 supra.
\item\textsuperscript{112} Election Law Developments, supra note 6, at 1279.
\item\textsuperscript{114} 370 U.S. at 389.
\end{itemize}
\end{footnotesize}
campaign there may be inadequate time for effective response. By providing some method of official adjudication, the state can at least provide some assistance to the candidate when there is still time for hearing and determination. In this sense, the time constraints inherent in the election process support the state interest in facilitating determinations of truth.

The state interest in promoting an informed electorate is no doubt a compelling consideration. But any measure which advances this interest at the expense of a robust public discussion may be defeating the very end it seeks to advance. Whatever secondary measures we may adopt to facilitate the quest for truth, the primary means by which the American system advances this process is through the unrestrained exchange of viewpoints and information in the marketplace of ideas. In the sense of providing objective determinations to the voters, the Orange County Fair Campaign Practices Commission advances this process. But to the extent that the ordinance punishes innocent or negligent misrepresentation, it "dampens the vigor and limits the variety of public debate." In the sensitive area of election campaigning, where almost all candidates have some access to the media for purposes of rebuttal, the ordinance's impact on public discussion seems a large price to pay for the benefits of the Commission's determinations.

This price should be fatal to the ordinance. To the extent that Vanasco is good precedent, the ordinance is difficult to support. The state interests advanced by the New York Code and the Orange County ordinance are virtually identical. If the interests in accurate information and voter confidence were insufficient to support fines in New York, they should not suffice to justify the impact of Commission findings in Orange County.

But Vanasco notwithstanding, the ordinance does not appear to meet the requirements of the first amendment. The clear message of New York Times is that the vigorous debate of public issues requires that innocent misstatement and negligent falsehood be protected. If the speaker must be certain of his or her facts, then certain facts may not become known. The fundamental question regarding publicity sanctions does not concern their character or intent. It concerns their impact. If the findings of the Orange County Fair Campaign Practices Commission punish unknowing falsehood, then they deter speech that matters. Without a malice standard, it would therefore appear that

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115. See generally Election Law Developments, supra note 6, at 1285.
the ordinance cannot withstand first amendment scrutiny.

No doubt it would be awkward for a strictly factfinding commission like the Orange County body to conduct hearings to determine only malicious falsity. The problems in ascertaining a candidate's state of mind in a highly publicized proceeding operating on election timetables would be almost impossible to manage. But the fact that publicity sanctions premised on a malice standard may be unworkable does not improve the constitutional posture of sanctions which do not employ the standard. If non-malicious falsity is punished, then the ordinance should fail.

C. Other Problems

The ordinance has two other provisions that merit brief consideration. First, the ordinance imposes two disclosure requirements. Broadcasts and literature in support of or which "aid in the defeat of any candidate" must indicate whether or not the contents have been authorized by any candidate. All literature and broadcasts, likewise, must bear the name of at least one person who is responsible for distribution. While the courts have invalidated broad statutes forbidding the distribution of all anonymous circulars, the courts have upheld disclosure requirements when the focus is more limited and when they advance important state interests.

The requirement that broadcasts and literature indicate whether they have been authorized by a candidate appears a limited intrusion which need not discourage an individual from presenting a controversial viewpoint. More far-reaching disclosure requirements relating to campaign contributions have been upheld by the United States Supreme Court. However, the ordinance's ban on all anonymous literature likely will fail. A nearly identical requirement in the California Elections Code was invalidated recently by the California Fourth District Court of Appeal.

Finally, the ordinance requires that persons using another person's name in support of or in opposition to a candidate or ballot measure must first obtain written permission from the person whose position is being represented. In the case of a private citizen, this protection

119. ORANGE COUNTY, CAL., COUNTY ELECTION REGULATIONS, art. 2, §1-7-21.
120. Id. art. 2, §1-7-22.
123. See id.
125. ORANGE COUNTY, CAL., COUNTY ELECTION REGULATIONS, art. 2, §1-7-20.
would be akin to statutes protecting against defamation and would present few problems. In the case of a public official or public figure, however, the provision creates difficulties. Presumably a public official who has taken a public position on an issue or a candidate, but who no longer wishes to associate with that position or candidate could prevent use of his name by refusing written permission. A public figure, who may be privately working in support of a candidate or measure, could prevent the advertisement of this fact by again refusing the written permission. In supporting contribution disclosure laws the Court stressed the public interest in information regarding the associational ties of public officials. The permission requirement could defeat this interest as well as inhibit the type of discussion about public figures that the Court addressed in *New York Times*. Thus, the provision seems to run afoul of the constitutional doctrines in this area.

**CONCLUSION**

On a practical level, the Orange County Fair Campaign Practices Ordinance represents a workable and apparently effective effort to discourage deceptive campaign advertising. On a constitutional level, the ordinance is an innovative attempt to circumvent the first amendment problems raised by *New York Times* and *Vanasco*. To avoid the malice requirement, the ordinance changes the character, but not necessarily the strength, of the sanctions imposed on false speech. But it is the impact of the sanction rather than the form which should be determinative in assessing the chill. If publicity sanctions dampen public discussion they should meet the same tests that have confronted more traditional sanctions on deceptive speech.

If the courts determine that publicity sanctions require the application of the malice standard, then approaches to the regulation of campaign falsity are likely to be seriously limited. The application of the malice standard to defamation actions by public figures has severely diminished the number of actions brought by such parties. Existing statutes imposing criminal sanctions on false campaign speech have been infrequently enforced and the widespread application of the malice standard is no doubt one explanation.

Alternatives to criminal sanctions premised on a finding of malice are not promising. A voluntary code of fair campaigning has been con-

126. See note 77 supra.
127. 424 U.S. at 66-68.
129. Election Law Developments, supra note 6, at 1280-81 n.269.
1981 / Campaign Speech

sidered by the California legislature. Such a code would not appear to raise problems so long as the provisions do not attempt to limit the subject matter of campaign appeals. But the effectiveness of a voluntary approach is subject to question. Private efforts to secure the subscription of candidates to a voluntary code have met with only mixed success.

Another approach might be to preclude pre-election determinations of falsity. This suggestion, however, does little to advance the public’s interest in accurate information and offers a doubtful deterrent at best. A politician will prefer not to be labeled as untruthful, no matter when the label is applied. But the pressures of an election contest may also encourage a candidate to risk these post-election consequences. In a hotly contested race, the chances that such a measure would provide a meaningful deterrent to false speech seem small.

Measures providing for retraction of false statements offer another approach. But because the retraction approach would require an initial finding of falsity, it would raise the same constitutional problems as any other system providing for pre-election determinations. Further complications would arise from the greater time necessary to find falsity and issue retractions. Thorny issues of whether or not the retraction received circulation similar to that of the original misstatement would likewise create problems.

Considering these alternatives, a statute employing the malice standard backed by fines may be the only approach capable of working on both a practical and a constitutional level. Any attempt to avoid the malice standard by changing the sanctions will spell its own failure.

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130. The Code of Fair Campaign Practices was originally introduced as SB 46, 1977-78 Regular Session (proposed addition of Chapter 5 to Division 9 of the Elections Code), on December 15, 1976. In its original form, the bill provided for the establishment of local campaign practices boards within each senatorial district. The local boards would have been unpaid, fact-finding bodies with no powers of enforcement. This provision was soon removed, leaving the proposal as a strictly voluntary measure to which each candidate would be asked to subscribe at the time of filing. For background, see CAMPAIGN L. REP., vol. 3, no. 12, January 1977, at 3; id., vol. 4, no. 2, March 1977, at 10; SENATE FINAL HISTORY, 1977-78 Regular Session, at 45, 137; SENATE WEEKLY HISTORY, June 28, 1980, at 203. As SB 988, 1979-80 Regular Session, the proposed code apparently died in committee. See SENATE WEEKLY HISTORY, Oct. 3, 1980, at 315.


132. The Fair Campaign Practices Committee, a private, nonpartisan group operating in Washington, D.C., attempts to promote fair campaign practices by seeking candidate subscription to a fair campaign pledge, investigating complaints regarding dirty political tactics, and promoting arbitration of campaign disputes. The group was founded in 1954 and offers its services to congressional, gubernatorial, and presidential candidates. In recent years the number of complaints filed with the committee and the number of disputes going into arbitration has declined. Forty-two complaints were filed in 1976. See CONG. Q. WEEKLY REP., Dec. 4, 1976, at 3276-77.
the sanctions are less effective, then the regulatory scheme may not successfully deter deceptive speech. If the sanctions are effective, then they chill negligent misstatement. Considering the general disuse of campaign falsity statutes that do employ the malice standard, some sort of adequately staffed enforcement agency would seem essential to any chance for success. But the larger conclusion of this analysis is that regulation of falsity in the campaign context lies more in the vigor of public debate than in the vigilance of government regulation.

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