

Campaign Finance, Transparency, and Citizen Autonomy: A Response to Professor Ringhand

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In her excellent, thought-provoking article in the *Ohio State Law Journal*, Professor Ringhand makes a valuable and much-needed contribution to what she describes as the “urgent conversation” concerning the “combined threat of online electioneering and foreign interference in domestic elections.”¹ Sadly, she is right to say that our democratic way of life is imperiled. As she notes, the U.S. experience of “fake news” and its apparent influence on the U.S. presidential election was foreshadowed by the U.K. experience, in which the narrow decision to leave the European Union (EU) was strongly influenced, it seems, by various untruths (downright lies) spread by pro-Leave campaign groups.²

Professor Ringhand’s comprehensive analysis of the laws governing campaign financing in the United Kingdom and United States is impressive for both its technical flair and systematic theorizing. As she says, we can divide these rules into four discrete issues relating to public education, transparency, sources of campaign finance, and campaign speech content.³ I tend to agree with much of what Professor Ringhand says. The few areas I disagree with are set out below. The overarching theme of my response is this: whereas I agree that the law can be improved, including in the ways that Professor Ringhand urges, I question whether law alone can address the underlying problems to which that she alerts us. Indeed, I question whether law is effective at all in these circumstances or whether change may simply do more harm than good. For even when there is compelling evidence that the rules were breached—as is apparent in varying degrees in the U.S. and U.K. elections of 2016⁴—the damage has been done. What can law do to reverse the consequences? I do not mean this literally—we can, of course, annul the results of an election or referendum—I mean pragmatically. People are stubborn—they will react with something like open hostility if told their vote was stupid or that they were conned (indeed, we

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¹ Lori A. Ringhand, *First Amendment (Un)Exceptionalism: A Comparative Taxonomy of Campaign Finance Reform Proposals in the United States and United Kingdom*, 81 OHIO ST. L.J. 405, 405–06 (2020).

² See *id.* at 407.

³ *Id.* at 418–19.

⁴ See *id.* at 409–10 (discussing the investigations occurring in the United States and United Kingdom regarding foreign interference in elections).

have seen this in post-Brexit-vote Britain).⁵ How can we be sure that they will not vote the same way again? How can we be sure that they will not conclude “there’s no smoke without fire”?

Moreover, even when we have proof of rule-breaching, can we really say that voters have been *manipulated*? Can “duped” voters claim that the moral responsibility for their actions was rendered nugatory by the fact of, say, foreign intervention or disinformation? Or is *caveat emptor* all that can be said?

Part of the reason I admire Professor Ringhand’s analysis is her recognition of public education in this process.⁶ This sets her apart from other commentators in this field. Typically, commentators assume a model of voter behavior that is too conjectural to provide the sort of solid premises on which to build reliable conclusions. For example, commentators—and the law, in fact—assume that voters will make the right decisions if they are given the right information.⁷ At other times, in other contexts, commentators see the problem but misdiagnose it, for they will lament what they call voter irrationality, usually in reference to political expression and the contemporary appetite for brash, simple, “tell-it-how-it-is” forms of political campaigning, in which populism is king and liberalism is either sinister or naïve (or, as Putin called it recently: obsolete).⁸ But, to my mind, this is too simplistic: President Trump’s admirers and Brexiteers are not irrational in a sort of “Dr. Seuss, *Green Eggs and Ham*” sort of way. It may be a form of bounded rationality but still rationalism, nonetheless.

My point is this: people vote according to their lived experience, which produces in them their own sense of credibility and comprehensibility. Voters understand propositions according to what they have seen, heard, and done. Thus, their sense of truth depends upon whether the information presented to them resonates with their worldview. If it does, then they are bound to act upon it. If not—and if the thing that this information represents is more credible than the alternative—then we should be clear that society’s task of correcting the misperception is daunting.

Thus, in relation to, say, the Trump election and the Brexit referendum decision, the initial question that prompts our inquiry into campaign financing—what caused rational beings to think that, whatever the problem was, President Donald Trump or Nigel Farage *was* the answer—should take account of this issue first. For we shall not make much progress unless and until we have tackled campaign financing.

⁵ See Sarah Harrison, *Hostility Between Voters over Brexit Feels Hopeless, but Our Research May Show a Way to Bridge the Divide*, INDEPENDENT (June 3, 2019), <https://www.independent.co.uk/voices/brexit-tensions-remain-leave-tax-conservative-party-a8941431.html> [https://perma.cc/L5KF-XCMN].

⁶ See *id.* at 24–27.

⁷ See, e.g., *Your Vote Always Counts, So Be a Responsible Voter*, MIL. ONE SOURCE, <https://www.militaryonesource.mil/financial-legal/legal/other-legal-issues/don-t-just-guess-know-how-to-become-a-responsible-voter> [https://perma.cc/BQH4-2PAW].

⁸ *Putin: Russian President Says Liberalism ‘Obsolete,’* BBC (June 28, 2019), <https://www.bbc.com/news/world-europe-48795764> [https://perma.cc/3FN8-L48J].

I cannot speak to the Trump election, however, as an Englishman, I can say something about the Brexit referendum. For it was apparent, both during the process and after, that the Leave campaign strategy worked phenomenally well because its message was *plausible*. The most well-known of these—and I think to American audiences as well—was the Leave campaign’s slogan, plastered garishly across a big red bus, which claimed (erroneously) that the United Kingdom sends £350 million per week to the EU and that this could be better spent on funding the National Health Service (NHS) instead.⁹ Perhaps less known to an international audience were the campaign’s claims that Turkey was about to gain membership to the EU (it was not)¹⁰ and that a flood of Syrian refugees, escaping their war-torn country were making their way, inexorably, in the millions, to the United Kingdom¹¹ (they were not, but I notice that President Trump repeated the same line to describe the infamous Mexican caravan heading for California, which I am told still hasn’t arrived).¹² These tropes—of solving the chronic financial problems of the NHS, of immigrants taking “advantage” of “soft-touch” Britain (in fact, all available data shows that immigrants are net contributors to the United Kingdom and are a vital source of economic prosperity,¹³ including doing the jobs that over-privileged white Britain refuses to do), and of the European Union being an anti-democratic, corrupt institution—were all demonstrably wrong, as the chief actors in the

⁹ Adam Payne, *Boris Johnson Says His £350 Million a Week Brexit Claim Was an ‘Underestimate’*, BUS. INSIDER (Jan. 16, 2018), <https://www.businessinsider.com/boris-johnson-says-his-350-million-a-week-brexit-claim-was-an-underestimate-2018-1> [<https://perma.cc/F4YH-Y3MB>].

¹⁰ See James Ker-Lindsay, *Did the Unfounded Claim that Turkey Was About to Join the EU Swing the Brexit Referendum?*, LONDON SCH. ECON. & POL. SCI. (Feb. 15, 2018), <https://blogs.lse.ac.uk/politicsandpolicy/unfounded-claim-turkey-swing-brexit-referendum/> [<https://perma.cc/QHQ8-4AZS>].

¹¹ See Heather Stewart & Rowena Mason, *Nigel Farage’s Anti-Migrant Poster Reported to Police*, GUARDIAN (June 16, 2016), <https://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants> [<https://perma.cc/EY3N-6BV9>]. See generally Ashley Cowburn, *EU Referendum: Brexit Campaign Accused of ‘Fanning Flames of Division’ with Controversial Map*, INDEPENDENT (June 6, 2016), <https://www.independent.co.uk/news/uk/politics/eu-referendum-vote-leave-accused-of-fanning-the-flames-of-division-after-publishing-controversial-a7067701.html> [<https://perma.cc/U6U7-VD55>] (discussing alleged consequences of Turkey gaining admission into the EU, as the EU will then “share a border with Syria”).

¹² See Priscilla Alvarez, *What Happened to the Migrant Caravans?*, CNN (Mar. 4, 2019), <https://www.cnn.com/2019/03/04/politics/migrant-caravans-trump-immigration/index.html> [<https://perma.cc/8PVL-DL44>]; Wendy Fry, *One Year Later: The Unpredicted Legacy of the Migrant Caravan*, SAN DIEGO UNION-TRIB. (Nov. 17, 2019), <https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-11-17/one-year-later-the-unpredicted-legacy-of-the-migrant-caravan> [<https://perma.cc/WKA3-UUDU>].

¹³ OXFORD ECON., *THE FISCAL IMPACT OF IMMIGRATION ON THE UK: A REPORT FOR THE MIGRATION ADVISORY COMMITTEE 21* (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759376/The_Fiscal_Impact_of_Immigration_on_the_UK.pdf [<https://perma.cc/C7UL-BL8L>].

Leave campaign have partially admitted,¹⁴ but all served their purpose. The Leave campaign was also cannier than Remain in utilizing a central slogan—“let’s take back control”—which empowered people (or otherwise gave the impression of empowerment)—in a way that many clearly responded to, as if it gave them palpable influence on their destiny.¹⁵

Yet, the absence of any popular reaction to the (left wing) media’s sustained demolition of the Leave campaign’s false claims speaks volumes. Indeed, it has become commonplace to hear those that voted Leave say that they voted for reasons other than those that have been proved false.¹⁶ Interestingly, these alternative reasons are rarely revealed let alone explained. As I said earlier, no one likes to be told they are stupid (no matter how nicely it is dressed up). Nevertheless, the response speaks to the populist attitude that knowledge, intelligence, and learning are elitist and that only instinct, belief, and feeling are authentic.¹⁷ These are the people who think cabinet minister Michael Gove was right to say in 2016 that “[Britain has] had enough of experts”—after he would not name a single expert to support his belief that Britain would prosper out of Europe.¹⁸ It may be that the Leave voters were not swayed by the Leave campaign’s rhetoric, or else genuinely believe that they were not, and so would have voted to leave anyway—or it may be that they are too embarrassed to admit to being suckered.¹⁹

Nevertheless, this anecdotal evidence reminds us of an essential feature of our democratic way of life: that there can be no guarantees about the quality of voter decision-making. Thus, whereas we can make endless refinements to the input process—the sort of information that voters have access to—we can do nothing about the output—that is to say, the intellectual processes that voters bring to bear upon that information. I do not mean this in an intellectually

¹⁴ John Lichfield, *Boris Johnson’s £350m Claim Is Devious and Bogus. Here’s Why*, GUARDIAN (Sept. 18, 2017), <https://www.theguardian.com/commentisfree/2017/sep/18/boris-johnson-350-million-claim-bogus-foreign-secretary> [<https://perma.cc/C3ND-VQB8>].

¹⁵ Polly Toynbee, *On Friday I’ll Get My Country Back. Britain Will Vote Remain*, GUARDIAN (June 21, 2016), <https://www.theguardian.com/commentisfree/2016/jun/21/friday-britain-remain-leave-campaign-foreigners> [<https://perma.cc/R9Y9B-NAEJ>].

¹⁶ The two main reasons surveys of Britons reveal they voted to leave were “immigration” and “sovereignty.” NOAH CARL, CTR. FOR SOC. INVESTIGATION, CSI BREXIT 4: PEOPLE’S STATED REASONS FOR VOTING LEAVE OR REMAIN 1 (Apr. 2018), <https://ukandeu.ac.uk/wp-content/uploads/2018/07/CSI-Brexit-4-People%E2%80%99s-Stated-Reasons-for-Voting-Leave.pdf> [<https://perma.cc/6WM8-824D>]; see also Dorian Lynskey, *I Thought I’d Put in a Protest Vote’: The People Who Regret Voting Leave*, GUARDIAN (Nov. 25, 2017), <https://www.theguardian.com/politics/2017/nov/25/protest-vote-regret-voting-leave-brexit> [<https://perma.cc/ZMW5-VFEM>].

¹⁷ See Lynskey, *supra* note 16.

¹⁸ Henry Mance, *Britain Has Had Enough of Experts, Says Gove*, FIN. TIMES (June 3, 2016), <https://www.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c> [<https://perma.cc/Z6DY-4GBS>].

¹⁹ See Lynskey, *supra* note 16 (“To admit that you now believe you were wrong requires unusual honesty and courage; publicly to admit it takes even more.”).

snobbish way, as if I am about to advocate some sort of educational threshold for voter eligibility (although there are many historical characters, J.S. Mill included, who have toyed with this idea)²⁰—not least because I am not convinced that IQ has much to do with these problems. I mean only to signal this: that although we might think voters should vote conscientiously and dispassionately, they may equally act irresponsibly, ill-advisedly, and ruefully. As a democratic society, though, our commitment to total enfranchisement outweighs most everything else. Indeed, this commitment is so strong as to represent the irreducible minima of democracy: one person, one vote.

How a person uses this vote though—what considerations they take into account, and what considerations they ignore—is irrelevant to their eligibility to vote. Whether they make the right decision or make a decision they later regret is equally irrelevant. As Martin Redish memorably put it, if a voter picks a candidate because of how he wears his tie, who are we to argue?²¹

Professor Ringhand disagrees. She argues that better public education can help tackle this problem by “mak[ing] voters more critical consumers of political messages they see online.”²² Her primary point here concerns school-age education—she does not mention what is to be done with the post-school electorate which, of course, will make up the overwhelming majority for the foreseeable future.²³ Even if we implemented these programs today, capturing all of our sixteen- to eighteen-year-olds, we should have to wait something like thirty to forty years before this enlightened group accounted for the majority of the electorate.²⁴ I suspect, though, that the omission of adults is deliberate and that Professor Ringhand is mindful of Hannah Arendt’s admonishment that “[e]ducation can play no part in politics, because in politics we always have to deal with those who are already educated.”²⁵ For “[w]hoever wants to educate adults really wants to act as their guardian and prevent them from political activity.”²⁶ As she said: “Since one cannot educate adults, the word ‘education’ has an evil sound in politics; there is a pretense of education, when the real purpose is coercion without the use of force.”²⁷ In other words, the collective good cannot be pursued at the expense of individual autonomy. This too is an immutable, irreducible minima of the open society and the secret to the good

²⁰ J. Joseph Miller, *J.S. Mill on Plural Voting, Competence and Participation*, 24 HIST. POL. THOUGHT 647, 647 (2003) (“[I]ndeed, Mill’s justification of plural voting is largely driven by his worry that those competent to run society will be effectively shut out of governing by the uneducated masses.”).

²¹ See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 619 (1982).

²² Ringhand, *supra* note 1, at 419.

²³ See *id.*; Richard Fry, *Millennials Approach Baby Boomers as America’s Largest Generation in the Electorate*, PEW RES. CTR. (Apr. 3, 2018), <https://www.pewresearch.org/fact-tank/2018/04/03/millennials-approach-baby-boomers-as-largest-generation-in-u-s-electorate/> [https://perma.cc/ZAM4-73XR].

²⁴ See generally Fry, *supra* note 23.

²⁵ HANNAH ARENDT, BETWEEN PAST AND FUTURE 176 (1993).

²⁶ *Id.* at 176.

²⁷ *Id.*

life. Ignorance nor error can be erased. Voters will make mistakes and live to regret them.

I tend to think Arendt is right about this (as she was about most things). Accordingly, I cannot agree entirely with Professor Ringhand's conclusion that public education efforts "raise few serious legal issues."²⁸ Whilst, as a matter of practice this may be true, I think it does raise an important point of principle that we should bear in mind. Any attempt by government to correct misunderstandings or raise awareness should be treated with the deepest suspicion for the difference between beneficence, innocent error, and outright propaganda is slight. For example, in both the Trump election and the Brexit referendum, the threat of foreign interference was said to emanate from the right-wing, rendering left-wing exhortations to voters, warning them of this danger, a source of serious tension with the very principle of liberalism it is entrusted to defend.²⁹ For the underlying paternalism motivating this intervention undermines individual autonomy even though it intended to do no such thing.

To my mind, two separate concerns have become intertwined in the debate on campaign financing. Although both naturally arise from the subject of fairness in democratic decision-making, only one ought to determine our thinking on campaign finance law. As I see it, this legitimate concern relates to the impact on candidates themselves should there be no limitations on spending. In a democracy, the only qualities in a candidate that matter are their internal qualities—their capacity for reason, thought, integrity, compassion (in other words, their capacity for statesmanship)—and not their external qualities—their wealth, their looks, their privileges. Since there is no direct correlation between wealth and intelligence, as Donald Trump proves every single day, then it must be removed from the board in the game of politics. This is why limitations on campaign financing are so important—so that we achieve something like fairness between candidates and so that the candidate with the best internal qualities has the greatest prospect of success. This, at any rate, is the theory.

The other concern in the debate is the capacity of wealth to influence voters in terms of what they see and hear. The fear is that the more one candidate can dominate the attention of the voter, the more likely they are to win. Yet this concern easily merges into a separate matter, which is the quality of the information that voters are exposed to and how attempts of one candidate to correct misrepresentations, of themselves, of their politics, and of their opponents, may be drowned out by the greater resources of that opponent. This is an important concern, but its paternalistic undertones render it something other than a concern purely about the fairness of the fight between opponents. It makes it a debate about the quality of public decision-making.

As I have said, this sort of reasoning is problematic as a matter of principle, to the extent that paternalism threatens individual autonomy. Yet it is also

²⁸ Ringhand, *supra* note 1, at 422.

²⁹ See *id.* at 408–10.

problematic as a practical matter, as the aftermath of the Brexit contest also illustrates. As Professor Ringhand says, the United Kingdom, like the United States, has strict rules concerning third-party campaign funding.³⁰ The Political Parties, Elections and Referendum Act 2000 (PPERA) imposes onerous obligations on third-party campaigners, who must register with the Electoral Commission (EC) and disclose detailed reports on their financial arrangements.³¹ The spending limits, however, are complicated and relate to, for example, how much can be spent in each of the four regions of the United Kingdom (England, Scotland, Wales, and Northern Ireland)³² and how much can be spent in a specific constituency.³³ In the last general election, for example, the amount that third-party (or, as the EC calls them, non-party) campaigners could spend on campaign activities was limited to a maximum of £645,759.³⁴

Professor Ringhand draws our attention to a pertinent example concerning the Brexit leave campaign.³⁵ These campaigners, led by an individual called Arron Banks, spent millions in supporting that campaign, and successfully so.³⁶ As Professor Ringhand comments, Banks's involvement with Rock Holdings Limited—an offshore company based in the Isle of Man—as well as another called Better for the Country Limited was referred, by the EC, to the National Crime Agency on suspicion of having breached PPERA, including the suspicion of foreign influence or foreign sources of funding being involved.³⁷ In a terse report, the NCA reported that it had concluded its investigations and had found no such breaches of PPERA.³⁸ Moreover, despite persistent rumors of foreign involvement, it had found no evidence of such.³⁹

As I understand it, the NCA was not investigating, nor asked to investigate, Banks and his associates in relation to the sums spent and whether the amounts

³⁰ *See id.* at 415.

³¹ *Id.* at 431.

³² THE ELECTORAL COMM'N, UK PARLIAMENTARY GENERAL ELECTION 2019: NON-PARTY CAMPAIGNERS 11, <https://www.electoralcommission.org.uk/sites/default/files/2019-11/Non-party%20campaigner%20UKPGE%202019.pdf> [<https://perma.cc/KBC8-LZCQ>] [hereinafter THE ELECTORAL COMM'N, UK GENERAL ELECTION].

³³ THE ELECTORAL COMM'N, OVERVIEW OF NON-PARTY CAMPAIGNS 9, https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Overview-of-non-party-campaigns-gen.pdf [<https://perma.cc/VK6Q-THQT>].

³⁴ THE ELECTORAL COMM'N, UK GENERAL ELECTION, *supra* note 32, at 13.

³⁵ Ringhand, *supra* note 1, at 445–47.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Public Statement on NCA Investigation into Suspected EU Referendum Offences*, NAT'L CRIME AGENCY (Sept. 24, 2019), <https://nationalcrimeagency.gov.uk/news/public-statement-on-nca-investigation-into-suspected-eu-referendum-offences> [<https://perma.cc/J2CP-XCMT>].

³⁹ *Id.*; see Ed Caesar, *The Chaotic Triumph of Arron Banks, the "Bad Boy of Brexit"*, NEW YORKER (Mar. 18, 2019), <https://www.newyorker.com/magazine/2019/03/25/the-chaotic-triumph-of-arron-banks-the-bad-boy-of-brexit> [<https://perma.cc/ZT7Q-A8B7>] (discussing laws that criminalize the use of foreign money in campaigns).

breached the law. Nevertheless, there is something amiss, to my mind, if a person, acting alone or as part of a group, can spend at least £2.9 million on campaign financing (and possibly as much as £8 million)⁴⁰ and *not* be in breach of spending limits—for what does it mean to say there are “limits” if they do not apply in circumstances like this? It is all very well to say that no single company breached those limits, but that is hardly an answer.

Nevertheless, I question how much even absolute transparency would have done to alter the result—in Brexit and the U.S. presidential election—and thus how much it would influence future decisions. For example, in the case of Brexit, regardless of whether the public was sufficiently informed about the nature and consequences of Brexit prior to the referendum, it has since then learnt the hard way that the process is far more complicated than anyone could have anticipated (apparently).⁴¹ Moreover, the demonstrable falsehood of the Leave campaign’s promises and assertions has been laid bare by the media (newspapers, broadcasters, and internet-based commentators) and is readily accessible to the discerning public. Nevertheless, and—incredibly—despite the shambolic, embarrassing way in which the Conservatives have conducted themselves during these proceedings, they still managed to gain a significant majority of the votes in the 2019 general election⁴² and now find themselves in a position of almost unassailable power.

So much for our theories about enlightened democracy.

⁴⁰ Peter Walker & Jim Waterson, *Arron Banks Faces Criminal Inquiry over Brexit Campaign*, GUARDIAN (Nov. 1, 2018), <https://www.theguardian.com/uk-news/2018/nov/01/arron-banks-referred-to-agency-over-suspected-offences-in-brexit-campaign> [<https://perma.cc/NQG7-3MN9>].

⁴¹ See generally Lynskey, *supra* note 16 (discussing those that voted in favor of Brexit and have since regretted their vote).

⁴² *UK Results: Conservatives Win Majority*, BBC, <https://www.bbc.com/news/election/2019/results> [<https://perma.cc/25KH-TRFH>].