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Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability

Tyler Yeargain

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Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability

Tyler Yeargain[*]

ABSTRACT

For better or for worse, election polls drive the vast majority of political journalism and analysis. Polls are frequently taken at face value and reported breathlessly, especially when they show surprising or unexpected results. Though most pollsters adhere to sound methodological practices, the dependence of political journalism – and campaigns, independent political organizations, and so on – on polls opens a door for the unsavory. Fake polls have started to proliferate online. Their goal is to influence online political betting markets, so that their purveyors can make a quick buck at the expense of those they've tricked.

This Article argues that these actions – the creation and promulgation of fake polls to influence betting markets – is a classic case of either commodities fraud, or wire fraud, or both, or conspiracy to commit either. It argues that publishing fake polls, even for the relatively esoteric purpose of influencing political prediction markets, could have adverse societal consequences if left unpunished. Accordingly, it makes the case for criminal liability and provides federal prosecutors with a roadmap of how to see it through.

* Law Clerk, United States Court of Appeals for the Eleventh Circuit, 2019–20. The author thanks Professor Morgan Cloud for his editorial insights and encouragement of this piece; Richada Ky for her patience, support, and love throughout my fixation on research projects like this one; and both the online community at DailyKos Elections and the denizens of "Election Twitter," especially Kevin Keelty Gartland and David Nir, for their constant inspiration, education, and indulgence. And a special note of appreciation to the staff of the *Missouri Law Review* who worked on this piece – Emily Holtzman, Michael Essma, Brittany Briggs, and Carleigh Cavender – for their hard work and dedication in improving this Article.

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INTRODUCTION

Suppose that someone is an investor in one of America's most profitable novelty weathervane manufacturers. The company is doing well, but the investor wants to drive up the value of her shares, so she crafts a clever scheme. Using her business acumen, she generates a devastating, but entirely fraudulent, earnings report for the company's biggest competitor and posts a link to the report on Twitter – from a Twitter account she created that purports to be a legitimate financial news outlet. The news goes viral, the competitor's stock dips, the investor's company sees a slight increase in its price, and she sells her shares for a nice profit.[1]

The conclusion that the investor's actions – a sort-of reverse "pump and dump"[2] or a "distort and short"[3] – would violate federal (and probably state[4])

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1. This is *roughly* a condensed description of minor subplot in the much-awaited sequel to *Wall Street*. *See generally* WALL STREET: MONEY NEVER SLEEPS (20th Century Fox 2010) (in which Shia LeBeouf's character spreads false rumors that an African government will soon nationalize its oil industry in an effort to kill the stock price of a rival investment firm).

2. "The pump-and-dump scheme generally operates by a manipulating party acquiring a position in a financial instrument, like a stock, then artificially inflating the stock through fraudulent promotion before selling its position to unsuspecting parties at the inflated price, which often crashes after the sale. . . . [M]odern variations of pump-and-dump schemes involve the use of boiler rooms, Internet chat rooms, fraudulent websites, social media, and spam e-mails to artificially inflate securities as part of the manipulative scheme." Tom C.W. Lin, *The New Market Manipulation*, 66 EMORY L.J. 1253, 1284–85 (2017).

3. "In a distort and short campaign, short sellers and their confederates promulgate a number of misleading or even fraudulent press releases containing negative news about a company and its prospects. They then attempt, through short selling, to accelerate declines in the company's share price first caused by the dissemination of negative news." Douglas M. Branson, *More Muscle Behind Regulation SHO? Short Selling and the Regulation of Stock Borrowing Programs*, 5 VA. L. & BUS. REV. 1, 12 n.38 (2010); *see also* Christopher Cox, *What the SEC Really Did on Short Selling*, Opinion, WALL STREET J. (July 24, 2008, 12:01 AM), https://www.wsj.com/articles/SB121685865187779279 [perma.cc/LCA5-CSPB].

4. Notwithstanding, of course, federal preemption of state securities law actions. *See generally* Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1 (1998). "The Uniform Securities Act is in effect in forty states," which includes a "verbatim copy of SEC Rule 10b-5 . . . . The obvious consequence is that a plaintiff or prosecutor could bring . . . a securities law claim and have behind her the force of a statutory enactment, not merely the rule of an administrative agency." Douglas M. Branson, *Choosing the Appropriate Default Rule – Insider Trading Under State Laws*, 45 ALA. L. REV. 753, 771–72 (1994).

law would be uncontroversial.[5] But how would this conclusion differ if, instead of generating a false earnings report in an attempt to drive down a *company's* stock price, the investor generated a fake poll in an attempt to drive down a *political candidate's* "stock price" on an online betting market for elections?

PredictIt is a prediction market – officially a "not-for-profit market for event contracts" – operated by the Victory University of Wellington in New Zealand.[6] It allows its users to bet on a number of different political events[7] – like the outcome of elections, the successful passage of legislation in Congress, the possibility of action by federal agencies, the odds of certain political actors being criminally prosecuted, and so on. But unlike virtually every other political prediction market, PredictIt is legal.[8] It received a no-action letter from the U.S. Commodity Futures Trading Commission ("CFTC") in 2014, which authorized its operation with a handful of restrictions.[9] PredictIt is, at least ostensibly, "operated for academic research

5. *E.g.*, United States v. Skelly, 442 F.3d 94, 97–99 (2d Cir. 2006) (affirming conviction of defendant for illegal pump-and-dump scheme as a violation of 18 U.S.C. §§ 1343, 1346 (2018) (wire fraud statutes) and SEC Rule 10b-5).

6. Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Staff Provides No-Action Relief for Victory University of Wellington, New Zealand, to Operate a Not-For-Profit Market for Event Contracts and to Offer Event Contracts to U.S. Persons (Oct. 29, 2014), https://www.cftc.gov/PressRoom/PressReleases/pr7047-14 [perma.cc/4PFJ-76LJ]. This determination is introduced here in passing but will be discussed much more comprehensively later. *Infra* Part II.A.3.

7. Husna Haq, *Why Is It Now Legal to Gamble on the 2016 Elections?*, CHRISTIAN SCIENCE MONITOR (Oct. 8, 2015), https://www.csmonitor.com/USA/Politics/2015/1008/Why-is-it-now-legal-to-gamble-on-the-2016-elections [perma.cc/DSJ4-AYH3]; Joe Perticone, *There's a 'Stock Market for Politics' Where Users Can Make Money on Washington's Chaos*, BUSINESS INSIDER (June 17, 2018, 7:41 am), https://www.businessinsider.com/predictit-is-a-stock-market-for-politics-where-users-can-make-money-2018-5 [perma.cc/A8QB-9JWN].

8. Press Release, Commodity Futures Trading Comm'n, *supra* note 6; *see also, e.g.*, Jessica Contrera, *Here's How to Legally Gamble on the 2016 Race*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/lifestyle/style/heres-how-to-legally-gamble-on-the-2016-race/2016/03/28/14397dde-f1dc-11e5-85a6-2132cf446d0a_story.html?utm_term=.ffa2a8e40f14 [perma.cc/2HQT-DZS2]; Haq, *supra* note 7. Though PredictIt is the most prominent political prediction market operating today, it is certainly not the only one. For example, the Iowa Electronic Markets, run by the University of Iowa, was created in the early 1990s as the first mainstream political market and is still operated today. *See infra* note 39 and accompanying text. Betfair, an online gambling site, has expanded to include political prediction markets for American and European elections. *US Politics*, BETFAIR, https://betting.betfair.com/politics/us-politics/ [perma.cc/BM6M-XTEX] (last visited Sept. 24, 2019). Other markets, like Augur, have developed as prediction markets built with blockchain technology. *See Frequently Asked Questions*, AUGUR, https://www.augur.net/faq [perma.cc/KDG3-VU8P] (last visited Sept. 24, 2019).

9. A "no-action letter" is "[a] letter from the staff of a governmental agency stating that if the facts are as represented in a person's request for an agency ruling, the staff will advise the agency not to take action against the person." *No-Action*

purposes only," and its "main objective . . . is to determine whether it can aggregate information and predict outcomes of certain events," like elections, "more accurately than through alternative means, such as public opinion polling."[10] Bettors on PredictIt rely on inside information, current events, and opinion polls (both publicly released and internal) in making their investments.[11]

Given the heavy reliance of PredictIt bettors on public opinion polls, it is perhaps unsurprising that some unscrupulous actors decided to publish fake polls,[12] likely in an effort to distort PredictIt's market.[13] This was first reported in July 2017 when Delphi Analytica released a poll of the U.S. Senate election taking place in Michigan in 2018.[14] The poll showed musician Kid Rock, who was tested as the Republican nominee, leading Democratic Senator Debbie Stabenow 30% to 26% and received a great deal of media attention and hand-wringing over Stabenow's election prospects.[15] Notably, the share

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Letter, BLACK'S LAW DICTIONARY (8th ed. 2008). Here, the CFTC's Division of Market Oversight's letter stated that it "will not recommend that the [CFTC] take any enforcement action in connection with the operation of [the University's] proposed market for event contracts based upon the operators' not seeking designation as a contract market, registering under the Act[,] or otherwise complying with the Act or Commission regulations," but "[did] not render any opinion as to whether the operation of [the] proposed market for event contracts violates any state law provisions . . . ." Letter from Vincent McGonagle, Director of Market Oversight, U.S. Commodity Futures Trading Commission, to Neil Quigley, Deputy Vice-Chancellor, Research, Victoria University of Wellington (Oct. 29, 2014), https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-130.pdf [perma.cc/C3ZU-ZGD8]; *see also* Press Release, Commodity Futures Trading Comm'n, *supra* note 6.

10. Press Release, Commodity Futures Trading Comm'n, *supra* note 6.

11. *See* Harry Enten, *Fake Polls Are a Real Problem*, FIVETHIRTYEIGHT (Aug. 22, 2017), https://fivethirtyeight.com/features/fake-polls-are-a-real-problem/ [perma.cc/ZA7X-KGV2]; Perticone, *supra* note 7.

12. As used in this Article, a "fake poll" refers to falsified opinion polling that presents itself as legitimate by a fraudulent "polling outlet" – fake polls are "fake" because they were never conducted in the first place, and their entire existence is a work of fiction. Enten, *supra* note 11. "Fake polls" identified herein are fundamentally different than the "fake polls" about which Donald Trump frequently complains. *See, e.g.*, Tamara Keith, *How Trump Tries to Discredit What He Doesn't Like With 'Fake' And 'Phony' Labels*, NPR (Aug. 31, 2018, 4:29 pm), https://www.npr.org/2018/08/31/643798637/how-trump-tries-to-discredit-what-he-doesnt-like-with-fake-and-phony-labels [perma.cc/UF%L-XVCX].

13. Enten, *supra* note 11.

14. *Id.*

15. *See, e.g.*, *Early Polling Strong for Bawitdaba Da Bang a Dang*, NAT'L REVIEW (July 27, 2017, 1:16 PM), https://www.nationalreview.com/corner/early-polling-strong-bawitdaba-da-bang-dang/ [perma.cc/UV83-LELP].

price of Stabenow "stock" initially dropped on PredictIt from 78 cents to 63 cents, and ended at 70 cents for the day[16] – a fairly significant response to a single event.

However, when Harry Enten – an analyst with Nate Silver's *FiveThirtyEight* – reviewed the poll, he concluded that "something didn't smell right about it" and that it "may not have been conducted."[17] Enten pointed out that the lack of specifics about the poll's methodology,[18] the total anonymity of the polling firm's leadership, and contemporaneous remarks in chatroom by the person apparently responsible for promulgating the poll all suggested that the poll wasn't actually conducted.[19] If Delphi Analytica didn't actually conduct its Michigan poll – as seems likely – it definitely wasn't alone. Other outfits operating under a similar haze published polls in at least six other elections in five other states.[20]

While the long-term effect of the Michigan poll was virtually undetectable – Kid Rock decided not to run for the Senate and Senator Stabenow easily won re-election over someone who likely never ate a grit sandwich for breakfast[21] – the long-term effects of *other* fake polls might not be so easily dismissed. Polls are usually seen as reflections of public thought, but they do more than reflect public opinion – they refract it, too.[22] As this Article explains later, this refraction has real-world political effects, like allowing candidates to participate in debates, helping (or hurting) campaigns' fundraising efforts, affecting turnout (positively or negatively), and even impacting election results.[23] Fake polls, therefore, have far more serious harms than manipulating small-dollar political prediction markets – in the wrong hands, they could chip away at the integrity of our democracy.

Therefore, like *Wall Street*, *The Wolf of Wall Street*, or any other good movie about securities fraud, the story of fake polls and their impact on PredictIt markets – and elections themselves – deserves a satisfying conclusion, with comeuppance for the fraudsters. This Article argues that, in the denouement of this story, federal criminal liability should come to bear on the creators and purveyors of fake polls. It provides a detailed overview of fake polls and identifies several theories of criminal liability for publication

16. Enten, *supra* note 11.

17. *Id.*

18. Proper disclosure of methodology generally includes reporting the sample size, the calculated error rate, the date range during which the poll was conducted, and the phrasing of the questions. *Id.*; *see generally Assessing Public Opinion Polls*, CONST. RTS. FOUND., http://www.crf-usa.org/election-central/public-opinion-polls.html [perma.cc/9CCD-5R9B] (last visited Mar. 2, 2019); Leighton Walter Kille, *Polling Fundamentals and Concepts: An Overview for Journalists*, JOURNALIST'S RES. (Nov. 10, 2016), https://journalistsresource.org/tip-sheets/reporting/polling-fundamentals-journalists/ [perma.cc/E98U-RYYB].

19. Enten, *supra* note 11.

20. *Infra* notes 81–100 and accompanying text.

21. *See generally* Kid Rock, Grits Sandwiches for Breakfast (Jive Records 1990).

22. *Infra* notes 325–40 and accompanying text.

23. *Infra* notes 328–344 and accompanying text.

of fake polls. It then argues that, regardless of which theory is utilized, the authors of publicized fake polls should face criminal charges.

Part I begins by providing a more detailed explanation of how PredictIt operates and then addresses the origin of fake polls. It explains – to the greatest extent possible given the shadowy nature of the subject matter – the life cycle of fake polls, from conception to publication to fallout. Next, Part II addresses two different theories of criminal liability for the publishers of fake polls –namely, commodities fraud and wire fraud.

Finally, Part III substantively argues that the publication of fake polls should be considered illegal and prosecuted to the fullest extent of the law. It contends that fake polls could have real-world consequences, like defeating PredictIt's purpose as an organization, affecting the public's trust in polling companies and political journalism, altering election outcomes in close races, and most concerningly, opening the door to even greater foreign interference in American elections.

I. PREDICTIT, FAKE POLLS, AND ONLINE ELECTORAL MANIPULATION

To understand how the publication of fake polls by rogue traders is likely illegal – and why it should be – it is helpful to understand how PredictIt operates from the user's perspective, from start to finish. Section A begins by providing a thorough, mechanical examination of PredictIt's operations. Section B traces the origin of the first-reported fake polls, details the subsequent release of other fake polls, and puts forward evidence pointing towards the falsity of the polls. It then concludes this Part by explaining how these fraudulent polls affect, or could affect, online betting markets.

A. How PredictIt Operates

In many ways, PredictIt operates like a miniature version of a stock market but with a much more limited number of "stock" options, all of which relate to the occurrence of a political event.[24] At any given time, PredictIt provides several hundred "markets" for users to purchase shares in.[25] The

24. PredictIt generally refers to "the outcome of political and financial events and circumstances" as "factors." *Terms and Conditions*, PREDICTIT, https://www.predictit.org/terms-and-conditions [perma.cc/S655-ZWLE] (last accessed March 2, 2019).

25. *All Markets*, PREDICTIT, https://www.predictit.org/markets [perma.cc/4VGH-2DEP] (last visited Mar. 3, 2019). PredictIt also allows users to suggest new markets. *Frequently Asked Questions*, PREDICTIT,

markets operate by asking a question – like, "Will Donald Trump be the 2020 Republican nominee for President?"[26] or "Who will win the 2020 Iowa Democratic caucuses?"[27] – and then by allowing users to purchase an answer to the question as a "share."[28] Some of the questions present only a binary decision for users – they can buy "Yes" or "No" – while others allow users to buy one (or more) of several different options.[29] The prices are set both by PredictIt's market trends[30] and by users themselves.[31]

https://www.predictit.org/support/faq [perma.cc/QL9H-2X98] (last visited Mar. 2, 2019).

26. *Will Donald Trump Be the 2020 Republican Nominee for President?*, PREDICTIT, https://www.predictit.org/markets/detail/3390/Will-Donald-Trump-be-the-2020-Republican-nominee-for-president [perma.cc/VUW5-RBNP] (last visited Mar. 3, 2019).

27. *Who Will Win the 2020 Iowa Democratic Caucuses?*, PREDICTIT, https://www.predictit.org/markets/detail/5241/Who-will-win-the-2020-Iowa-Democratic-caucuses [perma.cc/G2WM-JG5U] (last visited Mar. 3, 2019).

28. *How to Trade on PredictIt*, PREDICTIT, https://www.predictit.org/support/how-to-trade-on-predictit [perma.cc/P9R8-P8QG] (last visited Mar. 3, 2019).

29. *See, e.g.*, *Will Donald Trump Be the 2020 Republican Nominee for President?*, *supra* note 26; *Who Will Win the 2020 Iowa Democratic Caucuses?*, *supra* note 27. For the market of who will win the 2020 Iowa Democratic causes, users can pick one of eight choices – Bernie Sanders, Joe Biden, Beto O'Rourke, Kamala Harris, Amy Klobuchar, Elizabeth Warren, Sherrod Brown, or Cory Booker. *Who Will Win the 2020 Iowa Democratic Caucuses?*, *supra* note 28.

30. *See Frequently Asked Questions*, PREDICTIT, *supra* note 25 ("[T]he price assigned to each potential outcome is a reflection only of the most recent trade in that contract . . . .").

31. *Id.* ("PredictIt depends on traders offering prices for others to match. If you don't see a price you like, name the price and quantity you're looking for and we'll register an 'open' offer on your behalf.").

To purchase "shares,"[32] users must create an account and deposit funds onto the website through PredictIt's designated clearing house.[33] The clearing house holds users' deposited funds in trust in a clearing account, and it maintains a separate ledger for each user's funds.[34] Users purchase "shares" for a particular outcome – for example, predicting that Senate Candidate A will win her election – each of which costs less than one dollar.[35] Users can sell their shares at any time, or they can wait until an event has been completed.[36] If they choose not to sell, their shares will be cashed out with a value that depends on whether their prediction was correct.[37] If it was, their shares will be redeemed for one dollar each; if it wasn't, they are redeemed for nothing at all.[38] Regardless of the user's choice, after a sale has been completed, the user's profit (after subtracting PredictIt's 10% fee on profits) is deposited in trust with the clearing house.[39] When a user wishes to withdraw funds, the clearing house subtracts PredictIt's 5% fee on withdrawals and credits the user for the remainder.[40] As prerequisite conditions for its no-action letter, the CFTC requires PredictIt to "have a limit of 5000 total traders in any particular [election market]," with a "limit on

32. Under both its own and the CFTC's identification, PredictIt is a market for futures contracts. *See* Press Release, Commodity Futures Trading Comm'n, *supra* note 6; Letter from Vincent McGonagle to Neil Quigley, *supra* note 9. Bettors are actually "buying and trading *futures contracts* linked to political or financial events or circumstances," PREDICTIT, *Terms and Conditions*, *supra* note 24 (emphasis added). This understanding largely reflects the academic consensus for prior political event betting markets, like the Iowa Electronic Markets, though some commentators have proposed alternative classifications. *E.g.,* Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 1029–31 (2005); *but see, e.g.,* Philip Robin Cleary, Note, *Predicting the Taxation of Prediction Markets*, 27 VA. TAX. REV. 953, 956, 989–90 (2008) (arguing that an interest in a prediction market is a "forward contract"); Andrew S. Goldberg, Note, *Political Prediction Markets: A Better Way to Conduct Campaigns and Run Government*, 8 CARDOZO PUB. L. & POL'Y & ETHICS J. 421, 435–37 (2010) (arguing that an interest in a prediction market is an "excluded commodity"). However, for ease of clarity and explanation, this Article uses the term "shares" in lieu of "futures contracts."

33. *Terms and Conditions*, PREDICTIT, *supra* note 24.

34. *Id.*

35. *See Frequently Asked Questions*, PREDICTIT, *supra* note 25. The cost of each "share" "is a reflection only of the most recent trade in that contract." *Id.*

36. *Id.*; *Terms and Conditions*, PREDICTIT, *supra* note 24.

37. *Frequently Asked Questions*, PREDICTIT, *supra* note 25; *Terms and Conditions*, PREDICTIT, *supra* note 24.

38. *Frequently Asked Questions*, PREDICTIT, *supra* note 25.

39. *Id.*

40. *Id.*

investment by any single participant in any particular [election market] of $850."[41] These restrictions are more generous, though similar in scope, to what the CFTC applied to the Iowa Electronic Markets ("IEM"), one of the first political prediction markets, in the 1993 no-action letter it sent to the IEM.[42] These restrictions exist to ensure that PredictIt remains a non-profit, academic endeavor[43] and cultivate a feel that *is* distinctly academic. Pursuant to these requirements, PredictIt restricts the number of users and their investments in a single market[44] – it also only allows its shares to be bought and sold on the website (off-website trading is expressly forbidden),[45] prohibits users from using fronts to purchase shares,[46] bans "automated trading,"[47] reserves the right to "suspend the trading of any Contract on the Website at any time and for any period,"[48] and possesses the sole right to determine how a payout is structured.[49] The ambience, therefore, is not dissimilar to a high school economics class participating in a simulated stock market for a grade.

But despite the site's restrictions, PredictIt users are effectively trading on a real stock market – they're playing with real money and face real consequences depending on the outcome of their decisions. PredictIt acknowledges this reality, which it finds essential to its academic undertaking:

> Prediction markets work best when players have some stake, however small, in the outcome. With play money, many players take risks they wouldn't otherwise take or don't attend to their holdings as carefully.

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41. Letter from Vincent McGonagle to Neil Quigley, *supra* note 9.

42. Letter from Andrea M. Corcoran, Director of Market Regulation, U.S. Commodity Futures Trading Commission, to George R. Neumann, Professor of Economics, University of Iowa Department of Economics (June 18, 1993), https://www.cftc.gov/sites/default/files/files/foia/repfoia/foirf0503b004.pdf [perma.cc/H42W-83LV]. In the IEM's Political Markets, no more than 2,000 traders could participate in any market "for any particular election," and all traders were restricted to a maximum investment of five hundred dollars. *Id.*

43. *See generally* Press Release, Commodity Futures Trading Comm'n, *supra* note 6; Letter from Vincent McGonagle to Neil Quigley, *supra* note 9.

44. *Supra* note 41 and accompanying text.

45. *Terms and Conditions*, PREDICTIT, *supra* note 24.

46. *Id.* ("By applying for a User Account, you represent, warrant, and undertake to us that you: . . . [b] do not already have (and will, at no time while you have the User Account for which you are applying, have) a User Account, whether directly or indirectly (including through any company or other legal entity which you directly or indirectly control); . . . [d] are (and will at all times be) acting solely for yourself and not on behalf of any other individual, company, or other legal entity . . . .").

47. *Id.*

48. *Id.*

49. *Id.* ("The Provider will . . . examine the Rules applicable to [a particular] contract and judge whether or not the Rules require a Payout and, if so, what the Actual Payout is; and . . . liquidate that contract . . . . Provider may resolve a Market whenever, in Provider's judgment, the conditions to decide the outcome have been met. The Provider's decision . . . will be final.").

> Such markets may therefore have less research value than real money ones. Besides, we think real money is fun too.[50]

And participants are acting as though they're trading on a real stock market too. Though participation varies depending on the market in question, PredictIt markets attract significant participation.[51] By March 2016 – less than two years after PredictIt was launched – it had 29,000 active traders, each with an average of about $120 wagered on the site.[52] By 2018, the site had around 80,000 traders.[53] Despite the investment caps and the limits on total traders in a given market, one researcher estimated that around $1 million was invested in the 2016 presidential election.[54] And following PredictIt's spike in interest during the 2016 election, 300 million shares in total were traded in 2017 alone, despite the paucity of marquee elections.[55] Today, the most popular market on PredictIt is the 2020 Democratic primary, which has seen over 125 million shares traded since the market began and currently has over 28 million active shares.[56]

With this robust activity in mind, it is unsurprising that fraudulent activity has developed. Indeed, PredictIt seems to have predicted that fraud will occur. As it notes in its Terms and Conditions, "[T]here are no controls on market manipulation . . . ."[57]

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50. *Frequently Asked Questions*, PREDICTIT, *supra* note 25.

51. *See, e.g.*, David Hill, *The Wolves of K Street*, RINGER (Mar. 21, 2018, 6:20 AM), https://www.theringer.com/2018/3/21/17130490/predictit-politics-elections-gambling [perma.cc/X2XH-9YHK]; Contrera, *supra* note 8.

52. Contrera, *supra* note 8.

53. Hill, *supra* note 51.

54. Philip Wallach, Op-Ed, *Sick of Political Polls? Try Prediction Markets*, L.A. TIMES (Sept. 28, 2018), https://www.latimes.com/opinion/op-ed/la-oe-wallach-prediction-markets-20160928-snap-story.html [perma.cc/Ax36-HKH5].

55. Hill, *supra* note 51.

56. *Who Will Win the 2020 Democratic Presidential Nomination?*, PREDICTIT, https://www.predictit.org/markets/detail/3633/Who-will-win-the-2020-Democratic-presidential-nomination [perma.cc/L42U-M7TZ] (last visited Mar. 27, 2020).

57. *Terms and Conditions*, PREDICTIT, *supra* note 24 (emphasis added).

B. The Emergence of Fake Polls

Despite some notable times when polls have missed the mark,[58] modern polling is largely accurate, especially among top-tier pollsters.[59] Accordingly, PredictIt bettors are well-advised to include public opinion polls in the total mix of information when making their betting decisions.[60] So with massive profits potentially on the line and with a community of bettors who base their trading decisions (at least in part) on polls, fraudsters have likely started churning out fake polls to take advantage of these unsuspecting PredictIt bettors.

In fairness, falsified polling is nothing new. In late 2009, analyst Nate Silver suggested that Strategic Vision, an Atlanta-based public relations firm that dabbled in public opinion polling for conservative causes, was falsifying its results.[61] The American Association for Public Opinion Research reprimanded Strategic Vision – though *not* because of Silver's piece.[62] Instead, the Association was conducting a post-mortem investigation of polling in the 2008 Democratic presidential primary in New Hampshire, which incorrectly estimated that Barack Obama would win, and Strategic Vision declined to turn over details of its polling.[63] In response, the Association reprimanded it for falling short of the industry's disclosure requirements.[64]

In early 2010, three researchers investigating polls allegedly conducted by Research 2000 concluded that its results were fraudulent: "[W]e are

58. *See, e.g.*, Emily L. Mahoney, *Here's How Ron DeSantis Defied the Polls and Beat Andrew Gillum*, MIAMI HERALD (Nov. 7, 2018), https://www.miamiherald.com/news/politics-government/state-politics/article221146890.html ("[Ron] DeSantis' victory defied most polls that showed him trailing [Andrew] Gillum."); Andrew Mercer, Claudia Deane & Kyley McGeeney, *Why 2016 Election Polls Missed Their Mark*, PEW RES. CTR.: FACTTANK (Nov. 9, 2016), http://www.pewresearch.org/fact-tank/2016/11/09/why-2016-election-polls-missed-their-mark/ [perma.cc/A824-XX9W] ("Across the board, polls underestimated Trump's level of support.").

59. *E.g.*, Scott Clement, *'The Sky is Not Falling': Two Major Studies Show Election Polls Are Not Getting Less Accurate*, WASH. POST (June 1, 2018, 6:00 AM), https://www.washingtonpost.com/news/the-fix/wp/2018/06/01/the-sky-is-not-falling-two-major-studies-show-election-polls-are-not-getting-less-accurate/?utm_term=.0c308100b5b2 [perma.cc/Y4JT-UXPF]; Nate Silver, *The Polls Are All Right*, FIVETHIRTYEIGHT (May 30, 2018, 11:00 AM), https://fivethirtyeight.com/features/the-polls-are-all-right/ [perma.cc/QC5S-7Jyy].

60. *Supra* note 13 and accompanying text.

61. Shaila Dewan, *Polling Firm's Reprimand Rattles News Media*, N.Y. TIMES (Oct. 2, 2009), https://www.nytimes.com/2009/10/03/us/03survey.html [perma.cc/42JC-SAG3]; Nate Silver, *Strategic Vision Polls Exhibit Unusual Patterns, Possibly Indicating Fraud*, FIVETHIRTYEIGHT (Sept. 25, 2009, 1:04 PM), https://fivethirtyeight.com/features/strategic-vision-polls-exhibit-unusual/ [perma.cc/QC2J-V58M].

62. Dewan, *supra* note 61.

63. *Id.*

64. *Id.*

confident that [Research 2000's results] could not accurately describe random polls."[65] The researchers shared the results of their investigation with Daily Kos, a progressive media outlet that had contracted with Research 2000 to conduct polls in a number of states in 2008 and 2010.[66] Daily Kos had terminated its contract with Research 2000 several weeks prior, following the pollster's poor evaluation from Nate Silver's *FiveThirtyEight* article,[67] but upon receiving credible allegations of fraud, it filed a federal lawsuit against the pollster for fraud.[68] Research 2000's President responded to the lawsuit with a "rambling public response" that strongly suggested falsification on his company's part.[69] A year later, Daily Kos and Research 2000 settled the lawsuit with terms that were not disclosed but with clear indications of fraud on Research 2000's part.[70]

In that instance, Research 2000's alleged falsification resulted in very real consequences – not for online bettors but for candidates, voters, the news media, and third-party campaign organizations. In Arkansas's 2010 runoff to determine the Democratic nominee for the U.S. Senate, Research 2000 polls – which were the only public polls in the field – consistently showed Lieutenant Governor Bill Halter leading incumbent Senator Blanche Lincoln.[71] The Halter campaign promoted the polls (even as they privately

65. Nate Silver, *BREAKING: Daily Kos to Sue Research 2000 for Fraud*, FIVETHIRTYEIGHT (June 29, 2010, 5:40 PM), https://fivethirtyeight.com/features/breaking-daily-kos-to-sue-research-2000/ [perma.cc/93ZS-BHCD].

66. *Id.*; Mark Grebner, Michael Weissman & Jonathan Weissman, *R2K Polls: Problems in Plain Sight*, DAILY KOS (June 29, 2010, 12:01 PM), https://www.dailykos.com/stories/2010/06/29/880179/-Research-2000:-Problems-in-plain-sight [perma.cc/CT3J-HP2J]; Markos Moulitsas, *Polling*, DAILY KOS (June 9, 2010, 12:33 PM), https://www.dailykos.com/storyonly/2010/6/9/874403/-Polling [perma.cc/K5AV-4VNT].

67. Moulitsas, *supra* note 66; Silver, *supra* note 65.

68. Markos Moulitsas, *More on Research 2000*, DAILY KOS (June 29, 2010, 12:01 PM), https://www.dailykos.com/storyonly/2010/6/29/880185/-More-on-Research-2000 [perma.cc/99RE-H5DD]; Kos Media, LLC et al. v. Research 2000 et al., No. 3:10CV02894 (N.D. Cal. July 12, 2012) (this case was dismissed on July 12, 2012).

69. "Yes[,] we weight heavily and *I will, using [the] margin of error adjust the top line [results]*." Mark Blumenthal, *Daily Kos vs. Research 2000 Lawsuit Settled*, HUFFPOST (May 27, 2011, 7:43 AM), https://www.huffingtonpost.com/2011/05/27/daily-kos-research-2000-lawsuit_n_867775.html [perma.cc/SVM2-FNW3] (emphasis added).

70. *Id.*

71. David Catanese, *Poll Scandal Shocks Campaigns*, POLITICO (July 1, 2010, 4:39 AM), https://www.politico.com/story/2010/07/poll-scandal-shocks-campaigns-039265?o=0 [perma.cc/Y88F-LV7Z]; Chris Good, *Looking Back at Daily Kos, Research 2000, and Bill Halter*, ATLANTIC (July 19, 2010),

doubted their authenticity) and used them to raise money, attract national attention as the "perceived frontrunner," and convince labor unions to spend several million dollars supporting their campaign.[72] Halter ended up losing the election by four points, a result that public polling missed by seven or eight points.[73] Similarly, in California's Republican primary for the Senate that same year, an incorrect Research 2000 poll that showed former Congressman Tom Campbell leading Carly Fiorina by fifteen points enabled the Campbell campaign to raise money and scrambled expectations of the race.[74]

While faking polls is perhaps old news, doing it to affect the prices of futures contracts on an online political betting market is a very recent development. The July 2017 poll allegedly conducted by Delphi Analytica, which infamously showed musician Kid Rock leading Senator Debbie Stabenow, first attracted media attention to the concept of fake polls.[75] But outlets identified by commentators as fraudulent were publishing polls before the Michigan poll was widely publicized.[76]

For example, Delphi Analytica published three polls in the weeks prior to releasing its controversial Michigan poll: an extremely early poll of the 2020 Democratic primary,[77] a poll suggesting that a plurality of Arizona voters wanted John McCain to resign from the Senate following his terminal cancer diagnosis,[78] and a poll of the Republican primary for the special Senate election in Alabama.[79] Similarly, CSP Polling – which, according to University of Florida political science professor Michael McDonald and Jeff Blehar of the *National Review*, stands for "Cuck Shed Polling"[80] – alleged that

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https://www.theatlantic.com/politics/archive/2010/07/looking-back-at-daily-kos-research-2000-and-bill-halter/60024/ [perma.cc/XLG3-959V].

72. Catanese, *supra* note 71; Good, *supra* note 71.

73. Catanese, *supra* note 71; Good, *supra* note 71.

74. Catanese, *supra* note 71.

75. Enten, *supra* note 11.

76. *Id.*

77. *Democrats Have a Huge Leadership Void Heading Towards the 2020 Presidential Elections*, DELPHI ANALYTICA (July 11, 2017), https://medium.com/@DelphiAnalytica/democrats-have-a-huge-leadership-void-heading-towards-the-2020-presidential-elections-586a0faf7a74 [perma.cc/PZ8H-37VT]. In the event that these releases are deleted prior to, or following, the publication of this Article, all three are on file with the author.

78. *Majority of Arizonians Want McCain to Step Down Following Cancer Diagnosis*, DELPHI ANALYTICA (July 25, 2017), https://medium.com/@DelphiAnalytica/majority-of-arizonians-want-mccain-to-step-down-following-cancer-diagnosis-670af8ba6c96 [perma.cc/57CR-FHKV].

79. *Luther Strange Slightly Ahead of Mo Brooks in 3 Way Alabama Senate Race*, DELPHI ANALYTICA (July 23, 2017), https://medium.com/@DelphiAnalytica/luther-strange-slightly-ahead-of-mo-brooks-in-3-way-alabama-senate-race-6bcd1671a60b [perma.cc/79C4-WDD3].

80. Jeff Blehar (@EsotericCD), TWITTER (Mar. 2, 2018, 3:29 PM), https://twitter.com/EsotericCD/status/969671133871173637 [https://perma.cc/7Z5J-U97J]; Enten, *supra* note 11. In providing this anecdote, the Author acknowledges

it conducted polls in the 2017 special congressional election in Montana,[81] the special congressional election in Georgia,[82] and the Virginia Democratic primary for Governor.[83] Even after being identified in *FiveThirtyEight* as a fake pollster, CSP Polling continued to release polls,[84] though the seriousness of the poll "releases" noticeably deteriorated in the year that followed.[85]

Blumenthal Research Daily ("BRD") made its debut in March 2018, two weeks prior to the special election in Pennsylvania's 18th congressional district.[86] It released a poll in the special election showing Democrat Conor

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that many readers are unfamiliar with the term "cuck" and that this Article must, regrettably, provide an elaboration. In this instance, "cuck" is short for "cuckold," an antiquated term for a man whose wife is not faithful. *Cuckhold*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/cuckold [perma.cc/5DVV-NSK8]. The term has been adopted by the alt-right and many white supremacists. Avowed white supremacist Richard Spencer is a frequent user of the term and declared, "It is the cuckold who, whether knowingly or unknowingly, loses control of his future. This is an apt psychological portrait of white 'conservatives' whose only identity is comprised of vague, abstract 'values,' and who are participating in the displacement of European Americans – their own children." David Weigel, *'Cuckservative' – The Conservative Insult of the Month, Explained*, WASH. POST (July 29, 2015, 9:055 AM), https://www.washingtonpost.com/news/the-fix/wp/2015/07/29/cuckservative-the-conservative-insult-of-the-month-explained/?utm_term=.2e84460b7eb3 [perma.cc/9KFF-9PGQ]. The Author apologizes for the necessity of this clarification.

81. @CSP_Polling, TWITTER (May 25, 2017, 6:09 PM), https://twitter.com/CSP_Polling/status/867910603167289344 [perma.cc/45Rl-FV62] ("Final prediction: Greg Gianforte will win MT Special Election, 50.1% to 46.35%."). In the event that CSP Polling's tweets are deleted, screenshots remain on file with the author.

82. @CSP_Polling, TWITTER (June 18, 2017, 10:46 AM), https://twitter.com/CSP_Polling/status/876496380100984832 [perma.cc/A4WM-3R8J] ("Our final GA-6 poll: Handel 49, Ossoff 48, GA-6 election too close to call!").

83. Enten, *supra* note 11.

84. *E.g.*, @CSP_Polling, TWITTER (Nov. 13, 2017, 4:33 PM), https://twitter.com/CSP_Polling/status/930232257406648320 [perma.cc/X5FN-ZLLC] ("We find [Roy Moore] leading [Doug Jones] in the Alabama Senate election by 4 points, 49-45, in our #ALSen poll. 6% undecided.").

85. *See, e.g.*, @CSP_Polling, TWITTER (Nov. 12, 2018, 10:18 PM), https://twitter.com/CSP_Polling/status/1062228172006133760 [perma.cc/2JGE-L2WE] ("Just completed our poll in [M]ississippi. [T]hat one republican chick: 58. [T]hat one dem dude: 39[.]").

86. Karlyn Bowman, *The Trouble with Polling*, NAT'L AFFAIRS (Summer 2018), https://www.nationalaffairs.com/publications/detail/the-trouble-with-polling [https://perma.cc/N9QC-8JHG]; Ryan Deto, *Beware of a Fake Poll Circulating About the Special Election for Pennsylvania's 18th Congressional District*, PITTSBURGH CITY PAPER (Mar. 5, 2018, 3:24 PM), https://www.pghcitypaper.com/

Lamb leading Republican Rick Saccone by one point, but just three hours later, Timothy Blumenthal, the apparent founder of BRD, disavowed it.[87] Blumenthal acknowledged that BRD was a "fake pollster," that the "numbers used were random," and that he did "little to no research before piecing together a rather sloppy google doc."[88] He claimed that it was "an obvious troll" attempt that "almost nobody" fell for.[89] However, despite Blumenthal's disavowal and BRD's known identity as a fake pollster, BRD seemed to pretend that Blumenthal never actually came clean. Blumenthal's statement was quickly deleted from Twitter,[90] and BRD's website is inactive. And just hours after tweeting out Blumenthal's statement, BRD tweeted, "We do not need to prove ourselves to anyone. Our poll will speak for itself on March 13."[91] Several days later, another organization presenting itself as a polling company, KG Polling – which was apparently run by the same people behind BRD and CSP[92] – released a poll of the special election, showing Lamb ahead of Saccone by four points.[93]

Following the election – which saw Lamb win by one point, as BRD "predicted" – it continued the act and congratulated itself as "the most accurate pollster" in the race.[94] And like CSP Polling, BRD continued to "conduct" "polling" – of the 2018 Illinois Democratic primary for Governor,[95] the special election in Arizona's 8th congressional district,[96] and the North Dakota Senate election.[97] Though these fraudulent pollsters largely fell dormant after the 2018 elections, KG Polling released a purported poll of the

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Blogh/archives/2018/03/05/beware-of-a-fake-poll-circulating-about-the-special-election-for-pennsylvanias-18th-congressional-district [perma.cc/2WFE-KEQJ].

87. Deto, *supra* note 86.

88. *Id.*

89. Bowman, *supra* note 86.

90. Deto, *supra* note 86.

91. @BRD_Polling, TWITTER (Mar. 2, 2018, 11:44 AM), https://twitter.com/brd_polling/status/969659837863940096 [perma.cc/4P23-74RN].

92. G. Elliott Morris (@gelliotmorris), TWITTER (Mar. 11, 2018, 1:30 PM), https://twitter.com/gelliottmorris/status/972887501332533248 [perma.cc/YZC5-MU4X] (Morris is a political journalist for *The Economist*.)

93. *Pennsylvania 18 Special Election Poll 3/10/18*, KG POLLING (Mar. 10, 2018), https://kgpolling.wordpress.com/2018/03/10/pennsylvania-18-special-election-poll-3-10-18/ [perma.cc/Y9YR-JKK4] (last visited Jan. 23, 2020)

94. @BRD_Polling, TWITTER (Mar. 14, 2018, 4:49 AM), https://twitter.com/brd_polling/status/973888769958010880 [perma.cc/HWD9-US5U] ("We were the first poll to have Lamb winning. We were called fake news, mocked and laughed at. Not only were we the first to predict the correct outcome, but we were by far the most accurate pollster of the #pa18 race.").

95. @BRD_Polling, TWITTER (Mar. 19, 2018, 5:53 PM), https://twitter.com/brd_polling/status/975867970403684353 [perma.cc/4HPL-MQ6A].

96. @BRD_Polling, TWITTER (Apr. 17, 2018, 12:07 PM), https://twitter.com/brd_polling/status/986289949904461838 [perma.cc/W2HV-E75Q].

97. @BRD_Polling, TWITTER (Oct. 5, 2018, 12:28 PM), https://twitter.com/brd_polling/status/1048263613792903168 [perma.cc/7ZPZ-N4DA].

2020 Democratic caucus in Iowa, showing Bernie well ahead of his opponents with 31% of the vote, while Pete Buttigieg, who led in most polls at the time,[98] was in fourth place with 12%.[99]

The motive for releasing these "polls" – which almost assuredly were not actually conducted – is suspect according to many political commentators who have followed their development.[100] Professor Michael McDonald started following furtive conversations taking place on Discord, a chatroom application used by many Trump supporters and alt-right activists,[101] where the users were talking about political developments and online betting markets.[102] After following these conversations – in which some users were bragging about the Delphi Analytica poll, including the alleged founder of the "polling" agency – McDonald concluded that the users had two goals.[103] "The first: to gain notoriety and troll the press and political observers. . . . The second: to move the betting markets," by tricking PredictIt users to bet on a certain outcome – like Kid Rock winning the Senate election – and shorting that position.[104]

There may be no *direct* proof of this assertion – Delphi Analytica denies that its poll was falsified to affect online betting markets[105] – but some circumstantial evidence certainly supports it. As Harry Enten of *FiveThirtyEight* pointed out, "[S]hares of the stock for Michigan's 2018 Senate race *saw their biggest action of the year by far the day after Delphi*

98. *See, e.g.*, *Who's Ahead in Iowa?*, FIVETHIRTYEIGHT (last visited Jan. 23, 2020), https://projects.fivethirtyeight.com/polls/president-primary-d/iowa/ [perma.cc/C78U-P48B].

99. @KGPolling, TWITTER (Dec. 31, 2019, 8:43 PM), https://twitter.com/KGPolling/status/1212187475617210368 [perma.cc/W5RG-KBW3].

100. Jeff Blehar (@EsotericCD), TWITTER (Mar. 2, 2018, 3:17 PM), https://twitter.com/esotericcd/status/969668115817750529?lang=bg [perma.cc/JVR3-UEBS] ("Just so you know, [Blumenthal Research Daily] (the outfit with that supposed PA-18 poll) comes from the same group of scammers that released fake polls in GA-6 and AL-SEN. The goal is to move prediction markets using fake polls for profit"); Enten, *supra* note 11.

101. Samantha Cole, *Pro-Trump Discord Server 'Centipede Central' Says It's Being Monitored*, VICE: MOTHERBOARD (Aug. 14, 2017, 6:40 PM), https://motherboard.vice.com/en_us/article/zmmxje/pro-trump-discord-server-centipede-central-says-its-being-monitored [perma.cc/FX4M-7GQ8].

102. Enten, *supra* note 11.

103. *Id.*

104. *Id.*

105. *Id.* Technically, because PredictIt doesn't allow shorting, the comparable action in a market with a binary option would be to invest in the opposing candidate's shares, which would have the same practical effect as shorting a stock in a PredictIt market.

Analytica published its survey," increasing from less than 100 trades per day just the day before to nearly 3,000 the day after the poll was published.[106] Further, the polls published by the outlets mentioned above – Delphi Analytica, CSP Polling, and Blumenthal Research Daily – tended to feature results that were *quite* divergent from the general political consensus at the time.

The Delphi Analytica poll provides an obvious starting point. Suggesting that Kid Rock – a B-list musician with little history of advocacy before 2016[107] – would have a four-point lead over a well-liked politician before he had even entered the race strained credulity. A poll released around the same time by Target-Insyght, a more reliable pollster,[108] showed Senator Stabenow leading Kid Rock by eight points.[109] But Target-Insyght's much less flashy poll received significantly less media attention than the Delphi Analytica "poll" and had no discernible impact on PredictIt's trades.[110]

One of Delphi Analytica's other polls provides a similar point of reference: Its "poll" of the Republican primary in Alabama's special Senate, released on July 23, 2017, showed incumbent Senator Luther Strange with 29% of the vote, Congressman Mo Brooks with 25%, and former State Supreme Court Chief Justice Roy Moore with 24%.[111] This prediction *wildly* differed from every other poll conducted in a similar timeframe, nearly all of which showed Strange and Moore in first or second place with Brooks much further behind.[112] This estimate, which was released several weeks prior to the primary, looks even more suspicious in light of the election's actual results in which Moore received 40%, Strange received 32%, and Brooks received 20%.[113] In October 2018, after several months of silence, BRD published a

106. *Id.* (emphasis added).

107. *See* Amanda Petrusich, *Kid Rock's Senate Run is a Terrifying New Normal*, NEW YORKER (July 13, 2017), https://www.newyorker.com/culture/culture-desk/kid-rocks-senate-run-is-a-terrifying-new-normal [perma.cc/KW32-HPB4].

108. *FiveThirtyEight's Pollster Ratings*, FIVETHIRTYEIGHT (May 30, 2018, 11:00 AM), https://projects.fivethirtyeight.com/pollster-ratings/ [perma.cc/TT6X-XPVG]. Per *FiveThirtyEight*'s metrics, Target-Insyght received a "C" grade, which, while not great, beats a fake poll. *Id.*

109. Jonathan Oosting, *Poll: Kid Rock Trails Stabenow 50–42% in Senate Race*, DETROIT NEWS (July 31, 2017, 6:48 PM), https://www.detroitnews.com/story/news/politics/2017/07/31/poll-kid-rock-trails-stabenow/104176822/ [perma.cc/W373-6XPF].

110. *See* Enten, *supra* note 11.

111. DELPHI ANALYTICA, Luther Strange Slightly Ahead of Mo Brooks in 3 Way Alabama Senate Race, supra note 79.

112. *See Alabama Senate Special Election – Republican Primary*, REALCLEAR POLITICS (last visited March 3, 2019), https://www.realclearpolitics.com/epolls/2017/senate/al/alabama_senate_special_election_republican_primary-6220.html#polls [perma.cc/2NBJ-QXS9].

113. *See* David Weigel, *Sen. Luther Strange Will Face Jurist Roy Moore in Alabama's Republican Senate Runoff*, WASH. POST (Aug. 15, 2017), https://www.washingtonpost.com/powerpost/as-polls-open-in-alabama-senate-race-

"poll" of the Senate race in North Dakota, showing incumbent Democratic Senator Heidi Heitkamp leading her Republican opponent, Congressman Kevin Cramer, by 52% to 46%.[114] This estimate was wildly at odds with what other polls were showing and with what prognosticators were predicting. Heitkamp had not led in any publicly released poll in the preceding six months,[115] both parties indicated that their private polling had Heitkamp losing,[116] and most independent election raters had moved the race to "Leans Republican."[117] In the end, Cramer ended up defeating Heitkamp by eleven points,[118] making BRD's estimate off by *seventeen points*.

CSP Polling and Blumenthal Research Daily published two polls that, though they ultimately ended up very close to the final margins, confounded expectations at the time. For example, CSP Polling's "poll" of the special election in Georgia's 6th congressional district, released on June 18, 2017, showed Republican Karen Handel with a one-point lead over Democrat Jon Ossoff.[119] At the time, this was the first poll released in a month and a half showing Handel with a lead over Ossoff.[120] Similarly, BRD's poll of the special election in Pennsylvania's 18th congressional district showed

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republican-candidates-court-trump-voters/2017/08/15/b535cd58-81b1-11e7-ab27-1a21a8e006ab_story.html?utm_term=.fa25b9c8a219 [perma.cc/3XHJ-GYNY].

114. @BRD_POLLING, (Apr. 17, 2018, 12:07 PM), *supra* note 96.

115. Janie Velencia & Dhrumil Mehta, *Can Heitkamp Pull Off a Second Upset in North Dakota?*, FIVETHIRTYEIGHT (Oct. 12, 2018, 5:59 AM), https://fivethirtyeight.com/features/can-heitkamp-pull-off-a-second-upset-in-north-dakota/ [perma.cc/4AY5-ETYA].

116. Burgess Everett, *GOP Closes in on Heitkamp Knockout – and Control of the Senate*, POLITICO (Oct. 11, 2018, 5:08 AM), https://www.politico.com/story/2018/10/11/heidi-heitkamp-north-dakota-senate-2018-891461 [perma.cc/Y4LD-3RC4].

117. *E.g.*, Jennifer E. Duffy, *North Dakota Senate: Race Moves to Lean Republican*, COOK POLITICAL REPORT (Oct. 19, 2018), https://cookpolitical.com/analysis/senate/north-dakota-senate/north-dakota-senate-race-moves-lean-republican [perma.cc/8XYA-JLYW].

118. *North Dakota Election Results*, N.Y. TIMES (Jan. 28, 2019, 10:38 AM), https://www.nytimes.com/interactive/2018/11/06/us/elections/results-north-dakota-elections.html [perma.cc/KBB6-XBEW].

119. @CSP_POLLING, (June 18, 2017, 10:46 AM), *supra* note 82.

120. *Georgia 6th District Run-Off Election – Handel v. Ossoff*, REALCLEAR POLITICS (last visited Mar. 3, 2019), https://www.realclearpolitics.com/epolls/2017/house/ga/georgia_6th_district_runoff_election_handel_vs_ossoff-6202.html#polls [perma.cc/68TS-YJHR]; Jeff Stein, *Where the Polls Stand 2 Days Before Georgia's Special Election*, VOX (June 18, 2017, 10:20 AM), https://www.vox.com/policy-and-politics/2017/6/18/15825944/special-election-ossoff-handel [perma.cc/D7CF-FGFD] ("Polling over the last three weeks suggests Ossoff has a narrow but potentially shrinking lead over Handel . . . .").

Democrat Conor Lamb beating Republican Rick Saccone by one point.[121] BRD's "poll" was indeed the first publicly released estimate to put Lamb ahead of Saccone,[122] as all other polls released until that point had put Saccone ahead, albeit by a decreasing margin.[123] Given that Lamb narrowly defeated Saccone by one point, the few polls putting Lamb ahead were accurate[124] but still confounded expectations.[125]

The point here isn't to suggest that these polls were bad or inaccurate. Though some of them certainly *were* significantly off,[126] in hindsight, others ended up being quite accurate.[127] It is instead to suggest that these polls showed results that were unbelievable or otherwise out-of-line with either expectations for the election or the eventual results. Most pollsters have the exact *opposite* inclination: When they get a result that seems out of place, they decline to release it[128] or they rebalance the results so that their poll fits the norm.[129] Though documented reports of pollsters junking their own polls are scant, they do happen. Most prominently and most recently, a pollster

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121. Deto, *supra* note 86 and accompanying text.

122. @BRD_POLLING, (Mar. 14, 2018, 4:49 AM), *supra* note 94.

123. *Pennsylvania 18th District Special Election - Saccone v. Lamb*, REALCLEAR POLITICS (last accessed Mar. 4, 2019), https://www.realclearpolitics.com/epolls/2018/house/pa/pennsylvania_18th_district_special_election_saccone_vs_lamb-6327.html#polls [perma.cc/7SCM-YD83].

124. *Id.*

125. *See* Alex Isenstadt, *Republicans Trash Their Candidate in Pa. Special Election*, POLITICO (Mar. 7, 2018, 6:25 PM), https://www.politico.com/story/2018/03/07/republicans-pennsylvania-special-election-445221 [perma.cc/TH4B-FEHA] (noting that the special election was taking place in a Republican-favored district that Donald Trump "won by 20 percentage points"

126. *Supra* notes 107–117 and accompanying text.

127. *Supra* notes 119–125 and accompanying text.

128. *E.g.*, Tal Kopan, *PPP Reveals It Held Colo. Poll*, POLITICO (Sept. 11, 2013), https://www.politico.com/story/2013/09/ppp-colorado-poll-096628 [perma.cc/H3QW-BY4U]. In this case, Public Policy Polling conducted polls of a State Senate recall election in Pueblo, Colorado, and decided not to release the results. *Id.* Following the unexpected recalls of State Senators Angela Giron and John Morse, the head of PPP disclosed that the firm had polled the races and had accurately predicted the outcome. *Id.*

> We did a poll last weekend in Colorado Senate District 3 and found that voters intended to recall Angela Giron by a 12 point margin, 54/42. In a district that Barack Obama won by almost 20 points I figured there was no way that could be right and made a rare decision not to release the poll. It turns out we should have had more faith in our numbers.

Id.

129. Nate Silver, *Here's Proof Some Pollsters Are Putting a Thumb on the Scale*, FIVETHIRTYEIGHT (Nov. 14, 2014, 1:58 PM), https://fivethirtyeight.com/features/heres-proof-some-pollsters-are-putting-a-thumb-on-the-scale/ [perma.cc/4KJ7-9EZU]. This process is known as "herding," or "the tendency of polling firms to produce results that closely match one another, especially toward the end of a campaign." *Id.*

publicly admitted that it declined to release a poll of the 2019 Australian federal election that predicted the incumbent Coalition government would win re-election.[130] The poll ended up being correct, but it contradicted virtually every other publicly released poll, so the polling agency's chief executive decided not to publish it: "No one wants to release a poll that is wildly out of step."[131]

A poll that challenges a status quo assumption, whether correct or incorrect in the end, tends to disrupt expectations.[132] It is no surprise, then, that in the aftermath of the Delphi Analytica poll, trading on the Michigan Senate race exploded on PredictIt, Debbie Stabenow's "stock" price went down, and the Republican nominee's "stock" surged.[133] This reflects, generally speaking, how Wall Street traders respond to new information, like a change in a credit rating for a particular company[134] or an earnings report.[135]

Therefore, the *content* of the "polls" themselves provides some support for the assertion that they were fraudulent and were published to affect online betting markets. Regardless of their accuracy, the vast majority of them contradicted publicly available data and expectations. This contradiction would make sense if the publisher's goal was to affect stock prices. If a bettor's goal is to make money by shorting a candidate's "stock price" on PredictIt,[136] they could efficiently do so by identifying a candidate widely perceived as a favorite and releasing a fraudulent poll showing that candidate either losing or being in an unexpectedly close race. Given the speed with

130. Michael Koziol, *'Embarrassed' Pollster Ripped Up Poll That Showed Labor Losing Election*, SYDNEY MORNING HERALD (June 9, 2019, 12:00 AM EST), https://www.smh.com.au/politics/federal/embarrassed-pollster-ripped-up-poll-that-showed-labor-losing-election-20190604-p51u9v.html [perma.cc/Z88R-WXJT].

131. *Id.*

132. *Supra* notes 71–74 and accompanying text.

133. Enten, *supra* note 11; *see also supra* note 106 and accompanying text.

134. *See generally* John Hand et al., The Effect of Bond Rating Agency Announcements on Bond and Stock Prices, 47 J. FIN. 733 (1992).

135. *See generally* Anne E. Chambers & Stephen H. Penman, *Timeliness of Reporting and the Stock Price Reaction to Earnings Announcements*, 22 J. ACCT. RES. 21 (1984). Indeed, PredictIt assumes that their traders *will* behave this way. In its "Frequently Asked Questions," PredictIt answers the question, "When is it a good idea to buy or to sell?" by noting in part, "You could consider selling your shares if the price moves towards what you think is the right probability, *or if events cause you to reconsider your judgment of the right price*." PREDICTIT, *Frequently Asked Questions*, *supra* note 25 (emphasis added).

136. *Supra* note 105 (noting that, while PredictIt doesn't allow shorting as a technical matter, shorting can nonetheless occur in a binary market if a better purchases an event contract for the other candidate).

which political news – and shocking polls, in particular – travels on Twitter,[137] the fake poll could convince innocent PredictIt bettors to buy or sell shares, which would affect the overall stock price.[138] As explained in the introduction, this is exactly what happened to share prices in the Michigan Senate race.[139]

Assuming that the intent of the authors of these fake polls is to manipulate PredictIt markets – and assuming that the polls are, in fact, fake – the question then naturally arises: What crimes, if any, have they committed? Part II endeavors to answer that question.

II. THE AVENUES FOR CRIMINAL LIABILITY

This Part proceeds on the critical and necessary assumption that fraudsters are creating and publishing fake polls with the intent to affect share prices on an online political betting market.[140] As explained in Part I, this allegation is certainly possible – if not probable – and it is with this in mind that Part II addresses potential criminal liability for this conduct.

The two likeliest theories of criminal liability – commodities fraud and wire fraud – are addressed in Sections A and B, respectively. Both sections outline the requirements that any federal prosecutor would face in filing charges for commodities fraud and wire fraud and then argue that the conduct described in Part I satisfies those requirements.

A. Commodities Fraud

This Subpart focuses on the possibility that commodities fraud liability can attach to the creation and publication of a fake poll to influence political prediction markets. It begins by reviewing the relevant history of commodities fraud – which has undergone monumental change in the near-century since its inception – before outlining the elements of commodities fraud. Finally, this Subpart applies the elements of the crime and concludes that they are likely satisfied.

137. *See* Deto, *supra* note 86 (discussing the quick spread of BRD's poll of the Pennsylvania special election, despite the low number of Twitter users following BRD's account).

138. *See Frequently Asked Questions*, PREDICTIT, *supra* note 25 ("[T]he price assigned to each potential outcome is a reflection only of the most recent trade in that contract . . . .").

139. *Supra* note 18 and accompanying text.

140. This Article makes such an assumption not to paper over the conduct at issue, but instead to recognize that further investigation, combined with the inevitable discovery that would take place in civil or criminal litigation, would authoritatively confirm or deny this characterization of the available facts.

1. Development of Commodities Fraud

The seed of commodities fraud was first planted by the Grain Futures Act, which sought to prevent "false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce."[141] Though a federal statute – currently codified as 7 U.S.C. § 9 – that initially regulated against manipulation of agricultural markets seems an unlikely hero in the battle against fake polls, the Grain Futures Act was soon replaced by the Commodity Exchange Act ("CEA") in 1936.[142] As the law evolved, the definition of "commodity" expanded from solely agricultural products, as initially defined in the Grain Futures Act[143] and Commodity Exchange Act,[144] to include "all other goods and articles . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in."[145]

In safeguarding these interests, the CEA, as first adopted, meant to "protect[] commodity futures trading on exchanges from 'speculation, manipulation or control.'"[146] But preventing "manipulation" proved easier said than done. Until the passage of Dodd-Frank in 2010, commodities fraud was difficult for the CFTC to pursue.[147] This difficulty was borne largely by the fact that the CEA, unlike the Securities Exchange Act, contained only "general anti-manipulation provisions" and lacked any explicit prohibition of fraud.[148] At that time, "no statute, regulation, or case define[d] manipulation"

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141. Grain Futures Act, Pub. L. No. 67-331, 42 Stat. 998 (1922); *see also* Kevin T. Van Wart, *Preemption and the Commodity Exchange Act*, 58 CHI.-KENT L. REV. 657, 666 (1982).

142. Grain Futures Act, Pub. L. No. 67-331, 42 Stat. 998 (1922).

143. *Supra* note 141 and accompanying text.

144. *See* Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936) (current version at 7 U.S.C. § 1a(9) (2018)).

145. 7 U.S.C. § 1a(9) (2018).

146. Walter Bachrach, *The Cloverleaf Case, and Suspension of State Gambling Statutes as Applied to Commodity Futures Transactions*, 7 J. MARSHALL L.Q. 457, 461 (quoting Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936)). Still, in the CEA, "commodity" is defined as "wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs and Solanum tuberosum (Irish potatoes)." Commodity Exchange Act § 3(a).

147. Rosa M. Abrantes-Metz et al., *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357, 362–66 (2013); *see generally* Craig Pirrong, *Commodity Market Manipulation Law: A (Very) Critical Analysis and a Proposed Alternative*, 51 WASH & LEE L. REV. 945 (1994).

148. Andrew Verstein, *Benchmark Manipulation*, 56 B.C. L. REV. 215, 253–54 (2015).

for the purposes of the Act, leading to a "grab bag of accounts of manipulation" crafted by administrative and judicial opinions.[149] This led to the development of "extraordinarily confused" caselaw, which was frequently contradictory and which was "violently attacked" by judges and commentators[150] for its inconsistency[151] and lack of foundational support.[152]

The passage of Dodd-Frank in 2010 resolved most of this confusion.[153] The law added to the CEA the ability to prosecute *fraud*, not just manipulation.[154] The CEA now prohibits the use of "any manipulative or

149. Abrantes-Metz et al., *supra* note 147, at 362–63.

150. *See* Pirrong, *supra* note 147, at 945.

151. Cargill, Inc. v. Hardin, 452 F.2d 1154, 1166, 1172–73 (8th Cir. 1971) (criticizing the Fifth Circuit's approach in *Volkart Brothers v. Freeman*, a seminal case of commodities fraud, which it noted was reached "without any economic analysis whatsoever" and with no discussion of "its apparent discrepancy with the *Great Western* case").

152. *See* Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 180–81 (1963) (criticizing the Fifth Circuit's approach in *Volkart Brothers v. Freeman*, a seminal case of commodities fraud, which it argued was "not well founded").

153. To a significantly lesser extent, the Sarbanes-Oxley Act and the Fraud Enforcement and Recovery Act of 2009 also worked to strengthen federal prohibitions on commodities fraud. Sarbanes-Oxley was passed in 2002 in response to the Enron scandal, and created 18 U.S.C. § 1348. Section 1348 creates a new securities fraud crime that exists independently of the Securities Act of 1933, the Securities Exchange Act of 1934, and the SEC regulations that both Acts empowered it to promulgate. Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 681–84 (2002). Securities fraud under Section 1348 largely mirrored the prohibition on securities fraud that had existed previously, though perhaps made it easier to prosecute. *Id.* at 681–82. Many commentators viewed Section 1348 as largely repetitive and ineffectual, though Kathleen Brickey argued that it "make[s] significant strides toward piercing the veil of corporate silence." Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 359 (2003). In 2009, FERA amended Section 1348 and added "and commodities" before "fraud" and "any commodity for future delivery, or any option on a commodity for future delivery, or" before "any security." Cindy A. Schipani & H. Nejat Seyhun, *Defining "Material, Nonpublic": What Should Constitute Illegal Insider Information?*, 21 FORDHAM J. CORP. & FIN. L. 327, 360 n. 203 (2016). There is little academic discussion of FERA's impact beyond this note, and no academic discussion of commodities fraud prosecution in the year between FERA's passage and Dodd-Frank's. *See, e.g.*, *id.* at 360 ("In 2009, [Section 1348] was amended by [FERA] to extend the criminal penalties to commodities fraud.").

154. Rosa M. Abrantes-Metz et al., *supra* note 147, at 392–93. In many ways, the addition of fraud to the CEA settled a debate that had been brewing in the background since the CEA's adoption nearly a century earlier. *See* Harry B. Borders, Note, *Ernst & Ernst v. Hochfelder As Applied to Commodities Fraud: No Intent Required*, 79 KY. L.J. 369, 375 (1991) ("Although the 1936 Act contained no antifraud provision, [an] amendment would have made it illegal to 'knowingly' defraud a consumer. The

deceptive device or contrivance, in contravention of such rules and regulations as the [CFTC] shall promulgate," "in connection with any swap, or a contract of sale of any commodity interstate commerce."[155] This language mirrors almost verbatim the relevant provisions of the Securities Exchange Act.[156] The CFTC later promulgated Rule 180.1, which included a broad prohibition on manipulation and fraud in connection with a swap, commodity sale, or contract for future delivery.[157] The Rule echoes SEC Rule 10b-5,[158] and establishes that, in connection with the aforementioned transactions, it is illegal to:

> (1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;
>
> (2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;
>
> (3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person; or,
>
> (4) Deliver or cause to be delivered, or attempt to deliver or cause to be delivered, for transmission through the mails or interstate commerce, by any means of communication whatsoever, a false or misleading or inaccurate report concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, knowing, or acting in reckless disregard of the fact that such report is false, misleading or inaccurate.[159]

In adopting Rule 180.1, the CFTC further mirrored the SEC's Rule by noting that it "does not interpret the final Rule as requiring a showing of

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amendment was rejected, apparently because Congress believed that prosecution under state laws was a sufficient deterrent for fraud.").

155. 7 U.S.C. § 9 (2018).

156. *See* 15 U.S.C. § 78j(b) (2018) (prohibiting anyone from using, "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe"); Verstein, *supra* note 148, at 253–54.

157. 17 C.F.R. § 180.1 (2019).

158. Gregory Scopino, *The (Questionable) Legality of High-Speed "Pinging" and "Front Running" in the Futures Markets*, 47 CONN. L. REV. 607, 663–66 (2015).

159. § 180.1.

reliance or harm to market participants in a government action brought" under 7 U.S.C. § 9 or Rule 180.1.[160] The CFTC also established that, in interpreting the scope of the Rule, "it will be guided, but not controlled by, the substantial body of judicial precedent applying the comparable language of SEC Rule 10b-5."[161]

2. Elements of Commodities Fraud

The requirements of Section 9 and Rule 180.1 have been articulated slightly differently by the CFTC and the courts,[162] but this Article proceeds on the conclusion that the elements of commodities fraud are: (1) a material misrepresentation, (2) scienter (or intent), and (3) a connection to a

160. *See* Prohibition on the Employment, or Attempted Employment of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41398, 41403 (July 14, 2011).

161. *Id.* at 41399. The CFTC noted that there are differences between the securities and derivatives markets that justify flexibility in developing a body of interpretation. *Id.*

162. U.S. Commodity Futures Trading Comm'n v. Southern Trust Metals, Inc., 894 F.3d 1313, 1325 (11th Cir. 2018), *cert. denied sub nom* S. Trust Metals, Inc. v. Commodity Futures Trading Comm'n, 139 S. Ct. 1464 (2019) ("The CFTC must prove the same three elements to establish liability under each . . . provision[]: '(1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality.'" (quoting Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co., 310 F.3d 1321, 1328 (11th Cir. 2002))); Commodity Futures Trading Comm'n v. Gelfman Blueprint, Inc., No. 17-CV-07181, 2018 U.S. Dist. Lexis 207379, at *13–14 (S.D.N.Y. Oct. 1, 2018) ("[Section 9 and Rule 180.1] make it unlawful for any person, in connection with contracts of sale of any commodity in interstate commerce, including virtual currencies such as Bitcoin, to intentionally or recklessly: (1) use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud; (2) make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading; or (3) engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person."); Commodity Futures Trading Comm'n v. McDonnell, 332 F. Supp. 3d 641, 717 (E.D.N.Y. 2018) ("To prove a violation . . . the Commission must show that Defendants engaged in prohibited conduct (i.e., employed a fraudulent scheme; made a material misrepresentation, misleading statement or deceptive omission; or engaged in a business practice that operated as a fraud); with scienter; and in connection with a contract of sale of a commodity in interstate commerce."); Prohibition on the Employment, or Attempted Employment of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41400 ("Final Rule 180.1 prohibits fraud and fraud-based manipulations, and attempts: (1) By any person (2) acting intentionally or recklessly (3) in connection with (4) any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity (as defined in the CEA).").

commodity.[163] Scienter (or intent) as applied here is presumed to be satisfied,[164] and the remaining two elements – material misrepresentation and connection to a commodity – are each addressed in turn.[165]

Material misrepresentation, the first element, is logically divided into two sub-elements: (a) a misrepresentation (b) that is material.[166] Rule 180.1 outlines four different types of misrepresentations for which it provides criminal (and civil) liability, which echo SEC Rule 10b-5's prohibited acts.[167] Unlike securities fraud, commodities fraud – as articulated by the CFTC – excludes insider trading.[168] In any event, the conduct covered by Rule 180.1

163. This conclusion is grounded in the CFTC's own articulation of the requirements, and by its acknowledgement that Rule 180.1 is based off of – and that the CFTC's enforcement of the Rule will be guided by the judicial precedent applying – SEC Rule 10b-5. *See supra* note 158 at 41400, 41399. For a securities fraud prosecution, the requirements under Rule 10b-5 are: "(1) a material misrepresentation (or omission); (2) scienter, i.e., a wrongful state of mind; [and] (3) a connection with the purchase or sale of a security." Samuel W. Buell, *What is Securities Fraud?*, 61 DUKE L.J. 511, 545–46 (2011).

164. Though intent is undoubtedly a critical element of commodities fraud, it is largely a question of fact. *See* SEC v. Merch. Capital, LLC, 311 F. App'x 250, 252 (11th Cir. 2009). This Article does not attempt to address it in the abstract. Instead, this Article proceeds on the assumption that the conduct outlined in Part I occurred as characterized – in other words, that a group of people published fake polls intending to affect online political betting markets like PredictIt. It goes without saying that if the CFTC opted to pursue an enforcement action for this conduct, it would have to prove intent.

165. In discussing the elements of commodities fraud, this Article frequently cites cases and articles that discuss what qualifies as securities fraud. These conclusions should be taken with a grain of salt, given that the CFTC finds securities fraud jurisprudence *persuasive*, not *binding*. Prohibition on the Employment, or Attempted Employment of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41399. Therefore, this Article does not use brackets in this discussion to replace "securities" with "commodities."

166. *See* James J. Park, *Rule 10b-5 and the Rise of the Unjust Enrichment Principle*, 60 DUKE L.J. 345, 360 (2011) (discussing the requirement "that there be a misrepresentation that is material").

167. *Supra* note 159 and accompanying text.

168. Jerry W. Markham, *Commodity Exchanges and Regulation*, *in* COMMODITIES: MARKETS, PERFORMANCE, AND STRATEGIES 37, 45–46 (H. Kent Baker et al., eds., 2018). "Nevertheless, trading on 'misappropriated information' (i.e., stolen information) is prohibited. Trading [on] or disclosing nonpublic information to others is prohibited for CFTC commissioners and their employees, personnel of [self-regulatory organizations], as well as employees and members of Congress and judicial employees." *Id.* at 46. For an argument that commodities fraud should include insider trading, see Andrew Verstein, *Insider Trading in Commodities Markets*, 102 VA. L. REV. 447 (2016).

is broad: in the related securities fraud context, "Any form of publicized deception can create liability."[169] But unlike wire fraud,[170] "there can be no securities fraud liability for a true statement."[171] This limitation of liability for true statements exists even if the statements were not "literally false, [but] taken as a whole . . . were fraudulently misleading and deceptive."[172]

Further, a misrepresentation also must be *material*. Implicit in this requirement is the basic notion that "[n]ot all misrepresentations or omissions in connection with a security transaction . . . are fraudulent."[173] But defining "materiality" can be challenging. The U.S. Supreme Court has noted that the determination of materiality "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him."[174] If the misrepresentation (or omission) "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available," the misrepresentation is generally considered to be material.[175] A relatively simple case – though one that nonetheless made it to the Supreme Court – helps illustrate this concept. In *Matrixx Initiatives, Inc. v. Siracusano*, a group of plaintiffs brought a suit against Matrixx, a pharmaceutical company that manufactured the popular Zicam cold remedies.[176] The plaintiffs alleged that Matrixx had become aware of Zicam's side effects but did not disclose them. Instead, it made public statements to investors predicting that revenue would rise by 80%.[177] The Supreme Court ultimately concluded that Matrixx's knowledge of these side effects was "material" because it "had information indicating a significant risk to its leading revenue-generating product."[178] In other words, the Court concluded that "a reasonable investor would have viewed this information as having significantly altered the 'total mix' of information available."[179]

Second, a material misrepresentation must be "in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract

169. Ron Joshua Havas et al., *Securities Fraud*, 54 AM. CRIM. L. REV. 1787, 1792 (2017).

170. *Infra* Part II.B.

171. *See* In re Loewen Group Inc. Sec. Litig., No. 98-6740, 2003 U.S. Dist. Lexis 15680, at *41 (E.D. Pa. July 15, 2013).

172. Lustiger v. United States, 386 F.2d 132, 136–37 (9th Cir. 1967) (discussing wire fraud liability even for "literally true" statements); *but see generally* Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87 (1999) (comparing treatment of half-truths in the securities fraud context with treatment in the common law fraud context).

173. Havas et al., *supra* note 169, at 1796.

174. TSC Indus. v. Northway, 426 U.S. 438, 450 (1976).

175. *See* Helwig v. Vencor, Inc., 251 F.3d 540, 556 (6th Cir. 2001), *overruled by* Ricker v. Zoo Entm't, Inc., 534 F. App'x 495 (6th Cir. 2013).

176. 563 U.S. 27, 30–31 (2011).

177. *Id.* at 31–34.

178. *Id.* at 47.

179. *Id.* (quotation and citation omitted).

for future delivery on or subject to the rules of any registered entity."[180] In this context, "in connection with" is meant "broadly, not technically or restrictively."[181] When it promulgated Rule 180.1, the CFTC interpreted the phrase to "reach all manipulative or deceptive conduct in connection with the purchase, sale, solicitation, execution, pendency, or termination" of any commodity.[182] This requirement is "not limitless,"[183] however, and the CFTC essentially adopted the Supreme Court's interpretation of SEC Rule 10b-5 to require that, at a minimum, a transaction occur.[184]

Similarly, "any commodity in interstate commerce" is a broad phrase – like the definition of "security" in the context of securities law[185] – and this broad phrasing dovetails with the broad definition of commodity under the current CEA.[186] As one commenter put it, "[T]he CEA definition of 'commodity' seems to include literally everything except, expressly, onions and movie box office receipts."[187] The CFTC's regulatory authority extends well beyond the specific definition of "commodity" in the Act, given the far reach of categories of financial instruments like options and excluded commodities.[188]

3. Application of Commodities Fraud

Considering the factual scenario discussed in Part I – in which a group of people create and distribute a fake poll to influence online political betting markets – commodities fraud liability likely comes to bear. First, by publishing a "poll" that they did not actually conduct, the purveyors clearly communicated a misrepresentation. This is a straightforward conclusion, but identifying the specific misrepresentation is conceptually necessary. The misrepresentation here is best understood as: "I conducted a poll of the election, the results of which showed Candidate A with X% of the vote and Candidate B with Y%." The misrepresentation is necessarily comprised of *both* clauses of the statement. Someone who misrepresents that they

180. 17 C.F.R. § 180.1 (2019).

181. Prohibition on the Employment, or Attempted Employment of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. at 41405.

182. *Id.*

183. *Id.*

184. *See id.* at 41405–06; *see also* Havas et al., *supra* note 169, at 1800.

185. Havas et al., *supra* note 169, at 1800–02.

186. *Supra* notes 143–145 and accompanying text.

187. Timothy E. Lynch, *Derivatives: A Twenty-First Century Understanding*, 43 LOY. U. CHI. L.J. 1, 13 n.48 (2011).

188. *See* Commodity Futures Trading Comm'n v. Trade Exch. Network Ltd., 117 F. Supp. 3d 29, 37–38 (D.D.C. 2015).

conducted a poll without releasing the results undoubtedly makes a misrepresentation, but one that is unlikely to be material. On the other hand, someone who misrepresents that they believe Candidate A will win X% of the vote may be making a statement that is neither misleading[189] nor material.[190] Here, their entire statement is misleading – they *did not* conduct a poll showing Candidate A with X% of the vote and stating otherwise is false.

Second, their misrepresentation was likely material. To some extent, this can be a difficult element to prove in the abstract – materiality is usually seen as a mixed question of law and fact, though some courts view it as a pure question of fact.[191] Nonetheless, on a practical level, several things are true: PredictIt bettors rely on a variety of public information, including polls, in making their betting decisions.[192] Polls have affected betting markets for nearly a hundred years – well before the creation of online political betting markets like the IEM and PredictIt – and have actually made betting markets *less* accurate, which reflects the extent to which bettors take them into account.[193] Therefore, it seems a likely conclusion in this instance that, at a

189. The resolution of this question, though unnecessary for this Article, depends on the application of courts' frequently contradictory jurisprudence of when an opinion is misleading and gives rise to securities fraud liability. *See* Wendy Gerwick Couture, *Opinions Actionable as Securities Fraud*, 73 LA. L. REV. 381, 386–429 (2013) (for an in-depth discussion of this jurisprudence).

190. There could be circumstances where someone with a well-earned reputation for accuracy in political prognostication – like, for example, Nate Silver – could communicate a material misrepresentation if he falsely represented his belief that Candidate A would receive X% of the vote. *See* Va. Bankshares v. Sandberg, 501 U.S. 1083, 1090–91 (1991) (discussing liability for corporate directors' statements of belief if false because "[s]hareholders know that directors usually have knowledge and expertise far exceeding the normal investor's resources . . . ."). However, this can be difficult to prove. *See generally* Podany v. Robertson Stephens, Inc., 318 F. Supp. 2d 146 (S.D.N.Y. 2004) (in which the court dismissed plaintiffs' claims that "an equity analyst engaged in a scheme . . . to commit securities fraud by publishing false statements of opinion about certain issuers in reports disseminated by [his employer] broker-dealer" for lack of proof).

191. *Compare* United States v. Litvak, 808 F.3d 160, 169 (2d Cir. 2015), *and* ABC Arbitrage Plaintiffs Grp. v. Tchuruk, 291 F.3d 336, 359 (5th Cir. 2002), *and* Weiner v. Quaker Oats Co., 129 F.3d 310, 317 (3d Cir. 1997), *with* Bacon v. Stiefel Labs., 677 F. Supp. 2d 1331, 1345 (S.D. Fla. 2010).

192. Enten, *supra* note 11; Perticone, *supra* note 7; *see* PREDICTIT, *Frequently Asked Questions*, *supra* note 25.

193. Robert S. Erikson & Christopher Wlezian, *Markets vs. Polls as Election Predictors: An Historical Assessment*, 31 ELECTORAL STUDIES 532, 535 (2011) ("[T]he correlation and regression-based evidence indicates that the knowledgeable price-setters were able to gauge degrees of relative Democratic vs. Republican strength with amazing clarity – greater, so it appears, than price-setters in the thinner markets of the polling era. Polls may have had a distorting effect on markets. When the polls have been accurate, so too have been market prices. But when polls have gone wrong, so have market prices."); *see also supra* note 14 and accompanying text (discussing impact of Delphi Analytica poll on PredictIt share prices).

minimum, polls *affect* the "'total mix' of information made available"[194] – and it seems possible that polls actually *drive* the "total mix," too.[195]

Whether *these* "polls" affected the "total mix" is a closer question, however. Fake polls are still relatively rare, so it can be difficult to isolate them from "real" polls to determine their effect on political betting markets or on expectations more generally. But to some extent, the effects of one fake poll – the Delphi Analytica poll of the Michigan Senate race – can serve as a case study. As mentioned previously, the release of the poll resulted in the value of Senator Debbie Stabenow's "share" on PredictIt dropping by nearly 20%,[196] the largest volume of trades (by far!) the following day.[197] The poll was also widely distributed by the media,[198] Kid Rock himself,[199] and Texas Governor Greg Abbott.[200] Though the media didn't distribute the results of other fake polls, political prognosticators have noted that the American news media has a systemic problem with accurately reporting on public opinion polls,[201] and fake news more generally,[202] which bodes poorly for responsible media reporting of suspected fake polls in the future.[203] With that context in mind, promulgating a fake poll *could* be material depending on the attendant circumstances – which include the extent to which the poll's release was correlated with a noticeable increase in the volume of trading in a particular market, the distribution of the poll online, and so on.

Finally, the material misrepresentation was likely made in connection with a commodity. The exact nature of this financial instrument is somewhat of an open question,[204] as is the CFTC's ability to regulate political prediction

194. *Supra* note 175 and accompanying text.

195. *Supra* note 193 and accompanying text.

196. *Supra* note 18 and accompanying text.

197. *Supra* note 106 and accompanying text.

198. *E.g.*, *Kid Rock 4 Points Ahead in Race for Michigan Senate Seat, Poll Says*, FOX NEWS (July 25, 2017), https://www.foxnews.com/entertainment/kid-rock-4-points-ahead-in-race-for-michigan-senate-seat-poll-says [perma.cc/7L6F-B3FJ].

199. Judy Kurtz, *Kid Rock Tweets Poll Showing Him Leading Senate Race*, HILL (July 24, 2017), https://thehill.com/blogs/in-the-know/in-the-know/343461-kid-rock-tweets-poll-showing-him-leading-senate-race [perma.cc/5J3G-FKB2].

200. Jeremy Wallace, *Was Gov. Abbott Punk'd by Fake Poll?*, HOUSTON CHRON. (Aug. 23, 2017), https://www.chron.com/news/politics/texas/article/Was-Gov-Abbott-punk-d-by-fake-poll-11951030.php [perma.cc/XYH5-22Z5].

201. *E.g.*, Nate Silver, *The Media Has a Probability Problem*, FIVETHIRTYEIGHT (Sept. 21, 2017), https://fivethirtyeight.com/features/the-media-has-a-probability-problem/ [perma.cc/M5K3-H7WP].

202. *See generally* Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POLITICAL BEHAVIOR 303 (2010).

203. *See generally* Enten, *supra* note 11.

204. *Supra* note 32 and accompanying text.

markets – or, at least, it *was* an open question prior to the passage of Dodd-Frank.[205] The CFTC has two bases of authority for claiming that it has jurisdiction over political prediction markets: the CEA and Dodd-Frank.[206] In its definition of "commodity," the CEA gave the CFTC regulatory authority over "all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in,"[207] including event contracts.[208] The passage of Dodd-Frank in 2010 supplemented the CFTC's authority by giving them sole authority[209] to approve contracts "that are based upon the occurrence, extent of an occurrence, or contingency," which by its very terms, explicitly includes event contracts.[210] The CFTC has, in turn, fully embraced this authority – relying on both the CEA and Dodd-Frank – to grant no-action letters to some political prediction markets[211] and to issue orders prohibiting markets from operating.[212]

In an even stronger indicia of its jurisdiction over these markets, the CFTC has also pursued repeated enforcement actions against InTrade, an Irish-operated political prediction market.[213] In response to the CFTC's 2012 enforcement action, InTrade resisted the CFTC's exercise of its jurisdiction.[214] However, the U.S. District Court for the District of Columbia

205. *Infra* note 221 and accompanying text.

206. Michael P. Vandenbergh et al., *Energy and Climate Change: A Climate Prediction Market*, 61 UCLA L. REV. 1962, 1993–94 (2014).

207. 7 U.S.C. § 1a(9) (2018).

208. *See* Vandenbergh et al., *supra* note 206 at 1994.

209. *Id.*

210. 7 U.S.C. § 7a-2(c)(5) (2018).

211. *E.g.*, Press Release, Commodity Futures Trading Comm'n, *supra* note 6; Letter from Andrea Corcoran to George R. Neumann, *supra* note 42; Letter from Vincent McGonagle to Neil Quigley, *supra* note 9. The issuance of a no-action letter may not explicitly indicate that the CFTC believes it has jurisdiction over a particular subject matter or organization, but in another context, the CFTC noted that it "has many tools to reduce or eliminate regulatory burdens on entities or activities within its jurisdiction," including "staff exemptive, no-action, and interpretative letters." Trading Commission's Consolidated Reply in Support of its Cross-Motion for Summary Judgment, Opposition to Plaintiffs' Motion for Summary Judgment, and Motion to Dismiss in Part at 10, Sec. Indus. & Fin. Mkts. Ass'n v. U.S. Commodity Futures Trading Comm'n, 67 F. Supp. 3d 373 (D.D.C. 2014) (No. 13-1916).

212. *E.g.*, Press Release, U.S. Commodity Futures Trading Comm'n*, CFTC Issues Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts* (Apr. 2, 2012), https://www.cftc.gov/PressRoom/PressReleases/pr6224-12 [perma.cc/NL9C-HV4B]; *see also* Kesan & Hayes, *infra* note 221, at 812–13 (discussing CFTC's finding that the North American Derivatives Exchange's political futures contracts were "contrary to the public interest").

213. U.S. Commodity Futures Trading Comm'n v. Trade Exch. Network Ltd., 117 F. Supp. 3d 29, 31–34 (D.D.C. 2015) (discussing 2005 and 2012 CFTC enforcement actions).

214. *Id.* at 35, 37 (discussing InTrade arguments that the contracts it offered "are not options" and are excluded from the CEA's definition of "commodity").

fully rejected these arguments and held that the futures contracts traded on InTrade's prediction markets – which included contracts concerning weather-related events and economic data – were "commodity options [regulated] under the Act."[215]

Admittedly, the CFTC's actions occurred while an academic debate – albeit a mild one – was quietly simmering over whether the CFTC could properly exercise jurisdiction over political prediction markets. Several leading scholars argued that the CFTC's jurisdiction is either nonexistent or unclear;[216] chief among them was Professor Tom Bell, who has written extensively on the subject of prediction markets.[217] Bell argued that the average claim on a prediction market is classified as a "hybrid instrument predominantly a security," which would exclude it from CFTC oversight by the CFTC's own regulations.[218] That classification contains a crucial exception, however, for an instrument "marketed as a futures contract,"[219] which applies in PredictIt's case.[220] It is worth noting, however, that the academic debate over the CFTC's jurisdiction largely occurred *before* the 2010 passage of Dodd-Frank and that the discussion following the Act's passage, though limited, has leaned much more heavily in support of the CFTC's jurisdiction.[221]

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215. *Id.* at 38. InTrade's specific argument was that contracts "based on questions about weather events and economic statistics" were not "goods or articles" contemplated under the CEA. *Id.* at 37. However, the court noted that the CEA's definition of "commodity" includes a large scope of financial instruments and held that InTrade's contracts were appropriately considered "commodity options under the Act." *Id.*

216. *Infra* note 221 and accompanying text.

217. *See generally*, Tom W. Bell, Private Prediction Markets and the Law, 3 J. PREDICTION MARKETS 89 (2009); Tom W. Bell, Prediction Markets for Promoting the Progress of Science and the Useful Arts, 14 GEO. MASON L. REV. 37, 67–77 (2006); Tom W. Bell, Gambling for the Good, Trading for the Future: The Legality of Markets in Science Claims, 5 CHAP. L. REV. 159 (2002).

218. Bell, Prediction Markets for Promoting the Progress of Science and the Useful Arts, supra note 217 at 68–69.

219. 17 C.F.R. § 34.3(a)(3)(ii) (2019).

220. *Terms and Conditions*, PREDICTIT, *supra* note 24; *see also* Press Release, Commodity Futures Trading Comm'n, *supra* note 6; Letter from Vincent McGonagle to Neil Quigley, *supra* note 9.

221. *Compare* Michael Abramowicz & M. Todd Henderson, *Prediction Markets for Corporate Governance*, 82 NOTRE DAME L. REV. 1343, 1374 (2007) (noting that the CFTC's jurisdiction is unclear), *and* Bell, *Prediction Markets for Promoting the Progress of Science and the Useful Arts*, *supra* note 217, at 67–77 (arguing the CFTC does not have jurisdiction), *and* Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833, 863–64 (2008) (noting that the CFTC's jurisdiction is "not entirely clear"), *and* Cleary, *supra* note 32 at 961

In any event, by PredictIt's own terms and conditions, it is selling "*futures contracts* linked to political or financial events and circumstances."[222] It is therefore prevented from evading the CFTC's jurisdiction under the classification identified by Bell,[223] and futures contracts are irrefutably under the CFTC's oversight, anyway.[224] All of this is to say that the weight of the available evidence and legal analysis strongly suggests that any material misrepresentation in the arena of fake polls is "in connection with a commodity," thereby triggering commodities fraud liability for the actions. But even if this conclusion is incorrect, liability can *still* attach to the publication of a fake poll – namely, through wire fraud.

B. Wire Fraud

In this context, regardless of the applicability of the federal laws criminalizing commodities fraud – outlined in Section A – wire fraud serves as an additional source of legal liability.[225] In many ways, it is a more

n.29 (noting that the CFTC's jurisdiction is unclear), *and* Goldberg, *supra* note 32 at 435–38 (noting that the CFTC's jurisdiction is unclear), *and* Alexandra Lee Newman, Comment, *Manipulation in Political Prediction Markets*, 3 J. BUS. ENTREPRENEURSHIP & L. 205, 208 (2010) (noting that the CFTC's jurisdiction over prediction markets is a point of disagreement, especially under the CEA's anti-manipulation regime), *with* Tom W. Bell, *Government Prediction Markets: Why, Who, and How*, 116 PENN. ST. L. REV. 403, 420–22 (2011) (noting that "it remains unclear and to what extent the jurisdiction of the [CFTC] would reach prediction markets offering trading in claims pertaining to public policy issues"), *and* Jerry Brito et al., *Bitcoin Financial Regulation: Securities, Derivatives, Prediction Markets, and Gambling*, 16 COLUM. SCI. & TECH. L. REV. 144, 196–99 (2014) (noting the CFTC's asserted jurisdiction over prediction markets), *and* Jay P. Kesan & Carol M. Hayes, *Bugs in the Market: Creating a Legitimate, Transparent, and Vendor-Focused Market for Software Vulnerabilities*, 58 ARIZ. L. REV. 753, 812–13 (2016) (noting that the "CFTC's recent actions concerning NADEX and [PredictIt] support" the claim that the "definition of commodity is broad enough that it could cover contracts in a political prediction market"), *and* Vanderbergh et al., *supra* note 206 at 1994–96, 2014–15 (arguing that the CFTC has jurisdiction over political prediction markets). Notably, Bell's pre-Dodd-Frank opinion, that the CFTC did not have jurisdiction, softened after the Act's passage, and he now describes the CFTC's jurisdiction as "unclear." *See* Bell, *Government Prediction Markets: Why, Who, and How*, at 420–22; Bell, *Prediction Markets for Promoting the Progress of Science and the Useful Arts*, *supra* note 217, at 67–77.

222. *Terms and Conditions*, PREDICTIT, *supra* note 24.

223. Bell, Prediction Markets for Promoting the Progress of Science and the Useful Arts, supra note 217, at 68–69.

224. *See* 7 U.S.C. §§ 1a(9), 7a-2(c) (2018).

225. The proposed defendants in this case could be charged with both commodities and wire fraud. Even though "a number of the underlying facts used to prove . . . securities fraud [would] also [be] used to prove . . . wire fraud," the "two crimes are distinct and require the government to prove different elements in order to secure a conviction." United States v. ReBrook, 58 F.3d 961, 967 (4th Cir. 1995). Accordingly, a prosecution based on both theories of liability would not violate the

appealing avenue of liability – certainly for a criminal prosecution[226] – and inarguably easier to prove. This Section outlines the elements of the offense, briefly explains the historical development of the wire fraud statute, and then applies the elements to the conduct described in Part I.

1. Defining Wire Fraud

The wire fraud statute – currently codified at 8 U.S.C. § 1343 – was adopted in 1952 and was modeled after the mail fraud statute, which was first adopted in 1872.[227] The statute contains nearly identical language to its sister statute, save for the jurisdictional hook,[228] and both statutes are interpreted *in pari materia*.[229] In other words, "Where the two statutes share the same language, the law developed under the mail fraud statute applies to wire fraud and vice versa."[230]

The statute is logically understood broken into several subparts: Someone must devise a "scheme or artifice to defraud" or to "obtain[] money or property."[231] This scheme must be intended to be accomplished through the use of "false or fraudulent pretenses, representations, or promises."[232] To execute the scheme, the actor must transmit "any writings, signs, signals, pictures, or sounds" through "wire, radio, or television communication in interstate or foreign commerce."[233] In interpreting the wire fraud statute, courts have concluded that it contains three elements: (1) a scheme to defraud,

Blockburger test of double jeopardy because "each contains an element that is not contained in the other. Securities fraud requires a showing of fraud in connection with the purchase or sale of any security – an element not required to prove wire fraud. Wire fraud requires a showing of use of interstate wires – an element not required to prove securities fraud." United States v. Regensberg, 604 F. Supp. 2d 625, 634 (S.D.N.Y. 2009).

226. One advantage of commodities fraud is that it allows a private right of action, while wire fraud likely does not. This Article focuses on the viability of a criminal prosecution for the conduct outlined in Part I, but this discussion should not occur at the expense of the victims of this fraud.

227. C.J. Williams, *What is the Gist of the Mail Fraud Statute?*, 66 OKLA. L. REV. 287, 291–94, 304–05 (2014).

228. *Id.* at 305.

229. Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005).

230. William K.S. Wang, *Application of the Federal Mail and Wire Fraud Statutes to Criminal Liability for Stock Market Insider Trading and Tippin*g, 70 U. MIAMI L. REV. 220, 224 (2015).

231. 18 U.S.C. § 1343 (2018).

232. *Id.*

233. *Id.*

(2) the use of interstate wires in furtherance of the scheme, and (3) with specific intent to "deceive or defraud."[234]

First, the wire fraud statute requires a "scheme to defraud."[235] This term, by both its very nature and by Congress's lack of any definition or specification, is a broad and ambiguous term.[236] Courts interpreting its scope have responded to its breadth and ambiguity with gusto and have usually interpreted it broadly.[237] At its core, the prohibition of a "scheme to defraud" reflects the courts' idealistic standards of appropriate conduct: it prohibits "dishonest methods or schemes" and the use of "trick, deceit, chicane, or overreaching" to deprive someone of something with value.[238] But in many ways, this prohibition does not appear to capture any particular conduct. Instead, it captures "a plan, intention, or state of mind, insufficient in itself to give rise to any kind of criminal sanctions."[239] It is perhaps unsurprising, then, that "[f]ew restrictions have been placed on what will be subject to prosecution under this statute."[240]

An obvious requirement in any scheme to defraud is a misrepresentation. A qualifying misrepresentation is significantly broader in wire fraud than it is for commodities fraud.[241] "Although [wire fraud] can be committed by means of outright lies, literal falsity is seldom, if ever, required."[242] For example, wire fraud can attach to statements that may be "literally true," but that taken

234. Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1400 (9th Cir. 1986). Many courts articulate these three requirements differently. For example, the Fifth Circuit notes that there are only two elements: "(1) a scheme to defraud and (2) the use of interstate communications in furtherance of the scheme." United States v. Gordon, 780 F.2d 1165, 1171 (5th Cir. 1986). In *Gordon*, the Fifth Circuit noted that the government in the mail fraud context must also prove "a specific intent to commit fraud." *Id.* at 1170 (quoting United States v. Freeman, 619 F.2d 1112, 1117 (5th Cir. 1980)). Regardless, these three requirements are universally accepted as coterminous with both mail and wire fraud. *E.g.*, Wendy Gerwick Couture, *White Collar Crime's Gray Area: The Anomaly of Criminalizing Conduct Not Civilly Actionable*, 72 ALB. L. REV. 1, 4 (2009).

235. Gerwick Couture, *supra* note 234, at 4.

236. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 789 (1980).

237. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 160 (1993).

238. McNally v. United States, 483 U.S. 350, 358 (1987) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

239. Rakoff, *supra* note 236, at 775 (internal citations omitted).

240. Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 753–54 (1999) ("An incredible array of schemes have been prosecuted under the mail fraud statute. One finds, for example, 'divorce mill' fraud, insurance fraud, securities fraud, and franchise fraud.") (internal citations omitted).

241. *Supra* notes 166–68 and accompanying text (discussing misrepresentation in the commodities fraud context).

242. Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 188 (2001).

as a whole, are "fraudulently misleading and deceptive."[243] The nature of the misrepresentation interacts with the materiality and intent of the statement, discussed *infra*, because courts generally recognize that a statement that is "material and made with intent to deceive" qualifies as a misrepresentation.[244]

Though materiality is not explicitly mentioned in either the mail or wire fraud statutes, the Supreme Court added a materiality requirement to mail, wire, and bank fraud prosecutions in *Neder v. United States*.[245] In defining "materiality," the Court approvingly quoted the Second Restatement of Torts' definition of materiality, which provides that a matter is material if:

> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
>
> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.[246]

Federal courts disagree on the application of this materiality requirement – a circuit split has developed between circuits that apply an "objective standard, which measures [schemes] as applied to the hypothetical *reasonable* victim" and those that apply a "subjective standard, which takes into account the particular perspective of actual victims of a deception."[247]

But all courts agree that the standard of materiality adopted by the Court in *Neder* is looser for mail and wire fraud than it is for commodities and securities fraud.[248] A necessary implication of *both* the objective and subjective standards is that "material" is defined as including statements that "an objectively reasonable person would *not* regard as important."[249] The minimization of a "reasonable" recipient of deceptive information – even under the objective standard – perhaps reflects that "materiality" operates at a less practical level in wire fraud than it does in commodities or securities fraud. Liability in wire fraud is not predicated on the success of the fraud or

243. *E.g.*, Lustiger v. United States, 386 F.2d 132, 136–37 (9th Cir. 1967).

244. Green, *supra* note 242, at 188.

245. Neder v. United States, 527 U.S. 1, 20–25 (1999).

246. *Id.* at 22 n.5 (quoting RESTATEMENT (SECOND) OF TORTS § 538 (Am. Law Inst. 1976)).

247. Mark Zingale, Note, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 COLUM. L. REV. 795, 796 (1999).

248. Gerwick Couture, *supra* note 234, at 6.

249. *Id.* at 8 (emphasis added); *supra* note 246 and accompanying text.

even its completion.[250] It is instead predicated on the attempt itself.[251] Therefore, it makes intuitive sense that the current trend in evaluating materiality focuses on "using the credibility of the scheme merely as an indicator of whether the defendant possessed the requisite intent to defraud."[252] After all, if a scheme was not seen through to completion, it *could not* be classified as "material" under the standard used in commodities fraud – it affected neither its intended victims nor their behavior. The divergent attention paid to effects under both theories of liability reflects the core difference between the two theories. Though commodities fraud defines "materiality" loosely[253] – but certainly not as loosely as wire fraud – it focuses the bulk of its energy on the likelihood that a reasonable investor would consider the statement, or its omission, "important in deciding how to vote."[254]

The remaining two elements – transmission by "wire, radio, or television communication" and intent – are simpler than materiality and require less explanation. First, federal courts have largely interpreted the transmission requirement loosely to encompass activity only tangentially related to the actual fraud.[255] The Supreme Court held in *Schmuck v. United States* that an interstate communication need only be "incident to an essential part of the scheme" or a mere "step in the plot" to be "for the purpose of executing" the scheme.[256] This flexible approach grew out of the mail fraud statute's broad reach and original intent – which was to "punish those who misused a government agency, namely the United States Post Office, in the purpose of executing a fraudulent scheme."[257] In keeping with that purpose, the original statute was interpreted from the very beginning to designate each separate mailing as a separate offense.[258] The result of this broad approach – which triggers federal jurisdiction over transmissions that are incidental or sometimes even made by actors other than the fraudsters themselves – has been the growing use of the mail and wire fraud statutes to bring what might ordinarily be state-level fraud crimes to federal court.[259]

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250. *See* Neder v. United States, 527 U.S. 1, 24–25 (1999) (noting that the statute "prohibit[s] the 'scheme to defraud,' rather than the completed fraud").

251. *Id.*

252. Gerwick Couture, *supra* note 234, at 8–9.

253. *See generally* Dale A. Oesterle, *The Overused and Under-defined Notion of "Material" in Securities Law*, 14 U. PA. J. BUS. L. 167 (2011).

254. *Id.* at 175 (quoting TSC Indus. v. Northway, 426 U.S. 438, 449 (1976)); *see also supra* notes 173–173 and accompanying text.

255. Schmuck v. United States, 489 U.S. 705, 712 (1989).

256. *Id.* at 710–11 (1989) (quoting Badders v. United States, 240 U.S. 391, 394 1916)). Though *Schmuck* was decided in the mail fraud context, its holding has been similarly applied to wire fraud. *See, e.g.*, United States v. Hasson, 333 F.3d 1264, 1272–73 (2003) (applying *Schmuck* to wire fraud prosecution).

257. Williams, *supra* note 227, at 287.

258. *Id.*

259. *See Schmuck*, 489 U.S. at 722–23 (Scalia, J., dissenting).

In keeping with this broad interpretation, the statute has evolved with the times as the definition of "wire" expanded from physical telephone wires to wireless Internet transmissions. The statute is now widely understood to include crimes that involve the use of computers and the Internet generally.[260] This reach is necessarily broad – it's likely that the jurisdictional element of the wire fraud statute even applies to Internet communications that are sent and received in the same state.[261] "Because of fluctuations in the volume of Internet traffic and determinations by the systems as to what line constitutes the 'Shortest Path First,' a website connection request can travel entirely intrastate or partially interstate."[262] Accordingly, many courts have essentially held that the "very interstate nature of the Internet" means that *any* Internet activity results in data traveling in interstate commerce.[263] Some courts have distanced themselves from this generous application and have articulated that the government needs to prove more in a wire fraud prosecution based on Internet activity, such as evidence that a defendant uploaded content to a server based in one state and that the server transmitted the content across state lines to a "local host server."[264]

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260. *E.g.*, Richard W. Downing, *Shoring Up the Weakest Link: What Lawmakers Around the World Need to Consider in Developing Comprehensive Laws to Combat Cybercrime*, 43 COLUM. J. TRANSNAT'L L. 705, 725 n.39 (2005) (collecting cases).

261. Morgan Cloud & George Shepherd, *Law Deans in Jail*, 77 MO. L. REV. 931, 946 (2012) ("[T]he geography of the internet makes it likely that messages travel across state lines, and perhaps across even national borders, even if the origin and destination sites are in the same state. Similarly, if packages are sent by private courier, the hub systems used by the leading companies makes it likely that packages traverse an interstate itinerary. *Because knowledge of the bases for federal jurisdiction is not necessary under these statutes, the sender need not intend or even know that the email or package has crossed state lines*.") (emphasis added).

262. United States v. MacEwan, 445 F.3d 237, 244 (2006).

263. *E.g.*, *id.*

264. United States v. Kieffer, 681 F.3d 1143, 1154–55 (10th Cir. 2012). "Accordingly, we have no quarrel with the narrow proposition [that] one individual's use of the internet, 'standing alone,' does not establish an interstate transmission." *Id.* at 1155 (quoting United States v. Schaefer, 501 F.3d 1197, 1200–01 (10th Cir. 2007)). *See also* Valeria G. Luster, Note, *Let's Reinvent the Wheel: The Interstate as a Means of Interstate Commerce in* United States v. Kieffer, 67 OKLA. L. REV. 589, 597–99, 601–07 (2015) (discussing *Kieffer*'s approach to the Internet in the wire fraud context). The most voluminous discussion – and disagreement – by the courts over the jurisdictional requirement for crimes, like wire fraud, that require interstate transmission has been in the realm of child pornography. The federal laws prohibiting both wire fraud and child pornography use the same "'in interstate commerce' language" and are generally interpreted in tandem with each other. *See* Michael D. Yanovsky Sukenik, *Distinct Words, Discrete Meanings: The Internet and Illicit Interstate Commerce*, 2011 U. ILL. J.L. TECH. & POL'Y 1 22–23 (2011). A circuit split

Finally, the government needs to prove that the defendant had an intent to defraud.[265] This standard is perhaps the loosest of the three, and simply requires proof that the defendant possessed "an intent to deceive through misrepresentation"[266] – though some courts have even found the intent requirement to be satisfied where the defendant merely had an intent to deceive.[267] The government frequently uses circumstantial evidence to prove intent, like an attempt by the defendant to conceal their conduct, the defendant's misrepresentations, the defendant's knowledge that their statements were false, or even evidence of prior or subsequent bad acts.[268]

2. Applying Wire Fraud

In many ways, despite the previous discussion of the nature of the interests on PredictIt – which suggests, at the very minimum, that they have commodity-*like* features – wire fraud fits more easily with the conduct, stripped to its basics, described in Part I. Put simply, lies were communicated over the Internet in an attempt to yield a financial return for the liars. This is textbook wire fraud. The additional context – namely, that the lies were told to affect the value of *some* sort of financial instrument on a (pseudo-) stock exchange, as opposed to inducing the purchase or sale of a good or service – perhaps makes wire fraud a complementary charge in conjunction with commodities fraud. Of course, the conduct that triggers liability for commodities fraud *also* frequently triggers liability for wire fraud,[269] even if the reverse isn't always true. On a practical level, the more frequent prosecution of wire fraud, rather than commodities (or securities) fraud, occurs as an exercise of prosecutorial discretion because wire fraud prosecutions are both easier to prove *and* criminalize conduct usually left untouched by commodities fraud law alone.[270]

Based on the facts outlined in Part I (and the probable inferences naturally drawn from them), the elements of wire fraud are almost assuredly

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has developed over whether the "in interstate commerce" requirement is satisfied by proof of Internet use alone. Jonathan R. Gray, United States v. Schaefer *and* United States v. Sturm*: Why the Federal Government Should Regulate All Internet Use as Interstate Commerce*, 90 DENV. U. L. REV. 691, 697 n.57 (2013) (comparing cases).

265. Skye Lynn Perryman, *Mail and Wire Fraud*, 43 AM. CRIM. L. REV. 715, 721–24 (2006).

266. Julie R. O'Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC 23, 35 (2010).

267. Wang, *supra* note 230, at 229–31.

268. Perryman, *supra* note 265, at 722–24.

269. *See* Gerwick Couture, *supra* note 234, at 3–4; *see generally* Wang, *supra* note 230 (discussing wire fraud liability for insider trading).

270. Gerwick Couture, *supra* note 234, at 9–12 (discussing federal prosecutors' use of the so-called "wire/mail fraud run-around" due to the lower materiality standard and the ability to charge defendants for "allegedly false forward-looking statements accompanied by meaningful cautionary language").

met. Like the discussion of commodities fraud in Section A, for the purposes of this discussion, this Article presumes without substantial discussion that the element of intent is satisfied.[271] Based on the ends-driven application of the intent requirement by federal courts,[272] the element of intent is satisfied even if the use of the internet was tangential to the overall scheme.[273] In any event, the subpoenas preceding and discovery during a criminal trial or enforcement action by either the CFTC or the Department of Justice would definitively address this element. This Subsection therefore proceeds by discussing the remaining two elements – the existence of a "scheme to defraud" and the use of wires to further the scheme.

First, the conduct described in Part I is clearly a "scheme to defraud" under the wire fraud statute. Like intent, however, the existence of a "scheme to defraud" is largely a question of fact.[274] However, given that it has a higher standard of proof than intent[275] and that the existence of such a scheme is undeniably central to any wire fraud prosecution, a greater discussion of this element is appropriate here.

The practice of publishing fake polls with the goal of artificially driving up the price of futures contracts on PredictIt is best analogized to a pump-and-dump scheme. Fake polls serve as a reasonable analog for "intentionally misleading press releases"[276] or "promotional materials contain[ing] false and misleading information"[277] that are similarly published and distributed to artificially drive up (or down, in the case of a "distort-and-short" scheme) prices. Pump-and-dump schemes – though perhaps somewhat uncommon in

271. *Supra* note 164 and accompanying text.

272. *See supra* notes 265–64 and accompanying text.

273. *Id.*

274. *See, e.g.*, United States v. Doke, 171 F.3d 240, 243 (5th Cir. 1999) (noting that "intent to deceive" and the existence of a "scheme to defraud" are "questions of fact"); *supra* note 164 and accompanying text.

275. *See generally* Perryman, *supra* note 265, at 722–24.

276. *E.g.*, Robert J. Anello & Brian A. Jacobs, *Securities Fraud, in* WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 12.02[2] (Otto G. Obermaier & Robert G. Morvillo eds., 2019).

277. *E.g.*, United States v. Clark, 717 F.3d 790, 807 (10th Cir. 2013).

the context of futures contracts[278] – are generally considered to be "schemes to defraud" in wire fraud prosecutions.[279]

On a practical level, the scheme to defraud described in Part I included material misrepresentations. The misrepresentation, as outlined *supra* in Section A, is essentially: "I conducted a poll of the election, the results of which showed Candidate A with X% of the vote and Candidate B with Y%." If the purveyors of these fake polls did not actually conduct polls – or even if they conducted "polls" that seriously lacked in statistical accuracy and rigor such that its purveyors knew it was worthless information[280] – they were communicating a misrepresentation.

And that misrepresentation was material. By either definition of "materiality" adopted by the *Neder* court[281] – and by either the objective or

278. The paucity of both academic discussion and caselaw addressing "pump-and-dump" or "distort-and-short" schemes in the context of futures markets suggests that these schemes are rare, though market manipulation obviously occurs. *See generally* Levy v. BASF Metals Ltd., 917 F.3d 106, 107–08 (2d Cir. 2019) (a rare "pump-and-dump" case involving a scheme that manipulated the value of platinum futures in violation of the CEA"); Jerry W. Markham, *Manipulation of Commodity Futures Prices – The Unprosecutable Crime*, 8 YALE J. ON REG. 281 (1991) (discussing the difficulty of prosecuting manipulation of markets for futures contracts prior to Sarbanes-Oxley and Dodd-Frank). Some of this rarity could come from the fact that "[c]ommodities that are readily available and can easily be transported cannot be cornered." Daniel R. Fischel & David J. Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 HARV. L. REV. 503, 547 n.193 (1991). Much of the "pump-and-dump" schemes prosecuted by the CFTC involve the manipulation of currency markets, not futures contracts. *See* Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Warns Customers to Avoid Pump-and-Dump Schemes (Feb. 15, 2018), https://www.cftc.gov/PressRoom/PressReleases/pr7697-18 [perma.cc/HXF6-JMC6].

279. *See, e.g.*, United States v. Skelly, 442 F.3d 94, 96 (2d Cir. 2006) (affirming conviction for wire fraud for "pump and dump" scheme in which the defendants "used manipulative techniques to artificially inflate ('pump') the price of certain thinly-traded securities in which they held a substantial interest, and then used fraudulent and high-pressure tactics to unload ('dump') the securities on unsuspecting customers").

280. This hypothetical – in which the publishers of these fake polls "conducted" a poll using shoddy methods and claimed that it was a poll conducted using statistical rigor – helpfully illustrates how wire fraud prosecutions differ from securities fraud prosecutions. *See* Enten, *supra* note 11. This sort of hypothetical would likely be insufficiently misrepresentative to trigger securities fraud liability, because "literally true" statements cannot trigger securities fraud liability. *Supra* notes 166–64 and accompanying text. However, because "literally true" statements *can* be the basis of wire fraud if they are still misrepresentative when viewed in context, a statement that an ostensibly reputable pollster conducted a poll – which implies a degree of statistical rigor that is absent from the actual "poll" conducted – may be "literally true" but nonetheless materially misrepresentative. Even sidestepping the "literal falsehood" question, liability could still attach to shoddily conducted polls if prosecutors could prove that the representation of its accuracy was "made with reckless indifference to its truth or falsity." United States v. Cusino, 694 F.2d 185, 187 (9th Cir. 1982).

281. *Supra* note 246 and accompanying text.

subjective standard put forth by the federal circuit courts[282] – this sort of statement was material. As explained in the context of commodities fraud, PredictIt users rely on polls to make buying and selling information,[283] to some extent regardless of any one poll's reliability. Even more tellingly, the representation made by the publishers of these fake polls – namely, the *results* of the "polls" – was specifically crafted to be viewed as relevant to the narrow universe of PredictIt users.[284]

But not only was the representation intended to be *relevant*, it was intended to be *important*, and PredictIt users understandably relied on the information, despite its flaws, in making decisions on the website.[285] Assuming that the strictest possible standard applies, the representation of the purveyors of fake polls was important to reasonable people. The appropriate way to consider importance in this context is to consider how a PredictIt user would view the results of a single poll with dubious reliability – just like how we would consider how an investor would view a representation (or omission) in the context of a decision of her own.[286]

In the fast-paced environments of Twitter[287] and PredictIt, a poll of an upcoming election released by a new-on-the-scene pollster would likely be viewed with importance by a reasonable PredictIt user. There are practical reasons why this is so. Hundreds of pollsters regularly conduct and publish polls,[288] preventing virtually everyone who does not have an eidetic recollection of political news from recognizing a new pollster instantly. Therefore, a PredictIt user seeking to purchase a futures contract on the outcome of the Republican primary in Alabama's 2017 special U.S. Senate election who comes across a poll predicting a result of that exact election, allegedly conducted by CSP Polling,[289] might reasonably consider that poll in their purchasing decision – even if they do not know that CSP lacks a track

282. *Supra* note 247 and accompanying text.

283. Enten, *supra* note 11; Perticone, *supra* note 7; *Frequently Asked Questions*, PREDICTIT, *supra* note 25; *see also supra* notes 192–91 and accompanying text for the discussion of the reliance that PredictIt users have on polls.

284. *See generally* Enten, *supra* note 11 (discussing the apparent goals of fake poll publishers).

285. *Id.*

286. *See* Wendy Gerwick Couture, *Materiality and a Theory of Legal Circularity*, 17 U. PA. J. BUS. L. 453, 459–60 (2015) (discussing how to measure importance in the securities fraud context); George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspot in Securities Regulation*, 64 UCLA L. REV. 602, 622–23 (2017) (same).

287. *See* Deto, *supra* note 86 (discussing how quickly the fraudulent Blumenthal Research Daily poll spread).

288. *See* FIVETHIRTYEIGHT, *supra* note 108 (ranking pollsters by accuracy).

289. *See* DELPHI ANALYTICA, *supra* note 84.

record or any indicia of reliability. And given the speed with which PredictIt users buy and sell contracts, a user seeing this information might reasonably conclude that if she is to use this information to her benefit, she needs to act quickly.[290] But on the other hand, in the example of Blumenthal Research Daily, subsequent polls released after the pollster admitted its fraudulent nature may be less likely to be taken seriously by users.

In other words, at the risk of stating the obvious, the importance of a fake poll to a PredictIt user is dependent on the context in which it is publicized: A fake poll – especially one that garners significant attention on social media, spreads rapidly, contains an estimated result that flies in the face of conventional wisdom, and comes from a new pollster[291] – may be reasonably viewed as "important," thereby triggering the *Nader* court's definition of "materiality."

Second, the conduct described clearly involves the use of wires to achieve the intended scheme to defraud. Though the caselaw has been relatively slow to explicitly encompass the use of Twitter, Facebook, and other social media platforms to commit wire fraud, the unanimity of the caselaw holds that the fraudulent use of the Internet to execute a scheme to defraud satisfies the statute's jurisdictional element.[292] Most of the developed caselaw regarding the Internet – in a context other than emails – has focused on fraudulent postings on a defendant's own website, advertisements for sale,[293] or postings on a sales-driven, pseudo-social media platform like eBay,[294] but the existence of only these factual contexts does not limit wire fraud's applicability.[295]

In sum, the elements of wire fraud are clearly met when PredictIt users create and publish a fake poll with the intent of altering the prices of futures contracts on PredictIt's markets.[296] The lies told by these fraudsters – the alleged "results" of a poll they did not conduct – are best understood as

290. *See* Enten, *supra* note 11 (discussing the volume of trades in the Michigan Senate election following the July 2017 release of the Delphi Analytica poll); *cf.* Verstein, *supra* note 168, at 469 (noting that the "relative speed of commodities markets allow[s] information to be used very profitably").

291. These characteristics describe the polls released by BRD and Delphi Analytica discussed *supra* at notes 75–85 and their accompanying text.

292. *See* Downing, *supra* note 260, at 725 n.39.

293. *See* United States v. Pirello, 255 F.3d 728, 730–31 (9th Cir. 2001) (finding wire fraud liability for fraudulent advertisements posted on online classifieds website).

294. United States v. Gajdik, 292 F.3d 555, 556 (7th Cir. 2002) (finding wire fraud liability for fraudulent posts on eBay).

295. *See* Downing, *supra* note 260, at 725 n.39.

296. This channel of criminal liability is less navigable if the motivation of the purveyors is different. If, for example, malevolent actors publish a fake poll to benefit a campaign, it would be challenging to lay the foundation for a wire fraud prosecution. Even if the motivation was financial – for example, attracting campaign contributions – the causal link between the fraud and the financial loss is likely too weak. Instead, fraud of that nature could be prosecuted under a different theory: the violation of 52 U.S.C. § 30104(b) by failing to report an in-kind campaign contribution.

material misrepresentations, given the extent to which they affect the market decisions of PredictIt users.

C. Comparing the Avenues

As the above discussion illustrates, neither theory of liability is perfect; the advantages of each are somewhat coterminous with the disadvantages of the other. Wire fraud is perhaps a better fit, both in terms of standards of proof and the likelihood of its usage in a federal prosecution, but commodities fraud makes more sense given its subject-matter link to the conduct.

On that note, commodities fraud relates more naturally to the conduct meant to trigger criminal liability here. While the exact classification of the interest available for purchase on PredictIt is unclear, it has the distinct *feel* of a financial instrument. And in terms of practicality, commodities fraud, unlike wire fraud, has a private right of action,[297] so even if federal prosecutors decline to pursue charges, the harmed PredictIt investors might have a civil claim.

But the uncertainty in classifying the interests sold by PredictIt looms large over commodities fraud. The CFTC or federal prosecutors may be loath to pursue commodities fraud charges if doing so requires them to litigate whether a commodity was even at issue.[298] Further, the high threshold for materiality,[299] at least compared to wire fraud,[300] could make a commodities fraud prosecution dicier.

While wire fraud may lack the tighter subject-area link of commodities fraud, it functions as a more utilitarian approach to the issue at hand. Especially compared to commodities fraud, wire fraud has easier materiality and jurisdictional requirements; prosecutors find mail and wire fraud "easier

297. Rosa M. Abrantes-Metz et al., *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357, 362 (2013); Wang, *supra* note 230, at 227 n.17. However, this private right of action does not extend to civil RICO actions. *See* Sedima v. Imrex Co., 473 U.S. 479, 505–06 (1985) (Marshall, J., dissenting) ("[E]ven though commodities fraud is not a predicate offense listed in § 1961, the carefully crafted private damages causes of action under the Commodities Exchange Act may be circumvented in a commodities fraud case through civil RICO actions alleging mail or wire fraud.").

298. *Cf.* Mary M. Calkins, Note, *They Shoot Trojan Horses, Don't They? An Economic Analysis of Anti-Hacking Regulatory Models*, 89 GEO. L.J. 171, 193 (2000) (arguing that prosecutors are likelier to pursue fraud charges – rather than other charges, which in this case would have been hacking charges – when there is an "uncertain[]" statute at issue and the prosecutors fear the "difficulty of presenting a high-technology case to a lay judge and/or jury").

299. *Supra* notes 191–99 and accompanying text.

300. Gerwick Couture, supra note 234, at 6.

to prove" than the underlying commodities or securities fraud statutes.[301] And to the extent that the elements of either fraud charge is too difficult to prove, prosecutors could always fall back on conspiracy charges. Further, unlike commodities fraud, wire fraud is a predicate act for both civil and criminal RICO claims,[302] and as Justice Marshall noted in *Imrex*, commodities fraud claims can simply be converted to wire fraud claims to lay the groundwork for a civil RICO claim,[303] demonstrating its versatility.

III. THE CASE FOR CRIMINAL LIABILITY

In a vacuum, it may make little sense to criminally charge the people who create and publish fake polls to affect online political betting markets on PredictIt. After all, given the CFTC-mandated restrictions on the markets,[304] the fraudsters likely made a collective profit of no greater than a few thousand dollars, and the individual loss amounts, absent some unusually large investments, may be even less substantial. And given the unfortunately predictable commission of other, ostensibly more serious crimes, a federal prosecution for a loss amount of just a few thousand dollars may seem like a waste of time and money.

In a vacuum, this may be true. But the harms of distributing fake polls (to affect online markets or for other malicious purposes) are not coextensive with the *financial* loss that they cause some people to suffer. This Part begins by arguing in Section A that fake polls can undermine the purpose of political markets like PredictIt and, more seriously, erode trust in polling companies and manipulate the democratic process. Section B then discusses how these serious harms could be exploited by unethical candidates for political office or foreign governments seeking to sow discord in the United States. Finally, Section C concludes this Part and argues that the concerns raised in the preceding Sections are weighty enough to justify the criminal prosecution of the conduct at hand.

A. The Known (and Possible!) Harms of Fake Polls

This Section begins by noting the known harms that come from fake polls and later broadens the discussion by making reasonable guesses about possible harms that could flow from the distribution of fake polls in the future. Subsection 1 discusses the most obvious and least harmful consequence of fake polls: the purpose of political markets is defeated, and their academic

301. Wang, *supra* note 230, at 257 n.133; *see also* Peter R. Ezersky, Note, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427, 1440–42 (1985).

302. 18 U.S.C. § 1961(1) (2018) (defining "racketeering activity" as including "any act which is indictable under . . . section 1341 (relating to mail fraud), [and] section 1343 (relating to wire fraud)").

303. Sedima v. Imrex Co., 473 U.S. 479, 505–06 (1985) (Marshall, J., dissenting).

304. *See supra* notes 41–49 and accompanying text.

potential quashed. Subsection 2 ups the ante by arguing that the proliferation of fake polls threatens to smash the fragile trust that the public has in legitimate polling companies and the media. Finally, Subsection 3 concludes this Section with the assertion that the very real effects of legitimate polls – like on turnout, fundraising, and even election results themselves – could become very real harms of fake polls.

1. Undermining the Purpose of Political Prediction Markets

Markets like PredictIt – and the Iowa Electronic Markets before it – were formed with a distinctly academic purpose.[305] Researchers at the universities that created and ran the markets wanted to know if the wisdom of crowds could yield more accurate predictions than public opinion polls could on their own.[306] The answer – surprisingly or not – has been yes. When spectators to an event risk their own money in guessing what an outcome is, they quite consistently prove to be more accurate.[307] In many ways, this is to be expected. While political scientists have long known that asking survey respondents, "Who do you think will win the X election?" is more accurate than asking them who *they* will vote for, those results have been tempered somewhat by the fact that survey respondents engage in wishful thinking.[308] Effectively asking pseudo-survey respondents to *bet* on the outcome of an election, therefore, seeks to remove wishful thinking from the equation altogether.[309]

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305. Letter from Andrea Corcoran to George R. Neumann, *supra* note 42 ("The IEM is an electronic trading market trading contracts in specified 'products' which is organized as an experimental and academic program at the University of Iowa."); Press Release, U.S. Commodity Futures Trading Comm'n, supra note 6 ("Like the [Iowa Electronic Markets], Victoria University of Wellington's proposed market for event contracts [PredictIt] . . . is operated for academic research purposes only[.]").

306. *Frequently Asked Questions*, PREDICTIT, *supra* note 25. But PredictIt's utility to researchers has expanded beyond this question. For example, two political scientists used PredictIt data to evaluate the impact of Donald Trump's victories in individual Republican primary contests to ascertain the effect on high-quality congressional candidates deciding to run. *See generally* Gavin Riley & Jacob Smith, *The Trump Effect: Filing Deadlines and the Decision to Run in the 2016 Congressional Elections*, 16 FORUM 193 (2018).

307. Erikson & Wlezian, *supra* note 193, at 535.

308. David Rothschild & Justin Wolfers, *Forecasting Elections: Voter Intentions Versus Expectations*, 1–4, 34–38 (Jan. 23, 2013) (unpublished paper) (on file with the University of Pennsylvania Wharton School), http://users.nber.org/~jwolfers/Papers/VoterExpectations.pdf [perma.cc/U3NJ-DQGD].

309. *Frequently Asked Questions*, PREDICTIT, *supra* note 25. This is consistent with PredictIt's goal, as communicated on its website. *Id.* ("Prediction markets work best when players have some stake, however small, in the outcome. With play money,

All of this careful planning is undone when fraud invades the market. Though PredictIt discloses to its users that there are "no controls on market manipulation,"[310] it nonetheless issues a set of comprehensive terms and conditions governing user behavior, presumably to guard against the tainting of its data collection.[311] The argument advanced in this Subsection – that harm to the literal market itself, as opposed to the ethereal market consisting of companies, their shareholders, and traders[312] – is certainly not a traditional one. Admittedly, few tears are shed for the New York Stock Exchange when traders engage in fraud on the market, but smaller, less-established markets have a vested interest in protecting their integrity. The SEC's ability to ban offenders from the markets or revoke an offender's registration as a broker-dealer[313] can be seen in that light as a way of protecting the participants on the market *and* the market itself.

Accordingly, the harm done to PredictIt's viability and integrity as a political prediction market is a reason for criminal liability to attach to the act of distributing intentionally disruptive fake polls. PredictIt's users might reasonably conclude that the prices on the market don't accurately reflect the value of the contract because they're set by manipulated market trends and the fraudulent actions of users.[314] Accordingly, they might choose to not participate in any of the markets that PredictIt offers, which given the relatively low ceiling on the number of users in any set market,[315] could have a disproportionate effect on the market's academic value. And while this sort of academic or research-based harm is usually legally insufficient to trigger liability,[316] it should trigger liability in the unique context presented here.

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many players take risks they wouldn't otherwise take or don't attend to their holdings as carefully. Such markets may therefore have less research value than real money ones.").

310. *Terms and Conditions*, PREDICTIT, *supra* note 24.

311. *See generally id.*

312. Usually, when courts and commentators refer to the market harms that flow from securities fraud, they are not referring to the *literal* market, but rather to the *concept* of "maintaining free securities markets." Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1901 n.55 (2013) (quotation omitted).

313. Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 935 (2016).

314. *See Frequently Asked Questions*, PREDICTIT, *supra* note 25.

315. Letter from Vincent McGonagle to Neil Quigley, *supra* note 9.

316. *Cf.* Abigail Brown, *Medical Research: Understanding Pharmaceutical Research Manipulation in the Context of Accounting Manipulation*, 41 J.L. MED. & ETHICS 611, 615–16 (2013) ("[T]here are generally no legal remedies for misleading or incorrect academic research – this would threaten the foundation of academic freedom.").

2. Destroying Trust in Polling Companies and the News Media

It goes without saying that the American news media is facing a crisis of confidence. For nearly a century, conservative politicians complained about the so-called "liberal media."[317] In recent years, this refrain has changed slightly. Though politicians in the early 21st century referred to the "liberal media" or the "lamestream" media,[318] they now refer to media reports they don't like as "fake news"[319] and associate the media with the so-called "Deep State."[320] This rhetorical shift capitalizes on and weaponizes an attempt to use an accurate term to describe a growing problem: fake news. In the mid-2010s, as participation on social media platforms like Facebook and Twitter became more universal, fabricated news began flooding users' newsfeeds.[321]

This reality (or unreality?) sunk in and gave many Americans a reason to do what they already did: disbelieve the news media. Donald Trump began weaponizing the term, calling news organizations that he didn't like "fake news" and "enemies of the American people."[322] This purposeful rhetoric has achieved its goal. A Quinnipiac University poll from August 2018 found that 26% of respondents believed that the news media was "the enemy of the people," with 65% disagreeing.[323] Perhaps more concerningly, an Axios/Survey Monkey poll from just a few months earlier found that 72% of respondents believed that "news sources report news they know to be fake, false or purposefully misleading" "[a] lot" or "sometimes," compared to 25% who thought that this "rarely" or "never" occurred.[324]

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317. Nicole Hemmer, *The Conservative War on Liberal Media Has a Long History*, ATLANTIC (Jan. 17, 2014), https://www.theatlantic.com/politics/archive/2014/01/the-conservative-war-on-liberal-media-has-a-long-history/283149/ [perma.cc/CG93-USEB].

318. *E.g.*, Andy Barr, *Palin Trashes 'Lamestream Media'*, POLITICO (Nov. 18, 2009), https://www.politico.com/story/2009/11/palin-trashes-lamestream-media-029693 [perma.cc/BLF8-L77M].

319. *See generally* Lili Levi, *Real "Fake News" and Fake "Fake News"*, 16 FIRST AMEND. L. REV. 232 (2017).

320. *See, e.g.*, Michael Crowley, *The Deep State Is Real*, POLITICO MAG. (Sept./Oct. 2017), https://www.politico.com/magazine/story/2017/09/05/deep-state-real-cia-fbi-intelligence-215537 [perma.cc/H4N9-LNSJ].

321. Levi, *supra* note 319, at 248–57.

322. *Id.* at 257–62.

323. Eli Watkins, *Poll: Majority of GOP Agrees News Media is 'Enemy of the People'*, CNN (Aug. 15, 2018), https://www.cnn.com/2018/08/14/politics/quinnipiac-media-gop/index.html [perma.cc/4WFX-BCDR].

324. Sara Fischer, *92% of Republicans Think Media Intentionally Reports Fake News*, AXIOS (June 27, 2018), https://www.axios.com/trump-effect-92-percent-

But public skepticism of media reporting – and calculated efforts by politicians to capitalize on that skepticism – does not end with reports of factual statements. It extends to polling, too. The American public has a deep-rooted skepticism about the accuracy of public opinion polls,[325] and Donald Trump's pronouncement that "Any negative polls are fake news" finds fertile ground in that skepticism. In this context, the proliferation of fake polls is even more concerning. The media lacks sufficient knowledge of statistical methodology to accurately report on polls in the first place,[326] rendering them vulnerable to accidentally reporting fake polls as legitimate ones.[327] This leads to an obvious problem: If people *already* believe that the media lies and that polls are faked – even when they almost always aren't – the proliferation of *actually* fake polls could have an even more damaging effect on the public's trust in the media and polling companies by extension.

3. Manipulating the Democratic Process

Many of the harms of fake polls – either as they are used right now or as they could be used in the future – are derived from what decades of political science and public opinion research has shown are the results of *real* polls. Polls are common fodder for political reporting; the media regularly mentions

republicans-media-fake-news-9c1bbf70-0054-41dd-b506-0869bb10f08c.html [perma.cc/KQ5Z-8RBN].

325. Rosenstiel, *infra* note 329, at 711–12 (discussing public skepticism of polls).

326. Yosef Bhatti & Rasmus Tue Pedersen, *News Reporting of Opinion Polls: Journalism and Statistical Noise*, 28 INT'L J. OF PUB. OPINION RESEARCH 129, 130–37 (2016) (noting failure of media outlets to accurately report on polling methodology).

327. In response to this vulnerability, a number of political analysts have developed sets of guidance for political reporters to use when reporting on polls. *See generally, e.g.*, Harry Enten, *How to Avoid Falling for a Fake Poll*, FIVETHIRTYEIGHT (Aug. 23, 2017, 12:24 PM), https://fivethirtyeight.com/features/how-to-avoid-falling-for-a-fake-poll/ [perma.cc/C34K-A7PU]; Vicki Krueger, *5 Guidelines for Writing About Poll Numbers*, POYNTER (Oct. 18, 2016), https://www.poynter.org/educators-students/2016/5-guidelines-for-writing-about-poll-numbers/ [perma.cc/5P6V-EJQR]; Brian Resnick & Nora Kelly, *The Pollsters' Guide to Reporting on Polls*, ATLANTIC (June 16, 2015), https://www.theatlantic.com/politics/archive/2015/06/the-pollsters-guide-to-reporting-on-polls/448410/ [perma.cc/65WA-KYFD].

polls,[328] especially when polls project a close[329] or tightening race,[330] so their results can spread quickly. Perhaps owing to their popularity with journalists, polls have real effects on elections.

For example, public opinion polls affect turnout in elections.[331] Polls can affect turnout positively or negatively, depending on the perceived closeness of the election.[332] When polling predicts a close election, voter turnout experiences a noticeable "boost";[333] but when the opposite is true, and a "landslide victory is expected," polls projecting the landslide actually decrease turnout.[334]

Unsurprisingly, given the extent to which public opinion polls drive media coverage, they can also affect the viability of campaigns. The media's coverage of polls does more than just help gin up expectations of a close race – it also draws attention to individual candidates with a frequency that largely corresponds to those candidates' standings in the polls themselves.[335] Those

328. *See generally* Bhatti & Pedersen, *supra* note 326.

329. Tom Rosenstiel, *Political Polling and the New Media Culture: A Case of More Being Less*, PUB. OPINION Q. 698, 705 (2005) ("Polls that are outliers, diverging from the results of other polls, are . . . provocative and draw traffic to a news outlet, particularly to a Web site, where consumers who hear about a poll on TV might subsequently visit the site that originally published it. Controversial polls, in other words, can even be construed by some as good salesmanship."); Kathleen Searles et. al, *For Whom the Poll Airs: Comparing Poll Results to Television Poll Coverage*, 80 PUB. OPINION Q. 943, 952 ("[T]he [media] gatekeepers may be incentivized to cover polls that are either surprising or close.").

330. Searles, *supra* note 329, at 957 ("Significant changes in poll margins make it more likely that it will air.").

331. *Id.*

332. See Jens Großer & Arthur Schram, *Public Opinion Polls, Voter Turnout, and Welfare: An Experimental Study*, 54 AM. J. POL. SCI. 700, 714–15 (2010). This is also true for the kinds of election "forecasts" like FiveThirtyEight that estimate the likelihood that a particular candidate will win. Sean J. Westwood et al., *Projecting Confidence: How the Probabilistic Horserace Confuses and Demobilizes the Public*, 82 J. POLITICS (forthcoming) (manuscript at 26–27) (on file with author) (noting that "probabilistic horserace coverage lowers perceived electoral competition, confuses many potential voters, and, as odds diverge from 50-50, can have demobilizing effects compared [to] coverage focusing on vote share" and that "forecasting and fundamentally alter the information environment available to potential voters, with the potential to change the outcome of elections").

333. *Id.* at 714.

334. *Id.*

335. *See, e.g.*, Nate Silver, *Trump Boom or Trump Bubble?*, FIVETHIRTYEIGHT (Dec. 15, 2015, 9:10 AM), https://fivethirtyeight.com/features/trump-boom-or-trump-bubble/ [perma.cc/W5DD-29FA]; Jonathan Stray, *How Much Influence Does the Media Really Have Over Elections? Digging into the Data*, NIEMANLAB (Jan. 11,

poll results, the media attention, or both also contribute to candidate fundraising; candidates that do better in polls tend to raise more money.[336] Further, polls are used by national parties and the Commission on Presidential Debates as proxies for viability – which then determines a candidate's ability to participate in a sponsored debate.[337] Excluded candidates have understandably filed suit against the Commission for its use of polling in its requirements.[338] Third-party presidential candidates routinely allege that the failure to include them in presidential debates "cause[s] them to lose access to television audiences and resulting campaign contributions worth hundreds of millions of dollars," which is likely an accurate statement of the effects of debate exclusion – though not an injury redressable by courts.[339]

Even less surprisingly – given that polls affect media attention, perceived viability, and fundraising – polls also affect election results. To begin with, the Asch conformity experiments of the 1950s showed that people generally

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2016, 2:49 PM), https://www.niemanlab.org/2016/01/how-much-influence-does-the-media-really-have-over-elections-digging-into-the-data/ [perma.cc/F6B2-4UAW]; *see generally* Wayne P. Stegar, *Who Wins Nominations and Why? An Updated Forecast of the Presidential Primary Vote*, 60 POLI. RESEARCH Q. 91 (2007).

336. Randall E. Adkins & Andrew J. Dowdle, *The Money Primary: What Influences the Outcome of Pre-Primary Presidential Nomination Fundraising?*, 32 PRESIDENTIAL STUDIES Q. 256, 263–65 (2002).

337. Bob Bauer, *Political Parties and the Candidate Debates in the Presidential Nominating Process*, 93 N.Y.U. L. REV. 590, 603–612 (2018) (discussing the use of polling as part of candidate debate criteria for primary debates and general election debates in presidential elections). The Democratic Party's 2020 presidential debate criteria establishes a binary option for candidates: "Register 1% or more support in three polls . . . publicly released between January 1, 2019, and 14 days prior to the date of the Organization Debate," with a list of qualifying pollsters, or "by demonstrating that the campaign has received donations from at least (1) 65,000 unique donors; and (2) a minimum of 200 unique donors per state in at least 20 U.S. states." Press Release, Democratic Nat'l Comm., DNC Announces Details for the First Two Presidential Primary Debates (Feb. 14, 2019), https://democrats.org/press/dnc-announces-details-for-the-first-two-presidential-primary-debates/ [perma.cc/2AX4-X3E8].

338. The Commission has established three criteria for presidential debate inclusion:

> First, the candidate had to be constitutionally eligible to be president. Second, he or she must have qualified to appear on "enough state ballots to have at least a mathematical chance of securing an Electoral College majority in the 2012 general election." And, third, the candidate had to have achieved a "level of support of at least 15% (fifteen percent) of the national electorate as determined by" averaging the most recent results of "five selected national public opinion polling organizations."

Johnson v. Comm'n on Presidential Debates, 869 F.3d 976, 979 (D.C. Cir. 2017) (internal citations omitted).

339. *Id.* at 981.

tend to conform to majority opinions and social pressure.[340] This conformity discernibly manifests itself in public opinion too; when polls are released indicating the public's view on a matter of public policy, they "can be self-fulfilling prophecies and produce opinion cascades."[341] In other words, in some cases, people's opinions on an issue can be changed when a poll is released showing that a majority of the public feel a certain way on that issue. And in the context of voting for parties and candidates, political science research shows the presence of a "bandwagon effect," where voters are likelier to vote for perceived "winners."[342] These perceptions are at least in part driven by the results of public opinion polls.[343] Related research has shown an interaction between the "bandwagon effect" and strategic voting, where voters, in response to polls, switch their vote from their first preference to their second to prevent their *least*-preferred choice from winning.[344]

But consider for a moment that these effects – on turnout, candidate viability, fundraising, issues, and *election results themselves* – flow naturally, and likely unintentionally, from legitimate opinion polls. Though some of these effects may be desirable by individual actors who release polls,[345] there

340. *See generally* Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955). "There is, however, increasing evidence that the tendency to conform has declined over time." Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lowers Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. 1035, 1044 n.50 (2019) (internal citations omitted).

341. David Rothschild & Neil Malhotra, *Are Public Opinion Polls Self-Fulfilling Prophecies?*, 1 RESEARCH & POL. 1, 6 (2014). It is worth noting, however, that these cascades are strongest for "issues where people seem to have the weakest pre-treatment attitudes, the most uninformative priors of perceived public opinion, and for which their attitudes are not hardened by partisan predispositions." *Id.*

342. *E.g.*, Steven Callander, Majority Rule When Voters Like to Win, 64 GAMES & ECON. BEHAV. 393, 394–96 (2008); Jens Olav Dahlgaard et al., *How are Voters Influenced by Opinion Polls? The Effect of Polls on Voting Behavior and Party Sympathy*, 12 WORLD POL. SCI. 283, 296–99 (2016).

343. *See generally supra* note 340.

344. *See* Haldun Evrenk & Chien-Yuan Sher, *Social Interactions in Voting Behavior: Distinguishing Between Strategic Voting and the Bandwagon Effect*, 162 PUB. CHOICE 405, 405, 421 (2015).

345. Pollsters may alter their results in order to get their polls on television or to provide campaigns and affiliated political organizations with desired results. Rosenstiel, *supra* note 329, at 703–05. And individual campaigns may release misleading polling data, often in the form of a so-called "informed ballot," polls showing a close election in order to attract financial contributions and to boost turnout, or even flood unscientific online polls in order to build a narrative that their campaign has momentum. *See* Stuart Rothenberg, *I Never Read 'Informed Ballots.' You Shouldn't Either*, INSIDE ELECTIONS (Oct. 11, 2005, 11:47 PM), https://www.insideelections.com/news/article/i-never-read-informed-ballots.-you-

is no widespread effort to manipulate elections by releasing fraudulent polls – for now. But considering the exhaustive efforts undertaken by Russian intelligence services in the 2016 elections to sow discord and undermine the integrity of American democracy,[346] it is not hard to imagine a similar effort using fake polls.

B. Weaponizing Fake Polls

After more than a century of the United States meddling in the democratic elections of *other* countries,[347] it became a victim of its own success with the Russian government's successful interference in the 2016 elections. Though the extent of the Russian interference is not fully known – and given the classified nature of the information, it may not be fully known for a while, if ever[348] – it is clear that the Russian government's efforts were extensive. Hackers supported by the Russian government hacked into the Clinton campaign's emails,[349] internal Democratic National Committee correspondence and data,[350] and confidential documents belonging to the Democratic Congressional Campaign Committee and the campaigns of Democratic congressional candidates.[351]

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shouldnt-either [perma.cc/NY2D-NZ8B]; Michael Rothfield et al., *Cohen Hired IT Firm to Rig Early CNBC, Drudge Polls to Favor Trump*, WALL ST. J. (Jan. 17, 2019, 6:52 PM), https://www.wsj.com/articles/poll-rigging-for-trump-and-creating-womenforcohen-one-it-firms-work-order-11547722801 [perma.cc/PCY6-3F8V]; *e.g.*, Simone Pathé, *One Candidate's Positive Poll Is Another's Fundraising Boon*, ROLL CALL (July 14, 2016, 6:35 PM), https://www.rollcall.com/news/politics/one-candidates-positive-poll-anothers-fundraising-boon [perma.cc/HH2X-VBZ3].

346. *See generally*, OFF. OF THE DIR. OF NAT'L INTELLIGENCE, ICA 2017-01D, Background to "Assessing Russian Activities and Intentions in Recent US Elections": The Analytic Process and Cyber Incident Attribution (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf [perma.cc/CL9H-S8ZH].

347. Ishaan Tharoor, *The Long History of the U.S. Interfering with Elections Elsewhere*, WASH. POST (Oct. 13, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/10/13/the-long-history-of-the-u-s-interfering-with-elections-elsewhere/?utm_term=.e623ba19be84 [perma.cc/4ZBN-ATA7].

348. Natasha Bertrand, *Even Congress Might Not Get the Full Mueller Report*, ATLANTIC (Mar. 29, 2019), https://www.theatlantic.com/politics/archive/2019/03/what-has-happen-muellers-report-become-public/586060/ [perma.cc/MW2F-XU8V].

349. Ido Kilovaty, *Doxfare: Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information*, 9 HARV. NAT'L SEC. J. 149, 156–57 (2018).

350. *Id.* at 154–56

351. Dan Efrony & Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, 112 A.J.I.L. 583, 616 (2018); Eric Lipton & Scott Shane, *Democratic House Candidates Were Also Targets of Russian Hacking*, N.Y. TIMES (Dec. 13, 2016), https://www.nytimes.com/2016/12/13/us/politics/house-democrats-hacking-dccc.html [perma.cc/92XK-GLGJ]; *see generally* Indictment, United States v. Netyksho, Case No. 1:18-cr-00215-ABJ (D.D.C. July 13, 2018), available at https://int.nyt.com/data/documenthelper/80-netyksho-et-al-

Of course, some political campaigns benefited from and used the fruits of the Russian government's hacking, which maximized its impact[352] – regardless of whether "collusion" could be legally established. Republican candidates and organizations – like the National Republican Congressional Committee, the campaign arm of House Republicans – embraced the hacked information and used it against Democratic congressional candidates, even after House Democrats declared that doing so would make House Republicans "complicit in aiding the Russian government in its effort to influence American elections."[353] Officials affiliated with the Trump campaign seemingly coordinated with Russian-affiliated hackers to schedule document drops,[354] and Trump campaign manager Paul Manafort apparently shared polling data with Konstanin Kilimnik, a Russian political consultant with close ties to his country's intelligence services.[355]

But Russian intelligence services played a more active role than just hacking information and leaking it. They also organized active online efforts to weaponize the hacked information against its victims.[356] The Russian-affiliated users started Facebook groups – which disseminated *en masse* carefully crafted messages meant to increase Trump's support in the election – and planned protests and other events in the United States, which were successfully carried out.[357]

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indictment/ba0521c1eef869deecbe/optimized/full.pdf?action=click&module=Intentional&pgtype=Article [perma.cc/Z7HP-4C4V].

352. Lipton & Shane, *supra* note 351 (noting that Republican candidates and Republican-affiliated organizations used the documents hacked and leaked by Russian-affiliated hackers in their 2016 campaigns).

353. *Id.*

354. *See* Rosalind S. Helderman, *Roger Stone was in Close Contact with Trump Campaign About Wikileaks, Indictment Shows*, WASH. POST (Jan. 25, 2019), https://www.washingtonpost.com/politics/roger-stone-was-in-close-contact-with-trump-campaign-about-wikileaks-indictment-shows/2019/01/25/65d9ad1a-20a2-11e9-8e21-59a09ff1e2a1_story.html?utm_term=.d612326dc102; *see generally* Indictment, United States v. Roger Stone, Case No. 1:19-cr-00018-ABJ (D.D.C. Jan. 24, 2019), *available at* https://www.justice.gov/file/1124706/download.

355. Rachel Weiner et al., *Paul Manafort Shared 2016 Polling Data with Russian Associate, According to Court Filing*, WASH. POST (Jan. 8, 2019), https://www.washingtonpost.com/local/legal-issues/paul-manafort-shared-2016-polling-data-with-russian-employee-according-to-court-filing/2019/01/08/3f562ad8-12b0-11e9-803c-4ef28312c8b9_story.html?utm_term=.7da0eaf6709d [perma.cc/P2Y8-SMUT].

356. Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election*, N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html [perma.cc/B6ET-UDBX].

357. *Id.*

The scope of the Russian government's efforts – which are certainly not exhaustively documented here – demonstrate the harm that could come from weaponizing fake polls. What would stop the Russian government, for example, from starting and funding a polling agency designed to release fake polls? Their 2016 interference reflects a keen understanding of American politics, so given the obsession that American political journalists have with polls and that prognosticators have with poll aggregators like *RealClearPolitics* and *FiveThirtyEight*, this would be a logical, if chilling, step forward. The fake polls published in 2017 and 2018, which were apparently designed to affect PredictIt markets, were amateurish and easily uncovered as fraudulent.[358] But what would happen if unscrupulous manipulators, with more nuance and funds at their disposal, decided to do the same? They could play a long game by starting a polling firm that actually conducts polls, perfects the art of polling accuracy, cultivates respect from political analysts . . . and then changes course. The respected polling firm could then fake its numbers to boost the chances of favored candidates, confound polling averages, and alter expectations. And why stop with just *one* polling shop? Why not more? A single poll, even from a well-regarded pollster, can be recognized as an outlier,[359] but with confirmation from other pollsters, the narrative of a race can start to shift. And almost all of this would be undetectable, absent focused attention and a hearty supply of subpoenas.

The harms don't stop with foreign interference. What would stop similarly unscrupulous candidates from doing the same? Candidates already rely on misleading polls to attract fundraising support and to drive a narrative that they *can* win – but only if you, like-minded voter, turn out! What would stop them from *faking* a poll, then?

2019 might have seen the first instance of a candidate doing so. In March, Jacksonville mayoral candidate Anna Brosche's campaign began pushing a poll purportedly from Gravis Marketing to argue that she had a chance in the upcoming election.[360] But Gravis had not conducted that poll – or any other for the mayoral race.[361] Brosche responded by filing a complaint with Florida Attorney General Ashley Moody's office, which referred the matter to the Florida Department of Law Enforcement.[362] Though Brosche ended up losing the election, the poll ended up being pretty close to the mark,

358. Enten, *supra* note 11.

359. *See* Nate Silver, *Outlier Polls Are No Substitute for News*, FIVETHIRTYEIGHT (June 20, 2012, 6:37 PM), https://fivethirtyeight.com/features/outlier-polls-are-no-substitute-for-news/ [perma.cc/SQ2J-EEDC].

360. Peter Schorsch, *Sham Survey: Gravis Marketing's Jacksonville Mayoral Race Poll a Fraud*, FLA. POL. (Mar. 16, 2019), https://floridapolitics.com/archives/291085-sham-survey-gravis-jacksonville-mayor-poll-a-fraud [perma.cc/8X6V-WGPC].

361. *Id.*

362. A.G. Gancarski, *Gravis-gate: FDLE Still Looking at Fake Jacksonville Poll*, FLA. POL. (Mar. 27, 2019), https://floridapolitics.com/archives/291968-gravis-gate-fdle-still-looking-at-fake-jacksonville-poll [perma.cc/H4D3-UNUN].

and she closed her campaign by arguing that she was the victim of untoward election interference.[363]

In the event that a candidate uses a fake poll to solicit campaign contributions, a prosecution for wire fraud would be without helpful precedent – unlike a prosecution for foreign manipulation, of which there is now plenty.[364] Admittedly, federal prosecutions dating back to Watergate have certainly targeted the operators of "scam political action committees" – which convince contributors that "the money [they] raise[] will go to help or defeat [a] candidate" but actually funnel the contributions to the corrupt political operatives running them.[365] But those prosecutions are uncommon and usually are based on "fraudulent misrepresentation" under the 1974 amendments to the Federal Election Campaign Act.[366] Prosecutions against *candidates* themselves for fraudulent solicitation of campaign funds are certainly unheard of outside of the context of bribery[367] or unreported contributions.[368] Some federal prosecutors have successfully alleged – and courts have at least sometimes upheld – mail and wire fraud violations for

363. *Id.* The FDLE's investigation is ongoing, and though there is no evidence that Brosche's campaign was anything other than the victim of manipulation, the results of the investigation should yield more facts.

364. *See generally* Indictment, United States v. Netyksho, Case No. 1:18-cr-00215-ABJ (D.D.C. July 13, 2018), available at https://int.nyt.com/data/documenthelper/80-netyksho-et-al-indictment/ba0521c1eef869deecbe/optimized/full.pdf?action=click&module=Intentional&pgtype=Article [perma.cc/Z7HP-4C4V].

365. Matthew S. Raymer, *Fraudulent Political Fundraising in the Age of Super PACs*, 66 SYRACUSE L. REV. 239, 240 (2016); *see also* George S. Scoville III, Note, *Curtailing the Cudgel of "Coordination" by Curing Confusion: How States Can Fix What the Feds Got Wrong on Campaign Finance*, 48 U. MEM. L. REV. 463, 495–97 (2017) (discussing scam PACs).

366. *See* Raymer, *supra* note 365, at 245–63; *but see* United States v. Curry, 681 F.2d 406, 410–16 (5th Cir. 1982) (finding sufficient evidence of wire fraud for improprieties in running political action committee); Press Release, U.S. Dep't of Justice, Fraudulent Political Action Committee Operator Sentenced to Two Years in Prison (Mar. 15, 2019), https://www.justice.gov/usao-sdny/pr/fraudulent-political-action-committee-operator-sentenced-two-years-prison [perma.cc/7QPG-9ETQ] (noting that the defendant pled guilty "to one count of conspiracy to commit wire fraud.").

367. *See, e.g.*, Deborah Hellman, *A Theory of Bribery*, 38 CARDOZO L. REV. 1947, 1950 (2017).

368. *E.g.*, Anthony J. Gaughan, *The Case for Limiting Federal Criminal Jurisdiction over State and Local Campaign Contributions*, 65 ARK. L. REV. 587, 615–17 (2012) (discussing John Edwards's unsuccessful prosecution for accepting what federal prosecutors characterized as an illegal campaign contribution that his campaign did not report).

"what federal prosecutors view as 'corrupt' campaign contributions," based on a theory of honest services fraud.[369] Presumably, honest services fraud *could* extend to a campaign that solicits contributions based on a fraudulent poll, but given the significant cutback to the doctrine since the Supreme Court's decision in *Skilling v. United States*, such a prosecution may sit on weak ground.[370]

These dual risks – that foreign governments can use fake polls to undermine American democracy and that candidates can use them to enhance their own standing – come with different harms, but avoiding both is desirable. With the existential threats to democracy posed by gerrymandering, SuperPACs, legalized bribery following the Supreme Court's opinion in *McDonnell v. United States*, and more,[371] American democracy can hardly stand to be even *further* undermined.

C. Justifying Criminal Liability

Historically, there have been few instances in which criminal law has been available as a means of protecting the basic integrity of American democracy. Though most agree that one of the most basic functions of criminal law is to protect civil society,[372] few would go so far as to posit that another, related function is to protect *democratic* society. Indeed, criminal law was largely inapplicable to election conduct until the late nineteenth century, when the first federal and state efforts to clean up elections were passed.[373] Prior to this, the only "regulation" came in the form of political efforts, like election contests filed with the U.S. House of Representatives, which were woefully inadequate.[374]

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369. *See generally Curry*, 681 F.2d at 411; Gaughan, *supra* note 368.

370. *Id.* at 603.

371. *See generally* Michael Kent Curtis & Eugene D. Mazo, *Campaign Finance and the Ecology of Democratic Speech*, 103 KY. L.J.K 529 (2014–15); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004); Eugene Temchenko, Note, *A First Amendment Right to Corrupt Your Politician*, 103 CORNELL L. REV. 465 (2018).

372. *See* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1486, 1549–55 (2016) ("The state in the criminal context should be the embodiment and protector of society's lived moral culture – its way of life.").

373. Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 9 (2009) (discussing federal efforts to criminalize and ban election fraud); Richard A. Schurr, Note, *Burson v. Freeman: Where the Right to Vote Intersects with the Freedom to Speak*, 15 WHITTIER L. REV. 869, 890–91 (1994) (discussing state-level efforts to ban election fraud).

374. Sean J. Wright, *The Origin of Disputed Elections: Case Studies of Early American Contested Congressional Elections*, 81 ALB. L. REV. 609, 624–46 (2017/2018) (describing early nineteenth-century procedures for contesting elections and providing case studies). During this time period – and even before, in colonial

In many ways, little is different today. The progress made during the Civil Rights Era to protect the integrity of elections by expanding the franchise to all eligible voters was quickly followed by a greater use of the criminal law to block access to that franchise.[375] Today, the most notable intersection of criminal and election law is to block those who have been imprisoned from casting ballots[376] and to criminally prosecute those who do vote, even accidentally.[377] Meanwhile, the greatest opportunities to use the criminal law to protect the franchise have not been fully utilized. Though the U.S. Code is ripe with sections that criminalize election-related activities,[378] the enforcement of these crimes has been minimal. The FEC, for example, rarely refers election violations for criminal prosecution[379] and, due at least in part to gridlock,[380] rarely even pursues civil enforcement actions.[381] And the Supreme Court struck a serious blow to corruption prosecutions with its holding in *McDonnell*,[382] the results of which have already been felt.[383]

This asymmetric failure – the enforcement of criminal laws to narrow the franchise and the non-enforcement of criminal laws that seek to protect it

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times – election fraud certainly occurred, but legal historians disagree about its frequency. *See generally* TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION – 1742–2004 (2006), *see also*, Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 380–85 (1991).

375. *See* Friedrichs Benson, *supra* note 373, at 9–12.

376. *See generally* Note, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939 (2002).

377. *E.g.*, Sandra E. Garcia, *Texas Woman Sentenced to 5 Years in Prison for Voter Fraud Loses Bid for New Trial*, N.Y. TIMES (June 13, 2018), https://www.nytimes.com/2018/06/13/us/texas-woman-voter-fraud.html [perma.cc/4QLK-E9DV].

378. The Department of Justice divides these crimes into election fraud, patronage crimes, and campaign financing crimes. U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 2–4 (8th ed. 2017).

379. Kenneth P. Doyle, *FEC Rarely Votes to Refer Criminal Cases to Justice*, BLOOMBERG L. (July 29, 2015), https://www.bna.com/fec-rarely-votes-n17179934048/ [perma.cc/YJZ3-SXA9].

380. *See* Pichaya P. Winichakul, Note, *The Missing Structural Debate: Reforming Disclosure of Online Political Communications*, 93 N.Y.U. L. REV. 1388, 1399–1403 (2018).

381. *See, e.g.*, Michael W. Carroll, Note, *When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act*, 84 GEO. L.J. 551, 554–63 (1996).

382. *See generally* Khadija Lalani, *McDonnell v. United States: Legalized Corruption and the Need for Statutory Reform*, 113 NW. U. L. REV. ONLINE 29 (2018).

383. Joshua S. Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 FLA. ST. U.L. REV. 657, 698–702 (2018).

– comes at a time when the criminal law *could* be used more than ever to protect elections. Reports authorized by American intelligence agencies and the fruits of Special Counsel Robert Mueller's investigation have revealed the extent to which Russian agents interfered in American elections.[384] Candidates, party organizations, and even state registration systems were hacked, and the proceeds of these hacks leaked to the benefit of domestic political actors.[385] These efforts show no signs of halting,[386] and the Trump Administration's sluggish response to the problem of protecting election administration through robust cybersecurity efforts certainly doesn't help.[387]

It is in this vein that this Article suggests a straightforward way to use the criminal law to protect the integrity of American elections: federal prosecutions for the distribution of fake polls.[388] This is, admittedly, a bold solution, given that the fraudulent activity at issue in this Article may not ordinarily justify federal jurisdiction. After all, the loss amount – actual or anticipated – here likely does not exceed several thousand dollars, in contrast to the substantially larger loss amounts usually seen in federal fraud cases.[389]

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384. U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2019 PRESIDENTIAL ELECTION (2019), https://cdn.cnn.com/cnn/2019/images/04/18/mueller-report-searchable.pdf [perma.cc/8EV4-ZY5P].

385. *Id.*

386. *See* Patricia Zengerle & Doina Chiacu, *U.S. 2018 Elections 'Under Attack' by Russia: U.S. Intelligence Chief*, REUTERS (Feb. 13, 2018), https://www.reuters.com/article/us-usa-security-russia-elections/u-s-2018-elections-under-attack-by-russia-u-s-intelligence-chief-idUSKCN1FX1Z8 [perma.cc/9JHU-6NLR].

387. *See* David P. Fidler, *Transforming Election Cybersecurity*, COUNCIL ON FOREIGN REL. (May 17, 2017), https://www.cfr.org/report/transforming-election-cybersecurity [perma.cc/2CSJ-68E8]; Paul Rosenzweig et al., *Next Steps for U.S. Cybersecurity in the Trump Administration: Active Cyber Defense*, THE HERITAGE FOUND. (May 5, 2017), https://www.heritage.org/sites/default/files/2017-05/BG3188.pdf [perma.cc/G7WS-SPJ2].

388. While 2020 presidential candidates have been sluggish to address digital disinformation outside of broad strokes, Elizabeth Warren recently released a plan to "fight[] digital disinformation." Her plan specifically calls for the creation of "civil and criminal penalties for knowingly disseminating false information about when and how to vote in U.S. elections." *Fighting Digital Disinformation*, WARREN FOR PRESIDENT, https://elizabethwarren.com/plans/fighting-digital-disinformation [perma.cc/ZH87-ZTRW] (last visited Jan. 29, 2020); Cristiano Lima, *How Warren Would Fight Election Disinformation*, POLITICO (Jan. 29, 2020, 11:08 AM EST), https://www.politico.com/news/2020/01/29/warren-plan-election-disinformation-2020-108854 [perma.cc/QP97-RPUA]. The proposal outlined by this Article comfortably fits with Warren's plan.

389. *E.g.*, Glenn R. Schmitt & Cassandra Syckes, *Overview of Federal Criminal Cases – Fiscal Year 2017*, U.S. SENTENCING COMM'N, 11 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf [perma.cc/LK5A-7V6A] ("The losses in [federal fraud] cases [in 2017] ranged from no loss (in 170

Indeed, any U.S. Attorney's Office presented with the possibility of pursuing these charges would likely find that the loss amount falls below the "generally applicable minimum thresholds" in their internal prosecution guidelines.[390]

But in any event, federal prosecution would be appropriate given the facts of the case. Though the individual losses were – or would be – very small, they would likely be spread out over a large, national range, which would prevent a state prosecutor from effectively bringing charges.[391] So perhaps counterintuitively, *because* the loss amount is so small, "federal prosecution would be appropriate not only because of state inability to deal with the situation, but because the abuse of the [wires] is an inherent element of the scheme."[392]

In this case, prosecution would serve a strong federal interest. The interest at stake is weightier than concerns over how fake polls can shade the accuracy of an academic endeavor in prediction markets. It is instead to deter other wrongdoers, the sort who would weaponize fake polls to manipulate elections. Though the statutory theories that may lead to criminal liability for the publishers of *these* fake polls may not lead to similar liability for *other* publishers, like foreign governments and campaigns, deterring this sort of fraud before it can happen – and raising awareness of it – is vital.

CONCLUSION

The fake polls that have been created and distributed to online political betting markets seemingly represent just another routine use of fraud to make a quick buck. And in many ways, this is true. But to other, far more malicious

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cases) to more than $8 billion (one case), with an average loss amount of $6,100,603 and a median loss amount of $246,553."); *but see* Stephen F. Smith, *Federalization's Folly*, 56 SAN DIEGO L. REV. 31, 52 n.81 (2019) ("With a 'median loss amount of $246,553,' it is clear that many involved fairly small losses to victims. Indeed, almost a quarter (23.7%) of fraud defendants were not required to pay any restitution.") (citation omitted).

390. Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1142 (2004). These specific thresholds, as well as the internal guidelines more generally, are not publicly available, but usually differ depending on the U.S. Attorney's office in question and the volume of cases it handles. Patrick E. Corbett, *Prosecution Responses to Internet Victimization: Prosecuting the Internet Fraud Case Without Going Broke*, 76 MISS. L.J. 841, 863–64, 864 n.90 (2007).

391. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1140–45 (1995).

392. L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 73–75 (1948). Of course, this justification was, at least historically, predicated on *mail*, not *wire*, fraud, because abuse of the mails was an abuse of a "federally supported means of communication." *Id.* at 74.

actors, they could represent something more enticing – an opportunity to disrupt American elections as a means of achieving a foreign policy objective or for personal political gain. At first blush, these threats may seem unimaginable and unrealistic. However, with the benefit of hindsight and a more thorough understanding of the successful election interference in 2016 by Russian intelligence forces, these threats should be taken seriously by federal prosecutors. The consequences of fake polls are quite real – and so, too, should be their punishment.