11-23-2021

Muzzling Anti-Vaxxer FEAR Speech: Overcoming Free Speech Obstacles with Compelled Speech

Barbara Pfeffer Billauer
University of Porto

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Part of the [Law and Politics Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Barbara Pfeffer Billauer, *Muzzling Anti-Vaxxer FEAR Speech: Overcoming Free Speech Obstacles with Compelled Speech*, 76 U. MIA L. Rev. 1 ()

Available at: <https://repository.law.miami.edu/umlr/vol76/iss1/3>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Muzzling Anti-Vaxxer FEAR Speech: Overcoming Free Speech Obstacles with Compelled Speech

BARBARA PFEFFER BILLAUER^{*}

As the anti-vax industry continues to stoke fear and incite vaccine resistance, some means must be found to detoxify their false messages. Counterspeech, the preferred mode to deal with unfortunate rhetoric, is both ineffective and counter-effective when addressing factual “scientific speech” addressing health, I show here that many instances of the most potent anti-vax speech arise in the context of arguably commercial speech. I therefore investigate other free speech protections available to shield factually false anti-vax speech used in this context, concluding that while complete First Amendment protection may exist in the context of political speech (without proof of fraud), protections are more limited in the context of commercial speech. I then investigate the commercial ties of anti-vax groups and their mechanisms used in their strikingly effective outreach targeting insular audiences: the conference and pamphlet vehicles.

^{*} Barbara Pfeffer Billauer JD, MA , PhD, is Professor of Law in the International Program in Bioethics of the University of Porto, Portugal and Research Professor of Scientific Statecraft at the Institute of World Politics, Washington, DC. Dr. Billauer is currently a Visiting Sr. Faculty at the College of Law and Science in Hod HaSharon, Israel. With advanced degrees in law and public health, her scholarship focuses on tortious and constitutional aspects of health law practices. Her book, *Health Inequality and the Elderly: The Impact of Pandemic Policy, Law and Bioethics*, was recently published. The author gratefully acknowledges the advice and comments of Professors Eugene Volokh, Norman A. Bailey, Joshua Douglas, Spencer Waller, and Ms. Caroline McGuire. The author, however, bears full responsibility for the content of this Article.

Research indicates that these anti-vax vehicles incorporate fingerprints of commercial enterprise, thereby making them eligible for regulation under the doctrine of compelled speech. I conclude by proposing that this approach allows for requiring imposition of warning labels on pamphlets as well as conference advertising and marketing. This novel approach may provide the salutary benefit not obtainable by counterspeech.

INTRODUCTION	4
I. ANTI-VAX SPEECH AS A GRAVE AND IMMINENT THREAT	13
A. <i>Background</i>	13
B. <i>The Anti-Vax Modus Operandi</i>	17
II. CONTROLLING FEAR SPEECH UNDER THE FIRST AMENDMENT	23
A. <i>An Historical Review</i>	23
B. <i>The Brandenburg Standard: Incitement of Imminent Lawlessness</i>	29
C. <i>Charged Speech and Wanton Speech</i>	36
D. <i>False Speech as Protected Speech:</i> United States v. Alvarez	45
1. THE LEVEL OF JUDICIAL SCRUTINY DETERMINES THE OUTCOME	46
2. BALANCING THE GOVERNMENTAL INTERESTS	49
3. PROVABILITY	50
4. FRAUD AND <i>MENS REA</i>	52
5. THE LEAST RESTRICTIVE ALTERNATIVE	53
6. THE FUTILITY OF COUNTERSPEECH IN THE ANTI- VAX CONTEXT	54
III. ANTI-VAX RHETORIC AS COMMERCIAL SPEECH	59
A. <i>What is Commercial Speech?</i>	59
B. <i>Regulating Commercial Speech</i>	64
C. <i>Anti-vax Speech as Commercial Speech</i>	69
IV. A SOLUTION: COMPELLED SPEECH AND WARNINGS	73
A. <i>Compelled Speech—A Less Invasive Alternative</i>	73
B. <i>Compelling Factual and Non-Controversial Speech</i>	76
C. <i>Public Health Communications Campaigns and Warnings</i>	78
CONCLUSION	80

INTRODUCTION

The conflict between “*the needs of the many*” versus “*the [needs of the] few*,” as brilliantly articulated by *Star Trek* icon Mr. Spock, is, of course, not new, nor is it relegated to the realm of law.¹ With COVID-19 ransacking the planet, we are facing our second global epidemic in three years, right on the heels of the 2018–19 measles pandemic—bringing Spock’s mantra into stark relief.

The COVID-19 pandemic is exaggerated by actions of organized anti-vaccination (anti-vax) groups actively fulminating vaccine resistance,² stoking an already high vaccine resistance.³ Their efforts spout junk science and propaganda in its most egregious form: FEAR Speech. This false, flawed, fake, fraudulent, endangering, and reckless speech⁴ is designed to convince a suggestible and scientifically illiterate public that vaccines are dangerous, that the disease is not, and that vaccination should be avoided.⁵ It is highly effective at dissuading vaccine uptake.⁶

Current COVID-19 anti-vax efforts mimic those used in the years leading up to the 2018–19 measles pandemic when the world saw measles cases and deaths escalate to levels it had not seen in

¹ See Ari Armstrong, *Spock’s Illogic: “The Needs of the Many Outweigh the Needs of the Few,”* OBJECTIVE STANDARD (Sept. 12, 2013), <https://theobjectivestandard.com/2013/09/spocks-illogic-the-needs-of-the-many-outweigh-the-needs-of-the-few/>.

² Barbara Pfeffer Billauer, *Religious Freedom vs. Compelled Vaccination: A Case-Study of the 2018–2019 Measles Epidemic- or the Law as a Public Health Response*, 71 CATH. U. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3775590> [hereinafter Billauer, *Measles I Public Health*]; see also Imran Ahmed, *Dismantling the anti-vaxx industry*, 27 NATURE MEDICINE 366 (2021), <https://www.nature.com/articles/s41591-021-01260-6>.

³ Maggie Fox, *Measles Cases More Than Triple in Europe*, NBC NEWS (Feb. 20, 2018, 1:10 PM), <https://www.nbcnews.com/health/health-news/measles-cases-more-triple-europe-n849581>.

⁴ Barbara Pfeffer Billauer, *Anti-vax FEAR Speech: A Public-Health-Driven Policy Initiative When Counter-Speech Won’t Work*, 32 HEALTH MATRIX: J. L.-M. (forthcoming 2022) [hereinafter Billauer, *Measles II FEAR Speech*].

⁵ CENTER FOR COUNTERING DIGITAL HATE, THE ANTI-VAXX PLAYBOOK 11–21 (2020), https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9_fddbfb2a0c05461cb4bdce2892f3cad0.pdf (reporting online anti-vaxxers’ “master narrative” has three key messages: “COVID is not dangerous, COVID vaccines are dangerous, Vaccine advocates cannot be trusted”).

⁶ *Id.* at 4–5.

thirty years.⁷ Four developed countries lost their World Health Organization (WHO) Status for eradicating the disease.⁸ The United States barely escaped.⁹

The effects in less developed countries were far worse. The first eleven months of 2019 saw the Philippines reporting 42,612 measles cases and 566 measles-related deaths, many in children less than nine months old.¹⁰ The case-fatality was one percent,¹¹ similar to that sustained in the U.S. prior to vaccine development in 1963,¹² not far from the American COVID-19 rates.¹³ While the Philippines was battling its outbreak, Samoa, with a population about the size of Rochester, NY, was similarly engaged.¹⁴ In the last three months of 2019, Samoa reported eighty-one measles-related deaths.¹⁵ All but seven of these deaths were children under the age of fifteen.¹⁶

⁷ Billauer, *Measles I Public Health*, *supra* note 2, at 39–40; *see also* Billauer, *Measles II FEAR Speech*, *supra* note 4, at 2.

⁸ *Measles: Four European Nations Lose Eradication Status*, BBC NEWS (Aug. 29, 2019), <https://www.bbc.com/news/health-49507253>.

⁹ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 39–40.

¹⁰ Erika Fry, *Epidemic of Fear: How the Trouble-Ridden Debut of a Breakthrough Vaccine Sparked a Panic*, FORTUNE (Nov. 26, 2019, 6:00 AM), <https://fortune.com/longform/sanofi-dengue-fever-vaccine-dengvaxia/>.

¹¹ *Philippines Measles Outbreak 2019: 44K Cases, 576 Deaths*, OUTBREAK NEWS TODAY (Dec. 12, 2019), <https://outbreaknewstoday.com/philippines-measles-outbreak-2019-44k-cases-576-deaths-54972/>.

¹² *Measles History*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/about/history.html> (Nov. 5, 2020).

¹³ CTR. DISEASE CONTROL & PREVENTION, COVID-19 Mortality Overview, <https://www.cdc.gov/nchs/covid19/mortality-overview.htm> (Apr. 23, 2021) (reporting 748,164 deaths attributed to COVID-19 on death certificates as of September 29, 2021).

¹⁴ Lagipoiva Cherelle Jackson & Kate Lyons, “*These Babies Should Not Have Died*”: *How the Measles Outbreak Took Hold in Samoa*, THE GUARDIAN (Dec. 17, 2019, 6:58 PM), <https://www.theguardian.com/world/2019/dec/18/these-babies-should-not-have-died-how-the-measles-outbreak-took-hold-in-samoa>; *see also* *Philippines measles outbreak 2019: 44K cases, 576 deaths*, OUTBREAK NEWS TODAY, December 12, 2019.

¹⁵ WHO AND UNICEF, MEASLES OUTBREAK IN THE PACIFIC – SITUATION REPORT No. 9 2 (2019), https://www.who.int/docs/default-source/wpro---documents/dps/outbreaks-and-emergencies/measles-2019/measles-pacific-who-unicef-sitrep-20200103.pdf?sfvrsn=82f90381_2https://www.who.int/docs/default-source/wpro---documents/dps/outbreaks-and-emergencies/measles-2019/measles-pacific-who-unicef-sitrep-20200103.pdf?sfvrsn=82f90381_2.

¹⁶ *See id.*

Hospitalization was forty percent¹⁷ and the Samoan case fatality was one-and-a-half percent,¹⁸ similar to the current American COVID-19 case-fatality.¹⁹ It took a mandatory vaccination law addressed to all Samoan citizens²⁰—all 200,874 of them,²¹ for the epidemic to be felled²²—but not before it spread to Tonga, a small country about 550 miles away, transported by a squad of Tongan rugby players from New Zealand.²³

As of mid-2020, estimates suggested that fifty percent of the populace may refuse the COVID-19 vaccine,²⁴ in large measure

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ GOV'T OF SAMOA SDGs TASKFORCE, SAMOA'S SECOND VOLUNTARY NATIONAL REVIEW ON THE IMPLEMENTATION OF THE SUSTAINABLE DEVELOPMENT GOALS, CASE STUDY: MEASLES EPIDEMIC 2019 AND THE SDGS 50 (2020), https://sustainabledevelopment.un.org/content/documents/26429Samoa_Samos2ndVNR2020reduced.pdf; Lidia Kelly, *Samoa Declares State of Emergency as Measles Spreads Across Pacific*, REUTERS (Nov. 16, 2019, 9:19 PM), <https://www.reuters.com/article/health-measles-samoa/samoa-declares-state-of-emergency-as-measles-spreads-across-pacific-idUSL5N27X010>; see also Nick Perry, *Samoa Measles Epidemic Worsens with 24 Children Now Dead*, ASSOCIATED PRESS (Nov. 25, 2019), <https://apnews.com/article/health-new-zealand-epidemics-samoa-measles-8802d022fb8c4c6c8c9825375e3e8ca3>.

²¹ *Samoa Measles Outbreak: 100 New Cases as Anti-Vaccination Activist Charged*, THE GUARDIAN (Dec. 6, 2019, 11:56 PM), <https://www.theguardian.com/world/2019/dec/07/samoa-measles-crisis-100-new-cases-as-anti-vaccination-activist-charged>.

²² See *Death Toll from Measles in Samoa Reaches 79*, RNZ (Dec. 21, 2019, 4:22 PM), <https://www.rnz.co.nz/international/pacific-news/405991/death-toll-from-measles-in-samoa-reaches-79>; Press Release, Gov't of Samoa, National Emergency Operation Centre: (Press Release 36) Update on the Measles Outbreak (Dec. 22, 2019), <https://www.facebook.com/samoagovt/posts/2835748539789483> (the original press release was posted on Facebook and it was not posted on the Government's website).

²³ Kelly, *supra* note 20.

²⁴ See Warren Cornwall, *Just 50% of Americans Plan to Get a COVID-19 Vaccine. Here's How to Win Over the Rest*, SCIENCE (June 30, 2020), <https://www.science.org/news/2020/06/just-50-americans-plan-get-covid-19-vaccine-here-s-how-win-over-rest>; see also Peter Jamison, *Infected by Doubt: A 26-Year-Old Film Editor's Descent Into Coronavirus Vaccine Theories*, WASH. POST (Aug. 31, 2020), <https://www.washingtonpost.com/dc-md-va/2020/08/31/covid-19-vaccine-conspiracy-theories-public-support/> (reporting that a CNN poll in mid-August found that 40% of Americans said they would not try to get a coronavirus vaccine if it were widely available at a low cost and just over 50% would try to get one, which have been borne out by real data) [hereinafter Jamison,

stoked by the same anti-vax community that targeted measles.²⁵ But things could get worse—especially if the anti-vax messages proliferate. Imagine, if you will, that COVID-19 becomes a cyclical disease, like influenza, and if, simultaneously we are visited with another scourge of measles, as history portends.²⁶ Should this occur, we would be battling two vaccine-preventable diseases simultaneously, inflating the possibility of creating mutations and crashing the healthcare system. All the while, the anti-vaxxers merrily proceed along, successfully employing their propaganda and recruiting more converts.²⁷ Indeed, they began targeting COVID-19 even before a vaccine existed.²⁸ Because many constitutional scholars believe the First Amendment safeguards the rights of the anti-vax community to champion their false cause,²⁹ the government does not stop anti-vax rhetoric, and the message spreads and roots.

These anti-vax groups prey on vulnerable, ignorant, and unsuspecting pockets of society.³⁰ Their tactics include using targeted

Infected by Doubt]; *Half of Americans Either Refuse or Delay Covid Vaccination*, TRTWORLD (Feb. 2, 2021), <https://www.trtworld.com/magazine/half-of-americans-either-refuse-or-delay-covid-vaccination-43814>.

²⁵ Jamison, *Infected by Doubt*, *supra* note 24.

²⁶ See Cameron English, *Anti-Vaccine Group ‘Children’s Health Defense’ Smells a Coronavirus Conspiracy*, AMERICAN COUNCIL ON SCIENCE AND HEALTH (Apr. 1, 2020), <https://www.acsh.org/news/2020/04/01/anti-vaccine-group-childrens-health-defense-smells-coronavirus-conspiracy-14681> (“Children’s Health Defense says governments and corporations are using the coronavirus (SARS-COV-2) to advance a ‘global immunization agenda.’ . . . The anti-vaccine group claims that our leaders just needed the right pandemic as a pretext to goad us into getting vaccines. This is a clever story. It is also false.”).

²⁷ *Id.*

²⁸ David Klepper & Beatrice Dupuy, *Groups Sow Doubt About COVID Vaccine Before One Even Exists*, ASSOCIATED PRESS (Apr. 29, 2020), <https://apnews.com/article/mo-state-wire-id-state-wire-pa-state-wire-ny-state-wire-virus-outbreak-3287934e9316b008e2a6c7735b7b01df>.

²⁹ See Billauer, *Measles II FEAR Speech*, *supra* note 4, at 46.

³⁰ Julia Belluz, *New York’s Orthodox Jewish Community is Battling Measles Outbreaks. Vaccine Deniers are to Blame*, VOX, <https://www.vox.com/science-and-health/2018/11/9/18068036/measles-new-york-orthodox-jewish-community-vaccines> (“tight-knit communities—like the Somali-American community in Minnesota, the Amish in Ohio, and, more recently, the Russian-language immigrants in Washington—have recently fallen victim to measles outbreaks as a result of vaccine refusal. This New York outbreak is a reminder of how vulnerable more insular groups can be to anti-vaxxers, and the unique challenges for public

materials designed to inflame idiosyncratic fears of these marginalized groups.³¹ Thus far, attacks have been focused on the Somali and ultra-Orthodox Jews.³² With rip-roaring success, these groups stoked nascent resistance, exacerbating the indigenous contagion arising from an insular lifestyle and larger families.³³ These antics caused measles vaccine rates to plummet by as much as seventy five percent, increasing measles incidence in some areas by ten-fold in these communities.³⁴ This go-around with COVID-19, anti-vax groups are plumping for their newest victims—the Black community,³⁵ with outreach to this community having begun over a year ago, even before COVID-19 vaccines were available.³⁶

Various state and local initiatives have been proposed to topple the nefarious threat of anti-vax groups, which the WHO called one of the top ten public health scourges of 2019.³⁷ While pre-school vaccination for many diseases is required in all fifty states, generally

health advocates in countering their messages in these communities.”) (Apr. 10, 2019, 1:22 PM).

³¹ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 3.

³² *See id.* at 13–14, 19.

³³ *Id.* at 53.

³⁴ *Id.* at 24; Ruchira Sharma, *A Measles Outbreak in London Has Reached More Than 300 People In the Past Six Months*, INEWS.CO.UK, <https://inews.co.uk/news/measles-outbreak-london-hackney-haringey-cases-council-vaccination-276615> (Oct. 7, 2020, 4:29 PM) (reporting that the “latest outbreak [of measles] at 10 times” the rate between 2006 and 2013).

³⁵ Barbara Pfeffer Billauer, *Sisyphus, A Safer COVID-19 Vaccine, And Susceptible Populations*, AM. COUNCIL ON SCI. AND HEALTH (Nov. 2, 2020), <https://www.acsh.org/news/2020/11/02/sisyphus-safer-covid-19-vaccine-and-susceptible-populations-15123> [hereinafter Billauer, *Sisyphus*].

³⁶ Peter Jamison, *Anti-Vaccination Leaders Fuel Black Mistrust of Medical Establishment as Covid-19 Kills People of Color*, WASH. POST (July 17, 2020), <https://www.washingtonpost.com/dc-md-va/2020/07/17/black-anti-vaccine-coronavirus-tuskegee-syphilis/> (reporting on a Colorado bill tightening vaccine exemptions, noting “a remarkable new alliance between the anti-vaccine movement and black leaders in Colorado,” who felt aligned with their themes: “a predatory pharmaceutical industry profiting from the ignorance of vulnerable people . . .”) [hereinafter Jamison, *Anti-Vaccination Leaders*]; *see also* Billauer, *Measles II FEAR Speech*, *supra* note 4, at 3.

³⁷ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 3 (citing *see also* Aristos Georgiou, *Anti-Vax Movement Listed by World Health Organization as One of the Top Health Threats for 2019*, NEWSWEEK (Jan. 15, 2019, 1:01 PM), <https://www.newsweek.com/world-health-organization-who-un-global-health-air-pollution-anti-vaxxers-1292493>).

schools allow religious and sometimes philosophical exemptions.³⁸ Five states have now eliminated all non-medical exemptions, ensuring constitutional challenges were all rebuffed.³⁹ However, this approach has been torpedoed.⁴⁰ Recently, other states such as New Jersey, Maine, and Connecticut, have tried and failed to enact similar legislation.⁴¹ The anti-vaxxers have propagandized the legislators, now fearful of losing votes.⁴² They have infiltrated state governments, insuring other counter anti-vax measures will not pass.⁴³ The latest setback comes in *Roman Catholic Diocese v. Cuomo*,⁴⁴ which demeans the state's ability to protect the public health of its citizens under its police powers.⁴⁵ And while social media seemingly has begun reigning in anti-vax messages,⁴⁶ nothing is done to stop

³⁸ Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 356–57 (2004); see also James G. Hodge & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 874 (2002).

³⁹ Meredith Gingold, *The Path is Cleared: A Growing Body of Case Law Upholds State's Removal of Non-Medical Vaccination Exemption; Minnesota Should Be Next*, MINN. L. REV. BLOG (Dec. 4, 2018), <https://minnesotalawreview.org/2019/12/04/the-path-is-cleared-a-growing-body-of-case-law-upholds-states-removal-of-non-medical-vaccination-exemptions-minnesota-should-be-next/>.

⁴⁰ Billauer, *Measles I Public Health*, supra note 2, at 40–41.

⁴¹ *Id.* at 40–42.

⁴² Billauer, *Measles II FEAR Speech*, supra note 4, at 42, 54.

⁴³ Gingold, supra note 39 (“[I]n Minnesota government: key government leaders espouse immunization doubts, and vaccination skeptics were recently appointed to a new state autism council”).

⁴⁴ *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).

⁴⁵ Barbara Pfeffer Billauer, *How To Stage A Lockdown Without Triggering Constitutional Objections*, AM. COUNCIL ON SCI. AND HEALTH (Jan. 19, 2021), <https://www.acsh.org/news/2021/01/19/how-stage-lockdown-without-triggering-constitutional-objections-15286> [hereinafter Billauer, *How to Stage*].

⁴⁶ See Twitter Safety (@TwitterSafety), TWITTER (Dec. 16, 2020), https://blog.twitter.com/en_us/topics/company/2020/covid19-vaccine (discussing how to address misinformation about COVID-19 vaccinations); Jon Allsop, *Facebook Will Kick out Anti-Vaccine Misinformation. Is it Too Late?*, COL. JOURNALISM REV. (Dec. 4, 2020), https://www.cjr.org/the_media_today/facebook_coronavirus_vaccine_misinformation.php (announcing Facebook has promised to remove COVID-19 vaccination misinformation). But see Alex Berzow, *Why Isn't Anti-Vaxxer Robert F. Kennedy, Jr. Banned from Social Media?*, AM. COUNCIL ON SCI. AND HEALTH (Jan. 28, 2021), <https://www.acsh.org/news/>

organized anti-vax outreach in the form of conferences, symposia, forums, robo-calls, and pamphleteering,⁴⁷ all transpiring in the face of government officials who fear stopping them.⁴⁸

The prevailing belief of constitutionalists is that counterspeech is the antidote to noxious political speech where no imminent incitement to lawlessness is involved.⁴⁹ Why factual, scientific speech should fall under the penumbra of political speech is never addressed head-on.⁵⁰ More importantly, however, is that counterspeech regarding scientific facts, especially vaccines, just does not work.⁵¹ In fact, counter anti-vax speech may “backfire”, a term-of-art denoting cementing the mis-message, thereby escalating the problem.⁵² Further, a quick look at social media hosting anti-vax dialogue reveals that the dialogue is beyond acerbic.⁵³ The “civil”

2021/01/28/why-isnt-anti-vaxxer-robert-f-kennedy-jr-banned-social-media-15305.

⁴⁷ See Billauer, *Measles II FEAR Speech*, *supra* note 4, at 2, 5, 36; see also Oxiris Barbot, *To Fight the Measles Outbreak, Health Departments Must Balance Civil Liberties with Civic Accountability*, HEALTH AFFAIRS BLOG (June 5, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190604.967726/full/>.

⁴⁸ Billauer, *Measles I Public Health*, *supra* note 2, at 41.

⁴⁹ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁵⁰ See *id.*

⁵¹ See Emily K. Vraga & Leticia Bode, *Addressing COVID-19 Misinformation on Social Media Preemptively and Responsively*, 27 EMERG. INFECT DIS. 369, 396–403 (2021) (“[N]ot enough correction research has been done to investigate the enduring effect of exposure to misinformation and its correction [I]f the correction follows best practices by emphasizing facts and providing an alternative explanation, . . . lowered misperceptions may endure over time.”); see Olivia Benecke & Sarah Elizabeth DeYoung, *Anti-Vaccine Decision-Making and Measles Resurgence in the United States*, 6 GLOB. PEDIATRIC HEALTH (Jul. 24, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6657116/pdf/10.1177_2333794X19862949.pdf; see also Billauer, *Measles II FEAR Speech*, *supra* note 4, at 33 nn.278–282.

⁵² See Vraga & Bode, *supra* note 51, at 396–403; see also Billauer, *Measles II FEAR Speech*, *supra* note 4 (discussing the infirmities of counter anti-vax speech).

⁵³ See, e.g., Philip Ball & Amy Maxmen, *The Epic Battle Against Coronavirus Misinformation and Conspiracy Theories*, NATURE (May 27, 2020), <https://www.nature.com/articles/d41586-020-01452-z>; David Gorski (Orac), *On Reasonable Apologists for the Antivaccine Movement*, RESPECTFUL INSOLENCE (Sept. 1, 2021), <https://respectfulinsolence.com/> [hereinafter Gorski (Orac), *On Reasonable Apologists*].

debate envisioned by Justice Brandeis has resulted in death threats⁵⁴ and physical assault.⁵⁵ And because anti-vaccine doctrine is also couched as theology or the right to personal choice, it eludes rational discussion.⁵⁶ That leaves us with a constitutional quandary. How do we contain the real and quantifiable harm presented by organized anti-vax rhetoric if the vehicle envisioned—counterspeech—is unavailable or ineffective? If we can't defuse it, can we shut it off? And if we can't shut it off, is there some way to mute, if not contain, it?

To assess constitutional barriers to muzzling anti-vax FEAR speech,⁵⁷ this article looks at the traditional body of First Amendment literature, but in a different way—through a public health law lens.⁵⁸ This article also adduces a body of lesser known, but important cases, along with recent studies on the effectiveness of counter anti-vax literature. This compilation of legal and scientific materials leads us to a conclusion quite different from conventional First Amendment views and readers' expectations—one more in line with public health law and the current needs of the country.

A companion article suggests that using government speech to mandate a curriculum educating high school students on the rudiments of risk assessment, statistics, and microbiology—to enable them to proactively detoxify anti-vax propaganda.⁵⁹ However, this approach will do little to address current and ongoing dissemination of the anti-vax message. It will have little effect on preventing the

⁵⁴ Leah Simpson, *Pediatrician Gets DEATH THREATS After Posting a Pro-Vaccination Video on TikTok Reassuring Young People That They Don't Cause Autism*, DAILY MAIL, <https://www.dailymail.co.uk/news/article-7905327/Pediatrician-gets-DEATH-THREATS-posting-video-TikTok-saying-vaccines-dont-cause-autism.html> (Jan. 19, 2020, 6:09 PM).

⁵⁵ Anita Chabria, *Anti-Vaccine Protester Charged with Throwing Blood at California Lawmakers is Charged with Two Felonies*, L.A. TIMES (Jan. 10, 2020, 9:00 AM), <https://www.latimes.com/california/story/2020-01-10/charges-filed-against-vaccine-protester-accused-of-throwing-blood-onto-california-state-senators> (“[the incident] was suspected to be in protest of legislation signed by Gov. Gavin Newsom . . . that limited exemptions for childhood vaccinations”).

⁵⁶ See, e.g., Gorski (Orac), *On Reasonable Apologists*, *supra* note 53.

⁵⁷ See Billauer, *Measles II FEAR Speech*, *supra* note 4, at 2.

⁵⁸ See *infra* Part I.

⁵⁹ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 46, 51–55.

most vulnerable recipients—mothers in the targeted groups—from being seduced into believing the rank falsities.⁶⁰

This Article builds on my previous research objectively demonstrating the materiality of the threat produced by these groups, a feature necessary to sustain constitutional override.⁶¹ Relying on this data, this Article uses an original approach to interpret free speech literature and proposes an additional novel solution to the anti-vax problem in the form of compelled speech.⁶² This Article further suggests mandating warnings on conference advertising/placards and on the pamphlets themselves.⁶³ Since this is not a ban on speech, but rather a form of compelled speech, it should not invite valid push back. Pointedly, the aim of this work is to find a constitutionally sanctionable approach to fumigating anti-vax FEAR messages. In this regard, the approach is content-neutral: false, fake, fraudulent, or flawed information should never be used to coerce, persuade, intimidate, threaten, or manipulate an audience to take steps which are detrimental to their health, or that of their children and society, regardless of which side of the debate the information comes from.

This Article proceeds in four parts. Part I reviews the effectiveness of the anti-vax groups (the nature of the harm justifying the governmental interest invoked) and identifies their most effective means of persuasion. Part II recalls the constitutional predicates

⁶⁰ See *id.* at 5 (“Educating a scientifically-averse or illiterate public is hardly an achievable goal. But educating students, still within the ambit of their educational years . . . might well be achievable.”).

⁶¹ See, e.g., *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (“[the burden requires] showing not merely that [the ban’s] regulation will advance its interest, but also that it will do so ‘to a material degree’”); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (“[W]e must ask whether the State’s interests . . . are substantial, whether the challenged regulation advances these interests in a direct and material way, and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served.”); see also *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (finding that in some First Amendment contexts, it is permissible for litigants “to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether”); *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 535 (6th Cir. 2012) (“[T]he burden lies with the government to ‘demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’” (quoting *Ibanez v. Fla. Dep’t of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 146 (1994))).

⁶² See *infra* Part IV.

⁶³ See *infra* Part IV.

underlying free speech protection, including detailing exceptions to protection. Here, I also discuss the few cases where blanket free speech was rejected and examine the ambivalent nature of false speech when used in political vs. commercial speech. Part III discusses compelled speech in the context of commercial speech. Part IV proposes a vehicle to allow use of the commercial speech category in the context of organized anti-vax groups, including mandating warning labels on anti-vax literature and materials involved in marketing anti-vax conferences, using the 2019–20 measles epidemic as a case study.

I. ANTI-VAX SPEECH AS A GRAVE AND IMMINENT THREAT

A. *Background*

According to the WHO, European measles cases more than tripled during 2017–18 from the year prior,⁶⁴ increasing again in 2019.⁶⁵ The reason for the dramatic upsurge: a growing population refusing vaccination⁶⁶ fulminated by organized anti-vaccine groups,⁶⁷ who honed their approach to deploy misinformation regarding the COVID-19 vaccine.⁶⁸ Moreover, they were sniffing out

⁶⁴ *Measles Cases in Europe Tripled Last Year, WHO Says*, BBC NEWS, (Feb. 7, 2019), <https://www.bbc.com/news/health-47157020> (“Over 90% of cases were in 10 countries, including France, Italy and Greece.”).

⁶⁵ *New Measles Surveillance Data for 2019*, WORLD HEALTH ORG., <https://www.who.int/news/item/15-05-2019-new-measles-surveillance-data-for-2019> (May 15, 2019) (“reported [measles] cases rose by 300 percent in the first three months of 2019, compared to the same period in 2018”).

⁶⁶ *See Vaccines: MEPs Concerned About Drop in Vaccination Rates in the EU*, EUR. PARLIAMENT NEWS, <https://www.europarl.europa.eu/news/en/headlines/society/20180316STO99921/vaccines-meps-concerned-about-drop-in-eu-vaccination-rates> (July 11, 2019, 4:17 PM) (listing refusal of vaccines as one way to explain the difference in immunization rates between EU countries).

⁶⁷ Megan Trimble, *WHO: Anti-Vaccine Movement a Top Threat in 2019*, U.S. NEWS & WORLD REP. (Jan. 16, 2019, 2:36 PM), <https://www.usnews.com/news/national-news/articles/2019-01-16/who-names-vaccine-hesitancy-as-top-world-threat-in-2019>; see Jamison, *Infected by Doubt*, *supra* note 24 (describing low percentages of Americans plan to get vaccinated due to anti-vaccination activists fueling people’s doubts).

⁶⁸ Kristin Lunz Trujillo & Matt Motta, *A Majority of Vaccine Skeptics Plan to Refuse a COVID-19 Vaccine, a Study Suggests, and that Could be a Big Problem*, THE CONVERSATION (May 4, 2020, 8:12 AM), <https://theconversation.com>

a new vulnerable cohort—the Black community in this new context.⁶⁹

Per a recent Washington Post survey, “[o]nly 32 percent of black adults said they would definitely get a [COVID-19] vaccine, compared with 45 percent of whites and Hispanics.”⁷⁰ Reportedly, anti-vax activists are stoking this resistance by targeting Black leaders, raising the abuses perpetrated in the Tuskegee experiments.⁷¹ One prolific anti-vax activist who is proficient in targeting vulnerable communities, Del Bigtree,⁷² has resurfaced in the COVID-19 anti-vax efforts.⁷³ Here, he “claims scientists are pursuing one of ‘the most dangerous vaccines ever attempted’ for a virus that poses little risk to most people.”⁷⁴ Bigtree, who was featured prominently in the measles anti-vax crusade, is already courting his next audience, claiming “the true rationale for a phased release of a vaccine could be to observe its effects in black and brown people, turning them into unwitting test subjects.”⁷⁵

/a-majority-of-vaccine-skeptics-plan-to-refuse-a-covid-19-vaccine-a-study-suggests-and-that-could-be-a-big-problem-137559; see also Jamison, *Infected by Doubt*, *supra* note 24 (reporting “40 percent of Americans said they would not try to get a coronavirus vaccine if it were widely available at a low cost” and just over 50% would try to get one due to “anti-vaccination activists” fueling people’s doubts); Cornwall, *supra* note 24 (noting, months before the vaccine emerged, that “health communication experts say they need to start to lay the groundwork for acceptance now, because the flood of misinformation from antivaccine activists has surged”).

⁶⁹ Jamison, *Anti-Vaccination Leaders*, *supra* note 36 (reporting on a Colorado bill tightening vaccine exemptions); see also Billauer, *Measles II FEAR Speech*, *supra* note 4, at 3.

⁷⁰ Jamison, *Anti-Vaccination Leaders*, *supra* note 36.

⁷¹ See Rae Ellen Bichell, *Anti-Vaccine Movement, Racism and COVID-19 Collide in Colorado*, KUNC (June 11, 2020, 9:45 AM), <https://www.kunc.org/politics/2020-06-11/anti-vaccine-movement-racism-and-covid-19-collide-in-colorado>; see also Billauer, *Sisyphus*, *supra* note 35; Wendy L. Wilson, *COVID-19 Vaccine: Dr. Anthony Fauci Gets Why Black People Are Weary After Tuskegee Experiment*, BET NEWS, (July 29, 2020, 2:21 PM), <https://www.bet.com/news/national/2020/07/29/covid-19-vaccine-black-people-weary-dr-anthony-fauci-interview.html>.

⁷² See Billauer, *Measles I Public Health*, *supra* note 2, at 17–18, 26.

⁷³ See Cornwall, *supra* note 24.

⁷⁴ *Id.*

⁷⁵ Jamison, *Anti-Vaccination Leaders*, *supra* note 36.

‘The United States of America has a history of testing on African American people’ ‘To all of my African American brothers and sisters, I want them to know, look—it looks like they might try to create a fear base in you to make you part of a safety trial.’⁷⁶

Past successes of the anti-vax group efforts bear note. For 2018–19, the state of New York registered some 1,000 measles cases, virtually all in the ultra-Orthodox enclaves including Williamsburg, Borough Park, and parts of Rockland County.⁷⁷ The country, as a whole, recorded 1,276 measles cases during that same time period.⁷⁸ In 2014, the last major American epidemic, the entire country reported 667 measles cases⁷⁹—fifty-eight in the aforementioned ultra-Orthodox enclaves.⁸⁰

⁷⁶ *Id.*

⁷⁷ Billauer, *Measles I Public Health*, *supra* note 2, at 22.

⁷⁸ Billauer, *Measles I Public Health*, *supra* note 2, at 5.

⁷⁹ *Measles Cases and Outbreaks*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/cases-outbreaks.html> (July 9, 2021).

⁸⁰ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 24.

Area and Outbreak Years	Prodromal outbreak	Recent outbreak	Percentage Increase	Anti-vax group
1. Somali in Minnesota:	21 (2013)	79 (2017)	376%	Multiple
2. Brooklyn:	58 (2011)	654 (2018–19)	1,127%	PEACH, ICAN
3. Hackney, London:	47 ⁸¹ (2012–13)	322 ⁸² (2019)	685%	PEACH
4. Israel (Entire)	1469 ⁸³ (2007–08)	4292 (2019)	~292%	PEACH, Informed Consent Group *with ties to ICAN and possibly RFK's Children's Defense Fund
5. Jerusalem:	491 ⁸⁴ (2007)	1444 ⁸⁵ + 662 (sub-urbs) (2018–19)		

Table 1: Major Measles Case Incidence in Insular Communities (2007–19)⁸⁶

During the interval between the 2014 and the 2018–19 outbreaks, we saw the rise of several anti-vax outfits, at least two of which specifically targeted the ultra-Orthodox community through dispensing pamphlets and hosting conferences and symposia.⁸⁷

⁸¹ *Id.* (citing Vanessa Baugh, Jose Figueroa, Joanne Bosanquet, Philippa Kemsley, Sarah Addiman, & Deborah Turbitt, *Ongoing Measles Outbreak in Orthodox Jewish Community, London, UK*, 19 EMERGING INFECTIOUS DISEASES 1707, 1708 (2013)).

⁸² *Id.* (citing Stephen Oryszczuk, *Measles Surge Among London's Charedi Children—72% HIGHER than Average*, JEWISH NEWS (Sept. 12, 2019, 11:19 AM), <https://jewishnews.timesofisrael.com/measles-surge-among-londons-charedi-children/>).

⁸³ *Id.*

⁸⁴ *Id.* (citing C. Stein-Zamir et al., *An Outbreak of Measles in an Ultra-Orthodox Jewish Community in Jerusalem, Israel, 2007 - An In-Depth Report*, 13 EUROSURVEILLANCE 57, 58 (2008), <https://doi.org/10.2807/ese.13.08.08045-en>).

⁸⁵ *Id.* (citing *Number of Measles Cases by Locality in the Country*, ISR. MINISTRY OF HEALTH (July 11, 2019), https://www.health.gov.il/Subjects/disease/Pages/Measles_by_Cities.aspx). Numbers for Jerusalem and suburbs for 2007 were 930 compared to 2100+ for 2018–19. *Id.*

⁸⁶ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 33.

⁸⁷ *Id.* at 23–24, 37–39.

Primary among them are the groups Parents Educating and Advocating for Children's Health ("PEACH") and Informed Consent Action Network ("ICAN").⁸⁸ Robert Kennedy Jr.'s Children's Health Defense targets the non-Jewish contingent.⁸⁹ During these five years, vaccination rates plummeted in areas targeted by these groups and measles cases exploded.⁹⁰

B. *The Anti-Vax Modus Operandi*

My prior research revealed that the most effective dissemination vehicles of FEAR speech used by PEACH, ICAN, and other groups targeting insular communities is low tech,⁹¹ notably conferences and pamphlets.⁹² Squelching these expressive venues raises concerns of violating rights of freedoms of assembly, speech, and press—all of which this Article addresses under one umbrella of free speech.⁹³ The salient question becomes: can the rhetoric be shut down or otherwise controlled? New York State officials believe not. Defending a choice not to punish licensed physicians who spread anti-vax information, NYS Department of Health spokeswoman Jill Montag said, "the First Amendment protects an individual's right to speak and express opinions about controversial topics without fear of government retaliation," even as

⁸⁸ *Id.* at 22–23.

⁸⁹ *Id.* at 22–23, 35.

⁹⁰ *See, e.g., id.* at 22, 29.

⁹¹ *See Health Ministry Weighs Calling the Cops On Anti-Vaxxers Who Fake Appointments*, TIMES OF ISR. (Feb. 5, 2021, 2:04 AM), <https://www.timesofisrael.com/health-ministry-weighs-going-to-cops-as-anti-vaxxers-fake-appointments/>. In Israel, anti-vaxxers were reportedly making appointments for COVID-19 vaccination and abruptly cancelling them, forcing Health funds to throw out unused doses. "Channel 13 also revealed that a voice recording was disseminated in parts of the ultra-Orthodox community in which listeners are implored, using fake statistics, not to go and vaccinate, claiming that those who do are at risk of falling ill or dying."

⁹² *See, e.g.,* Billauer, *Measles I Public Health*, *supra* note 2, at 17, 19–21, 23–24, 31; *see also* Bichell, *supra* note 71 (noting Rev. Al Sharpton, in conjunction with Kennedy Jr., had proposed an anti-vax forum).

⁹³ There is no distinction between the protections afforded freedom of the press and freedom of speech. *See* 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.19 (5th ed. 2012).

it applied to physicians making grossly negligent medical statements.⁹⁴ While the legal officials stood around hand-wringing, the public health authorities were aghast.⁹⁵ NYC Health Commissioner, Dr. Oxiris Barbot, noted that holding such an event during an outbreak is “beyond irresponsible, it is downright dangerous.”⁹⁶ She attributes the proliferation of these callous tactics to the fact that these anti-vax groups answer to no one, adding that these groups “are adept at using strategies—from anonymous robocalls to transmitting false information through the Web—with impunity because they have no one to hold them accountable for misinformation.”⁹⁷

This Article suggests New York’s legal assessment might have been in error. “[T]he First Amendment has never been thought to bar an action . . . based on such written or spoken expression in a medical context.”⁹⁸ Nevertheless, a strong constitutional underpinning for any restriction or control must be realized before proceeding. Accordingly, this Article first addresses the means and method of message dissemination.

The persuasion techniques used by these groups rely on FEAR speech, i.e., deliberately using false and misleading information,⁹⁹

⁹⁴ J.K. Trotter, *This New York Doctor has Been Publicly Urging Parents Not to Vaccinate Their Children in the Midst of a Measles Outbreak. Why is He Still Allowed to Practice Medicine?* BUS. INSIDER, (May 30, 2019, 11:15 AM), <https://www.insider.com/anti-vaccine-doctors-medical-license-free-speech-2019-5>.

⁹⁵ Beth Mole, *Measles Cases Hit 1,001 As Anti-Vaxxers Hold Another Rally of Disinformation*, ARS TECHNICA (June 6, 2019, 5:41 PM), <https://arstechnica.com/science/2019/06/anti-vaxxers-continue-spreading-wild-conspiracy-theories-amid-measles-outbreak/>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *In re Factor VIII or IX Concentrate Blood Prod. Litig.*, 25 F. Supp. 2d 837, 845 (N.D. Ill. 1998); *see infra* note 344 and accompanying text; *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (discussing the need to reconcile First Amendment values with the “legitimate state interest” in providing legal remedy for injurious falsehoods); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–58 (1985) (“the First Amendment interest . . . is less important than the one weighed in *Gertz*”).

⁹⁹ *E.g.*, *User Clip: REP. Bill Posey Calling for an Investigation of the CDC’s MMR research fraud*, C-SPAN (July 29, 2015), <https://www.c-span.org/video/?c4546421/user-clip-rep-bill-posey-calling-investigation-cdcs-mmr-research-fraud>; Alice Park, *Whistleblower Claims CDC Covered Up Data Showing Vaccine-Autism Link*, TIME (Aug. 28, 2014, 5:13 PM), <https://time.com/>

skewing statistics,¹⁰⁰ invoking an illegitimate specter of religious authority,¹⁰¹ appealing to emotion by presenting tragedy-stories, and relying on hysteria and fear-mongering, e.g., referring to the

3208886/whistleblower-claims-cdc-covered-up-data-showing-vaccine-autism-link/; see David Gorski, *Deception by Omission, Del Bigtree's ICAN Calls the Studies Licensing MMR Into Question*, SCI. BASED MED. (May 6, 2019), <https://sciencebasedmedicine.org/deception-by-omission-del-bigtrees-ican-calls-the-studies-licensing-mmr-into-question/> [hereinafter Gorski, *Deception by Omission*]; see also *Anti-Vaccination Event in Midwood Draws Ire from Residents, Officials*, NEWS 12 BROOKLYN (June 4, 2019, 7:45 PM), <http://brooklyn.news12.com/story/40593621/antivaccination-event-in-midwood-draws-ire-from-residents-officials>.

¹⁰⁰ *Guide to Interpreting VAERS Data*, Vaccine Adverse Event Reporting Sys., <https://vaers.hhs.gov/data/dataguide.html> (last visited Oct. 4, 2021); e.g., Mis-reliance on the VAERS database, misusing “IOM (Adverse Events Associated with Childhood Vaccines: Evidence Bearing on Causality); David Gorski, *Dumpster Diving in the VAERS Database to Find More COVID-19 Vaccine-Associate Myocarditis in Children*, SCI. BASED MED. (Sep. 13, 2021), <https://sciencebasedmedicine.org/dumpster-diving-in-vaers-doctors-fall-into-the-same-trap-as-antivaxxers/#>; ROSS LAZARUS, HARVARD PILGRIM HEALTH CARE, INC., ELECTRONIC SUPPORT FOR PUBLIC HEALTH-VACCINE ADVERSE EVENT REPORTING SYSTEM (ESP:VAERS) 6 (2010), <https://digital.ahrq.gov/sites/default/files/docs/publication/r18hs017045-lazarus-final-report-2011.pdf> (“Adverse events from drugs and vaccines are common, but . . . fewer than 1% of vaccine adverse events are reported.”).

¹⁰¹ See, e.g., Natan Slifkin, *The Daas Torah of AntiVaxxers*, RATIONALIST JUDAISM (Dec. 1, 2018), <http://www.rationalistjudaism.com/2018/12/the-daas-torah-of-antivaxxers.html>.

Holocaust and Goebbels,¹⁰² conspiracy theories,¹⁰³ bad government,¹⁰⁴ whored-science,¹⁰⁵ and out-of-context materials.¹⁰⁶ The anti-vaxxers also claim that measles is not particularly dangerous and advocate pox-parties where children are intentionally

¹⁰² Sarah E. Bond, *Anti-vaxxers are claiming centuries of Jewish suffering to look like martyrs*, THE WASHINGTON POST (June 1, 2021 2:28 PM), <https://www.washingtonpost.com/outlook/2021/06/01/antivaxxers-yellow-stars-holocaust/>, (linking prominent Nazi and minister of propaganda, Josef Goebbels, who required the Jewish people to wear the Star of David, with the current yellow star that anti-vaxxers are wearing); see Mole, *supra* note 95 (A reporter summarized the message of Del Bigtree, of NY-based anti-vax group ICAN, at a June 2019 Rockland County rally billed under an informed consent educational seminar: “Over the course of about 12 minutes, Bigtree linked vaccines to the Holocaust and then to child sacrifice. He compared them to Nazi experimentation on unwilling Jewish medical subjects, then to the intentional ritual murder of children, in an effort to debunk the scientific consensus that a critical mass of vaccinated people, or herd immunity, means that even those who cannot be vaccinated for genuine medical reasons will have some protection from getting sick. ‘It’s hard to imagine what it would be that would let you accept killing an innocent child,’ he said. ‘What if I presented to you that this would make it worth it? This is the argument, right? Herd immunity. Herd immunity is the reason we’re allowed to kill some children.’”); *Fact Check: Joseph Goebbels Misquote on “Converting Intellectuals” Resurfaces*, REUTERS (July 8, 2020, 1:52 PM), <https://www.reuters.com/article/uk-factcheck-joseph-goebbels-misquote-co/fact-check-joseph-goebbelsmisquoteon-converting-intellectualsresurfaces-idUSKBN2492TD>.

¹⁰³ At least one study adduced the vulnerability of anti-vax individuals to high levels of conspiracy thinking. See Matthew J. Hornsey, Emily A. Harris & Kelly S. Fielding, *The Psychological Roots of Anti-Vaccination Attitudes: A 24-Nation Investigation*, 37 HEALTH PSYCH. 307, 310 (2018).

¹⁰⁴ SETH MNOOKIN, *THE PANIC VIRUS: A TRUE STORY OF MEDICINE, SCIENCE, AND FEAR* 222 (2011).

¹⁰⁵ *How the Case Against the MMR Vaccine was Fixed*, THE BMJ (Jan. 6, 2011), <https://www.bmj.com/content/342/bmj.c5347>.

¹⁰⁶ A prime anti-vax trope misuses Dr. Marina Angel’s statement referring to reporting of clinical trial results generally. Arjun Walia, *Half Empty – The Editor In Chief of World’s Best Known Medical Journal Claims That Half of All The Literature is False*, PATHWAYS TO FAM. WELLNESS, Sept. 2015, <https://www.collective-evolution.com/2015/05/16/editor-in-chief-of-worlds-best-known-medical-journal-half-of-all-the-literature-is-false/>; see also *Anti-Vaccination Event in Midwood Draws Ire from Residents, Officials*, NEWS 12 BROOKLYN (June 5, 2019); see also Billauer, *Measles II FEAR Speech*, *supra* note 4, at 11 (discussing Robert F. Kennedy Jr.’s use of Bernard Guyer’s study on Trends in Children’s Health).

exposed.¹⁰⁷ Additionally, they ignore serious sequelae such as encephalitis, pneumonia, subacute sclerosing pan-encephalitis¹⁰⁸ and immune amnesia,¹⁰⁹ and brush off concerns by advising a dose of immunoglobulin, as if it would be easily obtainable in a global double-pandemic.¹¹⁰

According to anti-vax activists,¹¹¹ *nothing* adduced by the pro-vaccine population is valid, be it basic science or simple facts.¹¹²

¹⁰⁷ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 26.

¹⁰⁸ Maggie Fox, *Fatal Measles Complication Killed Patients Years Later*, NBC NEWS (Oct. 28, 2016, 3:47 PM), <https://www.nbcnews.com/health/health-news/fatal-measles-complication-killed-patients-years-later-n674706> (reporting complications that killed at least sixteen people from measles outbreak in California where measles virus remains in patient's brain, undetected, activating years later as sclerosing panencephalitis (SSPE) once patient had recovered); *see also Complications of Measles*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/symptoms/complications.html> (Nov. 5, 2020) (listing subacute sclerosing panencephalitis as a long-term and fatal complication from a measles virus infection acquired earlier).

¹⁰⁹ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 9 (citing Ryan O'Hare, *Measles Causes 'Immune Amnesia' Leaving Us Vulnerable to Other Diseases*, IMPERIAL COLLEGE LONDON (Oct. 31, 2019), <https://www.imperial.ac.uk/news/193639/measles-causes-immune-amnesia-leaving-vulnerable/>; Melissa Healy, *Measles Infection Causes 'Immune Amnesia' Leaving Kids Vulnerable to Other Illnesses*, L.A. TIMES (Oct. 31, 2019 11:02 AM), <https://www.latimes.com/science/story/2019-10-31/measles-infection-causes-immune-amnesia-leaving-kids-vulnerable-to-other-illnesses>).

¹¹⁰ Dave Goldiner, *Brooklyn's Kooky Anti-Vaxxer Rabbi is Extremist on Sex Abuse, Circumcision—Even Opposes Israel*, N.Y. DAILY NEWS (May 16, 2019, 4:07 AM), <https://www.nydailynews.com/news/politics/ny-antivaxxer-hillel-handler-rabbi-hasidic-orthodox-abuse-circumcision-20190516-li6utlmne5czhoz34bafvozsoa-story.html>.

¹¹¹ *See* MNOOKIN, *supra* note 104, at 208, 218–19 (2011) (including a comprehensive report on anti-vax rhetoric).

¹¹² Stewart Lyman, *Pharma's Tarnished Reputation Helps Fuel the Anti-Vaccine Movement*, STAT (Feb. 26, 2019), <https://www.statnews.com/2019/02/26/anti-vaccine-movement-pharma-tarnished-reputation/> (explaining that “[t]he awful reputation of the pharmaceutical industry is now inhibiting the use of some of its most lifesaving products”). One anti-vax author even contested the fact that measles caused the three reported Israeli deaths. He attributed one case to hospital malpractice in treating dehydration, not realizing that the disease causes dehydration no matter how careful the providers are. Then, he claimed that the stewardess who died of measles-related meningio-encephalitis died months later of unrelated causes. I showed him the regional health authority's determination and precisely laid out the scientific details. E-mail from Barbara Pfeffer Billauer, Rsch.

Everything pro-vaccine advocates propose is tainted by Big Pharma, whose influence is ubiquitous and effective, and which is involved in some conspiracy against the masses.¹¹³ Conferences sponsored by anti-vax groups¹¹⁴ are falsely marketed as benign educational symposia dedicated to providing accurate information, educating parents, and employing rhetoric tailored to the vulnerabilities of the targeted group.¹¹⁵

In addition to conferences, key vaccine-resistance influence can be traced to two periodicals produced by the PEACH group.¹¹⁶ A third anti-vax pamphlet—also targeted at the ultra-Orthodox—called *Gedolim Letters on Vaccination, Parental Rights and Religious Freedom* seems to have been influential in Lakewood, New Jersey thanks to its spiffy and professionally produced fifty-four-page-brochure by anonymous author(s).¹¹⁷ One local anti-vax group

Professor of Sci. Statecraft, Inst. of World Pol., to Gedolim Letters, letters@gedolimletters.org (Feb. 5, 2020, 11:32 PM) (on file with author).

¹¹³ See *id.*; see Brandy Zadrozny, *Brooklyn Measles Outbreak: How a Glossy Booklet Spread Anti-Vaccine Messages in Orthodox Jewish Communities*, NBC NEWS (Apr. 12, 2019, 12:29 PM), <https://www.nbcnews.com/news/us-news/brooklyn-measles-outbreak-how-glossy-booklet-spread-anti-vaccine-messages-n993596> (noting that “[r]esearch shows combining vaccine misinformation with alternative medicine, homeopathy and diet content [in the manner utilized by anti-vax groups] . . . is one of the most pervasive and persuasive techniques used . . . to forward their agenda”).

¹¹⁴ See Billauer, *Measles II FEAR Speech*, *supra* note 4, at 13 (finding anti-vax groups host “educational conferences [] purposefully designed to foster vaccine resistance”).

¹¹⁵ See Billauer, *Measles II FEAR Speech*, *supra* note 4, at 48 (“the anti-vax movement entitles its symposia and pamphlets ‘informed consent’ or ‘educational’ [which] is . . . the height of propagandizing and misrepresentation”).

¹¹⁶ Parents Educating & Advocating for Children’s Health, *The Vaccine Safety Handbook: An Informed Parent’s Guide* (2017), https://issuu.com/peachmoms/docs/the_vaccine_safety_handbook_a4 [hereinafter *The Vaccine Safety Handbook*]; see Billauer, *Measles II FEAR Speech*, *supra* note 4, at 37–39 (reporting officials trace vaccine skepticism in the Orthodox community to the PEACH organization).

¹¹⁷ See GEDOLIM LETTERS ON VACCINATION, PARENTAL RIGHTS, AND RELIGIOUS FREEDOM, <https://k6s3v6r4.ssl.hwcdn.net/?file=20200114181029.pdf> (last visited Oct. 6, 2021). “Gedolim” refers to the Great Ones, the most Eminent Sages. The author(s) rejected my invitation to identify themselves, citing fears of defamation. E-mail from Gedolim Letters, letters@gedolimletters.org, to Barbara Pfeffer Billauer, Research Professor of Sci. Statecraft, Inst. of World Pol. (Feb. 5, 2020, 9:30 PM) (on file with the author). The rabbinical stances have been

in Lakewood, called The Vaccine Coalition, a Coalition of Non-Vaccinating Parents in Lakewood, New Jersey,¹¹⁸ also may have been instrumental in the New Jersey Legislature's rejection of eliminating religious exemptions.¹¹⁹

As such, not only is the anti-vax movement garnering adherents who refuse to vaccinate their children (therefore endangering them and the children of others), but also toppling legislative efforts to compel vaccination via lobbying, rallying, and stacking applicable legislative bodies.¹²⁰ Their approach both endangers the public and entrenches a legislative inability to compel vaccination.¹²¹ Is there any way, then, to legally muzzle or detoxify this propaganda without breaching First Amendment protections so effortlessly tossed out by New York State Department of Health spokesman, Jill Montag?¹²²

II. CONTROLLING FEAR SPEECH UNDER THE FIRST AMENDMENT

A. *An Historical Review*

The First Amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble"¹²³

impressively countered in a self-published brochure by a local physician-philanthropist.

¹¹⁸ See Natan Slifkin, *The Lakewood Suicide Squad*, RATIONALIST JUDAISM (Mar. 10, 2018), <http://www.rationalistjudaism.com/2018/03/the-lakewood-suicide-squad.html>.

¹¹⁹ See *TOTAL BLOWOUT: 50 Anti-Vaxxers Show Up to Flatbush Event, 1,300 Empty Chairs*, YESHIVA WORLD (June 4, 2019, 9:35 PM), <https://www.theyeshivaworld.com/news/general/1738022/stay-out-of-flatbush-leading-flatbush-rabbonim-and-fjcc-denounce-planned-anti-vaxxer-event-being-held-in-flatbush.html> [hereinafter *TOTAL BLOWOUT*].

¹²⁰ See Billauer, *Measles II FEAR Speech*, *supra* note 4, at 28; Gingold, *supra* note 39.

¹²¹ BILL OF RIGHTS INSTITUTE, *How Has Speech Been Both Limited and Expanded, and How Does it Apply to You and Your School?*, in PRESERVING THE BILL OF RIGHTS, https://bri-docs.s3.amazonaws.com/PBR-006-HandoutA_fillable.pdf.

¹²² Trotter, *supra* note 94.

¹²³ U.S. CONST. amend. I.

But Free Speech protection, while expanding in recent years,¹²⁴ is not absolute. [A] [d]efendant's contention that the . . . contest must be afforded the deference due society's interest in the First Amendment is clearly without merit The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.¹²⁵

Indeed, well-defined exceptions lie for First Amendment protections.¹²⁶ Historically, classes of speech that do not receive First Amendment protections include: fighting words,¹²⁷ libel,¹²⁸ obscenities,¹²⁹ commercial speech,¹³⁰ and words likely to incite imminent lawless actions.¹³¹ The case of *United States v. Alvarez*¹³² tightens the noose around First Amendment exemptions, and identifies three more categories of speech undeserving of such protections: fraud,¹³³

¹²⁴ Case Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1996 (explaining *Reed v. Town of Gilbert* "expanded the zone of content-based regulations" by "[u]sing *Reed* to extend the full protection of the First Amendment"); see also Lovelace Berkeley, *Biden's Next Fight: Anti-Vaxxers Jeopardize Plans to Protect U.S. Against Covid*, CNBC (Sep. 20, 2021, 3:41 PM), <https://www.cnbc.com/2021/02/10/biden-covid-vaccine-anti-vaxxers-us.html>.

¹²⁵ *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 40 (Cal. 1975).

¹²⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

¹²⁷ *Id.* at 572.

¹²⁸ *Id.*; see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964) ("the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech . . . that are required by the First . . . Amendment[] in a libel action . . .").

¹²⁹ *Chaplinsky*, 315 U.S. at 572; *Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity as lacking in "serious literary, artistic, political, or scientific value.").

¹³⁰ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) (holding commercial speech has a limited measure of protection as a First Amendment value).

¹³¹ *Chaplinsky*, 315 U.S. at 572; *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) ("[T]he constitutional guarantee[] of free speech . . . do[es] not permit a State to forbid or prescribe advocacy of the use of force . . . except where such advocacy is directed to inciting or producing imminent lawless action . . .").

¹³² *U.S. v. Alvarez*, 567 U.S. 709, 709 (2012).

¹³³ *Id.*

true threats,¹³⁴ “and speech presenting some grave and imminent threat the Government has the power to prevent”¹³⁵

The broadest protection available for expressing *ideas* is issued under the guise of political/social speech, although that protection is not absolute either.¹³⁶ In the inimitable words of Professor Zechariah Chafee:

[I]t is useless to define free speech by talk about rights To find the boundary line of any right, we must get behind rules of law to human facts [I]n technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right.¹³⁷

We start with the premise that a governmental incursion may be justified to deprive life, liberty, and property by legitimate, substantial, or compelling federal interest.¹³⁸ A heightened protection against deprivation of due process is provided by the Fourteenth

¹³⁴ And employment-speak (labor relations). *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 778 (1976) (Stewart, J., concurring) (noting that “the employer’s freedom to communicate his views to his employees may be restricted by the requirement that any predictions ‘be carefully phrased on the basis of objective fact.’”); *Id.* at 779 (noting “the Gissel Packing Co. opinion is highly significant . . . because it underscores the constitutional importance of the speaker’s specific and unique knowledge of the relevant facts and establishes that a regulatory scheme monitoring “the impact of utterances” is not invariably inconsistent with the First Amendment).

¹³⁵ *Alvarez*, 567 U.S. at 709.

¹³⁶ *See* Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919) (noting the story of the man, arrested for swinging his arms and hitting another in the nose, who asked the judge if he did not have a right to swing his arms in a free country, to which the judge responds, “Your right to swing your arms ends just where the other man’s nose begins.”).

¹³⁷ *Id.*

¹³⁸ LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 131 (3d ed. 2016) (“The procedural element of due process requires government to provide a fair process before depriving a person of life, liberty, or property”).

Amendment¹³⁹ to avoid arbitrary and capricious actions. This is accomplished by affording the action in question various levels of scrutiny, ranging from common sense¹⁴⁰ or rational basis,¹⁴¹ to intermediate review,¹⁴² to strict scrutiny,¹⁴³ depending on the governmental interests involved.¹⁴⁴ In other words, competing rights must be balanced against each other.¹⁴⁵ The level of constitutional review depends on the nature of the classification of the civil liberty in question, and “signals how a court will balance the various interests in a particular case—the government’s interest in advancing the public good and the individual’s interest in . . . liberty.”¹⁴⁶

In the situation before us, Lady Justice holds freedom of speech protection on one side of the scale and balances a competing governmental interest—the police power to protect the public health—on the other.¹⁴⁷ As aforementioned, the level of scrutiny depends on the categorization of the governmental interest and the type of speech involved. For example, commercial speech is given less

¹³⁹ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting the fundamental right of a parent to oversee the care custody and control of a child).

¹⁴⁰ *Zauderer v. Off. of Disciplinary Counsel. of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985).

¹⁴¹ *Id.* at 651 (1985) (“If a commercial-speech disclosure requirement fits within the framework of *Zauderer* and its progeny, then we apply a rational-basis standard”); *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 554 (6th Cir. 2012) (citing *Zauderer*, 471 U.S. at 651).

¹⁴² *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 574 (1980); see also Nathan Cortez, *Do Graphic Tobacco Warnings Violate the First Amendment*, 64 HASTINGS L.J. 1467, 1467–500 (2013).

¹⁴³ *Compelled Speech*, COMMUNICATION LAW AND ETHICS, <https://revolutionsincommunication.com/law/compelled-speech/> (last visited Oct. 6, 2021).

¹⁴⁴ The interest involved dictates the level of scrutiny, but judicial categorization of the interest also affects the determination. In some cases, the interest can straddle two classes, the decision of which determines the level of inquiry and hence the outcome. The question, then, is which comes first, deciding the level of scrutiny or characterizing the interest.

¹⁴⁵ See John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1482–83 (1975) (discussing the Court’s unwillingness to hold that symbolic flag burning is constitutionally protected speech).

¹⁴⁶ GOSTIN & WILEY, *supra* note 138, at 44.

¹⁴⁷ DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, *FREEDOM OF EXPRESSION IN THE MARKETPLACE OF IDEAS* 245 (SAGE Publications, Inc. 2010).

protection and less rigorous scrutiny than political speech.¹⁴⁸ Balancing public health and safety against other rights is not new. In fact, it was addressed by Justice Holmes almost 100 years ago,¹⁴⁹ as he, along with Justice Brandeis, was quite concerned about preventing the spread of diseases.¹⁵⁰ Nor did his position change even after back-stepping from his famous freedom of speech position and imposing a greater assurance of immediacy of danger.¹⁵¹ Indeed, he tells us that “[t]he government interest in preventing death, injury and destruction of property is surely compelling [I]t is not an interest in ‘prohibit[ing] the ex-pression of an idea simply because society finds the idea itself offensive or disagreeable.’”¹⁵²

The precise framing of the governmental interest, however, appears outcome-determinative.¹⁵³ The Supreme Court had dealt with dangers of rampant epidemics, allowing mandatory vaccination and

¹⁴⁸ See *Discount Tobacco*, 674 F.3d at 523 (“[For commercial speech to come within . . . [First Amendment protection] . . . it at least must concern lawful activity and not be misleading”); see also *id.* at 522 (“[C]ommercial speech[] [is] . . . analyzed under a different and less rigorous standard.”).

¹⁴⁹ BRAD SNYDER, *THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM* 277 n.13 (2017) (In 1918—just a few years before he would come to be lionized as a free speech hero—Oliver Wendell Holmes, Jr. wrote in a letter to Learned Hand that, so far as Holmes was concerned, free speech “stands no differently than freedom from vaccination.”); see also ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 75 (1992).

¹⁵⁰ *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 412, 415 (1926) (Holmes, J., dissenting) (noting he would have struck down a Pennsylvania law prohibiting “use of “shoddy” in bedding whereas Holmes, Brandeis and Stone ruled that if unsterilized shoddy could spread disease, Pennsylvania law could ban its use in bedding); see also SNYDER, *supra* note 149, at 413 (noting the Court struck down a public health and safety regulation as a violation of due process under the Fourteenth Amendment); see also *Price v. Illinois*, 238 U.S. 446, 450–51 (1915).

¹⁵¹ See, e.g., *Whitney v. California*, 274 U.S. 357, 376, 378–79 (1927) (Brandeis, J., concurring) (“To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent.”); see *Schenck v. U.S.*, 249 U.S. 47, 48–49, 52 (1919).

¹⁵² Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2432 (1996) [hereinafter Volokh, *Freedom of Speech*].

¹⁵³ *Quong Wing v. Kirkendall*, 223 U.S. 59, 64 (1912) (“Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way.”).

invasion of one's physical corpus (and autonomy) in *Jacobson v. Massachusetts* during a scourge of smallpox.¹⁵⁴ Previously, the court addressed public health protection during major outbreaks of yellow fever and cholera.¹⁵⁵ One would think that if, under the ambit of its police power, the State could compel physical invasion by requiring vaccination¹⁵⁶—even in the face of religious objections,¹⁵⁷ they could shut down verbal objections. Alas, maybe not—especially in view of the *Roman Catholic Diocese* case.¹⁵⁸

¹⁵⁴ See *Jacobson v. Massachusetts*, 197 U.S. 11, 25–27, 38 (1905).

¹⁵⁵ See *id.* at 29 (finding an American citizen arriving at an American port after a journey where there were cases of yellow fever or cholera can be held in quarantine against his will).

¹⁵⁶ See *id.* at 27 (“a community has the right to protect itself against an epidemic of disease which threatens the safety of its members”).

¹⁵⁷ *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (“[t]he right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death.”); *Zucht v. King*, 260 U.S. 174, 176 (1922) (“a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative”); see also *Phillips v. City of New York*, 775 F.3d 538, 540 (2d Cir. 2015) (“the statute and regulation [requiring students in public schools to be immunized] are a constitutionally permissible exercise of the State’s police power and do not infringe on the free exercise of religion”); *Love v. State Dep’t of Educ.*, 240 Cal. Rptr. 3d 861, 865 (Cal. Ct. App. 3d 2018) (“Senate Bill No. 277, which repealed the personal belief exemption to California’s immunization requirements for children . . . does not violate the right to free exercise of religion.”); *Brown v. Smith*, 24 Cal. App. 5th 1135, 1144–45 (Cal. Ct. App. 5th 2018) (holding Senate Bill No. 277 does not violate freedom of religion); *Ass’n of Jewish Camp Operators v. Cuomo*, 470 F. Supp. 3d 197, 229 (N.D.N.Y. 2020) (refusing to issue an injunction because “open[ing] overnight summer camps runs contrary to the public interest in stopping the spread of the COVID-19 virus”); *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (“The constitutional right to freely practice one’s religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children.”); *Abeel v. Clark*, 84 Cal. 226, 24 P. 383, 384 (1890) (holding it was up to the legislature to determine whether public school students could be required to be vaccinated); Billauer, *Measles I Public Health*, *supra* note 2, at 3.

¹⁵⁸ But see Stephen Pollard, *Free Speech Trumps Censorship – Be It Cecil Rhodes or Adolf Hitler*, THE TELEGRAPH (Dec. 23, 2015, 7:47 PM), <https://www.telegraph.co.uk/news/worldnews/europe/germany/12067590/Free-speech-trumps-censorship-be-it-Cecil-Rhodes-or-Adolf-Hitler.html>; see also A. Brad Schwartz, *The Infamous “War of the Worlds” Radio Broadcast Was a Magnificent Fluke*, SMITHSONIAN MAG. (May 6, 2015),

Perhaps, like most things, there are fashions of the times. Today, constitutional freedoms, both free speech (on the left) and freedom of religion (on the right) enjoy partial favoritism, perhaps because of a perceived heightened danger related to tampering with speech or religion that scholars don't perceive adheres to risks to public health in an era of advanced medical care.

In any event, it is crucial to recall that the capsule of speech sought to be constrained—anti-vax FEAR speech—does not encompass ideas or opinions, but rather false statements, fraudulently manipulated, involving (dis)provable biological or medical *facts* regarding both disease and disease prevention. Only this definable subclass of rhetoric is the object of the content-neutral concern. Rather than considering political speech encompassing the realm of ideas, which is deemed sacrosanct, perhaps considering factually driven science-speech more closely resembles the laws of defamation. Defamation also revolves around facts, chinks in its protective armor are beginning to show.¹⁵⁹

B. *The Brandenburg Standard: Incitement of Imminent Lawlessness*

Even as First Amendment protections were strengthened under *Brandenburg v. Ohio*,¹⁶⁰ situations continue to exist where free speech will not be protected. These conditions exist when the public health is imminently threatened and the health of the nation is

<https://www.smithsonianmag.com/history/infamous-war-worlds-radio-broadcast-was-magnificent-fluke-180955180> (depicting the power of mass-hysteria engendered by oral advocacy when Orson Welles performed Jules Verne's (1898) *War of the Worlds* on radio in 1938).

¹⁵⁹ See *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347–48 (“[the holding] do[es] not suggest that speech that touches on an important and controversial issue is always immune from challenge under state defamation law”); see also David Andrew Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 759, 761, 763 (2020) (“[T]he Court’s constraints on defamation law have facilitated a miasma of misinformation that harms democracy by making it more difficult for citizens to become informed voters.”).

¹⁶⁰ *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (holding that relaxation of free speech protections will only lie in cases of imminent incitement to lawlessness); see also James L. Walker, *Brandenburg v. Ohio (1969)*, FIRST AMENDMENT ENCYC. (2009), <https://mtsu.edu/first-amendment/article/189/brandenburg-v-ohio>.

subjected to grave danger, such as some activities conducted by the anti-vax movement.¹⁶¹ To address the broad extent of police power and regulation of anti-vax FEAR speech, i.e., the issue of protecting the public health versus protecting the hallowed right of free speech, there is little guidance post-*Brandenburg*. *Jacobson v. Massachusetts*¹⁶² (and its antecedents and progeny) give great deference to the police power,¹⁶³ but current Supreme Court justices demean the importance of that decision.¹⁶⁴ Whether Free Speech is superior to Freedom of Religion or Due Process, remains an open question. Freedoms of Religion and Speech rights, however, are often evaluated under different metrics.¹⁶⁵ For purposes of this Article, the analysis shall begin by balancing the state's police power to protect public health versus balancing Free Speech from the ground up, ignoring for now previous deference the Supreme Court afforded to public health protection.¹⁶⁶

¹⁶¹ There is good evidence that some social media propagation of FEAR speech is being masterminded and trolled by the Russians, implicating national security interests. See Bichell, *supra* note 71; see also Julian Cardillo, *Social Media is Feeding the Anti-Vaccination Movement*, BRANDEIS NOW (Nov. 3, 2020), <https://www.brandeis.edu/now/2020/november/social-media-vaccine-disinformation.html> ("Russian bots and troll farms are pushing anti-vaccination messages on a large scale on Western social media . . ."); see also Billauer, *When Public Health is Eroded by Junk Science: Muzzling Anti-Vaxxer FEAR Speech – and the First Amendment* 38, 42–43 (Mar. 9, 2020) (unpublished manuscript), <http://ssrn.com/abstract=3550670> [hereinafter Billauer, *When Public Health is Eroded*].

¹⁶² *Jacobson v. Massachusetts*, 197 U.S. 11, 25–27, 38 (1905).

¹⁶³ Billauer, *Measles I Public Health*, *supra* note 2, at 42, 44 (citing *Brown v. Smith*, 235 Cal. Rptr. 3d 218, 225 (Cal. Ct. App. 2018)).

¹⁶⁴ See *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting) ("It is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID–19 pandemic."); see also *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring) ("Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic?").

¹⁶⁵ Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1298 (2005) ("The Free Exercise Clause and the Free Speech Clause protect different private interests, and courts have long interpreted them differently.") [hereinafter Volokh, *Speech as Conduct*].

¹⁶⁶ See Chafee, *supra* note 136, at 957.

The analysis begins with a historical review. The inquiry opens with the (now mostly overruled) case of *Schenck v. United States*.¹⁶⁷ Therein, Justice Oliver Wendell Holmes enunciated the “clear and present danger” exception to Free Speech protections.¹⁶⁸ As articulated by Justice Holmes, the decision to remove Free Speech protections can be said to be situationally-driven, mandated by emergency.¹⁶⁹ Such a calculus might allow restricting publication of materials deemed to deter vaccination when an epidemic is raging, (what I call a time-Phase I inquiry) but might not be amenable, as a preventative or prophylactic measure, or a time-Phase II inquiry.

The *Schenck* case held that First Amendment protection would not apply where a compelling interest, in that case national security, was involved, but the harm from speech was not imminent (a time-Phase II level threat).¹⁷⁰ There, Holmes, writing for a unanimous court on the eve of World War I, wrote the now immortalized words:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.¹⁷¹

The *Schenck* case, crafted in language conjuring physical danger, addressed political threats.¹⁷² To be sure, *Schenck* has since

¹⁶⁷ See *Schenck v. U.S.*, 249 U.S. 47, 48–49, 52 (1919) (targeting mailing of printed circulars in pursuance of a conspiracy to obstruct recruiting and enlistment service, contrary to the Espionage Act of June 15, 1917).

¹⁶⁸ *Id.* at 52.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Frohwerk v. U.S.*, 249 U.S. 204, 206 (1919) (“the First Amendment, while prohibiting legislation against free speech as such . . . was not[] intended to give immunity for every possible use of language.”); see also *Debs v. U.S.*, 249 U.S. 211, 212–16 (1919); see generally SNYDER, *supra* note 149, at 274–90 (describing the tense postwar political environment during the time *Schenk* was published, including fears of communism and use of the Espionage Act to prosecute wartime radicals).

been (mostly) overruled. But the question that lingers is whether FEAR anti-vax messages under present circumstances give rise to the “falsely shouting fire in a theater”¹⁷³ standard, which remains good law. There is good evidence that it does,¹⁷⁴ at least under emergency situations. Two questions arise: what constitutes an emergency, and whether Free Speech protections can be abrogated to prevent a harm very likely to occur at some time in the near future.¹⁷⁵ The problem with the first question is that the determination of what is considered to be an emergency had hitherto vested in the state or locality.¹⁷⁶ Deference to state governmental authority seems to have withered.¹⁷⁷ Whether this lack of respect will apply to state legislative authority remains to be seen.

This background sets the stage to consider the impact of *Brandenburg v. Ohio*¹⁷⁸ on anti-vax propaganda campaigns. The facts of *Brandenburg*¹⁷⁹ could hardly be more akin to addressing anti-vax rhetoric. Nevertheless, on reflection, *Brandenburg* is *a propos*, at least in emergency situations. Therein, the Court set forth the “imminent lawless action” test (which supplants the “clear and present

¹⁷³ *Schenck*, 249 U.S. at 52.

¹⁷⁴ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic”).

¹⁷⁵ See Shelly Kamin-Friedman, *Would It be Legally Justified to Impose Vaccination in Israel? Examining the Issue in Light of the 2013 Detection of Polio in Israeli Sewage*, ISRAEL J. HEALTH POL’Y RSCH., Oct. 30, 2017, at 1, 4–5 (addressing the differences in Israeli policy between emergency and prophylactic public health measures in the context of polio vaccines).

¹⁷⁶ See e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

¹⁷⁷ See *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 74 (2020) (Kavanaugh, J., concurring); see also *W.D. ex rel. A. v. Cnty. of Rockland*, 101 N.Y.S.3d 820, 822 (N.Y. App. Div. 2019).

¹⁷⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447, 449 (1969) (noting that the Court established that *Brandenburg* did not incite or produce imminent lawless action, it ruled that, the Ohio statute was a violation of *Brandenburg*’s First Amendment rights).

¹⁷⁹ Michael Dorf, *Hate Speech Is Free Speech, but Maybe It Shouldn’t Be*, DORF ON L. (Apr. 24, 2017), <http://www.dorfonlaw.org/2017/04/hate-speech-is-free-speech-but-maybe-it.html> (“Although the language of the latter makes no express exceptions (as Justice Hugo Black was fond of saying), case law does: laws that restrict speech based on content must be ‘narrowly tailored to advance a compelling interest.’”).

danger” test).¹⁸⁰ Under *Brandenburg*, where the speech adduced in symposia or pamphlets is purposed to exhort readers and listeners not to vaccinate (incitement), when vaccination is required by law (lawlessness), and the situation calls for immediate vaccination (imminence), such speech should be bannable.

Thus, convening an anti-vax conference or disseminating literature that carries the message to deter or defer vaccination in the midst of a raging epidemic—especially when the state or locality has enacted laws or orders mandating vaccination—should be violative of the *Brandenburg* standard. It punches a gaping hole in the gut of New York’s skittishness at reining in organized anti-vax propaganda in the spring of 2019. Local health department orders mandating vaccination during the midst of an epidemic should allow for banning such conferences and squelching such pamphlets.

In real life, however, things played out differently. On April 8, 2019, New York City Health Department issued an order mandating measles vaccination that was legally upheld.¹⁸¹ A community symposium was held in a Brooklyn neighborhood near the epicenter of the measles outbreak, starring Del Bigtree of the anti-vax group, ICAN.¹⁸² Although the event was ostensibly billed as an educational seminar, Bigtree took to the podium, falsely claiming that vaccines cause autism, and reportedly diabetes, as well.¹⁸³ The event was prominently advertised—“cars with loudspeakers riding around Flatbush, Borough Park, and Williamsburg announc[ed] the event [along with] thousands of robocalls made to tens of thousands of phone numbers, [and] the signs hung on street-poles”¹⁸⁴ The

¹⁸⁰ See *Schenck v. U.S.*, 249 U.S. 47, 52 (1919).

¹⁸¹ Janelle Griffith, *New York City Declares Health Emergency Over Measles Outbreak in Brooklyn*, NBC NEWS (Apr. 9, 2019, 3:08 PM), <https://www.nbcnews.com/news/us-news/new-york-city-declares-health-emergency-over-measles-brooklyn-n992466>.

¹⁸² *TOTAL BLOWOUT*, *supra* note 119; Mole, *supra* note 95 (noting that ultimately 100-200 persons eventually showed up).

¹⁸³ *TOTAL BLOWOUT*, *supra* note 119; see Mole, *supra* note 95; The Yeshiva World (@theyeshivaworld), INSTAGRAM (June 6, 2019), <https://www.instagram.com/theyeshivaworld>; see Park Avenue Synagogue, *One Bus Of Anti-Vaxxers Arrived At Ateres Chynka*, YOUTUBE (June 5, 2019), <https://www.youtube.com/watch?v=VIHrX6dpnzI> (video of people being bussed in to anti-vaxxer event).

¹⁸⁴ *TOTAL BLOWOUT*, *supra* note 119 (similar to events in Rockland, the exact timing of the event was given only twenty-four hours beforehand, most likely to prevent the likelihood of shutting the event down and the hall proprietor

precise date and time were not disclosed until immediately prior, suggesting conference organizers were scared of being closed down.¹⁸⁵ While NYC Health Commissioner Oxiris Barbot bemoaned her impotence in dealing with such hysteria-mongering and FEAR speech in the face of the raging epidemic, all the while a NYC order mandating vaccination was in effect (having survived legal challenge),¹⁸⁶ no attempt was made to shutter the conference.¹⁸⁷

Brandenburg might also be read more expansively, applying to circumstances involving invitation to incitement—*invitation* being the operative word.¹⁸⁸ Therein, the perceived dangerous impact of the actions was indirect and time-remote. Specifically, the Court struck down Ohio’s criminal syndicalism statute because that statute broadly prohibited *advocacy* of violence.¹⁸⁹ The Court noted that “[f]reedoms of speech and press do not permit a State to forbid advocacy of the use of force . . . *except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*”¹⁹⁰ In other words, advocacy of harmful acts is protected as long as there are no immediate consequences. However, the flip side of the principle also must be recognized: advocacy when “inciting or producing imminent lawless action” or “likely to incite or produce such action,”¹⁹¹ can be barred, First Amendment notwithstanding.

from learning the exact purpose of the event); *see Mole, supra* note 95 (noting that at other events, press was excluded).

¹⁸⁵ *TOTAL BLOWOUT, supra* note 119.

¹⁸⁶ *See C.F. v. N.Y.C. Dept. of Health and Mental Hygiene*, No. 508356/19, slip op. at *1 (N.Y. Sup. Ct. Apr. 18, 2019).

¹⁸⁷ *See TOTAL BLOWOUT, supra* note 119 (reporting that NYPD stood guard outside the conference).

¹⁸⁸ *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that relaxation of free speech protections will only lie in cases of imminent incitement to lawlessness); *see also Walker, supra* note 160.

¹⁸⁹ *Brandenburg*, 395 U.S. at 449 (“[O]n pain of criminal punishment, assembly with others merely to advocate the described type of action . . . falls within the condemnation of the First and Fourteenth Amendments.”).

¹⁹⁰ *Id.* (emphasis added) (overruling *Whitney v. California*, 274 U.S. 357 (1927)).

¹⁹¹ Richard A. Parker, *Brandenburg v. Ohio*, in *FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS* 149 (Richard A. Parker ed., 2003).

In fact, according to prominent constitutional rights scholar Professor Nadine Strossen, if it can be shown that “intentional incitement of imminent” violence [or danger] . . . is *likely* to happen,”¹⁹² free speech can be abrogated. To be sure, she states that all three standards, including incitement to lawlessness, must be met to justify banning speech and assembly.¹⁹³ This position is confirmed by another constitutional law expert, Katie Fallow, who opines that although “the clear and present danger” test of *Schenck* is no longer operative law, falsely shouting fire in a crowded theatre does meet the *Brandenburg* requirements.¹⁹⁴

As of today, five states have removed non-medical exemptions to laws requiring mandatory pre-school vaccination.¹⁹⁵ Under *Brandenburg*, anti-vax activities immediately prior to the school year, where non-vaccination would violate the law, should also qualify for restriction—or even an outright ban—even when an epidemic is not in the offing. Yet, in at least one case, this type of speech was protected.¹⁹⁶

The question becomes what happens when neither emergency nor imminent lawlessness are before us? What happens when it is only reasonable to believe an emergency will occur if precautions are not taken? Questions, such as what protection lies for the

¹⁹² Katie Fallow & Nadine Strossen, *Supreme Court Landmark Case Brandenburg v. Ohio*, C-SPAN (Apr. 16, 2018), <https://www.c-span.org/video/?440874-1/supreme-court-landmark-case-brandenburg-v-ohio&live>.

¹⁹³ *Id.*

¹⁹⁴ *Brandenburg*, 395 U.S. at 447 (overruling the *Whitney* case, noting Brandeis’ position that while legislators have a right to curb truly dangerous expression, mere fear of unpopular ideas will not do); *see also* *Whitney v. California*, 274 U.S. 357, 376, 378–79 (1972) (Brandeis, J., concurring) (insisting on what some have called a “time to answer” test: i.e., no danger flowing from speech can be considered “clear and present” if there is full opportunity for discussion).

¹⁹⁵ *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT’L CONF. OF STATE LEGISLATURES, (Apr. 30, 2021), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> (reporting California, Connecticut, Maine, Mississippi, and New York have removed these non-medical exemptions).

¹⁹⁶ *See Hess v. Indiana*, 414 U.S. 105, 108 (1973) (concluding Hess’ statement, taken in context, was not aimed at producing imminent lawless conduct but rather, at most, producing lawless conduct at some indefinite future time).

extended effects of speech, which, similar to a virus, increases in intensity over time, seem without answers.¹⁹⁷

C. *Charged Speech and Wanton Speech*

Perhaps the unpopular case of *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*¹⁹⁸ affords some guidance. Therein, Justice Frankfurter's opinion abrogated free speech protection for future and non-imminent danger—when past indicia made anticipation of such events likely.¹⁹⁹ The case concerned commission of violence during picketing, and the question before the court was whether the picketing could be enjoined in light of a history of past violent behavior staged by the picketers.²⁰⁰

“[A]cts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The [speech] in this case was set in a background of violence . . . [n]or can we say . . . that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct.”²⁰¹

¹⁹⁷ See *Milk Wagon Drivers Union v. Meadowmoor Dairies Inc.*, 312 U.S. 287, 292 (1941) (holding that limitation of First Amendment privileges is recognized when future potential danger is in the offing on the basis of past history of abuse); cf. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928–29 (1982) (considering that if the speech could be read to establish that proof of actual violence resulting from that speech could retroactively show that the speech constituted incitement).

¹⁹⁸ *Milk Wagon*, 312 U.S. at 295.

¹⁹⁹ *Id.* at 296–98.

²⁰⁰ *Id.* at 291–92.

²⁰¹ *Id.* at 294–95 (citation omitted); see also *Altemose Constr. Co. v. Bldg. & Constr. Trade Council of Phila., Pa.*, 296 A.2d 504, 512 (1972) (“It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guaranty of free speech lay faith in the power of an appeal to reason by *all the peaceful means* for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guaranty of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution . . .”) (emphasis added).

One harm identified in *Milk Wagon*, was, of course, the violence itself.²⁰² But *Milk Wagon* could be read as extending the meaning of harm, not just to the violent acts, but to the words uttered in the context of violence.²⁰³ This reading leads to two different approaches. In one, the advocacy of conduct might be considered co-terminus with the conduct, and hence might suffer removal of First Amendment protection under that rubric.²⁰⁴ Another way of considering the matter is determining whether the context in which the words were uttered gave them some sort of “hyper-power,” catapulting them from plain (albeit detestable) speech into charged speech, triggering an emotion of “inciteful-imminence” by virtue of the conjoined force of word and psychological backdrop. In other words, the words and the charged backdrop merge. Thus, “utterance in a context of *violence* can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.”²⁰⁵

In the context of the anti-vax stirring—this harm could arguably apply to the exhortation to refuse vaccination which transcends the continuity of a harmful act (coercive speech) and the danger (transmission potential).²⁰⁶ Clearly, when an epidemic is not in the offing, or when extreme harm might be months away, as real and as probable as it might be, the question becomes: does utterance in the context of fear or panic, which also affects reason, become an instrument of force such as to transcend Constitutional protection?

To make such a determination, Justice Frankfurter paid particular attention to the context in which the speech was uttered and the

²⁰² *Milk Wagon*, 312 U.S. at 291–92.

²⁰³ *Id.* at 293.

²⁰⁴ Volokh, *Speech as Conduct*, *supra* note 165, at 1279–81 (evaluating examples where speech should be treated as conduct rather than speech); *see also* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1100 n.24 (2005) [hereinafter Volokh, *Crime-Facilitating Speech*]. *But see* Vill. of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 637 (1980) (noting the government can prohibit and punish conduct that amounts to fraudulent misrepresentation).

²⁰⁵ *Milk Wagon*, 312 U.S. at 293 (emphasis added).

²⁰⁶ Vraga & Bode, *supra* note 51, at 399–400, 402 (discussing the long-lasting “backfire” effects of counter-speech and the dangers of repeating misinformation, suggesting cumulative use of anti-vax rhetoric may need to be evaluated under a different standard).

subjective influence on the listeners' minds.²⁰⁷ *Milk Wagon* thus allows us to impute future emotional reactions based on past conduct.²⁰⁸ The same rationale should apply in the case of hysteria-driven rhetoric, which preys on unfounded fears of damage from vaccines and past ignominies suffered by the target audience. The conduct evidenced by anti-vax groups has a clear track record of preying on such emotion, panic, and threats of filial harm.²⁰⁹

Another question that arises is can we redefine the meaning of "imminence" in this context? Or is it sufficient to just evaluate anti-vax speech by categorizing it as a different type of speech, one subject to less protection than political speech? Certain anti-vax groups, e.g., ICAN, PEACH, and the Children's Defense Fund, have waged their campaigns continuously since at least 2016.²¹⁰ To take a line straight out of *Milk Wagon*, "[t]hese acts . . . are neither episodic nor isolated . . . [and] was not the conduct of a few irresponsible outsiders."²¹¹ For the same reason the state acted in *Milk Wagon*, it is reasonable to assume states should protect their citizens from anticipated anti-vax coercion during the next epidemic, by which time it may be too late to protect its constituents from harm.²¹² "It is therefore relevant to remind that the power to deny what otherwise would be lawful [speech] derives from the power of the states to prevent future coercion."²¹³

It is important to remember that the persuasion modality utilized by these groups includes frightening and threatening language.²¹⁴ Invocation of Holocaust images²¹⁵ and references to Tuskegee²¹⁶ or Goebbels²¹⁷ are interspersed with heart-rendering tales of children

²⁰⁷ *Milk Wagon*, 312 U.S. at 294 (discussing the "background of violence" in which the picketing at issue took place).

²⁰⁸ *Id.*

²⁰⁹ See Billauer, *Measles II Fear Speech*, *supra* note 4, at 37–39.

²¹⁰ See Billauer, *Measles II Fear Speech*, *supra* note 4, at 26, 37–39.

²¹¹ *Milk Wagon*, 312 U.S. at 295.

²¹² *Id.* at 295–96 (noting that it was not unconstitutional to use an injunction to prevent future violence and harm).

²¹³ *Id.* at 286.

²¹⁴ See e.g. Gorski, *Deception by Omission*, *supra* note 99.

²¹⁵ Mole, *supra* note 95.

²¹⁶ Bichell, *supra* note 71.

²¹⁷ Bond, *supra* note 102.

horribly afflicted by autism²¹⁸—and the “certain” testimony of ostensibly reasonable parents (including doctors²¹⁹ and lawyers²²⁰) that the disease was occasioned by a vaccine, beseeching other parents not to risk their own children’s lives, with organizers threatening that such harm will accrue, even in the face of objective scientific evidence to the contrary.²²¹

Such outrageous intimidation tactics may still fall short of the requirement that the speech be designed to command action, rather than act as advocacy.²²² The PEACH anti-vax literature, for example, repeatedly advises parents to do their own research (a suggestion reminiscent of a high school teacher telling a class of wayward students they might be well-advised to read *War and Peace* and expecting compliance).²²³ In fact, the operative criteria for protection turns on distinguishing between mere persuasive efforts and coercive speech, with the “[t]he Supreme Court distinguish[ing] between speech which merely advocates law violation and speech which incites imminent lawless activity; the former is protected, but the latter is not.”²²⁴ When the speech crosses the line between advocacy, which is allowed,²²⁵ and rank intimidation—which is

²¹⁸ See Billauer, *Measles II FEAR Speech*, *supra* note 4, at 19–21, 24.

²¹⁹ See e.g., Jane M. Orient, *AAPS Opposes Federal Vaccine Mandates*, ASS’N OF AM. PHYSICIANS AND SURGEONS (Feb. 26, 2019), <https://aapsonline.org/measles-outbreak-and-federal-vaccine-mandates/>.

²²⁰ See, e.g., *Special Solari Report: Vaccine Mandates with Mary Holland, J.D.*, CHILDREN’S HEALTH DEF. (Mar. 20, 2020), <https://childrenshealthdefense.org/video/special-solari-report-vaccine-mandates-with-mary-holland-j-d/>.

²²¹ See Vaccine Safety, *Autism and Vaccines: Questions and Concerns*, CTR. DISEASE CONTROL & PREVENTION (Sept. 14, 2021), <https://www.cdc.gov/vaccinesafety/concerns/autism.html>.

²²² *Rice v. Paladin Enter. Inc.*, 940 F. Supp. 836, 848 (D. Md. 1996).

²²³ *The Vaccine Safety Handbook*, *supra* note 116, at 1.

²²⁴ *Rice*, 940 F. Supp. at 845.

²²⁵ See *id.* at 846–47 (“Although the film [in *Yakubowicz v. Paramount Pictures Corp.*, 404 Mass. 624, 536 N.E.2d 1067 (1989)] is rife with violent scenes, it does not at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers. It does not create the likelihood of inciting or producing ‘imminent lawless action’ that would strip the film of First Amendment protection Nothing in the book says ‘go out and commit murder now!’ Instead, the book seems to say, in so many words, ‘if you want to be a hit man this is what you need to do.’ This is advocacy, not incitement. Advocacy is defined as mere abstract teaching.”).

prohibited²²⁶—there is of course a factual question. The Court must analyze the character of the words used by using the appropriate standard, and then decide whether that type of speech is protected by the First Amendment.²²⁷

[T]he question is one of alleged trespass across ‘the line between speech unconditionally guaranteed and speech which may legitimately be regulated.’ In cases where that line must be drawn, the rule is that we ‘examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.’²²⁸

That outside press is often restricted or even banned from attending anti-vax conferences, which complicates the determination and frustrates governmental assessment.²²⁹ (The practice also frustrates counter-speech initiatives, further highlighting the question whether “imminence” needs redefinition when the threat of physical danger to the populace is very high).²³⁰ What if action must be implemented at the time of the incitement to prevent future harm—does this vitiate the imminence requirement? The analogy to tort law is apt.²³¹ If someone places a time-bomb that explodes decades later—he is responsible. *If the time-bomb happens to be speech—or conduct caused by that speech—should that speech be protected?* Perhaps the uncontrollable time-bomb-type dangers posed by disease and

²²⁶ *Planned Parenthood v. Am. Coal. of Life Activists*, 945 F. Supp. 1355, 1373–1374 (D. Or. 1996) (applying statute that makes certain intimidation a federal crime when applied to those who provide reproductive health services).

²²⁷ *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984); *see also Rice*, 940 F. Supp. at 848.

²²⁸ *Bose Corp.*, 466 U.S. at 508 (citation omitted).

²²⁹ Anna Merlan, *Everything I learned While Getting Kicked Out of America’s Biggest Anti-Vaccine Conference*, JEZEBEL (Sept. 6, 2019) <https://jezebel.com/everything-i-learned-while-getting-kicked-out-of-america-1834992879> (explaining journalists were not allowed to a conference because of a generalized distrust of the media from the attendees).

²³⁰ *Weirum v. RKO General, Inc.*, 539 P.2d 36, 40 (Cal. 1975) (noting that defendants can be held liable for physical injury caused by their words; therefore, lending comparison to the repetitive and active urging of the attendees to act in an inherently dangerous manner characteristic at anti-vax symposia).

²³¹ *Id.*

lack of vaccination are too hard to envision, so justifying relaxation of a founding tenet becomes difficult to countenance.²³² Even today, who could have imagined the explosive nature of COVID-19,²³³ which on Jan. 1, 2020, tallied a few dozen cases internationally,²³⁴ and a year later culminated into over 100 million cases and two million deaths,²³⁵ with no end in sight?²³⁶

The case of *Dennis vs. United States*²³⁷ can provide additional insight. While *Dennis* also was largely overruled by *Brandenburg*, some dicta remains good law.²³⁸ In *Dennis*, the Court said that the correct interpretation of *Schenck's* (now overruled) clear and present danger doctrine allowed legislatures to decide what was dangerous.²³⁹ The courts, in applying the clear and present danger test, were simply to determine whether, on balance, the “gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”²⁴⁰ This concept found its way into *Milk Wagon*, where the court noted: that “just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, . . . so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts.”²⁴¹ This holding allows legislatures to

²³² *But see* *Gitlow v. New York*, 268 U.S. 652, 669 (1925) (“A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into sweeping and destructive conflagration.”).

²³³ Gabrielle Borter, *How One County Scrambled to Keep America Measles-Free*, REUTERS (Nov. 4, 2019, 8:47 AM), <https://www.reuters.com/article/us-health-measles-usa-insight/how-one-county-scrambled-to-keep-america-measles-free-idUSKBN1XE15F>.

²³⁴ *COVID-19 Coronavirus Pandemic*, WORLDOMETER (09/16/2021 2:04AM), <https://www.worldometers.info/coronavirus/>.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Dennis v. U.S.*, 341 U.S. 494 (1951).

²³⁸ Walker, *supra* note 160; *see also* *Brandenburg v. Ohio*, 395 U.S. 444, 453 (1969) (quoting *Dennis*, 341 U.S. at 510 (1951)) (“whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger”).

²³⁹ *Dennis*, 341 U.S. at 515. *But see* *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (plurality opinion).

²⁴⁰ *Dennis*, 341 U.S. at 510.

²⁴¹ *Milk Wagon Drivers Union v. Meadowmoor Diaries Inc.*, 312 U.S. 287, 292, 297 (1941) (barring peaceful picketing, because the state court believed it was enmeshed in contemporaneously violent conduct); *see In re Factor VIII or IX*

determine how to weigh the balance of speech versus the dangers such speech would trigger.²⁴²

Hence, as one post-*Brandenburg* court said, “If recent precedent is any guide, a state’s interest is compelling if the state says it is.”²⁴³ Veneration for protecting public health, either deriving from balancing “the rights of the one vs. the rights of the many,” or as a function of the State’s police power to protect the public health,²⁴⁴ should allow the state to trump First Amendment freedoms—just because the state says so.²⁴⁵ Nevertheless, anti-vax groups have maneuvered themselves to control legislative decisions in many states, meaning compulsory vaccination or legislation designating anti-vax speech as harmful are unlikely to pass.²⁴⁶ Further, the *Roman Catholic Diocese* case discounts the reverence hitherto afforded to state determinations.²⁴⁷ The only “out” available, then, might be to craft some type of solution that would emanate on a federal legislative level, which this Article discusses in Part IV.²⁴⁸

Nevertheless, even post *Brandenburg*, there are exceptions.²⁴⁹ Professors Reiss and Diamond note that “the closer one’s behavior is to instruction or incitement rather than just description or espousing an ideology, the less protected one is when speaking to a

Concentrate Blood Prod. Litig., 25 F. Supp. 2d 837, 843, 845 (N.D. Ill. 1998) (balancing the competing interest of society in providing redress for the grave injuries alleged against the danger of chilling the NHF’s communications).

²⁴² See *In re Factor VIII*, 25 F. Supp. 2d at 843, 845.

²⁴³ *Cath. Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 467 (N.Y. 2006); see also *LaRocca v. Lane*, 338 N.E.2d 606, 608 (N.Y. 1975) (“The free exercise of religion is a highly protected interest but is not absolute.”).

²⁴⁴ *Powell v. Pennsylvania*, 127 U.S. 678, 686 (1887) (discussing regulating oleomargarine as a dangerous substance under the State’s police power); see also *Holden v. Hardy*, 169 U.S. 366, 392 (1898) (quoting *Lawton v. Steele*, 152 U.S. 133, 136 (1884)) (noting that the police power “may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion [and] ‘is necessarily vested in the legislature’”).

²⁴⁵ See *Jacobson v. Massachusetts*, 197 U.S. 11, 25–27, 38 (1905).

²⁴⁶ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 43 (citing Billauer, *Measles I Public Health*, *supra* note 2).

²⁴⁷ *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020).

²⁴⁸ See *infra* Part IV.

²⁴⁹ See Nikolas Abel, *United States v. Mehanna, The First Amendment, and Material Support in the War on Terror*, 54 B.C. L. REV. 711, 714 (2013).

group.”²⁵⁰ Further, as Professors Reiss and Diamond suggest, where damaging misinformation is crafted to appeal to a narrow audience, First Amendment protections fall by the wayside.²⁵¹ As illustrated above, the exhortations of ICAN leader Del Bigtree and the “Literature of Lies” of anti-vax pamphlets²⁵² targeting particular communities, and stoking their idiosyncratic fears, are precisely crafted to influence a narrow audience to act in a dangerous manner²⁵³ and should qualify for this exemption.

Brandenburg, to be sure, is not limited to political speech.²⁵⁴ However, extension of *Brandenburg* beyond political speech has generally been confined to entertainment speech.²⁵⁵ In that situation, ensuing harm is likely limited to individuals, not entire populations. Moreover, in both political and entertainment speech, the rhetoric conveys ideas and opinions, not objectively disprovable facts.²⁵⁶ In balancing rights, then, the protection of artistic ideas embedded in

²⁵⁰ Dorit Rubinstein Reiss & John Diamond, *Measles and Misrepresentation in Minnesota: Can There Be Liability for Anti-Vaccine Misinformation that Causes Bodily Harm?*, 56 SAN DIEGO L. REV. 531, 554, 557 (2019) (highlighting the importance of a close or direct relationship as the key to imposing a duty and hence, liability); see also John L. Diamond & James L. Primm, *Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From the Mickey Mouse Club to Hustler Magazine*, 10 HASTINGS J. COMM’N & ENT. L. 969, 974 (1988) (finding the clear and present danger standard is met when a plaintiff shows “the words used . . . will bring about the substantive evil that Congress has a right to prevent”).

²⁵¹ Reiss & Diamond, *supra* note 250, at 553 (“publishers are still subject to defamation law targeting individuals, corporations, and small groups. Similarly, manufacturers of tobacco and medicine products may be liable for causing physical injury.”); see also *Weirum v. RKO Gen.*, 539 P.2d 36, 37–41 (Cal. 1975) (holding radio station liable for wrongful death when a teenage listener participating in the radio station’s contest to be the first to locate the radio disk jockey in a red car forced the victim off road).

²⁵² Billauer, *Measles II FEAR Speech*, *supra* note 4, at 35–37.

²⁵³ *Id.* at 3.

²⁵⁴ See, e.g., *DeFilippo v. NBC*, 446 A.2d 1036, 1040 (R.I. 1982) (parents of a deceased minor brought wrongful death action against NBC after their son hung himself while imitating a hanging stunt he observed on “The Tonight Show” hosted by Johnny Carson).

²⁵⁵ See *Rice v. Paladin Enter., Inc.*, 940 F. Supp. 836, 846 (D. Md. 1996) (citing *Zamora v. CBS*, 480 F. Supp. 199, 200 (S.D. Fla. 1979)) (discussing violent movies and television programs alleged to have caused physical injury or death).

²⁵⁶ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (suggesting the difficulty in distinguishing between politics and entertainment).

entertainment speech commands some honor of its own.²⁵⁷ Here, balanced against the likely danger, we have perpetrators of junk science and false facts jockeying for the same protection afforded art forms or political speech, the bedrock of our democracy.²⁵⁸

Likely, however, Justice Frankfurter's views in *Milk Wagon* (construed to allow restriction of speech with less than a direct nexus with immediate harm) might be seen differently in light of *Brandenburg*. Perhaps, then, a different type of unlawful act might be invoked to tether the inciteful speech to harm, one which bypasses the direct imminence requirement. In this regard, a particular Kentucky statute might serve as a model for constitutionally sanctioned rhetoric restriction—the crime of wanton endangerment. Kentucky Statute 508.070 states, “a person is guilty of wanton endangerment in the second degree when he wantonly engages in conduct which creates a substantial danger of physical injury to another person.”²⁵⁹

Here, the lawlessness would lie in creating a substantial danger of harm at any point in time, without imminence of disease being required—if the speech creates the substantial danger, the speech being the immediate conduct, which in this context, can be sufficient conduct to create the substantial danger. Triggering the imminence requirement would lie in convening conferences or disseminating the speech, not in causing the harm. Like the proverbial time-bomb case, such activities could be actionable and subjected to regulation if likely to cause substantial harm. The Bigtree conferences might

²⁵⁷ See *Rice*, 940 F. Supp. at 848 (“It is simply not acceptable to a free and democratic society to limit and restrict creativity in order to avoid dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals”); *Braun v. Soldier of Fortunate Mag., Inc.*, 968 F.2d 1110, 1115–56 (11th Cir. 1992) (analyzing the familiar balancing test applied in *Eimann v. Soldier of Fortune Mag., Inc.*, 880 F.2d 830, 833 (5th Cir. 1989)); *Ely v. Barbizon Towers, Inc.*, 115 S.E.2d 616, 620 (Ga. Ct. App. 1960); *Norwood v. Soldier of Fortune Mag., Inc.*, 651 F. Supp. 1397, 1402 (W.D. Ark. 1987); Debbie Lee, “*Gun for Hire*” Advertisement that Backfired and Hit the Publisher in the Pocketbook, 8 LOY. ENT. L.J. 439, 445–46 (1988). The retinue of cases clearly establishes that the courts will strike down free speech if they perceive the danger is too high. The matter here, then, becomes factual, not legal. Is the danger of anti-vax speech high enough to restrain the hallowed right of free speech?

²⁵⁸ See Billauer, *Measles II FEAR Speech*, *supra* note 4, at 36.

²⁵⁹ KY. REV. STAT. ANN. § 508.070 (West 2021). As of January 1, 1975, wanton endangerment in the second degree is a Class A misdemeanor.

subject the speakers to this type of liability—assuming wantonness can be proved.²⁶⁰

According to Black’s Law Dictionary, “an act without regard to any other person and their safety and welfare” is deemed wanton.²⁶¹ Perpetrators of anti-vax speech would vehemently deny that they are acting in anything but the highest degree of care for the welfare of others.²⁶² At first blush, then, establishing wantonness would seem daunting. One mechanism which might be availed is proving knowing dissemination of false materials or reckless disregard of their veracity.²⁶³ Nevertheless, falseness *alone* will not suffice to qualify for an exemption from free speech protection.

D. *False Speech as Protected Speech:* United States v. Alvarez

Even false speech is not devoid of First Amendment protection, and the right to disseminate it may be constitutionally protected.²⁶⁴ Hence, no discussion could be complete without analysis of *United States v. Alvarez*.²⁶⁵ Therein, ruling on a statute criminalizing false statements about having a military medal, the court held that content-based restrictions on false speech are invalid.²⁶⁶ Integral to the decision was the standard used in balancing false speech against a competing governmental interest.²⁶⁷

²⁶⁰ See Billauer, *Measles I Public Health*, *supra* note 2, at 19.

²⁶¹ *Wanton Act*, BLACK’S LAW DICTIONARY (11th ed. 2019).

²⁶² Billauer, *Measles II FEAR Speech*, *supra* note 4, at 4.

²⁶³ See e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that to recover damages in a libel action, a public official must show actual malice or that a statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false).

²⁶⁴ Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 69 (2013).

²⁶⁵ *U.S. v. Alvarez*, 567 U.S. 709 (2012).

²⁶⁶ *Id.* at 715.

²⁶⁷ *Id.* at 724; see also *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004) (discussing the Child Pornography Act and finding the test begins by “ask[ing] whether the challenged restriction has some additional ability to achieve Congress’ legitimate interest”).

1. THE LEVEL OF JUDICIAL SCRUTINY DETERMINES THE OUTCOME

The *Alvarez* case is touted as a 6-3 decision.²⁶⁸ Nevertheless, *Alvarez* can hardly be said to have commandeered a majority on the issue of the level of scrutiny required to assess the vulnerability of false speech.²⁶⁹ Indeed, we have hot, warm, and cool levels of required review touted. The main opinion, authored by Justice Kennedy—writing for himself, Chief Justice Roberts, and Justices Ginsburg and Sotomayor—pronounced the need for strict or even exacting scrutiny²⁷⁰ when false speech is considered in a political context, and presumably even outside that ambit.²⁷¹ There is an overlap in ultimate views, but not complete concordance in Justice Breyer’s concurring opinion (written for himself and Justice Kagan), which provides a cooler view of scrutiny required.²⁷² Justice Breyer agrees that false speech is protected here but only because less restrictive means of dealing with the dangers are available.²⁷³ Noting that “‘false statements of fact are particularly valueless,’”²⁷⁴ Breyer strikingly rejects Kennedy’s views on strict scrutiny,²⁷⁵ advocating an intermediate scrutiny:²⁷⁶

²⁶⁸ *Alvarez*, 567 U.S. at 709, 730, 739.

²⁶⁹ Jeffrey C. Barnum, *Encouraging Congress to Encourage Speech: Reflections on United States v. Alvarez*, 76 ALB. L. REV. 527, 527 (2013).

²⁷⁰ *Alvarez*, 567 U.S. at 724 (citing *Turner Broad. Sys., Inc. v. FCC* (Turner I), 512 U.S. 622, 642 (1994)) (noting that the Court applies the “most exacting scrutiny” in assessing content-based restrictions on protected speech, even to the Stolen Valor Act which targets falsity and nothing more).

²⁷¹ See *Ashcroft*, 535 U.S. at 575 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)) (“[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . .”).

²⁷² *Id.* (Breyer, J., concurring).

²⁷³ *Id.* (Breyer, J., concurring).

²⁷⁴ *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

²⁷⁵ *Id.* at 731–32 (Breyer, J., concurring) (“Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny. But this case does not involve such a law.”).

²⁷⁶ *Id.* at 730–31 (“Sometimes the Court has referred to this approach as ‘intermediate scrutiny,’ sometimes as ‘proportionality’ review, sometimes as an examination of ‘fit’ . . . But in this case, the Court’s term ‘intermediate scrutiny’ describes what I think we should do.”).

The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas. And the government often has good reasons to prohibit such false speech But its regulation can nonetheless threaten speech-related harms. Those circumstances lead me to apply what the Court has termed ‘intermediate scrutiny’ here.²⁷⁷

Certainly, the situation in *Alvarez*, as described by Justice Breyer, can be applied to the anti-vax situation when the targeted speech involves facts that have been clearly debunked (like whether vaccines eradicated polio or smallpox) or rebutted by acknowledged science and reputable scientists. By comparison, in Justice Alito’s dissent (signed by three justices) the argument goes even further, implying the lowest level of scrutiny, rational review,²⁷⁸ is warranted. Alito looks purely at the comparative value of the false speech balanced against the government interest of protecting national pride.²⁷⁹ Taking vigorous issue with Justice Kennedy, Justice Alito notes that, “[b]y holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest.”²⁸⁰

Alito goes further: “Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.”²⁸¹ To be sure, Justice Alito confines his

²⁷⁷ *Id.* at 732.

²⁷⁸ *Id.* at 730–31 (Alito, J., dissenting) (“near-automatic approval (as is implicit in [the] ‘rational basis’ review)”).

²⁷⁹ *Id.* at 755 (Alito, J., dissenting).

²⁸⁰ *Alvarez*, 567 U.S. at 739 (Alito, J., dissenting).

²⁸¹ *Id.* at 746 (Alito, J., dissenting); *see also* *Illinois ex rel. Madigan v. Tele-marketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (“Like other forms of public deception, fraudulent charitable solicitation is unprotected speech.”); *Hustler Mag., Inc., v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the

opinion to statements which are demonstrably false, i.e., what we used to call “facts,” where the “truth” is possible to ascertain.²⁸² To be also sure, false scientific “facts” are the stuff judges are charged to weed out from their courts,²⁸³ and hence should be amenable to a lesser standard of review.²⁸⁴

It becomes apparent that the ultimate determination is heavily dependent on the balancing test employed, which turns on the assessment of the significance of the government interest involved. The level of review utilized, per Justice Breyer, is outcome-determinative, with the Justice noting that a near-automatic condemnation will result from a “strict scrutiny” analysis, while a near-automatic approval is implicit in “rational basis” review.²⁸⁵ As for the importance of categorizing the impact of the governmental interest, Justice Breyer takes note of the *In re R.M.J.* case, which states that “interference with speech must be in proportion to the [substantial governmental] interest served.”²⁸⁶ The two features are interrelated.

marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”); *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776 (1984) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)) (“There is ‘no constitutional value in false statements of fact.’”); *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (“[F]alse statements are not immunized by the First Amendment right to freedom of speech”); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (“Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements.”); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) (citation omitted) (“Spreading false information in and of itself carries no First Amendment credentials.”); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“[T]he constitutional guarantees [of the First Amendment] can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function.”); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). The cases above may no longer be considered good law, in light of *Alvarez*.

²⁸² See *Alvarez*, 567 U.S. at 750.

²⁸³ See Barbara Pfeffer Billauer, *Admissibility of Scientific Evidence Under Daubert: The Fatal Flaws of ‘Falsifiability’ and ‘Falsification,’* 22 B.U.J. SCI. & TECH. L. 21, 24 (2016) [hereinafter Billauer, *Admissibility of Scientific Evidence*]; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993).

²⁸⁴ Compare *Alvarez*, 567 U.S. at 739 (Alito, J., dissenting) (expressing his views on the nature of Freedom of Speech) with *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603–04 (2020) (mem) (Alito, J., dissenting) (expressing his views on Freedom of Religion).

²⁸⁵ *Alvarez*, 567 U.S. at 731 (Breyer, J., concurring).

²⁸⁶ *Id.* (Breyer, J., concurring) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)) (“[S]ome such approach is necessary if the First Amendment is to offer proper

That which is to be balanced must be subject to the proper level of inquiry, and vice versa. Determining which level of consideration is appropriate, then, affects the outcome.²⁸⁷ Nevertheless, even under “strict scrutiny,” if the government shows that the restriction serves “to promote a compelling interest” and is “the least restrictive means to further the articulated interest,” speech may be restricted.²⁸⁸

Justice Kennedy begins his inquiry by deciding the level of scrutiny required is strict, sidelining consideration of the government interest. Justice Alito proceeds from the opposite point, focusing on the governmental interest.²⁸⁹ Justice Breyer side-steps the matter entirely, finding that the means of speech restriction, i.e., ban—always a key concern—was not the least restrictive available.²⁹⁰

In sum, false speech, *by itself*, does not trigger an exception to First Amendment protection.²⁹¹ One key reason is “that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”²⁹² “Th[e] erroneous statement is inevitable in free debate.”²⁹³ This concern leads to imposition of a requirement of fraud or knowingness, discussed in Section 3.

2. BALANCING THE GOVERNMENTAL INTERESTS

Justice Kennedy’s decision, which turns on strict or exacting scrutiny (all but guaranteeing the outcome protecting the speech), frames the governmental interest as solely vivifying the Stolen Valor Act, which “targets falsity and nothing more[,]” as the sentinel of truth, the protector from perjury, the guardian of the Nation’s

protection . . . but warrants neither near-automatic condemnation (as “strict scrutiny” implies) nor near-automatic approval (as is implicit in “rational basis” review).”).

²⁸⁷ See Mariam Morshedi, *Levels of Scrutiny*, SUBSCRIPT LAW (Mar. 6, 2018), <https://subscriptlaw.com/levels-of-scrutiny/>.

²⁸⁸ KATHLEEN ANN RUANE, CONG. RSCH. SERV., RL7-5700, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1 (2014).

²⁸⁹ *Alvarez*, 567 U.S. at 739 (Alito, J., dissenting).

²⁹⁰ See *id.* at 730 (Breyer, J., concurring).

²⁹¹ See generally *id.* at 715 (majority opinion).

²⁹² *Alvarez*, 567 U.S. at 718.

²⁹³ *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964)).

honor and self-respect.²⁹⁴ By comparison, Justice Alito characterized the state's interest thusly: "These lies, Congress reasonably concluded, were undermining our country's system of military honors and inflicting real harm on actual medal recipients and their families."²⁹⁵

Even as couched by Justice Alito, the noble aim of national pride cannot compare to the importance of the police power to protect public health and safety, including saving lives that might be lost or sickened (some permanently), protecting against deficits in the public health budget, and diverting personnel. This Article proposes that the invocation of *Alvarez* in the context of the anti-vax FEAR rhetoric is inappropriately and jaw-droppingly crass—unless we, as a society, want to go on record as valuing ideals more than the lives and health of the entire nation. Read broadly, *Jacobson v. Massachusetts* would suggest our national legacy prioritizes public health over ideals or even raw constitutional liberties.²⁹⁶

Stated differently, in *Alvarez* we are balancing two idealistic goals: freedom to express ideas versus honor and national pride. In the anti-vax context, we are balancing the one idealistic goal (free expression of opinion) against human lives, children's welfare, and the health of the nation. That the *Alvarez* calculus can be considered in the context of danger to life and welfare bespeaks a society that has ennobled itself with ideas and ideals at the expense of food and daily bread. Further, when we are on notice that parents are sacrificing their children to false, emotionally-charged, and intimidating propaganda, some extra burden is placed on the state to safeguard the welfare of its charges.²⁹⁷

3. PROVABILITY

One premise of Justice Kennedy's decision turns on the finding that the "Government [can] point[] to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez."²⁹⁸ The same

²⁹⁴ *Id.* at 719.

²⁹⁵ *Id.* at 724 (Alito, J., dissenting).

²⁹⁶ See generally *Jacobson v. Massachusetts*, 197 U.S. 11, 11–12 (1905).

²⁹⁷ See Margaret S. Thomas, *Parens Patriae and The States' Historic Police Power*, 69 SMU L. REV. 759, 762 (2016).

²⁹⁸ *Alvarez*, 567 U.S. at 726.

cannot be said in the context of anti-vax rhetoric. The claim that these groups wreak real danger is far from undocumented or ephemeral. The overall measles incidence nearly doubled between the last major outbreaks in 2013–14 and 2018–19.²⁹⁹ In pockets where anti-vax infiltration actively targeted various groups, the case numbers exploded ten-fold.³⁰⁰ Public health costs surged by the millions as hospitalizations burgeoned; health officials and academics bemoaned the harms occasioned by these groups.³⁰¹

Against Robert F. Kennedy Jr. falsely proclaiming that vaccines did not eradicate polio and smallpox, brandishing literature fraudulently intimating vaccines are ineffective,³⁰² Bigtree falsely claiming vaccines cause autism,³⁰³ and the PEACH pamphlets falsely asserting that vaccines are more dangerous than the disease,³⁰⁴ we have thousands of real, sick unvaccinated people.³⁰⁵ And because the decision to not vaccinate is not merely a decision to subject oneself to danger, but to subject one's children—and the children of others—to harm, the state has a double burden. Not only is the police power invoked, but the duty of *parens patriae*, the obligation of the king or monarch to protect wards of the state, is also triggered.³⁰⁶

²⁹⁹ See Billauer, *Measles I Public Health*, *supra* note 2 at 4; see Billauer, *Measles II Anti-Vax*, *supra* note 4 at 13.

³⁰⁰ Sharma, *supra* note 34 (reporting that the “latest outbreak [of measles] at 10 times” the rate between 2006 and 2013); see also Billauer, *Measles II FEAR Speech*, *supra* note 4, at 3, 28.

³⁰¹ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 2.

³⁰² *Id.* at 11 (RFK misrepresenting scientific literature and claiming “that vaccines did not eradicate polio or smallpox”); see also *The Vaccine Safety Handbook*, *supra* note 116.

³⁰³ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 23–24. Interestingly, while vaccine rates have decreased substantially, autism rates have increased. The figures for 2010–2014 indicate by thirty percent. Deborah L. Christensen, et al, *Prevalence and Characteristics of Autism Spectrum Disorder Among Children Aged 4 Years—Early Autism and Developmental Disabilities Monitoring Network, Seven Sites United States, 2010, 2012, and 2014*, 68 CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY. REP., Apr 12, 2019, at 10–11.

³⁰⁴ See *The Vaccine Safety Handbook*, *supra* note 116.

³⁰⁵ See Billauer, *Measles II FEAR Speech*, *supra* note 4 at 2, 25, 28.

³⁰⁶ See Thomas, *supra* note 297, at 768; Rajan Bal, *The Perils of “Parens Patriae,”* GEORGETOWN J. POVERTY L. AND POL’Y BLOG (Nov. 21, 2017), <https://www.law.georgetown.edu/poverty-journal/blog/the-perils-of-parens-patriae/>; see generally, *Ass’n of Jewish Camp Operators v. Cuomo*, 470 F. Supp. 3d

4. FRAUD AND *MENS REA*

Alvarez details cases outlawing false speech when a significant harm exists³⁰⁷ if accompanied by a moral imperative against “lying,” such as cases “discussing defamation, fraud, or some other legally cognizable harm,” as “falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”³⁰⁸ Indeed, prohibiting false speech requires an element of *mens rea* to avoid the chilling impact that might occur from dissuading valuable speech.³⁰⁹

However, while “the knowingly false statement and the false statement made with reckless disregard of the truth[] do not enjoy constitutional protection,”³¹⁰ neither do statements likely to confuse the public.³¹¹ In the context of anti-vax FEAR rhetoric we are not talking about simple or unknowingly false misstatements. Neither are we referring to statements made in passing, or isolated errors. We are talking about speech purposefully, consistently, and fraudulently designed to confuse and mislead a scientifically unsophisticated public, including using unqualified “experts” whose statements are made for material gain.³¹² These are key caveats distinguishing *Alvarez* speech from anti-vax FEAR Speech.

197, 227 (N.D.N.Y. 2020) (rejecting parents’ arguments that overnight camp experience was rudimentary for the children’s religious training, and camp closures violated their rights of due process by infringing on [the] parents’ “fundamental right to control the education and upbringing of their children”).

³⁰⁷ U.S. v. *Alvarez*, 567 U.S. 709, 718–19 (2012) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (citing *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 52 (1988)) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”).

³⁰⁸ *Id.* at 719. “Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say, offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.” *Id.* at 723.

³⁰⁹ See RESTATEMENT (SECOND) OF TORTS §525 (AM. L. INST. 1979); see, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–64 (1976) (noting that fraudulent speech generally falls outside the protections of the First Amendment).

³¹⁰ *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); see *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 530–31 (2002); *Virginia Bd. of Pharmacy*, 425 U.S. at 771.

³¹¹ See *S.F. Arts & Athletics, Inc. v. USOC*, 483 U.S. 522, 530, 535 (1987) (analyzing where there is a danger “to cause confusion, to cause mistake, or to deceive”).

³¹² Billauer, *Measles II FEAR Speech*, *supra* note 4, at 36–37.

5 THE LEAST RESTRICTIVE ALTERNATIVE

Regardless, “[t]he First Amendment requires that the Government’s chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest” There must be a direct causal link between the restriction imposed and the injury to be prevented.”³¹³ Further, a “cost-benefit” analysis must be undertaken to discern whether the harm occasioned by the speech is outweighed by any benefits incident thereto.³¹⁴

It is hard to discern benefits of espousing luddite science, reminiscent of those opposing inoculation two centuries ago. Repeating the results of debunked and retracted studies (such as Andrew Wakefield’s associating the measles vaccine with autism) is perpetuation of a rank fraud.³¹⁵ While Wakefield’s work was determined to be incident to profit-making schemes of his own,³¹⁶ the vaccine resistance of those who still believe in his work has cost the state millions of dollars and sickened thousands.³¹⁷ The benefit of espousing junk science and FEAR speech is hard to identify. The cost, apparent.

Even so, it is crucial to investigate whether some means exist to foster the government interest short of restricting the speech.³¹⁸ In *Alvarez*, Justice Kennedy advocated that counter-speech would be the means of choice when he wrote, “The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics

³¹³ *Alvarez*, 567 U.S. at 725; see also *U.S. v. O’Brien*, 391 U. S. 367, 377 (1968) (arguing the appropriate inquiry is whether the incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial governmental interest).

³¹⁴ *Herceg v. Hustler Mag.*, 814 F.2d 1017, 1019 (5th Cir. 1987) (“The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.”).

³¹⁵ See Vraga & Bode, *supra* note 51, at 398 (causing the false statements to mentally embed as “truth”); Billauer, *Measles II FEAR Speech*, *supra* note 4, at 18–19.

³¹⁶ Brian Deer, *How the Case Against the MMR Vaccine Was Fixed*, *BMJ* (Jan. 6, 2011), <https://www.bmj.com/content/342/bmj.c5347>.

³¹⁷ See Billauer, *Measles II FEAR Speech*, *supra* note 4, at 19–21.

³¹⁸ RUANE, *supra* note 288, at 1.

of free speech, of counterspeech, of refutation, can overcome the lie.”³¹⁹ This is not the case for anti-vax counterspeech.

6. THE FUTILITY OF COUNTERSPEECH IN THE ANTI-VAX CONTEXT

Counterspeech in the context of addressing anti-vax rhetoric is simply an exercise in futility. By necessity, counter anti-vax FEAR speech requires sophisticated presentation of statistics, biology, and epidemiology.³²⁰ This is not the ken of the average lay person. If the likes of Alan Dershowitz can be seduced by Robert F. Kennedy Jr.’s rhetoric,³²¹ hoping that the average listener can discern the slippery use of language, the omissions of facts, and the selective and misleading use of data is lemming-like. Even in the face of hard scientific evidence, anti-vax groups refuse to budge.³²² Causation between vaccine-adjuvants such as aluminum (which is not even contained in the measles vaccine)³²³ and autism is exhorted based on rubbish studies in *sheep* showing depression (ostensibly because the sheep were sleepy)³²⁴ or behavioral difficulties (ostensibly because

³¹⁹ U.S. v. Alvarez, 567 U.S. 709, 726 (2012).

³²⁰ See Billauer, *Measles II FEAR Speech*, *supra* note 4, at 43.

³²¹ *Id.* at 11.

³²² See E-mail from Gedolim Letters, letters@gedolimletters.org, to Barbara Pfeffer Billauer, Rsch. Professor of Sci. Statecraft, Inst. of World Pol. (Feb. 5, 2020, 9:30 PM) (on file with the author). One email exchange I had with the anti-vax editor of the *GEDOLIM LETTERS* brochure, see *GEDOLIM LETTERS ON VACCINATION, PARENTAL RIGHTS AND RELIGIOUS FREEDOM*, *supra* note 117, had him contesting three measles-related deaths reported by the Israeli Ministry of Health, claiming one died not from measles, but from dehydration, hinting to malpractice on the part of the hospital. This anti-vaxxer mistakenly assumed that the dehydration was the garden-variety type, rather than a systemic inability to absorb fluids and electrolytes caused by the disease.

³²³ *Adjuvants and Vaccines*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccinesafety/concerns/adjuvants.html> (Aug. 14, 2020) (listing the MMR vaccine [otherwise known as the measles vaccine] as having no adjuvant).

³²⁴ Javier Asin et al., *Cognition and Behavior in Sheep Repetitively Inoculated with Aluminum Adjuvant-Containing Vaccines or Aluminum Adjuvant Only*, J. OF INORGANIC BIOCHEMISTRY, Nov. 20, 2019, at 1 (noting samples of seven vaccinated and seven Adjuvant-only test sheep “exhibited . . . behavioral changes. Affiliative interactions were significantly reduced, and aggressive interactions and stereotypies increased significantly. [The fourteen test animals] also exhibited a significant increase in excitatory behavior and compulsive eating . . . In

the sheep were aggressive),³²⁵ or in *mice* because inoculated mice did not socially congregate, findings suggested as being relevant to humans.³²⁶ This rank junk science is accepted by audiences desperate to blame their children's autism on something other than God or genes.

Counterspeech in this context, as previously mentioned, not only does not work, but is dangerous,³²⁷ risking what is known as the “back-fire” effect, where the concern that repeating false information, even to correct it, can strengthen beliefs in the myths.³²⁸ Thus, the *Alvarez* court might be guilty of engaging in its own false speech when noting, *carte blanche*, that “[t]he remedy for speech that is false is speech that is true.”³²⁹ In actuality, true speech may cement and perpetuate the myth.

Consider this poetic, but obsolete, paean to counterspeech:

The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth . . . The theory of our Constitution is ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market’³³⁰

Or consider the words of Justice Brandeis:

general, changes were more pronounced in the Vaccine group than they were in the Adjuvant-only group.”).

³²⁵ *Id.*

³²⁶ Claire Dwoskin, *New Animal Study Reveals Aluminum Adjuvants Can Impair Social Behavior*, CHILDREN’S HEALTH DEFENSE (Apr. 30, 2018), <https://childrenshealthdefense.org/news/new-animal-study-reveals-aluminum-adjuvants-can-impair-social-behavior/> (study done by Sneha K.S. Sheth, Yongling Li and Christopher A. Shaw (an adviser to the Gedolim Letters author) studied mice to demonstrate correlations between rates of Autism Spectrum Disorder (“ASD”) and total aluminum given to children through vaccines).

³²⁷ Billauer, *Measles II FEAR Speech*, *supra* note 4, at 49.

³²⁸ Vraga & Bode, *supra* note 51, at 396; *see* MICHAEL LEWIS, THE UNDOING PROJECT 325 (2017) (finding that “unrealized possibilities contaminate people’s minds” and it constrains people’s freedoms until they learn how to undo that thought process).

³²⁹ *U.S. v. Alvarez*, 567 U.S. 709, 726 (2012).

³³⁰ *Id.* at 728 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

[N]o danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.³³¹

Sadly, as the research of Kahneman and Tversky demonstrates,³³² this is not even close to correct.

Two corollaries emerge from Justice Brandeis' pronouncement: one, that effective counterspeech can be dispatched in a timely fashion, and two, that the speech under question relates to ideas—not facts. But it is rank false facts and underhanded tactics (e.g., that correlation equals causation)³³³ that are dispensed by the anti-vax community³³⁴ which are not easily susceptible to counterspeech. Even Professor Volokh, taking issue with Justice Brandeis, recognizes that “[p]erhaps the counterspeech might undo some of the harm, but it seems quite unlikely that it will undo all or even most of it.”³³⁵

It also must be recalled that the issues addressed in *Brandenburg* involved “political speech” referencing communism, socialism, and cultural change.³³⁶ The counterspeech offensives were directed at

³³¹ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

³³² See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (1st ed. 2011); DANIEL KAHNEMAN & AMOS TVERSKY, CHOICES, VALUES, AND FRAMES 118–42 (1st ed. 2019).

³³³ E.g., the *GEDOLIM LETTERS* incorrectly using correlation to establish that the measles vaccine causes Sudden Infant Death Syndrome (SIDS). See *GEDOLIM LETTERS ON VACCINATION, PARENTAL RIGHTS AND RELIGIOUS FREEDOM*, *supra* note 117.

³³⁴ Benecke & DeYoung, *supra* note 51, at 3. “Perhaps the most common anti-vax trope . . . is the ‘overnight autism’ narrative, in which a parent takes their child in to get the MMR vaccine only to watch them digress cognitively almost immediately after.” *Id.* at 3 (citing Ashley Shelby & Karen Ernst, *Story and Science*, 9 HUM. VACCINES & IMMUNOTHERAPEUTICS 1795, 1796 (2013)).

³³⁵ Volokh, *Freedom of Speech*, *supra* note 152, at 2434.

³³⁶ *Landmark Cases: Historic Supreme Court Decisions—Brandenburg v. Ohio*, C-SPAN, <http://landmarkcases.c-span.org/Case/23/Brandenburg-v-Ohio>

speech designed to “accomplish political reform.”³³⁷ Allowing full discourse on such issues was a concept held dear by this country’s founders,³³⁸ perhaps as dear as the country itself. Free speech protections would, they opined, apply to both sides of an argument, balancing concerned individual views on one side with contrary views of other individuals on the other.³³⁹ That situation does not exist here.

In addition to jurists’ belief that counterspeech could rectify “bad speech” in a timely enough fashion was a desire to protect advocacy and *the free interchange of ideas*—which, by definition, had no objective, verifiable, falsifiable, or testable “right” or “wrong.” As the court in *Milk Wagon* noted, “the principle [fought] for by petitioners is the right to tell their side of the *story*.”³⁴⁰ The protected freedom involved “persuasion by *reason and peaceable argument*.”³⁴¹ The difference between that situation and ours is that here we are talking about facts, not story, and about the scientific method, not argumentation.

Evasive tactics by anti-vax groups further prevent adequate counterspeech. Their repeated custom of waiting to disclose dates and times of rallies until immediately prior frustrates attempts to produce responsive counterspeech in a timely fashion. Even the content of these seminars, sequestered from full view, deprives the pro-vaccine community of a chance to furnish targeted responses.³⁴² Moreover, the pervasive 24/7 force of social media calls out Justice

(last visited Oct. 6, 2021) (discussing *Brandenburg v. Ohio*, 395 U.S. 444, 448-456 (1969)).

³³⁷ *Id.*

³³⁸ Library of Congress, *Amdt1.2.1 Freedom of Speech: Historical Background*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1_2_1/ (last visited Oct. 6, 2021).

³³⁹ *Id.*

³⁴⁰ *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 320 (1941) (emphasis added). The peaceful picketing invited a state court’s view that such picketing may project fear from past violence into the future and hence was disallowed. *Id.*

³⁴¹ *Id.* at 301 (Black, J., dissenting) (emphasis added). The Court’s holding that the presence of violence justifies an injunction against both violent and non-violent activity “is contrary to the first principles of our government.” *Id.*

³⁴² See, e.g., Merlan, *supra* note 229. The press is routinely and aggressively excluded, so full availability of material disseminated at these conferences is unavailable. See Mole, *supra* note 95.

Brandeis' notion that bad speech can be rebutted by good speech in a timely fashion.³⁴³ Instagram is not called Instagram for nothing. Before the pro-vaccine community can formulate an effective counter-message, the anti-vax message has "gone viral," infecting (and affecting) tens of thousands.³⁴⁴

As Professor Arthur Caplan notes, "[d]isagreement with proven facts is a choice that anyone can choose to make. Disseminating falsehoods, misinformation and distortions of the facts about vaccines is not a choice that ought to go unremarked and unchallenged."³⁴⁵

Finally, there is the issue of cognitive dissonance.³⁴⁶ For those who have already been even marginally co-opted, the emotionally-laden presentations of the anti-vax groups (replete with pictures of autistic children)³⁴⁷ make effective counterspeech all but impossible.³⁴⁸ Given the realities of the virulence, power, and immediacy of dissemination of the anti-vax message, Justice Brandeis' hoped-for antidote, counterspeech, is simply not realistic.³⁴⁹

³⁴³ U.S. v. Alvarez, 567 U.S. 709, 727 (2012).

³⁴⁴ Simpson, *supra* note 54.

³⁴⁵ Ayelet Evrony and Arthur Caplan, *The Overlooked Dangers of Anti-Vaccination Groups' Social Media Presence*, 13 HUM. VACCINES IMMUNOTHERAPEUTICS 1475, 1476 (2017).

³⁴⁶ See generally MNOOKIN, *supra* note 104.

³⁴⁷ See Richard K. Zimmerman et al., *Vaccine Criticism on the World Wide Web*, 7 J. MED. INTERNET RES. 5 (2005) ("[t]he incidence of vaccine-preventable diseases is directly related to the number of unvaccinated children."). "We found that personal stories or pictures of children allegedly injured by vaccines appeared on 37% of websites." *Id.*

³⁴⁸ *Cf. id.* at 1 ("Parents . . . frequently express concerns about vaccine safety. The Internet can influence perceptions about vaccines because it is the fastest growing source of consumer health information."). But see "David Warmflash, *Brain Chemicals Fight for the Status Quo—That's Why It's So Hard to Change People's Minds Even When the Science Consensus is Overwhelming*, GENETIC LITERACY PROJECT (Feb. 7, 2020), <https://geneticliteracyproject.org/2020/02/07/brain-chemicals-fight-for-the-status-quo-thats-why-its-so-hard-to-change-peoples-minds-even-when-the-science-consensus-is-overwhelming/>.

³⁴⁹ Benecke & DeYoung, *supra* note 51, at 3. "According to an analysis of YouTube videos about immunization, 32% opposed vaccination. Perhaps more concerning, these videos had higher ratings and more views than pro-vaccine videos. In addition, a study that explored the content of the first 100 anti-vaccination sites found after typing 'vaccination' and 'immunization' into Google revealed that 43% of websites were anti-vaccination. Skeptics also use online platforms to

III. ANTI-VAX RHETORIC AS COMMERCIAL SPEECH

Rather than banning anti-vax FEAR speech outright, which would undoubtedly raise censorship concerns, and rather than requiring counterspeech, which is ineffective, an alternative approach might be considered. In this regard, this Article suggests implementing a form of compelled speech that has already found its way into commercial speech regulation.

It is important to recall that some categories of speech enjoy greater freedom from First Amendment protection (e.g., obscenity and defamation).³⁵⁰ Speech is often bifurcated into two classes with attendant levels of scrutiny: political and commercial, the latter generally enjoying less First Amendment protection.³⁵¹ But less does not mean none, as will be discussed below. Whether compelled speech is available in a political speech context has not been clearly determined. Hence, the simplest route would be to qualify anti-vax FEAR speech promulgated by organized groups as commercial speech.³⁵²

A. *What is Commercial Speech?*

It has been said that commercial speech does “no more than propose a commercial transaction.”³⁵³ This classification includes furthering trade or inducing the sale of goods or services.³⁵⁴ Commercial speech also includes providing information for inviting or enticing one to buy goods or services, and the informational function

advocate vaccine refusal; as many as 50% of tweets about vaccination contain anti-vaccine beliefs.” *See also supra* notes 41–43.

³⁵⁰ RUANE, *supra* note 288, at 1.

³⁵¹ *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 340 (1986) (“[C]ommercial speech receives a limited form of First Amendment protection.”).

³⁵² *See Advocacy of Unlawful Action and the “Incitement Test,”* EXPLORING CONSTITUTIONAL CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/incitement.htm> (last visited Oct. 5, 2021) (considering *Rice v. Paladin Enters.*, addressing First Amendment arguments of a publisher of a how-to guide for hitmen used by a reader as a guide for committing a brutal contract-killing).

³⁵³ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rel.*, 413 U.S. 376, 385 (1973) (upholding actions for damages against *Soldier of Fortune* magazine for deaths resulting from the magazine’s “gun for hire” advertisements).

³⁵⁴ *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 539 (1987) (noting 36 U.S.C. § 380(a) does apply to commercial speech).

of commercial speech has been recognized:³⁵⁵ “Although many . . . promotional uses will be commercial speech, some uses may go beyond the ‘strictly business’ context.”³⁵⁶ These, too, are subject to lesser free speech constraints attached to commercial speech.³⁵⁷ “[E]ven if the promotion is not to induce the sale of goods”³⁵⁸ or involves a significant educational presence,³⁵⁹ speech incident to commercial activities may be restrained under commercial standards.³⁶⁰ Further, regulating professional activities (and presumably its practice) is also covered under commercial speech rules.³⁶¹

Whether anti-vax speech can be considered commercial speech will be examined under three lenses: (1) the rank commercial nature of the events, including selling life-style goods at these events; (2) the sale of services such as speech-making; and (3) the sale of

³⁵⁵ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–64 (1976).

³⁵⁶ *S.F. Arts*, 483 U.S. at 535; *see* *Friedman v. Rogers*, 440 U.S. 1, 11 (1979) (finding the use of trade names in connection with a practice is solely a form of commercial speech).

³⁵⁷ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 562–63 (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”); *see also* *S.F. Arts*, 483 U.S. at 540 (allowing the USOC to prohibit use of “Olympic” for promotion of theatrical and athletic events).

³⁵⁸ *S.F. Arts*, 483 U.S. at 540.

³⁵⁹ Noncommercial promotion may include critical reviews of theatrical performances, anticipatory notices and descriptions in the media of athletic competitions, and distribution of educational literature describing the sociopolitical reasons for holding the public events. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 580 (Stevens, J., concurring).

³⁶⁰ *S.F. Arts*, 483 U.S. at 566–67 (Brennan, J., dissenting) (noting the statute conferring authority to the United States Olympic Committee to prohibit certain commercial and promotional uses of the word Olympic. “[The statute] gives it additional authority to regulate a substantial amount of noncommercial speech that . . . promote[s] social and political ideas . . . [or] are aimed at educating the public . . .”). *Id.*

³⁶¹ *In re Factor VIII or IX Concentrate Blood Prod. Litig.*, 25 F. Supp. 2d 837, 840, 842–43 (N.D. Ill. 1998) (finding First Amendment privileges extend to “writers of large established newspapers” as well as “the sole publisher of a newsletter or other writing or paper”); *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring) (“The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.”); *see* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1242 (2016) (“Imposing professional malpractice liability has never been found to offend the First Amendment.”).

services marketed as educational in the form of conferences, no different from marketing weight loss or cigarette-cessation educational programs. Because the conferences charge a fee, there is an exchange of money for the service, in this case, false education.

Undoubtedly, some will claim that anti-vax pamphlets and conferences, such as produced by PEACH or ICAN, are marketing ideas and should be judged under political speech rules.³⁶² But to paraphrase *San Francisco Arts*, merely because anti-vax groups claim “an expressive, as opposed to a purely commercial, purpose does not give [them] . . . First Amendment right[s] . . .”³⁶³ Moreover, the anti-vax groups in question are 501(c)(3) organizations, and hence should not qualify for political speech constitutional protection.³⁶⁴ “Section 501(c)(3) exempts religious, educational, and charitable organizations from federal income tax but denies them this exemption if they . . . devote a substantial part of their activities to *propaganda* or *other attempts to influence legislation*.”³⁶⁵ Simply put, 501(c)(3) corporations, even those of a charitable or religious ilk, engaging in fraudulent propaganda can be punished, and their rhetoric banned.³⁶⁶

Propaganda is defined as “information, especially of a biased or misleading nature, used to promote or publicize a political cause or point of view.”³⁶⁷ Anti-vax FEAR speech, an exemplar of propaganda, is the stock and trade of anti-vax groups with influencing the

³⁶² Billauer, *Measles II FEAR Speech*, *supra* note 4; *The Vaccine Safety Handbook*, *supra* note 116.

³⁶³ *S.F. Arts*, 483 U.S. at 541.

³⁶⁴ *Id.*; see also MNOOKIN, *supra* note 104.

³⁶⁵ Mark Pulliam, *Is Section 501(c)(3) a Form of Censorship?*, L. & LIBERTY (Sept. 27, 2018), <https://lawliberty.org/is-section-501c3-a-form-of-censorship/> (emphasis added) (discussing how Professor Philip Hamburger’s work in *Liberal Suppression* (2018) is an inquiry into the legitimacy of restrictions on the political speech of non-profit organizations).

³⁶⁶ *Vill. of Schaumburg v. Citizens for a Better Env’t.*, 444 U.S. 620, 637, 623 n.2 (1980). The court found that that government can prohibit and punish conduct that amounts to fraudulent misrepresentation and considers religious propaganda to fall under the ambit of “fraud.” *Id.* A “charitable purpose” is defined as “[a]ny charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose.” *Id.*

³⁶⁷ *Propaganda*, LEXICO BY OXFORD, <https://www.lexico.com/definition/Propaganda> (last visited Oct. 6, 2021).

legislature presumably part of their mission.³⁶⁸ Evidence of Bigtree's appearance at the New Jersey legislative hearings³⁶⁹ is indicative of such political involvement. In sum, the activities of these groups may be political, in which case they may qualify for heightened first amendment protection, but they should then lose their 501(c)(3) protection.³⁷⁰

It is foreseeable that anti-vax advocates will claim their materials are educational and factual, even though spouting provably false material can hardly qualify as pedagogical. A booklet replete with heart-rendering stories from scientifically untutored mothers claiming their children's diseases are caused by vaccines, does not qualify as educational.³⁷¹ False statements that there is "ample evidence to establish a strong causal connection between vaccines and associated reactions,"³⁷² while listing alongside it a host of serious—but unrelated—diseases is rank propaganda.

Moreover, educationally driven speech is still subject to reign-in when false or fraudulent, even when performed by a 501(c)(3) organization.³⁷³ In addition to *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, where the Court ruled on free speech protection in commercial activities such as educational initiatives, the issue of whether strictly educational 501(c)(3) organizations can invoke First Amendment protections was litigated in *In Re Factor VIII*.³⁷⁴ In that case, the National Hemophiliac Foundation ("NHF")

³⁶⁸ Gingold, *supra* note 39; Billauer, *Measles II FEAR Speech*, *supra* note 4, at 43.

³⁶⁹ See Tracey Tully et al., *How Anti-Vaccine Activists Doomed a Bill in New Jersey*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/nyregion/nj-vaccinations-religious-exemption.html>.

³⁷⁰ See Pulliam, *supra* note 365.

³⁷¹ *The Vaccine Safety Handbook*, *supra* note 116, at 2–3.

³⁷² *Id.* at 8.

³⁷³ See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 539 (1987) (prohibiting a nonprofit corporation from exploiting the "commercial magnetism" of the word "Olympic"); see Pulliam, *supra* note 365 (explaining the tax exemptions that non-profits are privy to under 501(c)(3)); see also *In re Factor VIII* or IX Concentrate Blood Prod. Litig., 25 F. Supp. 2d 837, 844–45 (N.D. Ill. 1998).

³⁷⁴ *In re Factor VIII*, 25 F. Supp. 2d at 840, 844–45 ("the interest of society in providing redress for the grave injuries alleged should be weighed against the danger of chilling the NHF's communications").

was accused of negligently producing flawed information.³⁷⁵ First Amendment protection could not protect them from liability.³⁷⁶

Therein, the defendant tried to use the commercial speech vehicle as a shield, claiming it should not be punished for dispensing negligently produced science. The court first bifurcated the speech into categorical classes, the *Alvarez* approach.³⁷⁷ It next held that the NHF would not be protected by the First Amendment—regardless of whether the speech would be considered political or commercial.³⁷⁸ Even though *mens rea* was not established, the court indicated the negative impact of the false speech created too high a cost for society to bear.³⁷⁹

The NHF next tried to cast itself as providing speech of matters of national concern, and that it “is entitled to First Amendment protection” under that rubric.³⁸⁰ The court disagreed, holding that matters of public concern do not provide any special cover or privilege.³⁸¹ Later courts confirmed that the doctrine of public concern is not relevant in a First Amendment inquiry.³⁸² In *Bolger v. Youngs Drug Prod. Corp.*, for example, the plaintiffs claimed that much of its content is inextricably intertwined with otherwise fully protected speech and thus governed by the test for fully protected

³⁷⁵ *Id.* at 839.

³⁷⁶ *Id.* at 846.

³⁷⁷ *Id.* at 841–42; see U.S. v. *Alvarez*, 567 U.S. 709 (2012).

³⁷⁸ See *In re Factor VIII*, 25 F. Supp. 2d at 841, 848 (“[NHF’s argument] is belied by a considerable body of law denying First Amendment protection in situations not involving obscenity, libel, incitement or fighting words”).

³⁷⁹ See *id.* at 845, 848.

³⁸⁰ *Id.* at 846. The national concern argument was also used in *National Review, Inc. v. Mann* to no avail. See *Nat’l Rev., Inc. v. Mann*, 140 S. Ct. 344, 347 (2019) (“To ensure that our democracy is preserved and is permitted to flourish, this Court must closely scrutinize any restrictions on the statement that can be made on important public policy issues.”).

³⁸¹ *In re Factor VIII*, 25 F. Supp. 2d at 847 (“[L]ibel suits are not automatically subject to the heightened standard articulated by *New York Times* simply because they involve matters of public concern.”).

³⁸² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346–47 (“Whether there is a privilege for good faith defamatory misstatements on matters of public concern or whether there is strict liability for such statements may not greatly affect the course of public discussion.”) (quoting William H. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 601 (1964)).

expression.³⁸³ Here, too, the court rejected the argument, noting: “We have made clear that advertising which links a product [or a service] to a current public debate is not thereby entitled to the constitutional protection afforded non-commercial speech.”³⁸⁴

B. *Regulating Commercial Speech*

Because commercial speech enjoys lesser protection than political speech, it is therefore subject to greater regulation.³⁸⁵ However, although commercial speech is not entitled to the same sublime of protection afforded political speech, it nevertheless falls under a penumbra of protection.³⁸⁶ The case of *Central Hudson Gas and Electric Corp. v. Public Service Commission*³⁸⁷ sets out the parameters: (1) Is the expression protected by the First Amendment? For speech to come within that provision, it must concern lawful activity and not be misleading; (2) Is the asserted governmental interest substantial?; (3) Does the regulation directly advance the governmental interest asserted?; and (4) Is the regulation more extensive than is necessary to serve that interest? There must be a reasonable fit between the government’s ends and the means for achieving those ends.³⁸⁸

In commercial speech, however, there is a greater call for accuracy than in political speech.³⁸⁹ For one reason, political speech traffics in ideas or opinions. And while courts imply that that errors incident thereto may be valuable as stimulating free thought, it also may be that “facts” produced for commercial gain are more easily verifiable, or in the words of the *Daubert* court, capable of

³⁸³ 463 U.S. 60, 65–66 (1983).

³⁸⁴ *Id.* at 65–66; *see also* Disc. Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509, 533 (6th Cir. 2012) (citing *Bolger*, 463 U.S. at 67–68).

³⁸⁵ Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1166 (2012) (discussing how false or misleading commercial speech is not protected by the First Amendment). *But see* Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

³⁸⁶ *But see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 790 (1985) (Brennan, J., dissenting) (citations omitted) (“Even commercial speech, however, receives substantial First Amendment protection.”).

³⁸⁷ *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

³⁸⁸ *Id.*

³⁸⁹ Va. State Bd. of Pharmacy, 425 U.S. at 771–72 (1976).

falsification.³⁹⁰ In other words, factual accuracy may be required in commercial speech, simply because it is more easily determined. In the case of scientific pronouncements, the falsity thereof is the stuff that courts should be capable of determining, as this is their charge under *Daubert*.³⁹¹ Courts addressing the issue of accuracy in commercial speech, however, do not couch their rationale in that vein. Rather, they talk about the need for truth so as not to mislead or confuse the public, which apparently is tolerable in political speech.³⁹² Specifically, they are concerned with assuring the words “are not likely ‘to cause confusion, to cause mistake, [or] to deceive.’”³⁹³ This confusion occurs when consumers make an incorrect mental association between the involved commercial products or their producer.³⁹⁴

So keen on protecting consumers from mistake or confusion, “[t]he [Trademark] Act seeks to control and suppress all false statements . . . in almost limitless times and settings without regard to whether the lie was made for the purpose of material gain.”³⁹⁵ This mindset is echoed in Justice Breyer’s concurring opinion in *Alvarez*, signaling that perhaps Breyer’s views are not as tolerant of falsehoods as we might believe.³⁹⁶ “[T]he interest in truthful discourse alone is sufficient to sustain a ban on speech, [even] absent any evidence that the speech was used to gain a material advantage”³⁹⁷

Simply stated, then, the principal justification for regulating commercial speech is protecting the flow of *accurate* information which is furthered by factual disclosures.³⁹⁸ This concern about reliability of come-on speech (aka advertising or promotional speech) is broad, even where speech is not provably false, but only misleading. “[M]uch commercial speech *is not provably false, or even*

³⁹⁰ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94 (1993).

³⁹¹ *Id.*

³⁹² *See id.*

³⁹³ *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 528 (1987).

³⁹⁴ *See U.S. v. O’Brien*, 391 U. S. 367, 376–77 (1968).

³⁹⁵ *U.S. v. Alvarez*, 567 U.S. 709, 710 (2012).

³⁹⁶ *Id.* at 732–33 (Breyer, J., concurring).

³⁹⁷ *Id.* at 723 (majority opinion).

³⁹⁸ *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 555 (6th Cir. 2012).

wholly false, but only deceptive or misleading . . . The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”³⁹⁹ The concern even includes speech that “is inherently *likely* to deceive.”⁴⁰⁰

The balancing equation utilized by the courts in evaluating restrictions that adhere to commercial speech seems to revolve around the degree of danger to which society is exposed by the activity, or the level of protection the court “feels” the populace requires.⁴⁰¹ Thus, while commercial speech enjoys some First Amendment protection,⁴⁰² limits are imposed when the court “feels” that decision-making ability is being usurped from the consumer, as illustrated in *Ohralik v. Ohio State Bar Association*.⁴⁰³ Therein the court held that where information is simply provided to the recipient, leaving him or her free to act on it, it is acceptable, but where the method of conveying the persuasive speech deprives the consumer of reflection, comparison, and verification, such tactics are prohibited.⁴⁰⁴ The court seems to assume the lawyer’s persuasion skills overtakes consumer reasoning:

[T]he aim and effect . . . may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision-making; [but] there is no opportunity for intervention or counter-education by . . . supervisory authorities, or persons close to the solicited individual . . . [This type of communication] is as likely as not to discourage persons needing counsel from engaging in a critical comparison . . .

³⁹⁹ *Id.* (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976)) (emphasis added).

⁴⁰⁰ *In re R.M.J.*, 455 U.S. 191, 202 (1982) (emphasis added).

⁴⁰¹ See *Ohralik v. Ohio State Bar Ass’n*, 436 U. S. 447, 462 (1978).

⁴⁰² *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

⁴⁰³ *Ohralik*, 436 U.S. at 462, 468 (upholding disciplinary action taken against an attorney who solicited accident victims for the purpose of obtaining remunerative employment and ruling that the state had a legitimate interest in preventing actions that involve fraud, undue influence, intimidation, and the like, expressing concerns regarding vulnerable recipients).

⁴⁰⁴ *Id.*

⁴⁰⁵ [and] it actually may disserve the individual and societal interest, identified in *Bates*, in facilitating ‘informed and reliable decision making.’⁴⁰⁶

Certainly, the climate and tenor of anti-vax rallies and conferences are far more coercive, invasive, and insidious than a lawyers’ attempted barratry.⁴⁰⁷ Moreover, it is beyond contradiction that the rhetoric contained in anti-vax pamphlets and websites and exhorted by anti-vax gurus, such as Bigtree (at least on YouTube), fails the first test of *Central Hudson*.⁴⁰⁸ The anti-vax assertions are facially misleading,⁴⁰⁹ or worse. Because of the low (or negative) value associated with such speech, and because the government’s interest is substantial, it can be argued that the speech should be amenable to being banned as a direct and dangerous assault on the public health.⁴¹⁰ Further, the services provided by the anti-vax groups in producing these conferences is packaged as education. And knowingly producing false education, *per se*, might be considered constitutionally objectionable.⁴¹¹

Nevertheless, “[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.”⁴¹² This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial

⁴⁰⁵ Cf. *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (“[commercial speech] performs an indispensable role in the allocation of resources in a free enterprise system . . . [and] serves individual and societal interests in assuring informed and reliable decision making”).

⁴⁰⁶ *Ohralik*, 436 U.S. at 457–58.

⁴⁰⁷ See Mole, *supra* note 95.

⁴⁰⁸ See *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

⁴⁰⁹ See generally *The Vaccine Safety Handbook*, *supra* note 116.

⁴¹⁰ *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 US 328, 346–47 (1986) (allowing implicitly for strict regulation of commercial speech related to legal, but presumably dangerous, activities).

⁴¹¹ Jonathan Stempel & Shobhana Chadha, *Weight Watchers Sues Jenny Craig for Bertinelli Ad*, REUTERS (Jan. 19, 2010), <https://www.reuters.com/article/us-weightwatchers/weight-watchers-sues-jenny-craig-for-bertinelli-ad-idUSTRE60I3OT20100119> (discussing Complaint, *Weight Watchers Int’l Inc. v. Jenny Craig Inc.*, No. 10-00392 (S.D.N.Y. Jan. 19, 2010), ECF No. 1).

⁴¹² *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983).

speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.⁴¹³

As previously demonstrated in one of my articles,⁴¹⁴ and as confirmed by the WHO, the anti-vax movement provides a distinct threat to the public health.⁴¹⁵ Further, my research specifically implicates the pamphleteering (with some evidence of commercial activity)⁴¹⁶ of at least one group which impacted four of the five epidemics studied. The burden of sustaining any restriction on commercial speech, then, should be satisfied and “[t]he State may ban [such] commercial expression that is fraudulent or deceptive without further justification.”⁴¹⁷

In sum, “[b]ecause the *Central Hudson* test does not govern commercial speech that is false, deceptive or misleading, if commercial speech is so categorized, we apply a different test to determine whether a restriction, or disclosure requirement, is unconstitutional.”⁴¹⁸

This different test employs the common-sense test (or fairness or rational-basis scrutiny), as explained in *Zauderer v. Office of Disciplinary Counsel*,⁴¹⁹ which presumptively allows restriction without the need to analyze whether the disclosures were unjustified or unduly burdensome.⁴²⁰ Thus, false, deceptive, or misleading

⁴¹³ *Id.*; see, e. g., *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 648-649 (1985); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983); *In re R.M.J.*, 455 U.S. 191, 205-06 (1982).

⁴¹⁴ See generally Billauer, *Measles II FEAR Speech*, *supra* note 4.

⁴¹⁵ See Zimmerman, *supra* note 347 (“[t]he incidence of vaccine-preventable diseases is directly related to the number of unvaccinated children.”).

⁴¹⁶ See *infra* notes 432-35 and accompanying text.

⁴¹⁷ *Edenfield v. Fane*, 506 U.S. 761, 769 (1993) (“[given] the test set forth in *Central Hudson*[,] we must ask whether the State’s interests in proscribing it are substantial; whether the challenged regulation advances these interests in a direct and material way; and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served”); see also *Fla. Bar v. WentForIt*, 515 U.S. 618, 628 (1995) (holding it has the authority to decide the outcome of the case even where very little evidence was produced).

⁴¹⁸ *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 523 (6th Cir. 2012) (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011)).

⁴¹⁹ *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985).

⁴²⁰ *Disc. Tobacco City*, 674 F.3d at 524 (citing *Zauderer*, 471 U.S. at 651) (“As set forth in *Zauderer*, in the case of misleading or potentially misleading

commercial speech in this context might also support draconian remedies as complete bans.⁴²¹ The challenge is now to validate “the commercialness” of the anti-vax industry.

C. *Anti-vax Speech as Commercial Speech*

While it might appear that the anti-vax message is devoid of commercial taint or personal interest obtained for valuable, if not mercenary, consideration, a look at the funders and supporters of these organizations belies this supposition.⁴²² Among its financial supporters are the Democratic-associated Dwoskin Foundation,⁴²³ presumably trying to incite its base.⁴²⁴ Others include ostensibly “charitable organizations” such as ICAN, founded in 2016 and supported by the Selz family.⁴²⁵

One contributing group with more obvious financial motivation are various trial lawyers, presumably trying to stir up business or

commercial speech, ‘an advertiser’s rights are adequately protected as long as disclosure requirements are’ . . . not ‘unjustified or unduly burdensome’”).

⁴²¹ “[A]n advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.” *Zauderer*, 471 U.S. at 651.

⁴²² See YITZHAK ZAHAVY & YARON HAZAN, *Financial Facilitators, in SERVANTS OF THE DEVIL: THE FACILITATORS OF THE CRIMINAL AND TERRORIST NETWORKS* (Norman Bailey & Berard Touboul eds., World Scientific Press 2021) (noting a key mechanism for disentangling terrorist activities is to follow the money).

⁴²³ Lachlan Markay, *Trial Lawyers and Dem Donors Support Anti-Vaccination Movement*, WASH. FREE BEACON (Feb. 3, 2015, 12:35 PM), <https://freebeacon.com/issues/trial-lawyers-and-dem-donors-support-anti-vaccination-movement/>. The article identifies Chris Shaw as an outspoken featured speaker and anti-vax contributor and chair of the Scientific Advisory Board of the anti-vaccine Children’s Medical Safety Research Institute, founded and funded by Claire Dwoskin. Dwoskin has used Shaw’s studies as supposed evidence that vaccines cause autism.

⁴²⁴ *Id.*

⁴²⁵ See Sun & Brittain, *Meet the New York Couple Donating Millions to the Anti-Vax Movement*, WASH. POST (June 19, 2019), https://www.washingtonpost.com/national/health-science/meet-the-new-york-couple-donating-millions-to-the-anti-vax-movement/2019/06/18/9d791bcc-8e28-11e9-b08e-cfd89bd36d4e_story.html.

influence prospective judges or jurors to inflate damage awards.⁴²⁶ Still another are doctors who recoup expert witness fees in their testimony for plaintiffs in vaccine litigation.⁴²⁷ Perhaps the most in-your-face indication of the commercial nature of the anti-vax ventures is Dr. Joseph Mercola, who contributed some four million dollars to anti-vax ventures, but who has reportedly made over one hundred million dollars largely from sale of natural health products sold or advertised at anti-vax conferences.⁴²⁸ The Tel Aviv Anti-Vax Conference⁴²⁹ (billed as an informed consent educational seminar) also is seemingly a commercial enterprise: vendors selling food, natural products, homeopathic remedies, literature and the like, populated the halls.⁴³⁰ Conference speakers sold their own literature after their talks.⁴³¹ Anti-vax articles are written by people paid for their work—by the very foundations set up to proselytize anti-vax rhetoric.⁴³²

With its hefty entrance charge,⁴³³ the conference vehicle is easily seen as an entity with commercial footprints. Reportedly,

⁴²⁶ Tom Goldstein, TRIAL LAWYERS GATHERING TO LEARN WINNING WAYS, N.Y. TIMES (July 31, 1979), <https://www.nytimes.com/1979/07/31/archives/trial-lawyers-gathering-to-learn-winning-ways-wellfinanced-lobby.html>.

⁴²⁷ See, e.g., MNOOKIN, *supra* note 104, at 175 (describing anti-vax author Mark Geier's reputation with judges as being "seriously intellectually dishonest" with unreliable testimony).

⁴²⁸ Neena Satija & Lena H. Sun, *A Major Funder of the Anti-vaccine Movement Has Made Millions Selling Natural Health Products*, WASH. POST (Dec. 21, 2019).

⁴²⁹ Barbara Pfeffer Billauer, *More on Conspiracies and Corona 2: Co-Vid Comes from Venus*, TIMES OF ISRAEL: BLOGS (June 22, 2020, 9:50 PM), <https://blogs.timesofisrael.com/more-on-conspiracies-and-corona-2-co-vid-comes-from-venus/>.

⁴³⁰ Barbara Pfeffer Billauer, *Anti-Vaxx Under Cover: Targeting Jewish Moms*, TIMES OF ISRAEL: BLOGS (Dec. 9, 2019, 11:53 PM), <https://blogs.timesofisrael.com/anti-vaxx-under-cover-targeting-jewish-moms/>.

⁴³¹ I met Dr. Donnegan at the Tel Aviv Conference and she sold me her materials. (On file with the author).

⁴³² Liz Essley Whyte, *Spreading Vaccine Fears. And Cashing In.*, CTR. FOR PUB. INTEGRITY, (June 8, 2021), <https://publicintegrity.org/health/coronavirus-and-inequality/spreading-fears-cashing-in-anti-vaccine/>.

⁴³³ Ben Kasstan, "A Free People, Controlled Only by God": *Circulating and Converting Criticism of Vaccination in Jerusalem*, CULTURE, MED., PSYCHIATRY (Feb. 4, 2021), <https://link.springer.com/article/10.1007/s11013-020-09705-2> ("I purchased my entry ticket [to the November Tel-Aviv Anti-Vax Conference] for

speakers are paid for their services and charge respectable sums. Wakefield charges \$3000 a speech, while Bigtree charges the same,⁴³⁴ along with generating revenue from conference tapes that are sold. But what about PEACH and its pamphlets? The pamphlets are distributed free of charge.⁴³⁵ Interestingly, however, the PEACH pamphlet advertises the services of both an attorney and a social activist⁴³⁶ and markets PEACH's interstate and international lending libraries, called a *Gemach*.⁴³⁷ The financial backing of PEACH has not been made public, although the obviously costly production indicates serious funding. Whether these advertisers funded the entire pamphlet is unknown. Information about the advertisers is, however, to say the least, intriguing.

The advertising attorney, Alan Phillips, was licensed in North Carolina and marketed himself as an expert in securing vaccine exemptions.⁴³⁸ Reportedly, he has been disbarred.⁴³⁹ The social activist, Gary Krasner, is

30₪ (approximately \$9)). I paid about \$70 to attend the *Tel Aviv First International Informed Consent Conference*, depending on the conversion rate. (receipt on file with author).

⁴³⁴ Eric Szeto et al., *Hidden Cameras Capture Misinformation, Fundraising Tactics Used by Antivaxx Movement*, CBC NEWS, <https://www.cbc.ca/news/health/marketplace-anti-vaccination-hidden-camera-washington-1.5429805> (Feb. 21, 2020).

⁴³⁵ See Toby Tabachnick, *Anonymous Anti-Vaxxers Push Propaganda on Local Orthodox Community*, PITTSBURGH JEWISH CHRONICLE (Jan. 31, 2018 4:42 PM), <https://jewishchronicle.timesofisrael.com/anonymous-anti-vaxxers-push-propaganda-on-local-orthodox-community/> (reporting anti-vaccine booklets were sent around a community without being requested or paid for).

⁴³⁶ *The Vaccine Safety Handbook: An Informed Parent's Guide*, *supra* note 116, at 17.

⁴³⁷ A Yiddish word generally referring to a lending institution.

⁴³⁸ Alan Phillips, J.D., *Vaccination and Family Law: The Overall Legal Context*, CHILD.'S HEALTH DEF., May 21, 2020.

⁴³⁹ David Donovan, "Bar Watch" Attorney Disbarred, N.C. LAWS. WKLY. (Aug. 1, 2019), <https://nclawyersweekly.com/2019/08/01/bar-watch-attorney-disbarred/> (reporting Phillips was disbarred on July 31, 2019); *see also* Gloria Rodriguez, *NC-Based Vaccine Rights Attorney Facing Lawsuit from NC State Bar*, ABC EYE-WITNESS NEWS (May 13, 2019), <https://abc11.com/vaccine-attorney-lawsuit-north-carolina/5298401/> (reporting that Mr. Phillips is being accused of providing legal services in jurisdictions where he's not licensed to practice law).

the director of Coalition For Informed Choice.⁴⁴⁰ Its website markets eight services available to members,⁴⁴¹ including referrals to sympathetic pediatricians and negotiation or litigation on behalf of a parent denied a waiver or entangled with child protective services. These ads, however small, could propel the “pamphlet-informercial” into the realm of interstate commerce which might also trigger federal governance, and which is subordinate to protection of the public health.⁴⁴²

Additionally, professional speech rules⁴⁴³ should encompass anti-vax rhetoric when offered by lawyers and physicians,⁴⁴⁴ even in conferences/rallies/pamphlets. Under this calculus, FEAR speech offered by medical professionals encompassing false or flawed rhetoric should be punishable.⁴⁴⁵ Thus far, state governments have declined to take such action against physicians appearing at anti-vax rallies, notwithstanding the potency of their flawed invectives, invoked under the color of “MD.”⁴⁴⁶

⁴⁴⁰ *Parents Should Decide Which Vaccines Are Given to Their Children*, CFIC, <http://www.cfic.us> (last visited Oct. 6, 2021) (“[the CFEC is] the primary clearing house for all aspects involving resistance to vaccine mandates in NYS”).

⁴⁴¹ *Id.*

⁴⁴² *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health*, 186 U.S. 380, 389 (1902).

⁴⁴³ *But see*, Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 67 (2016) (“The professional speech doctrine is generally used by courts to reduce the level of First Amendment protection professionals receive for their expression.”).

⁴⁴⁴ These include Wakefield who was struck off the British Medical Register and Jayne Donegan. *See also* David Gorski (Orac), *Antivaccine Physicians Like Dr. Lawrence Palevsky Should All Lose Their Medical Licenses*, RESPECTFUL INSOLENCE (May 31, 2019), <https://respectfulinsolence.com/2019/05/31/palevsky-antivaxer-docs/>.

⁴⁴⁵ Judicial opinions have likewise pointed to speech by professionals to their clients as examples of speech that should be treated as punishable conduct. *See, e.g.*, *Lowe v. SEC*, 472 U.S. 181, 228–29 (1985) (White, J., concurring) (finding client-adviser relationships including the legal profession and investment advising are speaking professions subject to governmental licensing).

⁴⁴⁶ It is interesting to consider whether medical societies might require public pronouncements by their members to be made in conformity with sound science and accepted medical practice. This might be a contentious proposal in that it might shut down some alternative medical practices such as homeopathy, and “cures” such as Lorenzo’s oil. *See Lorenzo’s Oil*, RXLIST, https://www.rxlist.com/lorenzos_oil/supplements.htm (June 11, 2021) (“[Lorenzo’s oil] probably does not help children who already have symptoms”).

IV. A SOLUTION: COMPELLED SPEECH AND WARNINGS

A. *Compelled Speech—A Less Invasive Alternative*

Under any circumstance, government involvement must use the least restrictive means available.⁴⁴⁷ In this regard, one alternative to banning commercial speech, even if allowed, involves compelling reporting “truthful information,” i.e., imposing a disclosure requirement.⁴⁴⁸ Because the “First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed . . . ,”⁴⁴⁹ this approach is generally applauded.⁴⁵⁰

In this regard, the case of *Zauderer v. Office of Disciplinary Counsel* is instructive. Here the court ruled that compelled disclosure of information is constitutional, as long as it reasonably relates to the state’s asserted interests,⁴⁵¹ especially when compelled disclosure is needed to “prevent[] confusion or deception”.⁴⁵²

Commercial disclosure requirements are treated differently from restrictions on commercial speech Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the marketplace of ideas.’ Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and

⁴⁴⁷ *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002).

⁴⁴⁸ VALERIE C. BRANNON, CONG. RSCH. SERV., R45700, ASSESSING COMMERCIAL DISCLOSURE REQUIREMENTS UNDER THE FIRST AMENDMENT (2019).

⁴⁴⁹ *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 n.14 (1985).

⁴⁵⁰ GOSTIN & WILEY, *supra* note 138, at 141.

⁴⁵¹ Relying on *Zauderer*’s principles, *Nat’l Elec. Mfrs. Ass’n v. Sorrell* held that the First Amendment is satisfied “by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose.” 272 F.3d 104, 115 (2d Cir. 2001). The court explained that the disclosure’s purpose was not to prevent consumer deception per se, but rather to protect “human health and the environment.” *Id.*

⁴⁵² *Id.* (citing *In re R.M.J.*, 445 U.S. 191, 201 (1982)); see *N.Y. State Rest. Assoc. v. NYC Bd. of Health*, 556 F.3d 114, 131-32 (2d Cir. 2009) (the protection afforded commercial speech is “somewhat less extensive than that afforded non-commercial speech”) (quoting *Zauderer*, 471 U.S. at 637, 651).

requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, non-misleading commercial speech is restricted.⁴⁵³

Where compelled speech is used as an antidote to false, flawed, and fake information, the review is even less restrictive, because “[p]rotecting commercial speech under the First Amendment is principally justified by protecting the flow of accurate information, and requiring factual disclosures furthers that goal.”⁴⁵⁴ Further, “[b]ecause mandates to disclose factual . . . information trench more narrowly on advertisers’ interests than do prohibitions on speech, the First Amendment interests implicated are substantially weaker than those at stake when speech is suppressed.”⁴⁵⁵

For this reason, the *Zauderer* standard involving disclosure of “accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests.”⁴⁵⁶ The *Zauderer* standard “applies where a disclosure requirement targets speech that is *inherently* misleading . . . [but] also controls our analysis where . . . the speech at issue is *potentially* misleading.”⁴⁵⁷

Several conditions must be fulfilled before speech can be compelled, however. Most importantly, the compelled information must be “purely factual and uncontroversial.”⁴⁵⁸ The first of this criteria is achievable by requiring anti-vax groups to include the position of the

⁴⁵³ N.Y. State Rest. Assoc., 556 F.3d at 131–32 (framing the protection afforded commercial speech as less extensive than that afforded noncommercial speech).

⁴⁵⁴ *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 555 (6th Cir. 2012); *Zauderer*, 471 U.S. at 650–51 (“First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.”).

⁴⁵⁵ GOSTIN & WILEY, *supra* note 138, at 141.

⁴⁵⁶ *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 29 (Rogers, J., concurring in part) (citing *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001)).

⁴⁵⁷ *Disc. Tobacco*, 674 F.3d at 524 (citing *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 641 (6th Cir. 2010)).

⁴⁵⁸ *Ent. Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006); *Zauderer*, 471 U.S. at 651.

scientific consensus.⁴⁵⁹ However, the latter gives us pause. The entire crux of the anti-vax movement thrives on the fact that there is controversy regarding the risk-benefit of vaccines.⁴⁶⁰

The anti-vax groups contend that their world-view is the true one, that they are not purveyors of mistruths and deceptions, and that vaccines are the sin of government and orthodox science.⁴⁶¹ Without, say, a *Daubert*-type hearing where anti-vax rhetoric is evaluated,⁴⁶² it would be difficult to establish whose view of scientific certainty is the “true” one.⁴⁶³ Further, a sentence-by-sentence evaluation of, for example, the PEACH pamphlet, might be too onerous a burden, as virtually every sentence may have to be rewritten or amended as a result of being not only false, but also fraudulent.⁴⁶⁴ Yet, even assertions which are not wholly false but merely misleading are subject to rectification under the commercial speech rubric.⁴⁶⁵ Under the argument that the pamphlets and conferences in question can fall under commercial speech,⁴⁶⁶ and that compelled speech is an available

⁴⁵⁹ See generally *N.Y. State Rest. Assoc. v. NYC Bd. of Health*, 556 F.3d 114, 134–36 (2d Cir. 2009) (upholding regulations requiring restaurants to post calorie content information on menus to combat the scientifically proven relationship between obesity and dining out).

⁴⁶⁰ See generally, Cornwall, *supra* note 24 (“[S]cientists are pursuing one of ‘the most dangerous vaccines ever attempted,’ for a virus that poses little risk to most people.”).

⁴⁶¹ See Gorski, *Deception by Omission*, *supra* note 99.

⁴⁶² *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 580 (1993); see generally Hasen, *supra* note 264, at 66, 75–76 (noting a similar method of extrinsic evaluation for false political speech). *Contra* *List v. Ohio Elections Comm’n*, 45 F. Supp. 3d 765, 769 (S.D. Ohio 2014) (“[W]e do not want the Government . . . deciding what is political truth—for fear that the Government might persecute those who criticize it.”). Contrariwise, we should not want those without valid credentials deciding public health speech.

⁴⁶³ One acceptable mechanism to determine what the prevailing scientific truths are is to use textbooks as a determinant. STEPHEN G. BRUSH, *MAKING 20TH CENTURY SCIENCE: HOW THEORIES BECAME KNOWLEDGE* 15, 72, 207 (2015).

⁴⁶⁴ See, e.g., Billauer, *Measles II FEAR Speech*, *supra* note 4, at 53–54 (noting how the PEACH pamphlet captions government graphs to generate false and misleading conclusions).

⁴⁶⁵ *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 n.14 (1985).

⁴⁶⁶ See *id.*, 471 U.S. at 651; see also *The Vaccine Safety Handbook*, *supra* note 116, at 17 (demonstrating the pamphlet’s commercial nature by naming advertisers).

remedy,⁴⁶⁷ it now remains to determine the feasibility of compelled speech in that context.

B. *Compelling Factual and Non-Controversial Speech*

Standing in the face of mainstream science,⁴⁶⁸ anti-vax groups offer an array of formerly credentialled (and now disgraced) physicians, impressive in quantity, if not quality.⁴⁶⁹ This facilitates implementation of the *Zauderer* standard which “stands for the proposition that commercial disclosure requirements must compel only truthful, accurate information, not opinions,”⁴⁷⁰ but also complicates matters when interpreting scientific tests, which can be construed as opinion.⁴⁷¹ Nevertheless, the *Joiner* case comes to the rescue here, as expert opinion is valid only if it logically flows from the data.⁴⁷² This maxim would enable targeting preposterous opinions of anti-vax “experts.”⁴⁷³

The *Sorrell* case reinforces the principle that distinguishing between a fact and a personal or political opinion controls whether a required disclosure is reviewed under *Zauderer*’s rational-basis rule or exacting scrutiny standards.⁴⁷⁴ Relying on the lenient common-sense (rational-basis) standard, *Sorrell* concludes that mandated disclosures would lead some consumers to change their behavior, and

⁴⁶⁷ See Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 113–14 (2d Cir. 2001).

⁴⁶⁸ See generally N.Y. State Rest. Assoc. v. N.Y.C. Bd. of Health, 556 F.3d 114, 136 n.24 (2d Cir. 2009) (naming mainstream scientific organizations supporting combating obesity fueling state requirement for restaurants to post calorie content on menus).

⁴⁶⁹ See, e.g., MNOOKIN, *supra* note 104, at 174–76.

⁴⁷⁰ Grocery Manufacturers Association v. Sorrell, PUBLIC CITIZEN, <https://www.citizen.org/litigation/grocery-manufacturers-association-v-sorrell/> (last visited Oct. 6, 2021); *Zauderer*, 471 U.S. at 651; see Grocery Mfrs. Ass’n v. Sorrell, 102 F. Supp. 3d 583, 630 (D. Vt. 2015) (discussing label mandates for genetically engineered foods requiring disclosure of only factual, noncontroversial information).

⁴⁷¹ See Gen. Elec. Co. v. Joiner, 522 U.S. 136, 137 (1997) (“Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert”).

⁴⁷² *Id.* at 146.

⁴⁷³ See *id.*; Gorski, *Deception by Omission*, *supra* note 99 (demonstrating how anti-vax proponents misconstrue data).

⁴⁷⁴ See Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 114 n.5 (2d Cir. 2001).

hence are valid.⁴⁷⁵ In the case of vaccine resistance (as well as other public health imperatives), changing behavior is a key determinant in the success of a program.⁴⁷⁶ As Professors Gostin and Wiley have noted, “human behavior is a powerful contributor to injury and disease . . . [hence] governmental suppression of commercial messages deemed hazardous to the public’s health (through advertising restrictions) and compel[led] warnings and disclosures deemed essential to the public health (compelled speech)”⁴⁷⁷ should be countenanced.

Undoing the harm engendered by pamphleteers, conferences, and robocalls requires propounding facts adduced by the orthodox scientific community,⁴⁷⁸ specifically establishing that failure to vaccinate is dangerous and that vaccines are reasonably safe.⁴⁷⁹ Thus, while PEACH’s pamphlets, for example, advise parents to do their own research,⁴⁸⁰ their research list includes false, fake, or flawed literature for parental perusal.⁴⁸¹ Moreover, it is highly unlikely that pamphlet recipients will take the initiative of searching out additional information for themselves, either due to their inexperience, cognitive dissonance (the anti-vax material sustains their inherent beliefs),⁴⁸² sheer laziness, or lack of time. Further complicating redress of inaccuracies and deception is the semblance of legitimacy accorded to various sources in the anti-vax assembled reference lists.⁴⁸³ Letters to the editor are fraudulently alluded to as published, peer-reviewed studies,⁴⁸⁴ financial ties of authors to the anti-vax

⁴⁷⁵ *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 564 (6th Cir. 2012).

⁴⁷⁶ *See Trimble, supra* note 67.

⁴⁷⁷ GOSTIN & WILEY, *supra* note 138, at 333.

⁴⁷⁸ *See Cardillo, supra* note 161.

⁴⁷⁹ *The Science Is Clear: Vaccines are Safe, Effective, and Do Not Cause Autism*, HUB, <https://hub.jhu.edu/2017/01/11/vaccines-autism-public-health-expert/> (Jan. 11, 2017).

⁴⁸⁰ *The Vaccine Safety Handbook, supra* note 116, at 25.

⁴⁸¹ *See Billauer, Measles II FEAR Speech, supra* note 4, at 24.

⁴⁸² *See Warmflash, supra* note 348 (identifying a chemical component to rational thinking “when a person maintains irrational beliefs in the face of counterevidence”).

⁴⁸³ *See The Vaccine Safety Handbook, supra* note 116, at 38–39.

⁴⁸⁴ Billauer, *Measles II FEAR Speech, supra* note 4, at 52.

movement are not clarified or clearly disclosed.⁴⁸⁵ Some authors have been held to be legally incompetent to testify.⁴⁸⁶

Compelling an addendum of material to rebut false assertions, for example, via the PIE materials⁴⁸⁷ compiled by the Orthodox Nurses Association, would make availability of counterspeech easier to access, and hence more likely that readers will do so. It would also alert parents that another organization, one in which they have greater trust than government, opposes the views espoused in the anti-vax literature. Countering conference speech by timely compelled speech is harder.⁴⁸⁸ Even providing counter anti-vax views in an audience largely populated by anti-vax activists would not be conducive to message-uptake by the unconvinced.⁴⁸⁹

C. *Public Health Communications Campaigns and Warnings*

To address the difficulties involved in compelled counterspeech, perhaps a page can be lifted from the tobacco litigation. The court in *Cipollone v. Liggett Group, Inc.* held that “[t]o avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves.”⁴⁹⁰ In this regard, it can be said that to avoid giving the false notion that non-vaccination is innocuous, the pamphleteer and conference-organizer must divulge the serious risks to life that that decision imposes.

This Article also suggests that false information might be countered by government-mandated education campaigns. “[E]ducation campaigns are the preferred public health strategy. . . . [In] many ways it is unobjectionable.”⁴⁹¹ Requiring dissemination of governmentally approved

⁴⁸⁵ See generally, *The Vaccine Safety Handbook*, *supra* note 116, at 17 (advertising anti-vax resources).

⁴⁸⁶ See, e.g., MNOOKIN, *supra* note 104, at 175.

⁴⁸⁷ EMES Initiative, *A Slice of PIE, Making PIEs Out of PEACH: MMR Edition*, N.Y.C GOV’T (May 2019), <https://www1.nyc.gov/assets/doh/downloads/pdf/a-slice-of-pie>.

⁴⁸⁸ See Warmflash, *supra* note 348 (providing a scientific explanation as to why people stand by their beliefs in the face of counter evidence).

⁴⁸⁹ See *id.*

⁴⁹⁰ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 527 (1992) (citation omitted).

⁴⁹¹ GOSTIN & WILEY, *supra* note 138, at 337.

literature⁴⁹² furthers the government interest in protecting the public health in the least restrictive manner possible as the “government’s use of its own voice does not raise the constitutional concerns triggers when it silences or compels speech.”⁴⁹³ Persons running afoul of the deceptive speech mandate can also be compelled to finance this government-speech.⁴⁹⁴

Another approach would require appending a warning—directly affixed to the anti-vax missives and conference marketing, or imprinting a governmental warning on the first page of a pamphlet or on marketing materials. This would put the information front and center where it is more difficult to ignore. Waiting till after reading highly persuasive anti-vax propaganda before confronting the reader with counterarguments is risky, as by then they have likely already formulated their opinions.⁴⁹⁵ Thus, ad-ducing a warning (perhaps under the name of the Surgeon General) at the outset might allay some of that concern.

For example:

- *Failure to vaccinate your children can be hazardous to their health and can endanger your loved ones.*
- *Warning: This pamphlet contains false and misleading information. It is strongly recommended that you consult the appended information furnished by the Surgeon General [or Department of Health].*

Finally, the constitutionality of requiring a warning has been approved.⁴⁹⁶ “[T]he Constitution permits the State to require speakers

⁴⁹² See, e.g., *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 561–62 (2005) (justifying beef promotional campaigns disseminated and approved by the Secretary of Agriculture by the government-speech doctrine). *But see* *U.S. v. United Foods, Inc.*, 533 U.S. 405, 415–16 (2001) (holding compelled subsidies for mushroom rooms used for advertising were not to be part of a broader regulatory scheme and unconstitutional).

⁴⁹³ GOSTIN & WILEY, *supra* note 138, 142; see *Rust v. Sullivan*, 500 U.S. 173, 194–95, 200, 203 (1991) (upholding a gag order on an abortion clinic).

⁴⁹⁴ See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 236 (1983); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1389–90, 1422–23 (2001); see also Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 375 (1983).

⁴⁹⁵ See Warmflash, *supra* note 348.

⁴⁹⁶ *Ent. Software Ass’n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006).

to express certain messages without their consent, the most prominent examples being warning and nutritional information labels.”⁴⁹⁷

CONCLUSION

I have previously established that anti-vax rhetoric disseminated by anti-vax groups is quantifiably dangerous and exacerbates baseline vaccine resistance. This rhetoric contains false, flawed, fake, fraudulent, endangering, and reckless misinformation (FEAR speech), which defies traditional counterspeech. Restricting such rhetoric when there is no law or order on the books requiring vaccination and no prevailing epidemic is problematic. Any such attempt triggers First Amendment fireworks and push-back, even if ostensibly performed under content neutral enactments. These objections track *U.S. v. Alvarez*, which rejects restricting false speech contained in political speech, while recognizing constitutional disdain for the same false speech employed within commercial speech.

In this work, I evaluate the constitutional question under a public health law lens, determining that these holdings are less amenable to science speech, especially FEAR speech, than is commonly considered under prevailing constitutional analysis. *Alvarez* is emblematic. Firstly, there is a three-way discord therein in the balancing standard to be utilized (strict, intermediate, or rational scrutiny) with no majority. Secondly, the balancing test frames the government interest as preserving national pride, which cannot rival the government interest here—the police power to protect the public health. Thirdly, false speech that is fraudulent (e.g., some FEAR speech) is actionable. After investigating anti-vax groups and noting the commercial nature of some of their activities, I investigate evaluating anti-vax rhetoric as commercial speech, triggering the use of compelled speech to counter the anti-vax rhetoric. Concluding that compelling disclosure of factual information would not be feasible, I recommend that anti-vax advertising and literature be required to affix a warning, setting forth the dangers of failing to vaccinate. Being that such speech is not restrictive and does not trample on First

⁴⁹⁷ See, e.g., *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 550–51 (6th Cir. 2012) (upholding requirement for warnings on cigarette packs); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114–15 (2d Cir. 2001) (upholding requirement for light bulb labels warning consumers of mercury content).

Amendment concerns, it should meet with no resistance, even if the speech is not considered commercial.

498

Figure 1: Illustration from the PEACH Vaccine Safety Handbook

⁴⁹⁸ *The Vaccine Safety Handbook*, *supra* note 116, at 17 (illustrating the purported components of the diphtheria-tetanus-pertussis vaccine).

⁴⁹⁹ Figure 2: Proposed Warning Labels to be Affixed to Anti-Vaccine Propaganda

⁴⁹⁹ See *The Vaccine Safety Handbook*, *supra* note 116, at 1. Author's note: I added two warning signs to PEACH's pamphlet to show how effective these signs can be.