LETHAL LIES: GOVERNMENT SPEECH, DISTORTED SCIENCE, AND THE FIRST AMENDMENT

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Throughout the COVID-19 pandemic, Americans have had to confront an extraordinary speech phenomenon: an onslaught of misinformation and recurring lies from government officials, including the former President and his top health officials, about the pandemic. This phenomenon intersects in potentially novel ways with enduring questions about the regulation of government speech.

Ordinarily, the government is free to articulate its own message to the exclusion of others. It can be pro-democracy or anti-tobacco without running afoul of the First Amendment. Whereas the requirement of content and viewpoint neutrality applies when the government polices the public speech of nongovernmental actors, neither the government nor government officials are required to be neutral in their own messaging. Nor would we want them to be neutral regarding scientific and factual issues. Rather, we expect that government health agencies, such as the CDC or FDA and their officials, would express only one side—the side best supported by science.

In this sense, we have traditionally treated government speech relating to health, safety, and scientific matters as a particular form of expert speech. The expectation of content neutrality also does not apply to nongovernmental experts, such as physicians and other health professionals. They are expected to ground the information they offer in the best science available. But unlike government officials, they are subject to malpractice law when they are offering advice to particular patients and clients. Government speakers have traditionally faced no such consequences for giving bad advice to the public. The torts of public health malpractice or public official informational fraud are not recognized. This raises the critical

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question: should they be? Or do First Amendment values demand that government speakers have free reign, even when they distort scientific information related to the health of the citizenry?

In this Article, we engage with such questions. We begin by offering a typology that disaggregates speakers and types of speech through the lens of the range of misinformation that officials have offered during the COVID-19 pandemic. We distinguish among government speakers who echo experts, government experts who speak outside of their realm of expertise, and government speakers who lack expertise and issue official statements contrary to expertise. We then explore the First Amendment's relationship to government health misinformation and consider whether private law should play a similar demarcation between protected and unprotected speech for government health officials as it does for privately practicing health professionals. We then argue that given the strong similarities between certain types of official health-related misinformation and professional speech, the legal regime that applies to the latter, more specifically malpractice law, provides a helpful model for thinking about and, more speculatively, potentially policing the former.

TABLE OF CONTENTS

I. INTRODUCTION

Throughout the COVID-19 pandemic, Americans have had to confront an extraordinary speech phenomenon: an onslaught of misinformation and recurring lies from government officials, including the former President and his top health officials, about the pandemic. Even now, more than two years into the pandemic, false and misleading statements by legislators and executive branch officials

across the country continue.[1] This phenomenon intersects in potentially novel ways with enduring questions about government speech.

"Governments must speak in order to govern," Helen Norton notes at the opening of her book, *The Government's Speech and the Constitution*.[2] Ordinarily, the government is free to articulate its own message to the exclusion of others.[3] It can be pro-democracy or anti-tobacco, without running afoul of the First Amendment. Although the First Amendment demands that government regulations (in almost all cases) adhere to content and viewpoint neutrality, such neutrality is not required when the government itself speaks.[4] Nor would we want the government to be neutral regarding scientific and factual issues. Rather, we expect that government health agencies, such as the Centers for Disease Control and Prevention ("CDC") or Food and Drug Administration ("FDA"), and the officials that work for them, will express only one side—the side best supported by science.

In this sense, government speech relating to health, safety, and scientific matters, which we will simply call health-related speech, can be viewed as a particular form of expert speech.[5] Nongovernmental experts, such as physicians and other health professionals, are also expected to ground the information they convey and the advice they offer their patients in the best science available.[6] However, unlike government officials, the law of malpractice polices the statements they offer to their patients.[7]

Traditionally, government speakers have faced no similar consequences for their misinformation and bad advice.[8] The torts of public health malpractice or public official informational fraud have not been recognized.[9] That raises the critical question: should they be? Or do First Amendment doctrine and free speech values demand that government speakers have free reign, even when they distort scientific information related to the health of the citizenry in ways that are likely to cause citizens harm? This Article begins to explore these questions.

This Article proceeds in four Parts. In Part II, we review the problem of health-related misinformation by government officials and connect it to the

1. *See, e.g.*, Kathy McCormack, *Legislator Leaves Panel Leadership Over False COVID Claims*, AP NEWS (Oct. 6, 2021), https://apnews.com/article/coronavirus-pandemic-technology-health-misinformation-c03e3c26a9bd1b1f80fa1bd7b34caad2 [https://perma.cc/YJG5-N7FE].

2. HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 1 (2019).

3. *Id.* at 5.

4. *Id.* at 5–6.

5. *See* Scott J. Schweikart, *Constitutional Regulation of Speech (and False Beliefs) in Health Care*, 20 AMA J. ETHICS 1041, 1041–44 (2018) (discussing government regulation of healthcare and clinicians in the speech context).

6. *See, e.g.*, Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1248–54 (2016) [hereinafter Haupt, *Professional Speech*] (conceptualizing the professions as "knowledge communities"); Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671, 690–704 (2017) [hereinafter Haupt, *Unprofessional Advice*] (discussing justifications for shared professional knowledge).

7. Haupt, *Professional Speech*, *supra* note 6, at 1285.

8. Wes Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, ST. JOHN'S L. REV. (forthcoming) (arguing for a tort based on fraud on the public).

9. *But see id.*

larger post-truth phenomenon. We then offer a typology that disaggregates speakers and types of speech through the lens of official speech relating to the pandemic. In particular, we distinguish government speech that echoes experts from government speech that contradicts it. We also distinguish between government speakers who have positions of authority relating to health, and education and experience in health, and those who do not. In Part III, we examine the First Amendment's role in government health misinformation, distinguishing among doctrinal frameworks governing government speech, private speech in public discourse, and professional speech. In so doing, we examine the similarities and differences between professional advice-giving and government advice-giving. Drawing out these parallels, we suggest, offers a clarifying analogy to foreground and investigate the shortcomings of the current free speech status of government health advice. In Part IV, we consider whether private law may offer a model for assessing or policing misinformation and dangerous speech offered by government health officials as it does for privately practicing health professionals. Ultimately, we argue that the law of malpractice, as applied to professional speech, provides helpful guidance for thinking about and, more speculatively, potentially regulating the harmful misinformation uttered by government officials. We conclude by discussing some of the strengths and limitations of viewing the problem through the lens of malpractice law. Our goal here is not to argue that there is a tort of governmental health misinformation, or to fully develop what one might look like, but rather to offer a useful model to think through why and when governmental health misinformation is harmful and how the law might respond.

II. LIES AND THE PANDEMIC

Misinformation about health threats is not new. Throughout history, pandemics have given rise to false rumors and conspiracy theories, as well as snake oil and quack cures. Misinformation about vaccinations, in particular, has a long history, and was spreading virulently long before COVID-19.[10] Sometimes, as with tobacco, health-related misinformation has been manufactured and disseminated by industries that have an economic interest in misleading the public about the dangers of their products.[11]

Several characteristics distinguish today's "infodemic," as the World Health Organization has termed the problem of COVID-related misinformation,

10. *See, e.g.*, MICHIKO KAKUTANI, THE DEATH OF TRUTH 13 (2018); SETH MNOOKIN, THE PANIC VIRUS: A TRUE STORY OF MEDICINE, SCIENCE AND FEAR 6 (2011); David A. Broniatowski et al., *Weaponized Health Communication: Twitter Bots and Russian Trolls Amplify the Vaccine Debate*, 108 AM. J. PUB. HEALTH 1378, 1378 (2018); Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 U. PA. J. CONST. L. 207, 207 (2018).

11. NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO CLIMATE CHANGE 136 (2010); *see also* DAVID MICHAELS, THE TRIUMPH OF DOUBT: DARK MONEY AND THE SCIENCE OF DECEPTION 15 (2020).

from prior proliferations of health-related misinformation.[12] First, social media helps to disseminate falsehoods with a rapidity that must make yesterday's "merchants of doubt" jealous.[13] Today's informational environment is also marked by intense partisan polarization, eroding trust in expertise, high degrees of individualism, and the loss of faith in either the existence of or even need for objective truth.[14] In short, we live in what some have called the "post-truth era."[15] In this Article, however, we focus on an additional, less theorized contributor to the infodemic: official misinformation.

A. The Rise and Nature of Government Misinformation

Throughout the pandemic, officials at all levels and branches of government have offered misleading and sometimes downright false information about how COVID-19 spreads and the efficacy and risks of various mitigation strategies, from masks to vaccines.[16] The misinformation began early in the pandemic when President Trump repeatedly told the public that the coronavirus was contained in the U.S. and posed no real threat, even though, as he told journalist Bob Woodward, he knew the situation was dire.[17] The problem continued throughout 2020 when Trump offered misleading information about masks[18] and the efficacy of hydroxychloroquine.[19] Once vaccines became available, other government officials, including Senator Rand Paul, spread misleading information

12. *Managing the COVID-19 Infodemic: Promoting Healthy Behaviours and Mitigating the Harm from Misinformation and Disinformation*, WORLD HEALTH ORG. (Sept. 23, 2020), https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation [https://perma.cc/H9NE-EH8B]. See *infra* notes 26–58 and accompanying text for a fuller discussion of what we mean by health-related misinformation.

13. The term comes from ORESKES & CONWAY, *supra* note 11. On the role of social media, *see, e.g.*, Anna Kata, *Anti-Vaccine Activists, Web. 2.0, and the Postmodern Paradigm—An Overview of Tactics and Tropes Used Online by the Anti-Vaccination Movement*, 30 VACCINE 3778, 3778 (2012).

14. *See* Wendy E. Parmet & Jeremy Paul*, Post-Truth Won't Set Us Free: Health Law, Patient Autonomy and the Rise of the Infodemic*, in COVID-19 AND THE LAW (I. Glenn Cohen, Abbe Gluck, Katherine Kraschel, and Carmel Shachar, eds., forthcoming), http://hdl.handle.net/2047/D20413069 [https://perma.cc/J3BD-JSZX].

15. LEE MCINTYRE, POST-TRUTH 1 (2018).

16. Like Norton, we consider government speech as including (1) the collective speech of a governmental body, (2) the speech of an individual who speaks for such a body, and (3) an individual who speaks when backed by the government's power. NORTON, *supra* note 2, at 3. We also go beyond her to include the public speech of legislators and other governmental officials who have governmental positions but are not necessarily speaking on behalf of the governmental organization or branch of government to which they belong when they offer the misinformation. *See infra* notes 17–22.

17. Alana Wise, *Trump Admits Playing Down Coronavirus's Severity, According To New Woodward Book*, NPR (Sept. 9, 2020, 4:40 PM), https://www.npr.org/2020/09/09/911109247/trump-admitted-to-playing-down-the-coronaviruss-severity-per-new-book [https://perma.cc/3NJ2-VAQV].

18. Daniel Victor, Lew Serviss & Azi Paybarah, *In His Own Words, Trump on the Coronavirus and Masks*, N.Y. TIMES (Oct. 2, 2020), https://www.nytimes.com/2020/10/02/us/politics/donald-trump-masks.html [https://perma.cc/7DBE-MC8Y].

19. Berkeley Lovelace Jr., *Trump Says He Still Thinks Hydroxychloroquine Works in Treating Early Stage Coronavirus*, CNBC (July 29, 2020, 11:22 AM), https://www.cnbc.com/2020/07/28/trump-says-he-still-thinks-hydroxychloroquine-works-in-treating-early-stage-coronavirus.html [https://perma.cc/QJQ2-KC3V].

about their efficacy.[20] Congresswoman Marjorie Taylor Greene likened the campaign to vaccinate people to the Nazi "brownshirts,"[21] and Senator Ron Johnson held an event to publicize people who claimed (without verification) that the vaccines had harmed their health.[22]

This type of misinformation can have deadly consequences. At the start of the pandemic, President Trump's misleading claims regarding the nature and seriousness of the pandemic convinced many individuals that COVID-19 was not a serious problem and that they had no need to adhere to public health recommendations, such as mask wearing.[23] By 2021, misinformation about vaccines, sometimes supported by prominent public officials, worked to legitimate the misinformation spread by private anti-vax groups, helping to undermine efforts to vaccinate the population, leaving America especially vulnerable to the Delta and later Omicron surges.[24] As Norton suggests, "sometimes the government's speech . . . wreaks grave harms."[25] This certainly happened during the pandemic, where government speech raised doubts about the seriousness and actuality of COVID-19, the efficacy of masks, and the safety of vaccines. This experience raises the question "how should we balance protections for speech and public health?" The pandemic scenario exposes the problematic tradeoffs that are generally assumed when more free speech is the default remedy and democratic accountability is insufficient to avoid harm to the public.

B. A Taxonomy of Official Lies: Who Said What About COVID-19?

Before turning to what the First Amendment has to say about official health-related misinformation, it is important to consider the different types of communications that may fall under that broad umbrella. As Norton notes, "[t]he government itself is composed of sundry speakers, as 'the government' can refer to any of many public entities and officials within the United States."[26] For this

20. *See* Victoria Knight, *Explaining What Rand Paul Said About Vaccines for People Who Had COVID-19*, POLITIFACT (June 17, 2021), https://www.politifact.com/article/2021/jun/17/explaining-what-rand-paul-said-about-vaccines-peop/ [https://perma.cc/7D5F-WX47].

21. Bess Levin, *You'll Never Believe It, But Marjorie Taylor Greene Is Still Lying About COVID-19*, VANITY FAIR (July 20, 2021), https://www.vanityfair.com/news/2021/07/marjorie-taylor-greene-coronavirus-lies [https://perma.cc/JL4G-L8A9].

22. Corrinne Hess, *Health Experts, Officials Slam Ron Johnson Over COVID-19 Vaccine Assertions*, WIS. PUB. RADIO (June 28, 2021, 4:15 PM), https://www.wpr.org/health-experts-officials-slam-ron-johnson-over-covid-19-vaccine-assertions [https://perma.cc/3L5L-L578].

23. ANDY SLAVITT, PREVENTABLE: THE INSIDE STORY OF HOW LEADERSHIP FAILURES, POLITICS, AND SELFISHNESS DOOMED THE U.S. CORONAVIRUS RESPONSE 4 (2021).

24. *See, e.g.*, Selena Simmon-Duffin, *This Is How Many Lives Could Have Been Saved with COVID Vaccinations in Each State*, NPR (May 13, 2022 5:01 AM), https://www.npr.org/sections/health-shots/2022/05/13/1098071284/this-is-how-many-lives-could-have-been-saved-with-covid-vaccinations-in-each-sta [https://perma.cc/AKW6-YKZ8] (discussing the numbers of lives that could have been saved through the Omicron surge had more Americans been vaccinated); Lisa Lerer, *How Republican Vaccine Opposition Got to This Point*, N.Y. TIMES (Sept. 12, 2021), https://www.nytimes.com/2021/07/17/us/politics/coronavirus-vaccines-republicans.html [https://perma.cc/4CZ7-MSP9] (discussing Republican politicians' role in spreading vaccine misinformation and its impact on vaccination rates and deaths among Republicans).

25. NORTON, *supra* note 2, at 2.

26. *Id.* at 12.

discussion, we take a broad view of government speech, including both the speech of governmental entities (such as CDC) and the speech of government officials who work for or wield authority over such entities (*e.g.*, a president, governor, or FDA official). At the outset, however, we should distinguish the private speech of government speakers from the speech they make in their official capacity. This can be a tricky line to draw. Norton, for example, does not include in her definition of government speech "the speech of an individual government official or legislator when she expresses her own views in a personal, rather than governmental, capacity."[27] But as Norton recognizes, "the line between" when a government official expresses her own views and when she speaks for the government "is not always bright."[28] A tweet from a postal worker about vaccines should not be considered government speech; a tweet by a president may be. For high-level government officials, such as a president, a governor, or even the head of an agency, any public pronouncements, whether by Twitter or press conference, should qualify as government speech.

Health-related misinformation by government officials, like health-related misinformation by private parties, comes in many flavors. From a public health perspective that focuses on population health outcomes, [29] rather than the dignitary or moral harms that misinformation can cause,[30] not all forms of health-related misinformation are equally concerning. Nor should all be subject to the same legal responses. We, therefore, begin by distinguishing among different types of health-related government misinformation. In so doing, we do not claim that our typology is complete. Also, as we discuss further below, we recognize that there are many hard cases and that the distinctions we offer generally fall along continuums. Still, the delineation of different types of health-related misinformation by the government and its officials is necessary to underpin the legal and normative analysis that follows.

Initially, it is critical to differentiate between intentional misrepresentations (what we will call "lies"), negligent misstatements, and nonnegligent or "innocent" misstatements.[31] For present purposes, we use the term "lie" in the same way that Helen Norton does, "to mean a false assertion of fact known by the speaker to be untrue and made with the intention that the listener understand it to be true."[32] Traditionally, the common law usually recognized lies through the tort of intentional misrepresentation, also known as fraud or deceit, only in the commercial context and only when the defendant knowingly misstated information with the intent of inducing reliance by the plaintiff.[33] Thus lies, when

27. *Id*. at 3.

28. *Id.*

29. WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 13–19 (2009).

30. Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 79–80 (2015).

31. *Cf.* CASS R. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 12–13 (2021) (similarly categorizing misstatements).

32. NORTON, *supra* note 2, at 77.

33. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. L. INST. 2020)

stated without the intent to induce reliance, do not constitute the tort of intentional misrepresentation.[34] The fact that the tort of intentional misrepresentation is limited to such cases, however, does not mean that the defendant who lies without seeking reliance from the plaintiff or outside of the commercial context is necessarily off the hook.[35] Most importantly, the fact that a misstatement was unintentional is not a defense to a negligence claim in which the lie was also unreasonable.[36]

Misrepresentations can also be reckless. A party is reckless when they either know of the risk of harm created by their actions or know facts that "make the risk obvious to another" in their situation, and the burdens of eliminating the risk are so small in relation to the harm as to show that they are acting with indifference to the risk.[37] Much of the health-related misinformation stated by public officials during the pandemic likely rises to the level of recklessness, even if the speaker lacked the intent necessary to establish a lie.

For discussion of the analogies between health-related speech by health officials and professional speech, negligent misrepresentation is an even more salient category. It occurs when the defendant unreasonably gives false information which causes harm to another who acts in "reasonable reliance" upon such information.[38] In the professional context, the determination of what statements are offered reasonably depends upon what a reasonable professional would state under the circumstances; statements that are offered unreasonably under the circumstances constitute malpractice.[39] Hence, it can be unreasonable and an act of malpractice for a professional to offer information or advice even when it would not be unreasonable for a layperson to provide that information or offer that advice.[40] This underscores the point that professionals are held to a higher standard of care than laypersons. For professionals, the key question is whether the advice they offer patients or clients differs from what a reasonable professional would offer, even if the advice does not contain intentional misstatements. Thus, a plaintiff in a malpractice action need not show that the professional lied or was reckless.[41]

Misstatements can also be "innocent." Both in the professional context, and outside of it, individuals can make misstatements without knowing that they are false and while exercising reasonable care. In products liability law, even nonnegligent, or "innocent," misrepresentations are actionable.[42] This is not so

34. Lies, as we and Norton define them, are also distinct from nondisclosures. *See id.* We also do not consider whether under some circumstances the failure to present information can mislead in the same way as misstatements.

35. *See id.*

36. 2 STEVEN E. PEGALIS, AMERICAN LAW OF MEDICAL MALPRACTICE § 10:1 (3d. ed. 2021) (stating that wrongful intent is not required in the context of medical malpractice).

37. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 2 (AM. L. INST. 2010).

38. RESTATEMENT (SECOND) OF TORTS § 310 (AM. L. INST. 1965).

39. Haupt, *Professional Speech*, *supra* note 6, at 1286–87.

40. *Id.*

41. For a further discussion of this issue, see *infra* text accompanying notes 205–07.

42. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. § 9 (AM. L. INST. 1998).

in professional liability cases; physicians, for example, are not liable for malpractice if they offer an innocent (reasonable) misstatement.

Consider the question of how COVID-19 is transmitted, an issue which is critical for deciding how to reduce the risk of contagion.[43] Early in the pandemic, many scientists relied on the very limited information that was available, as well as the epidemiology of SARS-COV-1 (the coronavirus that caused the 2003 SARS outbreak), to conclude that the SARS-COV-2 (the coronavirus that causes COVID-19) was spread mostly by large respiratory droplets, rather than fine aerosolized particles.[44] This information led health officials around the globe to recommend that individuals maintain six feet of distance between themselves and those outside their household, as large droplets usually do not travel far.[45]

Relatively quickly, as more data became available, the scientific consensus shifted towards one that recognized that SARS-COV-2 frequently spreads by aerosols.[46] Despite the fact that the initial statements many officials made were inaccurate and potentially harmful, because people who maintained six feet of distance thought they were safe when they were not, they were not lies; nor were they negligent. Rather, the statements were the reasonable conclusion of experts given the limited state of the information available in the early winter of 2020.[47] As new information became available and the expert consensus changed, however, CDC's continued unwillingness to acknowledge the role that aerosols played became less innocent. At some point, CDC's continued statements regarding how COVID-19 was transmitted likely constituted negligent misrepresentations, and perhaps, even reckless misrepresentations or lies.[48] Critically, there is no magic date when the agency's actions morphed from innocent misrepresentations to negligent misrepresentations to reckless misrepresentations to lies. Nevertheless, a transformation was readily evident.

Importantly, as with the initial articulation of the 6-foot rule, innocent but erroneous health-related misinformation may be common during a new outbreak, especially in its early days.[49] At the start of an epidemic, or other health problem, information will necessarily be limited. Reasonable and conscientious health officials will offer their best assessments, based on their background understanding of the field, and the limited data that is available. Over time, as more studies are conducted and more information becomes available, initial assessments will change and prior recommendations will be revised if not upended. This process

43. *Modes of Transmission of Virus Causing COVID-19: Implications for IPC Precaution Recommendations*, WORLD HEALTH ORG. (Mar. 29, 2020), https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations [https://perma.cc/7DEQ-R8KR].

44. *See id.*

45. *Id.*

46. Carolyn Barber, *Protecting Against COVID's Aerosol Threat*, SCI. AM. (Oct. 1, 2020), https://www.scientificamerican.com/article/protecting-against-covids-aerosol-threat/ [https://perma.cc/NQT8-M7VV].

47. *See id.*

48. The CDC only changed its stance in May 2021, *SARS-CoV-2 Transmission*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html#print [https://perma.cc/Z2JU-8SH9].

49. *See id.*

can be confusing to the public. Even when there is no health emergency, it can be difficult to convey complex health information to laypersons. During an emergency, when information and expert advice change rapidly, this evolution of scientific knowledge and advice can be especially perplexing and lead many laypersons to distrust or discount the experts, who can appear inconsistent or unsure of themselves. Despite that downside, the revision of advice due to new information is a virtue rather than a vice.[50] We want and expect scientists to test and revise their understanding of the world in light of new data and scientific tests, as well as changes in the nature of the threat, such as the rise of new variants.[51] We also do not want health officials to wait until all the information is in and everything that can be learned is learned (which may never occur) before advising the public. Consider again COVID-19. Although scientists in January and February 2020 did not have a complete understanding of how the virus spread, a decision to wait until all the facts were in before warning the public would have been—and in some cases was—catastrophic.[52] Indeed, CDC's failure to revise their guidance on masking as the Delta variant spread throughout the United States in the spring and early summer of 2021 may have facilitated Delta's transmission.[53] In a pandemic, time can be of the essence. Further, throughout a pandemic, or with any health problem, officials' failure to share what they know may smack of a lack of transparency and erode trust.[54] When the public's health is at risk, excessive caution can be deadly.

In exploring official misstatements related to health, it is also important to distinguish between factual misrepresentations (innocent, negligent, reckless, or intentional) and statements that express values and policy preferences. For example, the statement "masks do not protect people against COVID-19" is quite different than "free people should not be required to wear masks." The first is factually erroneous.[55] The second expresses a value that is not subject to scientific verification.[56] Of course, the lines between the two types of statements can

50. *See, e.g.*, Apoorva Mandavilli, *The U.S. Is Getting a Crash Course in Scientific Uncertainty*, N.Y. TIMES (Aug. 23, 2021), https://www.nytimes.com/2021/08/22/health/coronavirus-covid-usa.html?smid=url-share [https://perma.cc/FLM8-2MNH].

51. JOSEPH R. BIDEN, THE WHITE HOUSE, NATIONAL STRATEGY FOR THE COVID-19 RESPONSE AND PANDEMIC PREPAREDNESS 63 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf [https://perma.cc/Y8GW-GKK3] (prioritizing "[c]ontinu[ing] aggressive research to identify best practices for, and barriers to, implementing CDC public health guidance").

52. *See id.* at 6.

53. Dhaval Adjodah et al., *Association Between COVID-19 Outcomes and Mask Mandates, Adherence, and Attitudes*, PLOS ONE, (June 23, 2021), https://doi.org/10.1371/journal.pone.0252315 [https://perma.cc/RN27-35PM].

54. On the role of trust in public health, see e.g., Taylor A. Holroyd, Oladeji K. Oloko, Daniel A. Salmon, Saad B. Omer & Rupali J. Limaye, *Communicating Recommendations in Public Health Emergencies: The Role of Public Health Authorities*, 18 HEALTH SEC. 21, 21 (2020).

55. *See* Adjodah et al., *supra* note 53.

56. *See, e.g.*, Helena Rosenblatt, *No, There Isn't a Constitutional Right to Not Wear Masks*, WASH. POST (Aug. 20, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/08/20/no-there-isnt-constitutional-right-not-wear-masks/ [https://perma.cc/G8BU-DAX8].

be blurry.[57] Listeners who hear the second may well interpret it to mean "masks don't help," or "COVID-19 is not a big threat." Indeed, the speaker of the second sentence may even intend or at least concur with those interpretations. Further, the health impact of the second sentence may be as great, or even greater, than the health impact of the first sentence. Statements that are imbued with the language of values that resonate with listeners can be more persuasive than dry, factual recitations.[58] Nevertheless, as we shall discuss below, the intermingling of political ideology, values, and scientific facts in messages add complexity, especially from a First Amendment perspective, to the legal analysis of official health-related misinformation.[59]

It is also critical to consider both the context in which official misstatements are uttered—public or private—and the position and authority of the speaker. As we stated above, the speech of government officials that is not stated in their official capacity does not constitute government speech.[60] Public statements issued by public officials in their official capacity are also more likely to impact public health than officials' private, off-duty statements. Thus, the President stating to the press that COVID-19 is "under control"[61] when he knows that not to be the case is far more troubling from a public health perspective than the same claim stated to his family. Yet, once again, the line between public statements made in an official capacity (government speech) and private statements by public officials can be hard to distinguish, especially in the era of social media.[62] This applies not only to a very well-known public official, such as President Trump,[63] but potentially to less well-known officials. Thus, imagine the impact of a hypothetical "private" message to Facebook "friends" in March 2020 by a CDC scientist saying that "COVID-19 is a hoax; don't worry, it can't make you ill." Had such a statement gone "viral," the health implications could have been dire.

57. This is not only true for the pandemic but also more broadly whenever expertise and political or moral positions converge, such as in beginning- and end-of-life scenarios. *See, e.g.*, Claudia E. Haupt, *Religious Outliers: Professional Knowledge Communities, Individual Conscience Claims, and the Availability of Professional Services to the Public*, *in* LAW, RELIGION AND HEALTH IN THE UNITED STATES 37, 37 (Holly Fernandez Lynch, I. Glenn Cohen and Elizabeth Sepper, eds. 2017).

58. Gene Matthews, Scott Burris, Sue Lynn Ledord, Gary Gunderson & Edward L. Baker, *Crafting Richer Public Health Messages for A Turbulent Political Environment*, 23 J. PUB. HEALTH MGMT. & PRAC. 420, 423 (2017).

59. *See infra* Part III. We leave aside cases in which public officials may make misleading statements in furtherance of a greater good though we note that in the malpractice analogy there are rare circumstances in which withholding information from the patient to prevent harm is appropriate.

60. *See supra* Part I.

61. Kevin Breuninger, *Trump Says Coronavirus Death Toll 'Is What It Is' as He Insists Pandemic Is 'Under Control' in U.S.*, CNBC (Aug. 4, 2021, 12:13 PM), https://www.cnbc.com/2020/08/04/coronavirus-trump-insists-pandemic-is-under-control-in-us.html [https://perma.cc/DD9G-VMJS].

62. They can also be more difficult to attribute to the government. *See* NORTON, *supra* note 2, at 42.

63. Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019), *cert. granted, vacated sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021); *see also* NORTON, *supra* note 2, at 56–59 (discussing Trump's use of social media).

A different issue relates to the governmental position of the official who utters the misstatement. When it comes to the capacity of health-related information to affect public health, different speakers are differently situated. A statement by a municipal Director of Public Parks that "masks don't stop the spread of COVID-19" is likely to have far less influence on the public's health than the same statement issued by the city's Director of Public Health. A high-ranking public official, such as Larry Kudlow, the head of President Trump's National Economic Council, who reassured Americans that the coronavirus was "contained . . . I won't say airtight, but pretty close to airtight" in late February 2020 presents a harder case.[64] Unlike the Director of Public Health, Kudlow was speaking out-of-his lane, and the public probably should not have presumed that he had particular expertise over public health.[65] On the other hand, due to his prominence and access to the President, the public might well have believed that he was privy to "inside" information and that his assessment was based on it.

Misstatements by health officials, however, are probably the most dangerous, as the public has reason to believe that they are based on the best available science as well as the officials' own expertise. (After all, the public probably expects that the Commission of Public Health knows something about public health!) In this sense, just as medical misinformation is more problematic when it comes from your physician than from your (not medically trained) neighbor, misinformation about health can be more dangerous when it comes from a health official.[66] The danger only increases when the health official has medical or public health credentials.[67] People probably assume that the Surgeon General, who is sometimes known as "the nation's doctor,"[68] is qualified to offer advice about health. Yet, in contrast to most misstatements made by health professionals in the course of their duties, public health officials "speak" not within a professional-patient relationship but to the public writ large.[69] In a sense, the *public qua public* is the officials' "patient." This is a point to which we will return.[70]

Finally, it is worth considering the case of chief elected, executive branch officials—presidents, governors, mayors, and county executives. The head of the executive branch is not normally thought of as a public health official as such.[71]

64. SLAVITT, *supra* note 23, at 53.

65. *See id.*

66. Haupt, *Professional Speech*, *supra* note 6, at 1271.

67. *Id. See also* Philip A. Pizzo, David Spiegel & Michelle M. Mello, *When Physicians Engage in Practices that Endanger the Nation's Health*, 325 J. AM. MED. ASS'N 723 (2021).

68. Tanya Somanader, *The Nation's Doctor: Dr. Vivek Murthy Is Confirmed as Surgeon General*, WHITEHOUSE.GOV (Dec. 15, 2014, 6:31 PM), https://obamawhitehouse.archives.gov/blog/2014/12/15/nations-doctor-dr-vivek-murthy-confirmed-surgeon-general [https://perma.cc/UK3G-RZVY].

69. *See id.*

70. *See infra* text accompanying notes 128–41.

71. *See, e.g.*, ROBERT WOOD JOHNSON FOUND., THE PUBLIC'S PERSPECTIVE ON THE UNITED STATES PUBLIC HEALTH SYSTEM (June 18, 2020) https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/18/politicians-shunt-aside-public-health-officials [https://perma.cc/3K6X-W7NU] (discussing research findings that Americans place more trust in private healthcare providers than public officials).

Most lack training or experience in either public health or medicine.[72] Nevertheless, they wield significant authority over public health officials and public health policy.[73] Indeed, under our theory of government, they are the ones who are properly accountable to the public for health policy.[74]

In many situations, elected officials may leave the dissemination of health-related information (though not policy conclusions) to the "experts." That approach, perhaps, is what President Biden intended to signal when he promised "to follow the science" regarding the pandemic.[75] Nevertheless, especially in a pandemic or other high visibility health crisis, people will inevitably look to elected officials—whether they be Andrew Cuomo[76] or Donald Trump—for information about the nature and scope of the risk and about what they can do to protect themselves and their communities. In addition, elected officials exercise significant authority over the dissemination of information by less senior officials. Thus, during COVID-19, the White House reportedly prevented Dr. Anthony Fauci and other public health experts inside the government from speaking to the press.[77] For these reasons in the discussion that follows, we suggest that misinformation by public officials who have authority over health should be viewed the same as misinformation by public health officials who have expertise in health.

72. *See*, *e.g.*, Christine Vestal & Michael Ollove, *Politicians Shunt Aside Public Health Officials*, PEW (June 18, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/18/politicians-shunt-aside-public-health-officials [https://perma.cc/3K6X-W7NU] (noting that during the initial COVID outbreak, governors and local officials undermined the traditional roles public health officials performed).

73. Lawrence Gostin, *The Formulation of Health Policy by the Three Branches of Government*, *in* SOCIETY'S CHOICES: SOCIAL AND ETHICAL DECISION MAKING IN BIOMEDICINE 335, 352 (Ruth Ellen Bulger, Elizabeth Meyer Bobby & Harvey v. Fineberg eds., 1995) ("The executive branch of government has considerable power to develop, shape, and expand health policy through executive orders, rule making, and interpretive guidance.").

74. *Id.* For purposes of this discussion, we sidestep the case of independent agencies and elected boards of health, each of which may have some independence from the elected health of the executive branch. *See, e.g.*, *Boards of Health*, MAHB, https://www.mahb.org/boards-of-health/ (last visited July 26, 2022) [https://perma.cc/26EP-YCF7] (noting that Boards of Health in Massachusetts may be elected).

75. Annie Linskey, Yasmeen Abutaleb, Lena H. Sun & Tyler Pager, *Biden Vowed to 'Follow the Science,' but Left Many Out with Sudden Mask Guidance*, WASH. POST (May 20, 2021, 7:56 PM), https://www.washingtonpost.com/politics/biden-masks-cdc/2021/05/20/6467e66e-b974-11eb-a5fe-bb49dc89a248_story.html [https://perma.cc/HR6P-HQ5T].

76. Steven Reinberg, *Fauci, Cuomo Top Trump as Reliable Sources on COVID-19: Survey*, U.S. NEWS & WORLD REP. (Aug. 5, 2020, 2:00 PM), https://www.usnews.com/news/health-news/articles/2020-08-05/fauci-cuomo-top-trump-as-reliable-sources-on-covid-19-survey [https://perma.cc/G5VZ-9VFQ].

77. Yasmeen Abutaleb, Josh Dawsey & Laurie McGinley, *Fauci Is Sidelined by the White House as He Steps Up Blunt Talk on Pandemic*, WASH. POST (July 11, 2020), https://www.washingtonpost.com/politics/2020/07/11/fauci-trump-coronavirus/ [https://perma.cc/HU6G-UYGK].

III. THE FIRST AMENDMENT'S RELATION TO GOVERNMENT HEALTH MISINFORMATION

The First Amendment's Free Speech clause does not apply to government speech.[78] For private speech in a public forum, the First Amendment demands that government regulations (in almost all cases) adhere to content and viewpoint neutrality.[79] Such neutrality is not required when the government itself speaks. Indeed, "when the government speaks for itself, the First Amendment does not demand airtime for all views."[80] The government can choose its own message, and it can do so to the exclusion of other messages. [81] Thus, it can offer messages that are anti-smoking or pro-fluoride. It can also disseminate messages that are pro-smoking or anti-fluoride. To take Norton's example, that is "why tobacco companies don't have a First Amendment right to force the Surgeon General to deliver their views on the benefits of cigarettes."[82] In such cases, courts rely on democratic accountability, rather than the First Amendment, to check the government's problematic speech.[83] As the Court most recently reaffirmed in *Shurtleff v. City of Boston*, "[t]he Constitution . . . relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks."[84] The First Amendment also protects other activities, including protesting and petitioning, that the public can utilize to counter problematic governmental speech.[85]

Government speech is not only fundamentally different from private speech in public discourse, but it is also different from other forms of speech that generally occur outside of public discourse including—most importantly for our purposes— professional speech.[86] Since our primary concern is with expertise communicated as information or advice by government speakers, a comparison of this type of government expert speech and professional speech is instructive. To do so, we first outline the distinctions between professional and other forms of nongovernmental speech and then explore the similarities between professional speech and government speech that communicates health advice.

Before doing so, however, we want to underline a critical point: the analysis that follows focuses solely on government speech. As we noted above, this includes the speech of government officials acting in their official capacity.[87] It does not include all of the speech of government actors when they are speaking

78. NORTON, *supra* note 2, at 5.

79. Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 72 (2004).

80. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022).

81. *See, e.g. id.*; Walker v. Tex. Div. Sons of Confederate Veterans, Co., 576 U.S. 200, 203 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) (distinguishing government speech and private speech in a public forum).

82. NORTON, *supra* note 2, at 28.

83. *Id.* at 5.

84. *Shurtleff*, 142 S. Ct. at 1589.

85. NORTON, *supra* note 2, at 29.

86. *See* discussion *infra* Section III.B.

87. *See supra* text accompanying notes 26–28.

on their own account to the public. During the pandemic, the role of public health officials who disagreed with executive branch officials was particularly salient.[88] While the First Amendment grants the government wide berth to control its own message as articulated through its employees,[89] the public also has a significant interest in hearing from public employees who disagree with official statements.[90] This raises important questions of the extent to which the government can police the unofficial speech of its own employees, including whistleblowers.[91] Because our focus is on misinformation offered in officials' official capacity, we leave that important question for another day.

A. Professional Speech and Private Speech

Anchored within the professional-client or professional-patient relationship, professional speech generally occurs outside of public discourse, usually for the purpose of giving professional advice.[92] Whereas speech within the professional-client or professional-patient relationship is regulated in numerous ways, for example by licensing requirements or tort liability, to ensure its accuracy, such constraints are largely absent outside of this relationship.[93] This means that if a professional writes an op-ed that is not up to scientific standards, a tort law remedy would not be available. To illustrate the connection to academic expertise, Robert Post gives the following example:

> Biologists can with impunity write editorials in the *New York Times* that are such poor science that they would constitute grounds for denying tenure within a university. Members of the general public can rely on expert pronouncements within public discourse only at their peril. Such pronouncements are ultimately subject to political rather than legal accountability.[94]

Importantly, although the Supreme Court declared in its 2018 decision in *National Institute of Family and Life Advocates* [("NIFLA")] *v. Becerra* that it has never recognized professional speech as a category for First Amendment

88. Many public health officials have resigned or were ousted following disagreement with executive officials who disagreed with the expertise they offered. *See, e.g.*, Michelle R. Smith, Lauren Weber & Anna Maria Barry-Jester, *Public Health Workers Fighting Virus Face Growing Threats*, ASSOCIATED PRESS (June 12 , 2020), https://apnews.com/article/co-state-wire-only-on-ap-health-nc-state-wire-virus-outbreak-8839ed5e94eea718304820218919738e [https://perma.cc/2N6Y-EVS3].

89. Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).

90. NORTON, *supra* note 2, at 60.

91. *See id.* at 60–67 (discussing cases).

92. Haupt, *Professional Speech*, *supra* note 6, at 1247 (arguing that the core elements of professional speech include "(1) a knowledge community's insights, (2) communicated by a professional within the professional-client relationship, (3) for the purpose of providing professional advice").

93. This is not to suggest that all constraints designed to ensure accuracy of speech in public discourse are impermissible. There are, for example, restrictions on false advertising that are permissible as a First Amendment matter. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976).

94. ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 44 (2012).

purposes, the Court accepted that speech within the professional relationship receives special doctrinal treatment.[95] Specifically, Justice Thomas, writing for the *NIFLA* majority, offered the Court's approval of "[l]ongstanding torts for professional malpractice" and emphasized that informed consent is "firmly entrenched in American tort law."[96]

Hence, the First Amendment permits the regulation of what professionals may communicate within the professional relationship so that clients and patients receive comprehensive, accurate, and reliable advice. The knowledge asymmetry between professional and client or doctor and patient fundamentally characterizes their relationship. The client/patient seeks the professional's advice precisely because of the professional's expertise.[97] To account for this asymmetry, which leaves the client/patient in a vulnerable position relative to the professional's power derived from their superior knowledge, the law imposes certain guardrails on the professional relationship.[98] Whereas restrictions on speech based on content and viewpoint in most other noncommercial contexts are considered suspect,[99] legal limits on professional speech—"[p]rofessional licensing, fiduciary duties, informed consent, and malpractice liability"—impose permissible limits on the content of professional advice.[100]

Unlike other types of speech, the content of professional advice, and the regulation of that advice, is tied to professional knowledge, that is, expertise specific to the profession.[101] "The individual professional" functions "as a conduit between the [professional] knowledge community and the client[/patient]."[102] This connection to a knowledge community distinguishes the quality of advice communicated within the professional relationship from speech, including health advice, that occurs outside of it. Conceptualizing the professions as knowledge communities for speech purposes also parallels the mechanics of malpractice liability where "the knowledge community's standard of care determines the benchmark against which the individual professional's liability is assessed."[103]

In addition, fiduciary duties attach within the professional relationship that create obligations of loyalty and care to mitigate the knowledge asymmetry between professional and client/patient.[104] When, for example, a patient entrusts

95. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2372 (2018) ("This Court's precedents do not recognize such a tradition for a category called 'professional speech.'").

96. *Id.* at 2373 (citations omitted).

97. *See* Haupt, *Professional Speech*, *supra* note 6, at 1271 (discussing knowledge asymmetry as characteristic for professional relationship).

98. *Id.* at 1254.

99. Commercial speech doctrine is contested and a full discussion beyond the scope of this paper. We offer a summary at Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231, 241–44 (2021).

100. Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J. F. 185, 192 (2018). *See generally* Jane Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73 (2018).

101. Haupt, *Professional Speech*, *supra* note 6, at 1241–42 (conceptualizing the professions as "knowledge communities").

102. *Id.* at 1254.

103. *Id.* at 1242.

104. *See, e.g.*, Maxwell J. Mehlman, *Why Physicians Are Fiduciaries for Their Patients*, 12 IND. HEALTH L. REV. 1, 2–3 (2015).

their doctor with providing guidance on important health decisions, the doctor must act in the patient's best interest.[105] This requires that the doctor act according to the insights of the profession.[106] Hence, the professional's obligation is to convey the relevant insights of the knowledge community in an accurate and relatively comprehensive manner.[107] Likewise, informed consent requirements, which enforce the interest in disclosure of information that is relevant to patient's medical decision-making, address the knowledge asymmetry to facilitate patient autonomy.[108] Finally, malpractice liability aims to protect the integrity of advice a patient receives from their doctor.[109] Put into a free speech perspective, "only good professional advice, as measured by the standards of the relevant knowledge community is protected."[110] In contrast, "[b]ad professional advice is subject to tort liability, and the First Amendment provides no defense."[111]

In public discourse among private speakers outside of the commercial setting, by contrast, there is no distinction between expertise and quackery. Advice that departs from the insights of the knowledge community can be sanctioned in the professional-client relationship, but "false ideas" do not generally exist in public discourse.[112] Commercial speech remains a significant exception because "commercial speech is not entitled to any protection at all unless it is true. . . . [T]he First Amendment does not protect false commercial speech."[113] But while some courts and scholars analogize commercial and professional speech, we suggest that the professional's connection to a knowledge community makes professional speech qualitatively different from commercial speech.[114]

Outside of commercial speech, just as informed consent requirements have no place in the public discourse, so too, fiduciary duties are generally deemed incompatible with non-commercial public discourse.[115] Whereas malpractice liability sanctions bad advice in the professional-patient relationship, First

105. *See* Claudia E. Haupt, *Assuming Access to Professional Advice*, 49 J. L. MED & ETHICS 531 (2021) (discussing professional licensing, fiduciary duties, and malpractice liability as "guardrails" in the doctor-patient relationship).

106. Haupt, *supra* note 100, at 191.

107. *See* Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 545 (2019).

108. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 776 (D.C. Cir. 1972); *see also* Haupt, *Professional Speech*, *supra* note 6, at 1287–89 (discussing informed consent).

109. Haupt, *supra* note 100, at 191.

110. *Id.*

111. *Id.* at 191–92.

112. *Id*. This sharp distinction does not apply to fraud or misinformation by commercial entities, however. *See, e.g.*, Bambauer, *supra* note 100, at 117. Misinformation about a drug, for example, is still actionable. Our focus, by contrast, is specifically on governmental speakers giving health information and advice.

113. TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 6 (2012).

114. Haupt, *Professional Speech*, *supra* note 6, at 1264–68 (distinguishing commercial and professional speech).

115. Haupt, *supra* note 105, at 544. There is, however, a robust literature on fiduciary duties in public law. *See, e.g.*, D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2013) ("[P]olitical representatives should . . . be treated as fiduciaries, subject to a duty of loyalty, which they breach when they manipulate election laws . . . ."); Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles*

Amendment doctrine outside of that relationship (or a commercial context) protects lies just as much as advice grounded in expertise.[116] Content- and viewpoint-based regulations, uniformly accepted for professional speech in the form of informed consent and malpractice as just discussed,[117] are presumptively unconstitutional outside of the scope of the professional's duties. [118] Most often, though not always, a professional's duties will be circumscribed by the professional-client or professional-patient relationship; an important exception is that lawyers, for example, also have professional duties to the court.[119]And in some cases, courts have recognized a physician's duty to third parties when patients pose a foreseeable threat to others.[120] For most professionals, however, the duty is limited by the professional relationship. Where there is no "personal nexus between professional and client . . . and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted,"[121] the duties owed within the professional relationship do not exist. The First Amendment, instead, generally tracks the scope of the duty.[122]

Several theoretical justifications exist for robust speech protection in noncommercial public discourse, including democratic self-government interests, autonomy interests, and the "marketplace of ideas" theory. First, the constraints that limit speech in the professional-client relationship are absent in noncommercial public discourse because, at least for First Amendment purposes, the speakers are considered to be equals.[123] The reason for this lies in the function of free speech in a democracy. The project of self-government, the theory goes, demands that all opinions count equally.[124] Alexander Meiklejohn, for example, articulated "the reason for this equality of status in the field of ideas lies deep in the very foundation of the self-governing process. When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger." [125] Equal participation in democracy thus demands speaker

into Public Law, 126 HARV. L. REV. FORUM 91, 101 (2013) (questioning Rave's Theory); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J.1820, 1822 (2016) (discussing the viability of applying "fiduciary political theory" to different areas).

116. *See* United States v. Alvarez, 567 U.S. 709, 713–14, 729–30 (2012).

117. Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J. F. 150, 151–52 (2017). This is not to say that informed consent laws cannot be problematical or contested on First Amendment grounds when they depart from the teachings of the knowledge community. State laws mandating that physicians provide women certain (often incorrect) information prior to obtaining an abortion are an especially problematic example. *See infra* text accompanying notes 180–87.

118. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

119. *See, e.g.*, *In re* Rudolph Giuliani, 146 N.Y.S. 3d 266, 268 (2021).

120. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 353 (Cal. 1976). *See also* Richard S. Saver, *Physicians' Elusive Public Health Duties*, 99 N.C. L. REV. 923 (2021).

121. Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring).

122. *See, e.g.*, Haupt, *Professional Speech*, *supra* note 6, at 1285 (describing speech protection as the flip side of malpractice liability).

123. Haupt, *Unprofessional Advice*, *supra* note 6, at 682; Haupt, *supra* note 105, at 539–43.

124. Haupt, *supra* note 105, at 540.

125. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

equality in public discourse.[126] Hence, the First Amendment protects the speech of all speakers in such discourse, even when the speech is based on bad information or lack of knowledge.[127] But, as we will explain more fully in the next section, this notion of speaker equality does not apply when the government offers health-related misinformation.

Speaker autonomy offers an additional reason to be suspicious of the types of limits on speech in public discourse that are permissible in the professional relationship. Respect for autonomy in public discourse demands that each speaker be allowed to speak their mind, without government interference.[128] But speakers' autonomy interests are somewhat different in the professional context. Professionals acting within the scope of their professional duty do not usually have an interest to speak their own mind but rather to communicate their message according to the professional standard of their knowledge community.[129]

The marketplace-of-ideas rationale may supply good reasons to let professionals, when acting outside of the scope of a professional relationship, challenge their knowledge community's consensus.[130] Such speech may further innovation and challenge orthodoxies which might warrant questioning.[131] In the medical context, we have seen outside ideas gain traction over time, only to be absorbed into the mainstream. Take, for instance, the wide acceptance of medical marijuana[132] or the emergent recognition of certain medical uses of psilocybin.[133] Professionals ahead of the curve ought not be stifled in expressing potentially paradigm-shifting ideas contrary to the current professional consensus.[134] But their doing so can also result in serious harm. In the context of health advice, emergent and untested ideas might have adverse effects that have not yet been discovered or sufficiently studied.[135] While this potential for harm is to be avoided within the professional-patient relationship, it is generally accepted for public discourse.[136] As currently understood, the balance between speech protection and liability for harm in public discourse usually cuts decisively in favor of protecting speech.

As traditionally conceptualized, the role of the speaker in public discourse is generally irrelevant for First Amendment purposes. Beyond their professional

126. Haupt, *supra* note 105, at 540.

127. *See* Haupt, *Professional Speech*, *supra* note 6, at 1241–45.

128. *See id.*

129. *Id.* at 1272–73 (discussing professional autonomy interests).

130. This is distinct from the internal marketplace for the formation of professional knowledge, such as for example academic conferences or the academic literature: "to the extent that such a marketplace of ideas exists as what we might call an epistemic marketplace, and that professional standards are generated by testing insights on that marketplace, nonprofessionals do not participate in it." *Id.* at 1275.

131. *See id.* 1276.

132. Haupt, *Unprofessional Advice*, *supra* note 6, at 721–24.

133. *See, e.g.*, Mason Marks, *Psychedelic Medicine for Mental Illness and Substance Use Disorders: Overcoming Social and Legal Obstacles*, 21 N.Y.U. J. LEGIS & PUB. POL'Y 69 (2019); Mason Marks, *Controlled Substance Regulation for the COVID-19 Mental Health Crisis*, 72 ADMIN. L. REV. 649, 709 (2020).

134. Haupt, *Unprofessional Advice*, *supra* note 6, at 721.

135. *See id.* at 721–24.

136. *See id.* at 721.

duty, outside of the professional relationship, individual professionals are not usually bound by the knowledge community's insights.[137] Consequently, they are deemed free to challenge even the most fundamental professional insights.[138] A professional's speech in public discourse, when speaking as a private person rather than in their professional capacity, according to this understanding receives the same First Amendment protection as anyone else's, [139] even though based on their expertise, they might be considered especially trustworthy, and their statements on medical matters might be deemed more reliable—and thus more dangerous if they're wrong—than those of laypeople.[140] This traditional understanding can make for tricky line-drawing with respect to government speakers with multiple roles, including professional ones. For example, when Senator Rand Paul, a licensed physician, disputes the effectiveness of masks to curb the spread of the coronavirus, his statements likely have a different valence than those of other senators who cannot claim professional expertise in addition to their official role.[141] But unlike speech stated in the professional-patient relationship, there currently are no legal guardrails. Thus, Robert Post has argued, "[w]hen a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment."[142] The significant potential for harm caused by such speech outside of the professional relationship reveals the normative shortcomings of the current doctrinal understanding, and good reasons exist to reject it. Regulatory interventions, such as disciplinary actions by licensing boards, might be advisable and permissible under the First Amendment.[143] Nonetheless, the stark contrast between speech within the professional relationship and speech of professionals outside of it persists. When the physician is also a government speaker, two positions of authority converge, and the potential for harm is especially great if the speaker's advice is bad. We now turn to this problem.

B. Professional Speech and Government Speech

Statements from government speakers that conflict with expert consensus or that differ from what experts would say, such as for example, those of former White House advisor Dr. Scott Atlas, may be particularly problematic in terms of causing health-harms, especially if they are couched in the form of advice or

137. *See id.*

138. *See id.*

139. Haupt, *Professional Speech*, *supra* note 6, at 1254-57.

140. Haupt, *Unprofessional Advice*, *supra* note 6, at 681. *See also* discussion *supra* notes 65–66 and accompanying text.

141. *See* Daniel Victor, *YouTube Suspends Rand Paul for a Week Over a Video Disputing the Effectiveness of Masks*, N.Y. TIMES (Aug. 11, 2021), https://www.nytimes.com/2021/08/11/business/youtube-rand-paul-covid-masks.html [https://perma.cc/6C8E-T8AR].

142. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 949 (2007).

143. *See* Claudia E. Haupt, *Pseudo-Professional Advice*, 103 B.U. L. REV. (forthcoming 2023); Carl H. Coleman, *Physicians Who Disseminate Medical Misinformation: Testing the Constitutional Limits on Professional Disciplinary Action*, 20 FIRST AMEND. L. REV. 1 (2022).

commands. [144] This type of advice has led to harmful outcomes such as the widely-reported death of a man and hospitalization of his wife after ingesting chloroquine to prevent coronavirus, reportedly relying on President Trump's erroneous assertions about its benefits.[145]

As already mentioned, government speech is not usually considered a form of public discourse that is protected by the First Amendment. The First Amendment does not protect government speech in the way that it shelters speech by private actors in public discourse from government interference.[146] Government speakers and other speakers are unequal in their power, including with respect to their access to information and ability to disseminate their messages.[147] The normative tradeoff between free speech and liability for harm does not have to mirror public discourse when government speakers act as advice-givers. Indeed, we suggest that the listeners' interests in receiving reliable health advice from trusted speakers vested with public authority are significantly similar to listeners' interest in a professional relationship. The similarities will be strongest when the government speaker has both authority over health and professional training in it. But we argue that the parallels go beyond this group to encompass all government speakers who have authority with respect to health.[148]

This assertion requires a closer look at the speech interests at stake in professional speech and government speech respectively. In contrast to the case of public discourse by private parties, where each speaker is free to speak their mind, there is no need to protect the government's ability to speak its mind. That is the premise of excluding government speech from the First Amendment: "[t]he Constitution protects us from the government and not vice versa."[149] Likewise, in the professional context, because the professional is a fiduciary who is bound to act on behalf of the client/patient, the professional does not have a legally recognized individual interest to speak their mind to the client/patient.[150] Rather,

144. Noah Weiland, Sheryl Gay Stolberg, Michael D. Shear & Jim Tankersley, *A New Coronavirus Advisor Roils the White House with Unorthodox Ideas*, N.Y. TIMES (Sept. 9, 2020) https://www.nytimes.com/2020/09/02/us/politics/trump-scott-atlas-coronavirus.html [https://perma.cc/U6ZK-8VD4]. *See also* CATHERINE J. ROSS, A RIGHT TO LIE? PRESIDENTS, OTHER LIARS, AND THE FIRST AMENDMENT 91–106 (2021).

145. Neil Vigdor, *Man Fatally Poisons Himself While Self-Medicating for Coronavirus, Doctor Says*, N.Y. TIMES (Apr. 24, 2020), https://www.nytimes.com/2020/03/24/us/chloroquine-poisoning-coronavirus.html?smid=url-share [https://perma.cc/TRP7-G2CY]. No doubt health-related misinformation is not the only type of misinformation by government officials that can cause imminent harm. The "Big Lie" about the 2020 election comes to mind as another example. *See, e.g.*, ROSS, *supra* note 144; Henricksen, *supra* note 8. A discussion of these other types of misinformation is beyond the scope of this paper.

146. *See* Post, *supra* note 142, at 974.

147. *See, e.g.*, *id.* at 950.

148. Haupt has elsewhere distinguished professional speech and government speech. Haupt, *Professional Speech*, *supra* note 6, at 1257–58. That distinction hinges on incompatibility of the government's message with expertise and the use of professionals within the professional-client relationship as the mouthpiece for the government's message. By contrast our focus here is the government's own speech contra expertise to the public at large, outside of the professional relationship. *See supra* note 142 and accompanying text.

149. NORTON, *supra* note 2, at 27.

150. *See* Post, *supra* note 142, at 977.

the professional has a duty to help the client/patient by communicating information according to the insights of the knowledge community.[151] Thus, "listener interests are vitally important to professional speech where the very purpose of the professional-client relationship is to give accurate, comprehensive, and reliable advice to the client."[152]

Ensuring the quality of advice is also important for respecting the client/patient's autonomy to make decisions.[153] With bad advice, clients and patients will make decisions that do not further or fulfill their own goals and choices.

Similar asymmetries and risks exist when government officials with authority over health offer information which conflicts with the understanding of expert communities. In this case, however, the officials' obligation adheres to the public in their jurisdiction—the public they are supposed to serve—rather than to an individual client or patient.[154] In both cases, however, the speaker (professional/government official) has access to information and knowledge with which to interpret it, which the listener (patient/client or public) lacks. And in both instances, respect for autonomy means that many choices should be left to the individual. Yet, in order to make an informed choice that furthers their values and preferences, individuals must be able to "access[] the knowledge community's knowledge through the individual professional."[155] In the classic formulation of *Canterbury v. Spence*, the patient needs professional advice to gain "enlightenment with which to reach an intelligent decision."[156] Of course, access is just a necessary, but not necessarily sufficient, first step; the patient or, in the case of government speech, the public, also must understand the advice. The professional, or government official, in turn, must "communicate all information necessary to make an informed decision to the client."[157] Hence, legal limitations imposed on the professional or government official's speech can be viewed, and in our view should be viewed, as protections for individuals' decisional autonomy.[158] In effect, the *public qua public* is the health officials' patient.[159]

The power disparities between government and public, however, are even greater than the knowledge asymmetry between professionals and clients. In many situations, government officials may have access to data that is not available to the public (including members of relevant professions) and would be material to individual decision-making.[160] For example, the public did not know

151. Haupt, *Professional Speech*, *supra* note 6, at 1272–73 (discussing professional autonomy interests).

152. Haupt, *supra* note 105, at 544.

153. *See supra* note 97 and accompanying text.

154. *See supra* Section III.A.

155. Haupt, *Unprofessional Advice*, *supra* note 6, at 680.

156. 464 F.2d 772, 780 (D.C. Cir. 1972).

157. Haupt, *Professional Speech*, *supra* note 6, at 1271.

158. *Spence*, 464 F.2d at 781 ("To enable the patient to chart his course understandably, some familiarity with the therapeutic alternatives and their hazards becomes essential.").

159. *See supra* note 74 and accompanying text.

160. Haupt, *Unprofessional Advice*, *supra* note 6, at 714.

about the full extent of the pandemic in January/February 2020.[161] The government, on the other hand, might have had better data that could have guided its own advice or could have contributed to expertise more broadly.[162] This is not directly related to the content of advice but rather speaks to the availability of data to the government that is not available to others. This contributes to the even greater information asymmetry between government and nongovernment speakers.

Just as in the professional context, because the speech at issue is not only information but expertise, the marketplace model does not work when government officials communicate expert advice. "The marketplace of ideas expresses the egalitarian principle that persons cannot be regulated based upon the content of their ideas."[163] That premise is incompatible with the nature of expertise.[164] Expert knowledge is not just another opinion among many.[165] This is true for both expertise communicated within the professional relationship and expertise communicated by government speakers.

Ultimately, it seems to us that the normative underpinnings of the First Amendment's protection for public speech are not met when officials communicate messages—such as health information but also climate science, for example—not aligned with relevant expertise. Because government health-related speech is often a form of expert speech, we see it as closely related to professional speech. As such, the listener perspective demands good advice.

The question, then, is whether government speech ought to be subject to regulation. Courts, as we have noted, usually defer to political rather than legal remedies for such speech.[166] Ideally, democratic accountability may be preferable to other types of oversight. But democratic accountability is insufficient to overcome the asymmetries between government speakers and the public. Some of the asymmetries extant in other professional speech contexts exist here and can impede accountability.[167] Because of the knowledge asymmetry between speakers (professionals or government) and listeners (client/patient or public), it may not be obvious to the listener what exactly constitutes bad advice inconsistent with expert knowledge.[168]

161. *See, e.g.*, Linskey, *supra* note 75.

162. Nancy Cook, Meredith McGraw & Adam Cancryn, *What Did Trump Know and When Did He Know It? Inside His Feb. 7 Admission*, POLITICO (Sept. 10, 2020, 9:17 PM), https://www.politico.com/news/2020/09/10/trump-coronavirus-bob-woodward-412222 [https://perma.cc/B849-MZBF].

163. POST, *supra* note 94, at xi.

164. *See id*.

165. Of course, expertise can be wrong, but it is still qualitatively different than other forms of information. *See, e.g.*, Haupt, *supra* note 107, at 532–34 (distinguishing information and knowledge).

166. *Id.* at 44.

167. Some forms of government misinformation may also impede accountability itself, by misinforming the people about the nature of a problem in ways that the press (in today's media environment) has trouble exposing. *See* Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 854–55 (2020).

168. *Id.* at 854.

Further, expert knowledge is particularly ill-suited for democratic deliberation, which requires equality among speakers. Professional knowledge, and expertise—including when offered by health officials, breaks the assumption of equality among speakers and opinions.[169] Nevertheless, it still serves an important function, because

> it informs public discourse in a manner that can lead to more informed decisions of citizens without expert knowledge by providing expertise that would not otherwise exist. Thus, precisely by virtue of its undemocratic nature, professional knowledge has the potential to advance democratic public discourse. On this view, the presence of expert knowledge is better for public discourse than its absence.[170]

On the flip side, however, only good advice—in the sense that it aligns with the understandings of the relevant knowledge community—can serve this function.

Another reason why democratic accountability may not solve the problem of misinformation by health officials is that such speech may at times be understood as a direct imperative to individuals to take or refrain from some actions. If the President says, "inject bleach," some people will quickly follow and suffer serious health consequences.[171] Likewise, if officials say "vaccines are ineffective," many will reject the jab.[172] In such circumstances neither the favored cure of "more speech," nor democratic accountability which might occur months or years later can protect people from imminent harm.[173] Delayed accountability response therefore may not be sufficiently responsive to the threat. Finally, over time, repeated government misinformation contributes to the larger problem of erosion in expertise, helping to "destabilize[] truth itself."[174] Thus the more common it is for officials to deceive the public, the less likely the public may be to hold those who purvey misinformation accountable.

In sum, democratic accountability for expertise communicated by government speakers is insufficient to avoid potentially grave harm. Further, the similarities to professional speech are sufficient to consider imposing a set of similar legal guardrails to ensure listeners receive good information and advice from government speakers. We next turn to the question of what these guardrails could look like.

169. *Id.*

170. Haupt, *supra* note 107, at 541.

171. *See* Meridith McGraw & Sam Stein, *It's Been Exactly One Year Since Trump Suggested Injecting Bleach. We've Never Been the Same.*, POLITICO (Apr. 23, 2021, 4:30 AM), https://www.politico.com/news/2021/04/23/trump-bleach-one-year-484399 [https://perma.cc/4JTT-YZS5].

172. *See, e.g.*, Knight, *supra* note 20.

173. Corbin, *supra* note 167, at 879.

174. *Id.* at 854.

IV. THE ROLE OF TORT LAW

The proliferation of misinformation, including lies, from government officials in recent years, as well as the lack of First Amendment protection for government speech, has led scholars to consider ways to address such misinformation. In this Section, we begin by reviewing some of the most important recent scholarship that has focused on the problem and has suggested tort or tort-like remedies,[175] including the contributions by Helen Norton,[176] Caroline Mala Corbin,[177] and Wes Henricksen.[178] We then argue that because government health-related speech is often a form of expert speech, the law of malpractice, which governs such speech, provides an important model for understanding and, more speculatively, potentially constraining such speech. We conclude by discussing some of the limitations on malpractice law's potential reach in the area of government speech and by noting why the professional malpractice analogy nevertheless remains valuable in elucidating the problem created by a lack of accountability beyond the democratic process for harmful government advice and thus warrants further consideration.

A. Existing Scholarship

Surveying the landscape of government lies, and the damage they can inflict, several scholars have searched for a legal remedy. In the most comprehensive discussion of the topic, Helen Norton explains that in many instances, government lies violate the Constitution and may thus be amenable to the full range of remedies typically available to redress the violation of recognized constitutional rights, including actions for declaratory and injunctive relief, as well as claims for money damages.[179] Importantly, in contrast to some types of common law actions, such constitutional torts may allow for nominal damages.[180] In addition, because the injury is the violation of the constitutional right, rather than bodily harm, factual causation may be less difficult to establish than in private law actions, in which the plaintiff must show that the defendant's wrong was the factual and proximate cause of some type of compensable harm, usually bodily injury.[181]

Norton does not focus specifically on health-related misinformation, but she adds the important insight that, in some cases, such misinformation can violate a protected constitutional right. One example she offers is abortion-related

175. We use the term "tort-like" to capture constitutional torts, as well as private law actions that are intertwined with constitutional law. *See infra* Section IV.A.

176. NORTON, *supra* note 2, at 26.

177. Corbin, *supra* note 167, at 815.

178. Henricksen, *supra* note 8.

179. NORTON, *supra* note 2, at 213–17.

180. *Id*. at 215–20.

181. *Id.* at 216.

misinformation.[182] Before *Roe v. Wade* was overruled,[183] several states have required health care providers to supply patients with false or misleading information about abortion.[184] For example, Arizona once required abortion providers to tell patients that a nonsurgical abortion is reversible after it has begun.[185] South Dakota required providers to tell patients that abortions are associated with an increased risk of suicide and suicidal ideation.[186] Texas and Alaska have required health care workers to present patients with brochures containing highly misleading information about a link between abortion and breast cancer.[187] Had health professionals on their own offered such information, they likely would have committed malpractice.[188]

Such mandates have been challenged—sometimes successfully, sometimes not—as violating both a woman's right to an abortion and the provider's right to Free Speech.[189] The chief problem that such claims have faced is that in *Planned Parenthood v. Casey,* the Supreme Court quickly cast aside the argument that Pennsylvania's informed consent law relating to abortion either placed an undue burden on abortion or violated the First Amendment's restrictions on compelled speech.[190]

In many cases other than abortion, the connection between the misinformation and an underlying constitutional claim—and thus the remedy that Norton offers—will be even harder to find. For example, because there is no constitutional "right to health," it is hard to imagine a court concluding that misstatements by a public official about vaccination violated some type of right to be vaccinated or protected against a vaccine-preventable disease. True, a law mandating that physicians provide false information might well violate their First Amendment rights.[191] But in most cases, especially during the pandemic, government speakers have not tried to enlist health care providers to serve as mouthpieces for misinformation.[192] Instead, officials have used their own platforms to spread misinformation.

Norton's analysis does suggest another way in which misleading speech by government actors may at times rise to the level of a constitutional harm. She

182. *Id.* at 141–44.

183. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

184. For a review of governmental misinformation relating to abortion, see B. Jessie Hill, *Sex, Lies and Ultrasound*, 89 U. COLO. L. REV. 421, 426–37 (2018).

185. NORTON, *supra* note 2, at 143.

186. *Id*. at 143 n.52.

187. Hill, *supra* note 184, at 425.

188. *Id.*

189. *See id.* at 429–32; NORTON, *supra* note 2, at 142–43; Sonia M. Suter, *The First Amendment and Physician Speech in Reproductive Decision-Making*, 43 J. L. MED. & ETHICS 22, 28–30 (2015); Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1187–92 (2014).

190. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 884–85 (1992). *Casey* was overruled while this paper was in publication. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 228 (2022).

191. Haupt, *Professional Speech, supra* note 6, at 1240–41; Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: Unraveling the Commercial-Professional Speech Paradox*, 78 OHIO ST. L.J. 887, 910–15 (2017).

192. *Cf.* Haupt, *Professional Speech, supra* note 6, at 1257–58 (discussing use of professionals as mouthpieces for the government's message).

explains that "[i]n rare circumstances, the government's intent to inflict pain or cruelty through its speech may run afoul of the Due Process Clause."[193] Where government speakers intend through their speech to inflict bodily injuries, their speech might "shock the contemporary conscience" and thereby violate the Due Process Clause, even in the absence of a violation of another underlying right.[194] So, for example, if a government speaker recommended that individuals inject bleach in order to cause pain and injury, a court might conclude that the official violated the Due Process Clause. Such cases are likely (and hopefully) rare and do not encompass the far wider pool of cases in which government speakers spread false information without caring about the adverse health consequences which might follow.

In her 2020 paper, The *Unconstitutionality of Government Propaganda*, Caroline Mala Corbin offers a different approach for viewing at least some government lies as unconstitutional.[195] Corbin's focus is not on health-related misinformation. Rather, her concern is with government propaganda, which she defines as "government speech that meets four criteria: The statement must (a) be said by the government; (b) assert a verifiably false or misleading statement of fact; (c) concern a matter of public interest; and (d) be made with actual malice."[196] Noting that such speech "undermines core goals of the Free Speech Clause, most notably the promotion of democratic self-governance," she argues, "the Free Speech Clause should not just reach government propaganda, but in certain cases ban it."[197] Thus, Corbin believes that the First Amendment does not simply protect individuals from government efforts to regulate their own speech but also from the ill effects of certain forms of government speech itself.[198] The First Amendment, therefore, does not simply protect people from government regulation, it also offers a regulatory limit on government speech.

Interestingly, through the fourth element of her definition of propaganda, she accepts that the First Amendment restricts the regulation of propaganda to cases in which the government has acted with actual malice, a term that she borrows from *New York Times v. Sullivan* and other cases which discuss First Amendment limitations on tort claims.[199] Thus, although her proffered remedy is constitutional in nature, her discussion leans heavily on tort principles, and the First Amendment limitations which the Supreme Court has applied to tort cases that implicate speech.[200] Indeed, the four elements of her definition of propaganda could well be described as four elements of a constitutional tort for government propaganda. Corbin, however, does not make that claim, and she does

193. NORTON, *supra* note 2, at 152.
194. *Id.* at 152–53.
195. Corbin, *supra* note 167, at 817.
196. *Id.* at 829.
197. *Id.*
198. *Id.*
199. *Id*. at 834–35 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)).
200. *See id.* at 837.

not focus on whether a First Amendment right against propaganda should be enforced by injunctive or declaratory relief, or through constitutional tort actions that seek money damages.

In contrast to Norton and Corbin, Wes Henricksen looks primarily to private, common law remedies. In *Disinformation and the First Amendment: Fraud on the Public,* he draws upon the common law tort of deceit to address what he calls "fraud on the public."[201] He argues that this tort (which would not be limited to public official defendants) would occur when defendants,

> (1) purposefully disseminate a message to the public, (2) that contains verifiably false or misleading information (3) with actual malice (4) to obtain profit, benefit or advantage, or to intentionally mislead the public, (5) which results in, or likely will result in, substantial harm and (6) such harm was reasonably foreseeable.[202]

By requiring the plaintiff to prove actual malice, Henricksen, like Corbin, seeks to track Supreme Court precedent pertaining to defamation and other speech-related claims.[203] Although he does not limit his tort to health-related misinformation, he does offer COVID-related misinformation, as well as misinformation offered by the pharmaceutical industry relating to opioids, as examples of the type of "fraud" that might be considered actionable.[204]

Although their work is very valuable in explicating the problem of official misinformation and underscoring that the First Amendment does not insulate such misinformation from legal sanction, neither Norton, Corbin, nor Henricksen examine the similarities between official misinformation about health and professional malpractice. Instead, they tie their remedies to other pre-existing legal categories; constitutional law in the case of Norton; defamation law in the case of Corbin; and deceit in the case of Henricksen. Each of these approaches offer important insights, but so, too, does malpractice law. Most importantly, malpractice law captures the informational asymmetry and breach of fiduciary duty that makes official misinformation relating to health so dangerous. In addition, and critically, the malpractice law model suggests that, at least in some cases, a legal wrong may occur even when the official defendant does not act with actual malice or even with intent. Our approach thus encompasses not only lies and reckless misrepresentations but also negligent misinformation.

B. Conceptualizing Official Misinformation as a Form of Professional Malpractice

As discussed in Section III.B above, health-related information by some government officials—at least those who have authority related to health—shares many characteristics with professional speech. First, as with professional speech, there is a significant asymmetry of information between the lay plaintiff

201. Henricksen, *supra* note 8, at 20.
202. *Id*. at 24–25.
203. *Id*. at 28–29.
204. *Id*. at 22, 27–29.

and the defendant.[205] While this asymmetry is most pronounced when the official who offers the misinformation is a health professional, it also exists when public officials have access to information and advice from experts (often on their professional staffs) that is unavailable to the public at large.[206]

Second, just as individuals reasonably rely on the advice of their physicians and other health care providers, they frequently rely on the statements of public officials to make decisions that express their autonomy and affect their health.[207] For example, when the Emergency Manager of Flint, Michigan told city residents that the water was "safe,"[208] residents reasonably relied on this reassurance to drink the unsafe water.

The asymmetry of information, as well as individuals' reasonable reliance on official statements, points to a third similarity between professional speech and health-related speech by public officials. Physicians and other health care providers have a type of fiduciary duty to their patients that requires them to act in their patients' interest.[209] Likewise, public officials with authority over health have a type of fiduciary duty to safeguard the health of the public.[210] They are expected to act on the public's behalf.

The difference is that, while physicians' duty is to discrete patients, officials' duty is to the public at large, or at least the public in their city, county, state, or nation.[211] Nevertheless, just as physicians may breach their duty to their patients when they provide bad professional advice, public officials may breach their duty to the public when they provide dangerous misinformation.[212]

205. *See* Haupt, *Professional Speech*, *supra* note 6, at 1271.

206. *Id.*

207. *Id.*; Ron Fonger, *Emergency Manager Calls City Council's Flint River Vote 'Incomprehensible'*, MICH. LIVE (Jan. 20, 2019, 3:26 AM), https://www.mlive.com/news/flint/2015/03/flint_emergency_manager_calls.html [https://perma.cc/ND4M-35DR].

208. Fonger, *supra* note 207.

209. *See*, *e.g.*, Flores v. Liu, 274 Cal. App. 5th 278 (2021) (discussing cases); Saver, *supra* note 120, at 930–32 (2021); Mehlman, *supra* note 104, at 53–63 (2015); *see also* Sam F. Halabi, *Against Fiduciary Utopianism: The Regulation of Physician Conflicts of Interest and Standards of Care,* 11 U.C. IRVINE L. REV. 433, 435–36 (2020) (examining the limitations of the fiduciary analogy for claims against fiduciaries). On the fiduciary duties of public officials, see for example Vincent R. Johnson, *The Fiduciary Obligations of Public Officials*, 9 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 298, 298 (2019) ("[P]ublic officials have a broad fiduciary duty to carry out their responsibilities in a manner that is faithful to the public trust that has been reposed in them."). *But see* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1148 (2014) (arguing that the concept of fiduciaries should not be applied to public law).

210. *See, e.g.*, Haupt, *supra* note 107, at 545; Johnson, *supra* note 209, at 298 ("[P]ublic officials have a broad fiduciary duty to carry out their responsibilities in a manner that is faithful to the public trust that has been reposed in them."). *But see* Davis, *supra* note 209, at 1148 (arguing that the concept of fiduciaries should not be applied to public law).

211. Saver, *supra* note 120, at 932 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 41 cmt. h (AM. L. INST. 2012)) (discussing the duties of public health practitioners); *id.* at 950–65 (exploring physicians' duties to the broader public); Enrique Regidor et al., *The Role of the Public Health Official in Communicating Public Health Information*, 97 AM. J. PUB. HEALTH 93, 93 (2007); COMM. ON ASSURING THE HEALTH OF THE PUB. IN THE 21ST CENTURY, INST. OF MED. (U.S.), THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY 101 (2002) (explaining that the general population has an interest in elected health officials "monitor[ing] the population's health and interven[ing] when necessary through laws, policies, regulations, and expenditure of the resources necessary for the health and safety of the public").

212. *See* Johnson, *supra* note 209, at 319 (discussing breach of fiduciary duty by public officials).

These similarities between the professional-patient relationship and the official-public relationship suggest that malpractice law, which governs the relationship between professionals and patients, provides a useful model for thinking about the legal regulation of health-related misinformation by public officials with authority over health. Indeed, conceptualizing claims to redress the harm caused by such (mis)information as malpractice claims, rather than as intentional torts, offers several key advantages.[213] Most importantly, it captures in a way that intentional tort claims cannot what makes health-related misinformation by health officials so dangerous. The problem is not simply that officials lie or spin the truth for political gain, though their doing so can ultimately lead to an erosion of belief in the value of truth itself.[214] Rather, what makes health-related misinformation by public officials so uniquely problematic is that it has the capacity to cause imminent harm to the health of individuals (and thereby the greater public), an interest that tort law has long protected. Troublingly, this risk is probably the highest for socially disadvantaged groups and individuals who lack access to private professional advice.[215] The well-insured and well-connected individual can ask their personal physician about the risks of vaccines or the benefits of wearing a mask. Those who lack access to insurance and a physician-patient relationship, not to mention friends and family members in the health professions, may be forced to rely on government (mis)information.[216]

The recognition of official misstatements as a form of malpractice law also suggests that the focus on *lies qua lies* may be too narrow. In certain circumstances, harmful advice that can reasonably be construed as a suggestion to engage in a dangerous activity may be unreasonable even when it does not contain an intentional misstatement of facts.[217] Physicians and other professionals, after all, can be found liable for malpractice for giving "bad advice" even when they do not "lie[]" or assert a factual misstatement.[218] For example, if a physician tells a patient, "I think you need to amputate your leg," when there is no sound medical justification for that prescription, the physician can be liable even though, read literally, the statement is one of opinion rather than fact. Likewise, if Flint, Michigan's Emergency Manager says, "drink the water," the fact that the statement utilizes the language of advice, and does not contain a factual misstatement, does not obviate the harm, nor should it negate the breach of duty.

The medical malpractice model also decentralizes the role of the official's intent. Although President Trump uttered thousands of "lies," his ease with misstating reality raised the perplexing question of whether he usually "knew" what he said was false, or whether he simply believed that reality was what he wished

213. *Id.* at 325.
214. *See* Parmet & Paul, *supra* note 14, at 5.
215. *See* Haupt, *supra* note 105.
216. *See id.*
217. *Id.* at 10–11.
218. *Id.* at 8.

it to be.[219] In effect, he may not have intended to deceive in the narrow sense of the term; he may have simply believed what he wanted to believe and did not think about the harm his statements might cause. If so, it might be difficult to show that he acted with "actual malice."[220] In a malpractice case, no such problem exists. The plaintiff can establish breech simply by showing that the defendant failed to act as a reasonable health official would act, judged by the profession's own standards.[221] The fact that the defendant did not intend to deceive or act with the type of indifference required in a recklessness claim does not matter. Nor would the First Amendment preclude finding liability in such a case. The First Amendment, as we have said, permits the regulation of government speech in general, and professional speech when it is inconsistent with the information that would be offered by the professional community.[222] Intent is beside the point.

The application of the professional standard of care also removes the challenge, discussed above, created by the incomplete and changing nature of scientific information.[223] Under the professional standard, we would not expect health officials to offer perfect advice, nor would we expect them to know what is not yet knowable. We would only expect them to know and state what a reasonable official in their position would know and state at the time.[224] Further, what constitutes reasonable care would be determined by the state of the science, as experts understood it, at the time.[225] Thus, expertise rather than intent would mark the boundaries of the defendants' duty with respect to the dissemination of health-related information.

The malpractice model also suggests a way of thinking about the problem presented when government officials who lack training in a health-related field offer advice that conflicts with the understanding of health-related professionals. If we use the law of negligence as a model, we would not expect a mayor with a business background to have the knowledge and understanding of a CDC director who possesses a Master's of Public Health and medical degree. But we would expect the mayor to act as a reasonable mayor who has access to the information that this mayor has would act. Because, in many cases, a mayor or governor or president will have access to experts with information and training unavailable to the public, the reasonable mayor or governor or president would consult with

219. Robert Schlesinger, *Trump's Covid Performance Makes You Wonder If He Believes His Own Lies—or Just Wants Us To*, NBC NEWS (Oct. 6, 2020, 5:35 PM), https://www.nbcnews.com/think/opinion/trump-s-covid-performance-makes-you-wonder-if-he-believes-ncna1242329 [https://perma.cc/U8ZV-JXTY].

220. It is certainly possible that his actions could be seen as reckless or meeting the actual malice standard as a result of a "reckless disregard" of the truth. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

221. Haupt, *supra* note 143, at 4.

222. *See supra* text accompanying notes 106–08.

223. *See supra* text accompany notes 49–55.

224. The analogy to malpractice law raises the critical question as to whether officials should be liable not only for misinformation but for failing to provide information, in effect, for failing to warn people. Our discussion suggests that the answer should be "yes," in many cases, but we leave for another day the question whether officials like physicians should have affirmative duties. *See* Johnson, *supra* note 208, at 325 (discussing malpractice analogy).

225. Haupt, *Professional Speech*, *supra* note 6, at 1289.

and convey that information to the public. In contrast, if the mayor of a small town had less access to information and expertise than the mayor of a major city, they would not be expected to convey the same information or advice as the big city mayor.

In effect, in an official malpractice case relating to health-related misinformation, the professional standard would be set by the custom of similarly situated officials. This would not preclude senior executive officials from considering political, economic, and normative issues when making their decisions, but it would mean that they would be expected to convey expert knowledge about factual matters in a reasonable manner. So, for example, a mayor might determine, without fear of liability, that schools should be open during a pandemic based a wide range of considerations. But liability might attach if the mayor erroneously stated that "children cannot get COVID-19" when all of their health experts said otherwise.[226] Doing so would likely be negligent. Conversely, a reasonable park department official would not be expected to have such information, nor would the public reasonably rely on their statements about the transmission of a new virus. Hence, their statements, even if troubling, might not be malpractice.[227]

The malpractice model would also help to align the regulation of official health-related misinformation with the First Amendment. As noted above, both Corbin and Henricksen insist that plaintiffs establish actual malice to overcome First Amendment objections to the regulation of official misinformation.[228] Their concerns, however, are overstated given that the First Amendment does not generally preclude the government from regulating its own speech.[229] In theory, that should mean that the common law can regulate official speech, just as the government can do so via administrative regulations and internal policies. Yet, even where there are First Amendment constraints on the regulation of speech, as in the case of the private speech of health officials (hence speech that

226. *Cf.* Norton, *supra* note 30, at 93.

227. We leave a full discussion of the case of legislators to another day. The speech and debate clause provides immunity for the speech of members of Congress before Congress. *See* ALYSSA M. DOLAN & TODD GARVEY, CONG. RSCH. SERV., THE SPEECH OR DEBATE CLAUSE: CONSTITUTIONAL BACKGROUND AND RECENT DEVELOPMENTS 1 (2012). Further, we do not usually expect legislators (especially at the state and local level) to have access to the type of expert information that is generally available to executive branch officials. Nor do they have the same responsibility as executive branch officials to safeguard the health of the public. INST. OF MED. (U.S.) COMM., *supra* note 211, at 102. On the other hand, there are certainly situations in which legislators do have access to "inside information" and in which the public's reliance on their speech would be reasonably foreseeable. Further, where legislators have training and credentials in health, such as in the case of Senator Rand Paul, see *supra* note 141 and accompanying text, the public's reliance on their (mis)information may be especially foreseeable and dangerous.

228. Government workers, however, as individuals may have First Amendment interests. Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75, 88–89 (2008) (describing the Connick/Pickering test, which "requires courts to balance the individual employee's interest 'as a citizen, in commenting upon matters of public concern' and the government employer's interest in efficiently providing public services"); Connick v. Myers, 461 U.S. 138, 145 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). The "actual malice" standard may be important to permitting some types of tort claims against such workers. For the reasons discussed above, however, it should not be necessary with respect to claims based on a professional speech/malpractice model. *See supra* notes 211–15 and accompanying text.

229. *See* Norton, *supra* note 228, at 75–76.

is not "government speech" as we use the term), the professional malpractice model suggests a wider reach for the common law than Corbin and Henricksen presume.[230] Recall that in professional malpractice cases, the First Amendment permits plaintiffs to recover when they show that professional defendants deviated from the standards set by their own expert community.[231] A similar approach should apply to malpractice claims based on health-related misinformation by public officials. In such cases, deviation from the professional standard of care, rather than actual malice or intent, should be sufficient for First Amendment purposes.

C. The Limitations and Utility of the Common Law Remedy

Although the malpractice model offers a valuable model for understanding the nature of officials' duties with regard to health-related speech as well the nature of wrong that officials commit when they give bad advice about health problems, malpractice actions are unlikely to play a significant role in constraining officials' unreasonable speech. Even if courts accept that claims for official health-related misinformation constitute a form of malpractice and permit such claims to proceed under tort claims acts, these actions are likely to remain rare and difficult for plaintiffs. Plaintiffs will face numerous hurdles, in addition to immunities.[232] They will likely have to convince a court that the defendant had relevant authority over public health to create a type of fiduciary relationship.[233] Officials such as the park department head who says that vaccines are unsafe probably do not. Arguably, legislators also lack such authority.[234]

Discerning the distinction between policy arguments (*i.e.*, "vaccine mandates undermine freedom") with actionable malpractice may also prove daunting. As discussed above, malpractice claims may arise when professionals offer advice that fails to comport with expertise.[235] Policy and ethical arguments (*i.e.,* "mandates abridge freedom"), however, are distinct from professional advice. They do not purport to tell individuals what they should do to keep themselves healthy and would not normally be viewed as falling within the purview of bad professional advice.[236] Yet, the public may often have trouble seeing the lines between policy arguments and dangerous advice. If a governor repeatedly says, "vaccine mandates violate freedom," the public may be forgiven for assuming that the governor also believes that the vaccines are ineffective (after all, the abridgement of "freedom" is more outrageous if the vaccines do not work). Uttering such opinions may be dangerous, and foreseeably so. Still, because they are neither advice (*i.e.*, a statement that tells someone what they should do) nor

230. *See supra* Section III.B (discussing professional speech and government speech).
231. *See supra* notes 98–100.
232. *See* NORTON, *supra* note 2, at 217–18.
233. *See supra* text accompanying notes 101–08.
234. *See* discussion *supra* note 227.
235. *See supra* text accompanying notes 36–40.
236. *See* Haupt, *Unprofessional Advice*, *supra* note 6, at 704.

a factual misstatement, courts should not see them as falling within the category of tortious health-related misinformation.

Causation is also likely to prove challenging. In some cases—Flint, Michigan may again offer an example—plaintiffs will have little trouble establishing that the misinformation was the "cause in fact" of their harm.[237] Flint residents drank the city's water after officials told them it was safe.[238] In many others circumstances, however, the proliferation of misinformation from so many sources may make it difficult for plaintiffs to establish that a particular defendant caused their harm.[239] Indeed, even individuals who ingested bleach to prevent COVID-19 have blamed videos on YouTube rather than Trump's comments.[240]

We recognize too, that many courts are loathe to conclude that officials have duties to the public writ large. Courts understandably fear overstepping into political debates and turning political issues into common law claims. Numerous judicial doctrines, including public official immunities and the "no public duty rule,"[241] seek to limit the scope of official liability. We leave a full analysis of these issues for another day. For now, it is worth noting that negligence claims against government officials are far more likely to fall within the scope of state and federal torts claims acts, thereby escaping both sovereign and qualified immunities, than intentional tort claims. For example, although the Federal Tort Claims Act does not apply to claims for "libel, slander, misrepresentation, deceit . . . [,]"[242] claims for professional malpractice under the Act are well-established.[243]

Nevertheless, we have some sympathy for the concerns that underlie statutory and judge-made limitations on officials' liability for discretionary actions and worry about the increased judicialization of America's political debates. In the current political climate, the risk that partisans would weaponize malpractice actions as yet another way to attack office holders of the opposite party cannot be ignored. Further, the mere prospect of facing litigation for informing the public about health-related matters might well chill officials into providing too little information. As we discussed above, that too can threaten the public's health.[244]

237. *See* Fonger, *supra* note 207. For a fuller discussion of what happened in Flint, see *A Timeline of the Water Crisis in Flint, Michigan*, AP NEWS (June 14, 2017), https://apnews.com/article/north-america-us-news-rick-snyder-mi-state-wire-flint-1176657a4b0d468c8f35ddbb07f12bec [https://perma.cc/T86B-S2CE].

238. *See A Timeline of the Water Crisis in Flint, Michigan*, *supra* note 237.

239. *See* Adam Satariano, *Coronavirus Doctors Battle Another Scourge: Misinformation*, N.Y. TIMES (Aug. 17, 2020), https://www.nytimes.com/2020/08/17/technology/coronavirus-disinformation-doctors.html [https://perma.cc/TD7F-EXSH] (discussing misinformation issues during the COVID-19 pandemic).

240. *Id.*

241. *See, e.g.*, Cuffy v. City of New York, 505 N.E.2d 937, 939 (N.Y. 1987) (generally finding that "a municipality may not be held liable for injuries resulting from a simple failure to provide police protection").

242. 28 U.S.C. § 2680(h).

243. DANIEL A. MORRIS, FEDERAL TORT CLAIMS § 10:1 (2021) ("Claimants have been allowed to maintain actions against the United States in numerous circumstances involving medical malpractice."). The Act, however, does not apply to discretionary functions. 28 USC § 2680. We can imagine President Trump arguing that the provision of misinformation designed to calm the public falls within that exception.

244. *See supra* text accompanying notes 51–53.

Hence, although we find the parallels between professional malpractice and official health-related misinformation compelling, we do not offer the model because we think that tort remedies can or should solve the larger problems of dangerous misinformation by the government and its officials.

Rather we offer the analogy, or perhaps, metaphor, because it shines important light on the nature of the problems we face. Many of the officials upon whom the public reasonably relies to protect their health have misled them in dangerous ways.[245] This is a breach of trust, larger in scope but no different in kind, than the type of breach that occurs when doctors give bad advice. And just like the bad advice given by doctors, it can harm our health.

By seeing health-related misinformation through this lens, we hope to promote a remedy apart from tort law. The duty that applies in malpractice cases is a professional duty, enforced not only by litigation but also by professional education, ethics, and acculturation. Although the field of public health has parallel paths for training and inculcating norms to protect the public's health in its workforce,[246] many government officials seem to have viewed the pandemic as but another opportunity to score political points and play hardball partisan politics. By regarding their disregard for the public's well-being through the dissemination of lies and negligent misinformation that rise to the level of malpractice, we hope to highlight how their actions constitute a breach of duty that neither the First Amendment nor respect for robust political debate sanctions.

V. CONCLUSION

As we have suggested, the nature of government speech renders First Amendment doctrine not particularly useful to address harms caused by government lies. We do think, though, that the First Amendment's application to professional speech provides a useful lens through which to understand the problem of health-related misinformation by government officials. We also think that the First Amendment's treatment of professional speech helpfully points us to another area of the law that can shed light on the problem: professional malpractice. In light of normative interests in public discourse, treating all speakers generally as equal to each other makes some sense, though we are unconvinced that the stark demarcation between the professional relationship and public discourse adequately reflects the interests in accurate information-flow from the government to the public. In any event, government speakers are different because they are not appropriately characterized as part of public discourse to begin with. As we have illustrated in the comparison between government speech and professional speech, public health officials seem more like professional advice-givers in certain situations.

245. *See supra* text accompanying notes 17–26.

246. Victoria Doudenkova, Jean-Christophe Bélisle-Pipon, Louise Ringuette, Vardit Ravitsky & Bryn Williams-Jones, *Ethics Education in Public Health: Where are We Now and Where are We Going?*, 2 INT'L J. ETHICS EDUC. 109, 120 (2017).