ARTICLE

PSEUDOPROFESSIONAL ADVICE

CLAUDIA E. HAUPT*

ABSTRACT

Public demand for health advice soared during the coronavirus pandemic. Numerous health experts, including licensed professionals and other individuals claiming relevant expertise, disseminated health advice on social media, television, and elsewhere. Some of this advice aligned with professional knowledge; some did not. And some advice even resulted in physical harm to those who followed it. Yet, the law does not constrain bad advice outside of the professional relationship.

This scenario highlights the still undertheorized gulf between the treatment of speech in the professional relationship and speech outside of it. Within the confines of the professional relationship, the First Amendment operates in a way that safeguards good advice. Outside of this relationship, good and bad advice are treated as equals. Perhaps this reflects an appropriate tradeoff between expertise and freedom of speech in ordinary times. But the value of this tradeoff is significantly strained when the stakes of advice-giving are high, exposing the weakness of the traditional framework.

Focusing on "pseudoprofessional advice," that is, advice offered by licensed professionals outside of the professional relationship that contradicts professional insights, this Article reexamines the theoretical and doctrinal interplay among speech, harm, and expertise. It argues that the traditionally rigid doctrinal distinction between the speech of licensed professionals within the professional relationship and their speech outside of it does not adequately

* Associate Professor of Law and Political Science, Northeastern University School of Law; Affiliate Fellow, Information Society Project, Yale Law School; Senior Visiting Research Scholar, Solomon Center for Health Law and Policy, Yale Law School. Many thanks to Jack Balkin, Joseph Blocher, Ed Cheng, Stephen Cody, John Cogan, Glenn Cohen, Carl Coleman, Caroline Mala Corbin, Elizabeth Glowacki, Abbe Gluck, Hiba Hafiz, Thomas Kadri, Kristin Madison, Helen Norton, Wendy Parmet, Robert Post, Blaine Saito, Jessica Silbey, Alicia Solow-Niederman, Sarah Swan, Allison Tait, and audiences at the Boston Area Junior Faculty Roundtable, the Northeastern University School of Law Faculty Colloquium, the University of Richmond School of Law Junior Faculty Forum, the 2021 Freedom of Expression Scholars Conference at Yale Law School, and the Health Law, Policy, Bioethics, and Biotechnology Workshop at Harvard Law School. Research for this Article was supported by a Center Faculty Fellowship at the Center for Health Policy and Law, Northeastern University School of Law.

capture the normative interests implicated by pseudoprofessional advice. Translating these normative insights into doctrinal prescriptions, this Article concludes that regulatory interventions can be justified to tie licensed professionals' speech to professional knowledge in order to safeguard against harm.

CONTENTS

INTRODUCTION 778
I. IDENTIFYING SOURCES OF ADVICE 783
A. *Professional Speech* 783
B. *Experts in Public Discourse* 788
C. *Nonexperts in Public Discourse* 792
D. *Distinguishing Government Speech* 795
II. THEORIZING EXPERT SPEECH 797
A. *The Marketplace of Ideas* 798
B. *Harm and the First Amendment* 801
C. *Justified True Belief* 806
D. *Knowledge Communities* 807
III. EXPERTISE AT THE EDGE OF PUBLIC DISCOURSE 809
A. *Autonomy Interests* 810
1. Listener Autonomy 811
2. Speaker Autonomy 814
B. *Democratic Self-Government Interests* 815
C. *Trust* 818
IV. CHARTING ALTERNATIVE APPROACHES 819
A. *A Torts Solution for a Speech Problem* 820
B. *A Speech Solution for a Torts Problem* 822
C. *A Regulatory Solution* 823
CONCLUSION 829

INTRODUCTION

As the COVID-19 pandemic unfolded, the American public was desperate for health advice. Facebook was awash in pandemic-related information.[1] The major U.S. cable news channels booked medical experts to answer viewer questions.[2] YouTube videos of doctors giving advice went viral.[3] Did these experts, including licensed professionals and other individuals claiming relevant expertise, give good advice? Sometimes. But some of this advice resulted in physical harm to those who followed it.[4] Yet, the law does not constrain bad advice outside of the professional-client or doctor-patient relationship. In ordinary times, this perhaps reflects an appropriate tradeoff between expertise and freedom of speech. But the value of this tradeoff is significantly strained when the stakes of advice-giving are high. Recall only President Joe Biden's exasperated statement regarding coronavirus vaccine disinformation on Facebook and other social media platforms: "They're killing people."[5]

As a matter of First Amendment theory, this scenario highlights the still undertheorized gulf between the treatment of expert speech in the professional-client or doctor-patient relationship (I will refer to both as "the professional relationship") on the one hand and expert speech in public discourse on the other.

---

[1] *See* Charlie Plain, *People Use Facebook as an Emergency Communication System During Pandemic*, UNIV. OF MINN.: SCH. OF PUB. HEALTH (Sept. 27, 2021), https://www.sph.umn.edu/news/people-use-facebook-as-an-emergency-communication-system-during-pandemic/ [https://perma.cc/XFM8-K34B].

[2] *See* Brian Flood, *Coronavirus Crisis Puts Medical Experts Center Stage on Cable, Network Newscasts*, FOX NEWS (Mar. 17, 2020, 1:05 PM), https://www.foxnews.com/media/coronavirus-crisis-medical-experts-tv-news [https://perma.cc/LP7N-TALE] (describing increase in segments featuring both in-house medical correspondents and outside medical experts).

[3] *See* Abby Ohlheiser, *Doctors Are Now Social-Media Influencers. They Aren't All Ready for It.*, MIT TECH. REV. (Apr. 26, 2020), https://www.technologyreview.com/2020/04/26/1000602/covid-coronavirus-doctors-tiktok-youtube-misinformation-pandemic/ (recounting stories of healthcare providers whose YouTube videos gained millions of views).

[4] *See, e.g.*, Oscar Gonzalez, *Ivermectin: New Study Didn't, in Fact, Find It Was Effective Against Omicron*, CNET (Oct. 6, 2021, 5:00 AM), https://www.cnet.com/health/medical/ivermectin-new-study-did-not-in-fact-find-it-was-effective-against-omicron/ [https://perma.cc/8BFZ-RASM] (identifying multiple state poison centers that received calls after individuals had consumed ivermectin); 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 (reporting death and hospitalization of individuals who ingested fish tank cleaner containing chloroquine phosphate).

[5] Zolan Kanno-Youngs & Cecilia Kang, *'They're Killing People': Biden Denounces Social Media for Virus Disinformation*, N.Y. TIMES (July 19, 2021), https://www.nytimes.com/2021/07/16/us/politics/biden-facebook-social-media-covid.html. The President later modified this statement. *See* Eugene Scott & Rachel Lerman, *Biden Clarifies Comments About Facebook 'Killing People' with Vaccine Misinformation*, WASH. POST (July 19, 2021, 2:33 PM), https://www.washingtonpost.com/politics/2021/07/19/biden-facebook-misinformation/.

Within the confines of the professional relationship, the First Amendment operates in a way that safeguards good advice.[6] Outside of this relationship, by contrast, the traditional speech protections prohibit content- and viewpoint-based regulation of speech.[7] Good and bad advice, in short, are treated as equals.[8] This sharp distinction is considered axiomatic in First Amendment doctrine and theory. But the type of speech I will call "pseudoprofessional advice"[9]—that is, advice given by licensed professionals outside of the professional relationship that contradicts the professional knowledge community's insights—exposes a theoretical challenge: why are licensed professionals only constrained within the professional relationship in the advice they may dispense to *one* client or patient, but in public discourse they may give bad advice to *millions* with potentially deadly consequences?[10] How should the First Amendment treat pseudoprofessional advice disseminated to the public?

Recently, professional organizations including state medical licensing bodies have called for disciplinary sanctions against licensed professionals who disseminate misinformation.[11] Meanwhile, some scholars have begun to tackle

---

[6] *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 843 (1999) (explaining government may regulate speech within professional relationship); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 947-49 [hereinafter Post, *Informed Consent*] (noting medical professionals may be disciplined for giving advice within professional relationship that contradicts prevailing scientific consensus). *See generally* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016) [hereinafter Haupt, *Professional Speech*].

[7] *See* Post, *Informed Consent*, *supra* note 6, at 949-50.

[8] Despite my exclusive focus on advice-giving in this Article, I do not mean to suggest that there are no other limits on wrong information such as false advertising, contained, for example, in the COVID-19 Consumer Protection Act. Pub. L. No. 116-260, § 1401, 134 Stat. 1182, 3275 (2020) (codified as note to 15 U.S.C. § 45) (outlawing deceptive practices in commerce related to COVID-19); *see also* Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 875 (2015) [hereinafter Post, *Commercial Speech*] (discussing "vast regulatory apparatus" to which commercial speech, including speech of licensed professionals, is subject (quoting Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 153)); Press Release, Fed. Trade Comm'n, With Omicron Variant on the Rise, FTC Orders More Marketers To Stop Falsely Claiming Their Products Can Effectively Prevent or Treat COVID-19 (Jan. 19, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/omicron-variant-rise-ftc-orders-more-marketers-stop-falsely [https://perma.cc/4VML-5NAJ] (reporting Federal Trade Commission action against marketers nationwide making baseless claims regarding COVID-19 treatment or prevention).

[9] This label is intended to evoke notions of pseudoscience and to describe a type of advice-giving relationship that approximates but does not fully replicate a professional relationship.

[10] Claudia E. Haupt, *The Dr. Oz Paradox*, HARV. L. PETRIE-FLOM CTR.: BILL OF HEALTH (Sept. 21, 2022) [hereinafter Haupt, *Dr. Oz Paradox*], https://blog.petrieflom.law.harvard.edu /2022/09/21/the-dr-oz-paradox/ [https://perma.cc/P63K-8HKG].

[11] *See, e.g.*, Davey Alba & Sheera Frenkel, *Calls Grow To Discipline Doctors Spreading Virus Misinformation*, N.Y. TIMES (Aug. 27, 2021), https://www.nytimes.com/2021/08/27

the free speech and liability issues surrounding pandemic-related misinformation.[12] Others have examined increased threats of professional discipline for misinformation disseminated by licensed professionals under existing free speech doctrine.[13] But the larger theoretical premise of the current balance between speech protection and harm remains underexplored. This Article takes on that challenge and reexamines the interplay among speech, harm, and expertise to expose the weakness of the traditional doctrinal framework. Complicating this task, and making it particularly pressing, the roles of both harm[14] and knowledge[15] within the First Amendment are still undertheorized. The harmful consequences of pseudoprofessional advice during

/technology/doctors-virus-misinformation.html?smid=url-share (citing *FSMB: Spreading COVID-19 Vaccine Misinformation May Put Medical License at Risk*, FED'N OF ST. MED. BDS. (July 29, 2021), https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-misinformation-may-put-medical-license-at-risk/ [https://perma.cc/CQ6S-VB3D]) (reporting Federation of State Medical Boards' statement condemning physicians' spread of COVID-19 misinformation as contrary to ethical and professional responsibilities and subject to disciplinary sanctions). For a full discussion, see *infra* Section IV.C. The coronavirus pandemic has renewed the focus on this issue, which of course existed before. *See, e.g.*, Jon C. Tilburt, Megan Allyse & Frederic W. Hafferty, *The Case of Dr. Oz: Ethics, Evidence, and Does Professional Self-Regulation Work?*, 19 AMA J. ETHICS 199, 199 (2017).

[12] *See, e.g.*, Claudia E. Haupt & Wendy E. Parmet, *Lethal Lies: Government Speech, Distorted Science, and the First Amendment*, 2022 U. ILL. L. REV. 1809, 1822-32 (exploring parallels between government expert speech and professional speech); Robert Post, NIFLA *and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1083-85 (2022) [hereinafter Post, NIFLA] (identifying tensions between malpractice law and freedom of speech for doctors who sincerely believe inaccurate information); Dorit Rubinstein Reiss, *Anti-Vaccine Misinformation and the Law: Challenges and Pitfalls*, 18 IND. HEALTH L. REV. 85, 90 (2021) (proposing tort liability for antivaccine speech); Wes Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, 96 ST. JOHN'S L. REV. (forthcoming 2023) (manuscript at 101-03, 113), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860211 [https://perma.cc/FY9E-JSTE] (framing purposely deceptive speech, including claims 2020 presidential election was stolen, as "fraud on the public").

[13] *See, e.g.*, Carl H. Coleman, *Physicians Who Disseminate Medical Misinformation: Testing the Constitutional Limits on Professional Disciplinary Action*, 20 FIRST AMEND. L. REV. 113, 115-16 (2022) (arguing disciplining physicians for speech outside professional relationship is unconstitutional absent evidence of physician's "actual malice"); *see also* Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J.L. & POL'Y 37, 41-42 (2022) [hereinafter Green & Roiphe, *Lawyers and the Lies They Tell*] (disputing state's authority under "current First Amendment framework" to discipline lawyers for "political lies").

[14] *See, e.g.*, Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 111 [hereinafter Schauer, *Harm(s)*] ("[T]he question of harm is one of huge First Amendment significance, and it has been one that has largely been avoided . . . .").

[15] *See, e.g.*, Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 447 (2012) ("[T]he First Amendment faces . . . an epistemological problem: specifically, the problem of figuring out just how knowledge fits within the First Amendment.").

the pandemic dramatically highlight the shortcomings of the ordinary doctrinal framework, but the problem exists independent of the COVID-19 health crisis.

This Article challenges the existing doctrinal framework as normatively unsound. It argues that the traditionally rigid doctrinal distinction between the speech of licensed professionals within the professional relationship and their speech outside of it does not adequately capture the normative interests implicated by pseudoprofessional advice. When licensed professionals give advice to the public that departs from the insights of their professional knowledge communities, the fundamental assumption of speaker equality in public discourse is so strained that limited regulatory interventions may be justified. I suggest that, when appropriately tailored to tie licensed professionals' speech to professional knowledge in order to safeguard against harm, professional discipline may be consistent with these normative interests.

This Article proceeds in four parts. Part I provides a survey of the current doctrinal framework of advice-giving and introduces the interplay of speech, harm, and liability for a range of sources of expertise. To illustrate the strict doctrinal bifurcation of speech within the professional relationship and speech outside of it, this Part first outlines the permissible limits on professional speech before comparing it to the treatment of expert speech, including advice given by licensed professionals, in public discourse. It then turns to the speech of nonexperts in public discourse and, finally, distinguishes government speech.

Part II maps various theoretical frameworks to think about expert speech. It first considers, and rejects, the marketplace of ideas as a useful theory for expertise. Next, it unpacks harm-centered approaches to speech. Accepting speech-based harm is commonly considered to be baked into the First Amendment. As Leslie Kendrick notes, the notion that "freedom of speech [must] protect harmful speech" is a widely held assumption.[16] Going even further, Rebecca Brown observes that "[i]t is common practice to proclaim proudly that the U.S. Constitution protects speech even when it causes harm."[17] But these common notions of the relationship between speech and harm in fact rest on mere caricatures of the normative interests involved. At the same time, Frederick Schauer suggests that the Supreme Court has failed to appropriately grapple with the harms that speech can inflict.[18] When the Court has confronted harm created by speech, Schauer contends, it has only done so "in a somewhat evasive and unfocused way."[19] As a consequence, considerations of harm have

[16] Leslie Kendrick, *Must Free Speech Be Harmful?*, 2020 U. CHI. LEGAL F. 105, 105.

[17] Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 954 (2016).

[18] Schauer, *Harm(s)*, *supra* note 14, at 82-83 ("The Supreme Court has often been complicit in denying or downplaying the harm-producing capacity of speech, framing even its most strongly speech-protective First Amendment decisions in a way that emphasizes the importance of the speech and de-emphasizes the possibility that even the speech we rightfully protect has substantial harm-producing capacities.").

[19] *Id.* at 83.

been overlooked in the development of free speech doctrine,[20] suggesting that even in ordinary times, the harm-producing capacity of speech remains neglected. This Part then introduces Joseph Blocher's recent contribution that helpfully foregrounds "justified true belief."[21] Finally, I suggest that the justified true belief approach and the harm-centered approach can usefully be combined in the context of expertise by focusing on professional knowledge communities.

Part III examines the theoretical underpinnings of licensed professionals' speech at the margins of public discourse, particularly as speech approximates what looks like professional advice-giving outside of the professional relationship. I will focus on pseudoprofessional advice given by licensed professionals but contradicting professional knowledge. This Part probes the normative tradeoffs that would be necessary to address the problem of pseudoprofessional advice that has the potential to cause significant harm to public and individual health. Despite the initial focus on health advice, this discussion also has implications for other types of professional advice.

Finally, Part IV translates these normative insights into three potential doctrinal prescriptions to address harm caused by pseudoprofessional advice. It charts these alternative approaches from the speech perspective, the torts perspective, and the regulatory perspective. So doing, it argues that neither the least speech-protective approach of tort liability for bad advice in public discourse nor the most speech-protective approach—that is, more speech—is doctrinally responsive to the underlying normative concerns. The regulatory approach that contemplates disciplinary sanctions for pseudoprofessional advice, I suggest, is best suited to align normative and doctrinal interests by tethering licensed professionals' speech to professional knowledge in order to prevent harm.

Vincent Blasi observed that, for First Amendment purposes, certain periods of time are more "pathological" than others.[22] I suspect that he did not have actual pathogens and the role of the First Amendment during a global pandemic in mind. But understanding the First Amendment in "the worst of times"[23] may require deeper normative consideration of the most appropriate doctrinal design in the best of times.

---

[20] *See id.* at 96 (arguing recent Supreme Court decisions that downplay speech-related harm "provide an occasion . . . to reflect more broadly on the role that genuine harm can and might play in understanding free speech theory and fashioning First Amendment doctrine").

[21] Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 444, 446-47 (2019) (proposing shift in First Amendment discourse from prioritizing truth to prioritizing knowledge).

[22] Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985) (arguing courts should shape First Amendment doctrine to protect speech "when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically").

[23] *Id.* at 450.

I. Identifying Sources of Advice

We take as axiomatic that professionals within a professional relationship are subject to a variety of legal constraints, while speakers outside of this relationship are not, even if they are licensed professionals. The consequences of this sharp doctrinal distinction can be quite jarring: "Why does the law sanction giving bad advice to *one* patient, while it permits giving bad advice to *millions* of YouTube or television viewers, which may result in significant physical harm? We might call this the 'Dr. Oz paradox.'"[24]

This Part sketches ordinary speech doctrine during ordinary times and identifies shortcomings of the traditional doctrinal approach that are most plainly revealed in times of crisis. It first highlights the bifurcation of licensed professionals' speech within the professional relationship and their speech outside of it. It then considers the role of nonexperts in public discourse and, finally, distinguishes the unique speech concerns of government speakers, including government experts.

A. *Professional Speech*

Professionals possess knowledge that their clients or patients lack but need to make important life decisions for themselves, and they enter into a professional relationship to access this body of professional knowledge.[25] The professional's speech within the professional relationship, for the purpose of giving professional advice, is of a specific quality. Unlike other types of speech, its content is tied to professional knowledge, that is, expertise specific to the profession.[26] As I have previously suggested, we might think of the professions as "knowledge communities," which exist to generate and disseminate knowledge.[27] "The individual professional thus serves as the conduit between the knowledge community and the client" or patient.[28]

First Amendment doctrine treats the speech between a professional and a client or a doctor and a patient within their respective professional relationships and for the purpose of giving professional advice differently from speech outside of that relationship. Some courts and scholars refer to this type of speech as

[24] Haupt, *Dr. Oz Paradox*, *supra* note 10.

[25] Haupt, *Professional Speech*, *supra* note 6, at 1271.

[26] *Id.* at 1242.

[27] *Id.* at 1241; *see also* Blocher, *supra* note 21, at 487; Renee Knake Jefferson, *Lawyer Ethics for Innovation*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 17 (2021) ("The concept of a profession assumes that individuals, through specialized education, training, and licensing, hold access to knowledge that the general public does not. This has been termed a 'knowledge community,' i.e., 'a network of individuals who share common knowledge and experience as a result of training and practice.'" (quoting Haupt, *Professional Speech*, *supra* note 6, at 1250-51)); Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1294 (2015) (adopting characterization of professions as "knowledge communities").

[28] Haupt, *Professional Speech*, *supra* note 6, at 1254.

"professional speech."[29] The federal appellate courts were split on the existence of professional speech as a separate category of speech.[30] In *National Institute of Family & Life Advocates* (*NIFLA*) *v. Becerra*,[31] Justice Clarence Thomas noted that the Supreme Court has not recognized professional speech as a distinctive category of speech.[32] Similarly, some scholars reject the idea of professional speech as a unique category.[33]

Notwithstanding the Court's skepticism directed at the professional speech label, speech within the professional relationship is treated differently from other forms of speech.[34] Justice Thomas, writing for the *NIFLA* majority, acknowledged as much, specifically mentioning "[l]ongstanding torts for professional malpractice"[35] and characterizing informed consent as "firmly

[29] *See, e.g.*, *id.* at 1241; Halberstam, *supra* note 6, at 777 (proposing constitutional framework for commercial and professional speech); Post, *Informed Consent*, *supra* note 6, at 944 (analyzing tension between First Amendment and attempts to regulate professional speech).

[30] *See, e.g.*, Otto v. City of Boca Raton, 981 F.3d 854, 865 (11th Cir. 2020) (describing professional speech as falling within "twilight zone" of uncertain First Amendment protections); Wollschlaeger v. Governor, 848 F.3d 1293, 1311 (11th Cir. 2017) (en banc) (rejecting rational basis review for "so-called professional speech"); Pickup v. Brown, 740 F.3d 1208, 1227-29 (9th Cir. 2014) (framing professional speech on three-part "continuum"); Conant v. Walters, 309 F.3d 629, 637 (9th Cir. 2002) (positing professional speech may merit highest level of First Amendment protection); Vizaline, L.L.C. v. Tracy, 949 F.3d 927, 928-29 (5th Cir. 2020) (discussing Supreme Court's rejection of "'professional speech' doctrine"); Serafine v. Branaman, 810 F.3d 354, 359 (5th Cir. 2016) (tracing history and potential applications of professional speech doctrine); Hines v. Alldredge, 783 F.3d 197, 202 (5th Cir. 2015) (recognizing validity of "content-neutral regulation of the professional-client relationship"); Cap. Associated Indus. v. Stein, 922 F.3d 198, 207 (4th Cir. 2019) (noting lower court's reasoning was grounded in professional speech doctrine); Nat'l Ass'n for the Advancement of Multijurisdiction Prac. v. Lynch, 826 F.3d 191, 195 (4th Cir. 2016) (applying "professional speech doctrine"); Stuart v. Camnitz, 774 F.3d 238, 248 (4th Cir. 2014) (applying *Pickup*'s continuum framework); Moore-King v. County of Chesterfield, 708 F.3d 560, 568 (4th Cir. 2013) (identifying origins of Supreme Court's professional speech doctrine); King v. Governor of N.J., 767 F.3d 216, 232 (3d Cir. 2014) (holding speech within professional relationship "warrants lesser protection"). Following the Supreme Court's decision in *National Institute of Family & Life Advocates* (*NIFLA*) *v. Becerra*, 138 S. Ct. 2361 (2018), some of these courts overruled their professional speech precedents. *See, e.g.*, Hines v. Quillivan, 982 F.3d 266, 270 (5th Cir. 2020).

[31] *NIFLA*, 138 S. Ct. 2361.

[32] *Id.* at 2371. The Court, however, did not rule out the possibility that reasons for recognizing such a category in the future might exist. *See id.* at 2375 ("In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists.").

[33] *See, e.g.*, Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 68 (2016).

[34] *See* Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185, 188 (2018) [hereinafter Haupt, *Limits*].

[35] *NIFLA*, 138 S. Ct. at 2373.

entrenched in American tort law."[36] Moreover, the Court did not address the constitutionality of professional licensing. Subsequently, it is still true that "identifying professional speech as distinct merely acknowledges a specific set of doctrinal features that we have traditionally assumed apply to speech between professionals and clients."[37] The bifurcation between speech in the professional relationship and speech outside of it thus still holds after *NIFLA*.[38] Indeed, professionals are subject to various legal limits on their speech that are unknown in other speech contexts and under current doctrine would be held to violate the First Amendment if they were imposed. Numerous legal guardrails are designed to ensure that professionals within the professional relationship give good advice; they include professional licensing and discipline, malpractice liability, informed consent, and fiduciary duties.

First, professionals routinely must be licensed to practice before they may dispense professional advice.[39] Professional licensing requirements in the United States have a long history.[40] The Supreme Court has recognized the link between licensing and professional qualification since its 1889 decision in *Dent v. West Virginia*[41] upholding a licensing requirement to practice medicine.[42] The Court noted:

> No one has a right to practise medicine without having the necessary qualifications of learning and skill, and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications.[43]

Although professional licensing is often rightly criticized as an economic obstacle that limits entry to the profession,[44] it also can ensure the health and

---

[36] *Id.* (quoting Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990)).

[37] Haupt, *Limits*, *supra* note 34, at 190.

[38] *Id.* at 188 (detailing First Amendment doctrine's differential treatment of professional speech).

[39] *See* Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 509-11 (2019) [hereinafter Haupt, *Licensing Knowledge*].

[40] *See, e.g.*, Douglas A. Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 WM. & MARY L. REV. 46, 46 n.1 (1972) ("The licensing of lawyers and doctors in this country began in the latter part of the eighteenth century and the first years of the nineteenth.").

[41] 129 U.S. 114 (1889).

[42] *Id.* at 123.

[43] *Id.*

[44] *See, e.g.*, MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 146-47 (2006) (finding licensing requirements "discourage new entrants into the occupation"); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 6 (1976) (arguing licensing deters "occupational mobility and economic

safety of the client or patient by establishing minimum standards to practice.[45] Consequently, licensure's role in ensuring competence is its strongest justification and centers professional knowledge as the object of regulation.[46] "Licensing so understood ties the individual professional to the knowledge community by requiring a link between the ability to speak as a professional and the communication of knowledge as defined by the profession."[47]

Licensing regimes are based on the states' police powers, illustrating the link between licensing, competence, and harm avoidance as the traditional justification for licensing.[48] In short, licensing limits the risk that clients and patients will receive bad advice from unqualified professionals and suffer harm.[49]

In an ordinary First Amendment context, by contrast, licensing requirements might be understood as prior restraints on speech.[50] Requiring government permission to speak is troublesome in public discourse and serves as a justification to prohibit prior restraints. But whereas licensing also functions as an ex ante requirement to dispense advice, "suppression of incompetent advice is normatively desirable in the professional context."[51] The goal is "preserving the reliability of expert knowledge by guarding professionals' competence, and protecting the dissemination of reliable professional advice to the client."[52]

Moreover, professional advice must be consistent with the insights of the profession, and professionals face malpractice liability for advice that contradicts these insights, to the degree that it falls below the professional standard and causes harm.[53] The First Amendment, in turn, provides no defense against malpractice claims.[54] This means that the doctrine of content neutrality, usually applicable to speech regulation elsewhere, cannot logically apply to

competition"); Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH. L. REV. 1903, 1914-17 (2018) (explaining criticism of occupational licensing).

[45] *See* Haupt, *Licensing Knowledge*, *supra* note 39, at 509-31; Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671, 679 (2017) [hereinafter Haupt, *Unprofessional Advice*] ("In licensing, the administrative function of granting access to the profession and the substantive evaluation of the knowledge community's ability to impart its professional knowledge come together.").

[46] Haupt, *Licensing Knowledge*, *supra* note 39, at 530.

[47] *Id.*

[48] *See, e.g.*, *Dent*, 129 U.S. at 122; Hawker v. New York, 170 U.S. 189, 191-92 (1898).

[49] Haupt, *Licensing Knowledge*, *supra* note 39, at 522.

[50] *Id.* at 554-55 (noting disagreement among courts and scholars on question whether professional licensing requirements constitute prior restraint). *See generally* Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885 (2000).

[51] Haupt, *Licensing Knowledge*, *supra* note 39, at 555.

[52] *Id.* at 504.

[53] *See* Haupt, *Unprofessional Advice*, *supra* note 45, at 675.

[54] *Id.*

speech within the confines of the professional relationship.[55] Indeed, the point of malpractice liability is to ensure good advice and sanction bad advice within the professional relationship. 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."[56]

Importantly, professional knowledge is neither monolithic nor static. There is a range of opinions that count for good professional advice (as tort law recognizes through the "two schools of thought" or "respectable minority" doctrines),[57] and professional knowledge can change over time.[58] However, the shared notions of validity to which knowledge communities subscribe limit the spectrum of opinions that constitute acceptable expertise.[59] Change within the knowledge community's discourse occurs by reference to these shared notions of validity.[60] Thus, "[d]ifferent assessments of shared knowledge, if valid under the agreed upon methodology, may produce good professional advice, even if it departs from the mainstream."[61]

In addition, to mitigate the knowledge asymmetry between professionals and clients or patients, fiduciary duties of loyalty and care attach within the professional relationship.[62] When the client or patient entrusts the professional with providing guidance on important life decisions, the professional must act in the client's or patient's best interest. This also means the professional must act according to the insights of the profession.[63] A fiduciary relationship between speakers and listeners, however, is typically considered incompatible with the idea of speaker and listener autonomy in public discourse.[64] Likewise, informed consent requirements, which enforce the interest in full disclosure of relevant

[55] *See* Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J.F. 150, 152 (2017) [hereinafter Haupt, *Content-Neutrality Trap*].

[56] Haupt, *Professional Speech*, *supra* note 6, at 1242.

[57] Haupt, *Unprofessional Advice*, *supra* note 45, at 708.

[58] *Id.* at 677; Haupt, *Professional Speech*, *supra* note 6, at 1275 ("The current state of the art provides the foundation of the professional's advice (though current debates within the field may influence what counts as a defensible professional position).").

[59] Haupt, *Unprofessional Advice*, *supra* note 45, at 680 (observing that knowledge communities collectively define acceptable knowledge and practices); David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 734-35 (2021) ("All professions need 'shared notions of validity and a common way of knowing and reasoning' if they are to have coherent conversations and answer questions to which they direct themselves." (quoting Haupt, *Professional Speech*, *supra* note 6, at 1251)).

[60] *See* Haupt, *Unprofessional Advice*, *supra* note 45, at 680.

[61] *Id.* at 704.

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

[63] Haupt, *Limits*, *supra* note 34, at 191.

[64] Haupt, *Licensing Knowledge*, *supra* note 39, at 544 (noting First Amendment's focus on speaker, not listener, interests). For a further discussion of fiduciary duties, see *infra* Section III.C.

information in the medical context, address the knowledge asymmetry and promote patient autonomy.[65]

Although the fiduciary duty of care includes the duty to act as a competent professional, it is not necessarily duplicative of the malpractice regime. The category of harm is betrayal of trust in the former and professional incompetence in the latter regime.[66] The two regimes are complementary in that the listener's interests include access to accurate advice upon which they can safely rely.[67] In both instances, professional knowledge, as determined by the knowledge community, sets the standard of care for the individual professional.[68] Put into a free speech perspective, "only good professional advice, as measured by the standards of the relevant knowledge community, is protected," while bad advice exposes professionals to tort liability and receives no First Amendment protection.[69] But this only applies to speech within the confines of the professional relationship.

B. *Experts in Public Discourse*

The constraints imposed on speech in the professional relationship to ensure its accuracy, as measured by the professional knowledge community's standard, do not exist outside of the relationship. When a professional speaks to the public at large, "there is no distinction between expertise and quackery."[70] Whereas malpractice liability sanctions bad advice that contradicts the knowledge community's insights in the professional relationship, there are no "false ideas" in public discourse[71]—First Amendment doctrine outside of that relationship protects lies just as much as disciplinary expertise.[72] Content- and viewpoint-based regulations, accepted for professional speech in the form of informed consent and malpractice as just discussed,[73] "are presumptively

[65] *See* Haupt, *Professional Speech*, *supra* note 6, at 1287-89.

[66] Haupt, *Licensing Knowledge*, *supra* note 39, at 548.

[67] *Id.*

[68] Haupt, *Professional Speech*, *supra* note 6, at 1286-87 (discussing standard of care in malpractice context); Haupt, *Limits*, *supra* note 34, at 191 (explaining fiduciary duties require doctor to "act in the patient's best interests according to the knowledge of the profession").

[69] Haupt, *Limits*, *supra* note 34, at 191.

[70] Haupt & Parmet, *supra* note 12, at 1825; *see also* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 12-13 (2012) [hereinafter POST, DEMOCRACY] (explaining First Amendment protected dentists' public statements contradicting state dental board positions on danger of mercury-based amalgams); Jane R. Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73, 101, 118 (2018) (observing that free speech jurisprudence ensures public discourse is overprotected to combat incorrect scientific consensus while advertising can be highly regulated to protect public safety).

[71] Haupt, *Limits*, *supra* note 34, at 191-92.

[72] *See* United States v. Alvarez, 567 U.S. 709, 729-30 (2012) (holding First Amendment protected respondent's false claim he received Congressional Medal of Honor despite statement's "contemptible" nature).

[73] *See* Haupt, *Content-Neutrality Trap*, *supra* note 55, at 159-60.

unconstitutional" outside of the professional relationship.[74] Just as informed consent requirements have no place in public discourse, so too are fiduciary duties deemed incompatible with speech in that context.[75] 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," the duties owed within the professional relationship do not exist.[76] In public discourse, therefore, each speaker and listener is on their own.

Importantly, under current doctrine, the identity of the speaker in public discourse is irrelevant for First Amendment purposes.[77] Thus, a professional's private speech in public discourse receives the same protection as anyone else's.[78] Of course, it is possible that a professional's speech will be perceived as more likely to convey accurate information.[79] Thus, "[c]redentialed experts . . . might receive deference above and beyond the truth value of the statements that they are making at any given time."[80] Based on their training and licensing, doctors speaking publicly might be considered trustworthy, and their statements on medical matters might be deemed more reliable than those of laypeople. But unlike in the professional relationship, there are no legal guardrails—such as malpractice liability for bad advice—to ensure that this is

[74] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

[75] Haupt, *Licensing Knowledge*, *supra* note 39, at 544.

[76] Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring). Alternatively, there might be a personal nexus, but not a professional one, likely resulting in the same outcome. Consider a licensed physician who tells their friend to take zinc and drink diet tonic water as a cure for COVID-19. *See* Atul Gawande, *Inside the Worst-Hit County in the Worst-Hit State in the Worst-Hit Country*, NEW YORKER (Feb. 8, 2021), https://www.newyorker.com/magazine/2021/02/15/inside-the-worst-hit-county-in-the-worst-hit-state-in-the-worst-hit-country ("This man, who's a physician, *a doctor*, told me, 'Tom, if you get COVID, God forbid, take two hundred and twenty milligrams of zinc and drink a gallon of diet tonic water for two days. That'll clear it up.' . . . I've got to believe my classmate. He wouldn't steer me wrong."). Would the friend, in this one-on-one interaction but outside of the doctor-patient relationship, be inclined to rely on the doctor's expertise? An interesting wrinkle might follow if we assume that fiduciary duties exist between friends to act in each other's best interest. *See* TAMAR FRANKEL, FIDUCIARY LAW 57 (2011) (discussing cases involving fiduciary duties based on friendship). *See generally* Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009) (arguing fiduciary law provides useful framework to understand friends' duties to each other).

[77] *See* Haupt, *Unprofessional Advice*, *supra* note 45, at 682 (explaining First Amendment treats speakers as equals in public discourse).

[78] Haupt, *Professional Speech*, *supra* note 6, at 1254-57.

[79] Haupt, *Unprofessional Advice*, *supra* note 45, at 681 (observing that professional's training is likely to influence listener's perception of speech's accuracy).

[80] Blocher, *supra* note 21, at 484.

actually the case.[81] As widely conceptualized, licensing and discipline may not provide an alternative avenue for ensuring the quality of advice in public discourse.[82] According to this understanding, outside of the professional relationship, individual professionals are not bound by the knowledge community's insights.[83] Returning to the "Dr. Oz paradox,"[84] imagine, for example, that a trained and licensed physician hosts a television program in which he gives advice. No matter how inaccurate the advice may be, the First Amendment prohibits the extension of medical malpractice liability to the physician's public statements.[85] The reason for this difference is that "[w]ithin public discourse, traditional First Amendment doctrine systematically transmutes claims of expert knowledge into assertions of opinion."[86] Moreover, professionals may challenge the professional knowledge community's most fundamental insights in public discourse—something they are not free to do while dispensing professional advice within the professional relationship.[87] But as the remainder of this Article will argue, in important respects, this traditional doctrinal truism is normatively unsound.

The shortcomings of the traditional doctrinal framework are revealed most starkly in times of crisis. To be sure, bad advice by experts is not necessarily connected to a pandemic. In ordinary times, experts frequently advise the public in a manner that questions or contradicts expertise.[88] But the problem is

[81] Post, *Informed Consent*, *supra* note 6, at 949 ("When 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.").

[82] Coleman, *supra* note 13, at 129-30 (explaining regulation of medical misinformation would likely constitute presumptively unconstitutional content-based limitations on speech).

[83] *See id.*

[84] *See supra* note 24 and accompanying text.

[85] Haupt, *Unprofessional Advice*, *supra* note 45, at 681; *see also* Post, *Commercial Speech*, *supra* note 8, at 875 ("When Dr. Oz speaks as a citizen in public discourse on his television show, the state cannot sanction him for dispensing deceptive or misleading advice."). But, to reiterate, there may be other legal avenues to limit what professionals may say to the public, such as restrictions on misleading commercial speech. As Post notes, "[I]f Dr. Oz were to use his television show to engage in commercial speech to sell medical supplements, . . . his communication would immediately become entangled in a 'vast regulatory apparatus in both the federal government and the states . . . to control . . . potentially misleading or deceptive speech.'" Post, *Commercial Speech*, *supra* note 8, at 875 (omissions in original) (quoting Sullivan, *supra* note 8, at 153).

[86] POST, DEMOCRACY, *supra* note 70, at 44.

[87] *Id.* at 12-13; Haupt, *Unprofessional Advice*, *supra* note 45, at 681; Post, *Informed Consent*, *supra* note 6, at 947; *see also* Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc., 952 P.2d 768, 770-73 (Colo. App. 1997) (rejecting malpractice claim against dentist's advice on television).

[88] *See, e.g.*, Christina Korownyk, Michael R. Kolber, James McCormack, Vanessa Lam, Kate Overbo, Candra Cotton, Caitlin Finley, Ricky D. Turgeon, Scott Garrison, Adrienne J. Lindblad, Hoan Linh Banh, Denise Campbell-Scherer, Ben Vandermeer & G. Michael Allan, *Televised Medical Talk Shows—What They Recommend and the Evidence To Support Their*

particularly pressing when the stakes are high. During the pandemic, celebrity "TV doctors" dispensed advice to large audiences that was inconsistent with professional expertise.[89] On the one hand, there are known personalities with large prepandemic followings, such as Dr. Oz, whose viewers may already be familiar with his proclivity for unorthodox views.[90] On the other hand, less prominent professionals emerged who may "sincerely and authentically hold false scientific beliefs."[91] Take the example of Dr. Stella Immanuel, who appeared in a video widely shared on social media.[92] As Post recounts, she promoted—apparently based on her sincere conviction—hydroxychloroquine as a cure for COVID-19.[93] However, had Dr. Immanuel advised a patient in the same way and subsequently been sued for malpractice, she would not have had a First Amendment defense, because within the professional relationship, a doctor "is not entitled to force patients to wager their salvation on the experiment of a professional's wayward opinion."[94] In yet another scenario, consider the widely reported issues connected to the misuse of the drug ivermectin.[95] The drug is broadly propagated by social media figures and organizations such as America's Frontline Doctors, whose members appear to be licensed physicians but whose advice routinely contradicts professional insights.[96]

This is not to suggest that there is no reliable health advice available outside of the doctor-patient relationship. Throughout the pandemic, for example, good medical advice was also dispensed by "the doctor-journalists who usually play

Recommendations: A Prospective Observational Study, BMJ, Dec. 20, 2014, at 24, 25; Terrence McCoy, *Half of Dr. Oz's Medical Advice Is Baseless or Wrong, Study Says*, WASH. POST (Dec. 19, 2014, 2:53 AM), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/19/half-of-dr-ozs-medical-advice-is-baseless-or-wrong-study-says/; *see also* Haupt, *Unprofessional Advice*, *supra* note 45, at 681-82 (discussing professionals' First Amendment protections when they speak outside professional-client relationship).

[89] *See, e.g.*, James Hibberd, *TV Doctors Like Dr. Phil, Dr. Oz Keep Blowing It When Talking Coronavirus*, ENT. WKLY. (Apr. 17, 2020, 4:52 PM), https://ew.com/tv/dr-phil-oz-drew-coronavirus-fail/ [https://perma.cc/2UQV-BMJV].

[90] *See, e.g.*, Tilburt et al., *supra* note 11, at 201 ("[W]hen it comes to epistemic boundaries, Dr. Oz admits he applies different standards of evidence compared to those accepted in the medical establishment."); McCoy, *supra* note 88.

[91] Post, NIFLA, *supra* note 12, at 1083.

[92] Sheera Frenkel & Davey Alba, *Misleading Virus Video, Pushed by the Trumps, Spreads Online*, N.Y. TIMES (July 28, 2020), https://www.nytimes.com/2020/07/28/technology/virus-video-trump.html?smid=url-share.

[93] Post, NIFLA, *supra* note 12, at 1083.

[94] *Id.*

[95] *See, e.g.*, Emma Goldberg, *Demand Surges for Deworming Drug for Covid, Despite Scant Evidence It Works*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/08/30/health/covid-ivermectin-prescriptions.html; Gonzalez, *supra* note 4; Christina Szalinski, *Fringe Doctors' Groups Promote Ivermectin for COVID Despite a Lack of Evidence*, SCI. AM. (Sept. 29, 2021), https://www.scientificamerican.com/article/fringe-doctors-groups-promote-ivermectin-for-covid-despite-a-lack-of-evidence/.

[96] *See, e.g.*, Szalinski, *supra* note 95; *see also* Coleman, *supra* note 13, at 122 (discussing same group's promotion of hydroxychloroquine).

a supporting role in network and cable newscasts and have now become the leading performers."[97] But while, for instance, the American Medical Association ("AMA")—as a private organization not subject to First Amendment constraints—provides ethical guidelines for physicians' media interactions, stating that any information they give should be aligned with "medical expertise" and "based on valid scientific evidence,"[98] the quality of advice is not secured by the same legal guardrails as advice within the doctor-patient relationship.[99] This divergence between the speaker's identity as a licensed professional and the largely unregulated content of their potentially dangerous message outside of the professional relationship makes pseudoprofessional advice especially troublesome.

C. *Nonexperts in Public Discourse*

Nonexperts have also contributed to large-scale mis- and disinformation about the pandemic,[100] including an exacerbated problem of vaccine

[97] *See, e.g.*, Jeffrey Kluger, *In a Time of Pandemic, TV Doctors Wield Growing Influence. Is That a Good Thing?*, TIME (Apr. 29, 2020, 1:21 PM), https://time.com/5828108/tv-doctors-coronavirus/.

[98] *Ethical Physician Conduct in the Media*, AMA CODE OF MED. ETHICS, https://code-medical-ethics.ama-assn.org/ethics-opinions/ethical-physician-conduct-media [https://perma.cc/5NED-GTQJ] (last visited Mar. 17, 2023).

[99] Note, however, that scholars disagree about the extent to which the AMA Code in particular can provide legal obligations. *Compare* David Orentlicher, *The Physician's Duty To Treat During Pandemics*, 108 AM. J. PUB. HEALTH 1459, 1459 (2018) ("The AMA code . . . can be enforced as a matter of law."), *with* Carl H. Coleman, *Beyond the Call of Duty: Compelling Health Care Professionals To Work During an Influenza Pandemic*, 94 IOWA L. REV. 1, 22 (2008) (arguing physician violations of professional ethics codes would likely not result in discipline).

[100] *See, e.g.*, Wendy E. Parmet & Jeremy Paul, *COVID-19: The First Posttruth Pandemic*, 110 AM. J. PUB. HEALTH 945, 945 (2020) (describing political leaders, celebrities, and pundits as sources of false COVID-19 information); *see also* Kara Swisher, Opinion, *Fox's Fake News Contagion*, N.Y. TIMES (Mar. 31, 2020), https://www.nytimes.com/2020/03/31/opinion/coronavirus-fox-news.html (reporting Fox News hosts spread COVID-19 misinformation to their viewers).

misinformation.[101] Athletes,[102] musicians,[103] celebrities, and other influencers[104] without specific claims to expertise have spread bad health information. Given the speakers' notoriety and their messages' viral dissemination on social media, their errant and potentially harmful views receive outsized attention.[105] And misguidedly trusted nonexperts may equally cause harm. But nonexperts' speech does not constitute pseudoprofessional advice.

The reliance on advice disseminated by these individuals does not primarily follow from their superior knowledge, publicly signaled by their status as licensed professionals, but rather their position as respected or admired public figures, or their self-promotion skills in other contexts. If, for example, Tom Brady advises to follow his diet or fitness regimen, a listener is unlikely to

---

[101] *See, e.g.*, Ana Santos Rutschman, *Facebook's Latest Attempt To Address Vaccine Misinformation—And Why It's Not Enough*, HEALTH AFFS. (Nov. 5, 2020), https://www.healthaffairs.org/do/10.1377/hblog20201029.23107/full/ [https://perma.cc/H8WL-X3HV].

[102] *See, e.g.*, Ken Belson & Emily Anthes, *Scientists Fight a New Source of Vaccine Misinformation: Aaron Rodgers*, N.Y. TIMES (Nov. 14, 2021), https://www.nytimes.com/2021/11/08/sports/football/aaron-rodgers-vaccine.html; Christopher Clarey, *Novak Djokovic Expresses Resistance to Coronavirus Vaccine*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/2020/04/20/sports/tennis/coronavirus-djokovic-vaccine-covid19.html.

[103] *See, e.g.*, Daniel Kreps, *Eric Clapton's Anti-Vaccine Diatribe Blames 'Propaganda' for 'Disastrous' Experience*, ROLLING STONE (May 16, 2021), https://www.rollingstone.com/music/music-news/eric-clapton-disastrous-vaccine-propaganda-1170264/; Grant Rindner, *Nicki Minaj's Cousin's Friend's Balls, Explained*, GQ (Sept. 16, 2021), https://www.gq.com/story/nicki-minaj-vaccine-twitter-met-gala-2021 [https://perma.cc/PE4J-BG2V].

[104] Jim Waterson, *Influencers Among 'Key Distributors' of Coronavirus Misinformation*, GUARDIAN (Apr. 8, 2020, 12:08 PM), https://www.theguardian.com/media/2020/apr/08/influencers-being-key-distributors-of-coronavirus-fake-news [https://perma.cc/3HFV-WED7].

[105] A separate issue concerns social media companies hosting such content, both by experts and nonexperts. *See, e.g.*, Dawn Carla Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts To Combat Medical and Political Misinformation*, 19 FIRST AMEND. L. REV. 32, 38-43 (2020) (discussing Facebook's and Twitter's responses to COVID-19 misinformation on their platforms); Claire Wardle & Eric Singerman, *Too Little, Too Late: The Real Threat of Failing To Tackle Vaccine Misinformation*, BMJ, Jan. 30, 2021, at 140, 140; Joan Donovan, *Social-Media Companies Must Flatten the Curve of Misinformation*, NATURE (Apr. 14 2020), https://doi.org/10.1038/d41586-020-01107-z [https://perma.cc/X8C5-6NMF] (arguing social media companies' moderation of COVID-19 misinformation is insufficient). Social media companies themselves have started to moderate content to curb the spread of misinformation. *See, e.g.*, Davey Alba, *YouTube Bans All Anti-vaccine Misinformation*, N.Y. TIMES (Oct. 14, 2021), https://www.nytimes.com/2021/09/29/technology/youtube-anti-vaxx-ban.html (describing YouTube's policy of removing videos with false and misleading claims about vaccines); EJ Dickson, *'A Menace to Public Health': Doctors Demand Spotify Puts an End to Covid Lies on 'Joe Rogan Experience*,*'* ROLLING STONE (Jan. 12, 2022), https://www.rollingstone.com/culture/culture-news/covid-misinformation-joe-rogan-spotify-petition-1282240/.

assume that he has particular medical expertise.[106] They might assume that someone who still played professional football at an age at which most other players have retired[107] must be following a superior diet, which in turn means that he himself has received expert advice. (Incidentally, Brady's health advisor reportedly "had been sanctioned by federal regulators for falsely presenting himself as a medical doctor and deceptively promoting nutritional supplements, according to government records.")[108] But the reason listeners would believe Brady's advice hinges on their perception of him as an accomplished athlete rather than a medical expert.

When nonexperts disseminate advice, the knowledge asymmetry between speaker and listener does not exist in the same way as with experts in public discourse. Knowledge asymmetries within certain institutionalized relationships provide a strong justification for imposing constraints on speech. The law therefore regulates the professional within a professional relationship, as discussed earlier. Different considerations apply to speech in public discourse where autonomy interests, democratic self-government interests, and marketplace interests are invoked to justify speech protection.[109] The limits imposed on the professional relationship do not exist in public discourse, because here, the function of free speech in a democracy requires the speakers to be considered equals. To illustrate, Alexander Meiklejohn noted that "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."[110] Thus, speaker equality is deemed a central tenet of equal participation in democracy. This, in turn, results in First Amendment protection for even the most ill-informed speech in public discourse.[111]

[106] *See, e.g.*, Julia Belluz, *Tom Brady's Diet Book Makes Some Strange Claims About Body Chemistry*, VOX (Feb. 1, 2019, 3:42 PM), https://www.vox.com/2019/1/30/18203676/tom-brady-diet-book-water [https://perma.cc/RV8V-MDM5] (highlighting false assertions and pseudoscience in Tom Brady's exercise and diet book).

[107] *See* Ben Volin, *An Emotional Tom Brady Bids Farewell to the NFL—'For Good' This Time*, BOS. GLOBE (Feb 1, 2023, 11:03 AM), https://www.bostonglobe.com/2023/02/01/sports/tom-brady-retires-again/.

[108] Bob Hohler, *Bill Belichick Curbs Privileges of Tom Brady's Associate Alex Guerrero*, BOS. GLOBE (Dec. 19, 2017, 4:53 PM), https://www.bostonglobe.com/sports/patriots/2017/12/19/bill-belichick-curbs-privileges-tom-brady-associate-alex-guerrero/NgoTiMHsA7UfWyG3jtquVI/story.html; *see also* Chris Sweeney, *Tom Brady's Personal Guru Is a Glorified Snake-Oil Salesman*, BOSTON (Oct. 9, 2015, 3:24 PM), https://www.bostonmagazine.com/news/2015/10/09/tom-brady-alex-guerrero-neurosafe/ [https://perma.cc/TZ33-U4MP] (reporting Federal Trade Commission actions against Guerrero).

[109] Haupt & Parmet, *supra* note 12, at 1826.

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

[111] Haupt & Parmet, *supra* note 12, at 1827.

Moreover, there are no ex ante readable credentials denoting expertise, such as those created by professional licensing, that would induce reliance. A separate problem might exist when credentials are misrepresented or misunderstood, such as when someone with a PhD appropriately uses the title "doctor" but proceeds to dispense medical advice outside of their field of expertise.[112] When advice is rendered to an individual, this could potentially be addressed as a case of unauthorized practice.[113] But whereas reliance on expertise may be justified when licensed professionals speak to the public—as is the case with pseudoprofessional advice—such reliance is unwarranted for other speakers. Speaker and listener equality, a fundamental assumption in public discourse, best supports the case for permitting bad advice.

D. *Distinguishing Government Speech*

Government speech poses related but different challenges, and its comprehensive discussion is beyond the scope of this Article.[114] Importantly, "[t]he First Amendment's Free Speech clause does not apply to government speech. . . . The government can choose its own message, and it can do so to the exclusion of other messages."[115] Government speech is instead subject to the democratic process, which might include lobbying, voting for a new government, or other activities protected by the First Amendment, such as protesting and petitioning.[116]

---

[112] *See, e.g.*, *Covid: Twitter Suspends Naomi Wolf After Tweeting Anti-vaccine Misinformation*, BBC: NEWS (June 6, 2021), https://www.bbc.com/news/world-us-canada-57374241 [https://perma.cc/86S8-ZG6G] (reporting Twitter's suspension of author Naomi Wolf for peddling COVID-19 misinformation); *see also* Philip A. Pizzo, David Spiegel & Michelle M. Mello, *When Physicians Engage in Practices That Threaten the Nation's Health*, 325 JAMA 723, 723 (2021) ("The Federation of State Medical Boards defines . . . the practice of medicine to include using the designation 'Doctor' 'in the conduct of any occupation or profession pertaining to the prevention, diagnosis, or treatment of human disease or condition.'" (quoting FED'N OF STATE MED. BDS., GUIDELINES FOR THE STRUCTURE AND FUNCTION OF A STATE MEDICAL AND OSTEOPATHIC BOARD 7 (2021), https://www.fsmb.org /siteassets/advocacy/policies/guidelines-for-the-structure-and-function-of-a-state-medical-and-osteopathic-board.pdf [https://perma.cc/E86Y-BU5Z])).

[113] *See* Haupt, *Professional Speech*, *supra* note 6, at 1283.

[114] For a more comprehensive analysis, see generally Haupt & Parmet, *supra* note 12.

[115] *Id.* at 1822; *see, e.g.*, Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022) (indicating government speech need not promote every viewpoint because it must adopt policy); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) (noting First Amendment does not prevent government from choosing speech content); Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (distinguishing government speech and private speech in public forum).

[116] *See Shurtleff*, 142 S. Ct. at 1589 (asserting government speech is regulated by "ballot box" as opposed to "viewpoint discrimination" prohibitions); HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 29 (2019) (suggesting "voting, lobbying, petitioning, and protesting" are political restraints on government speech); Haupt & Parmet, *supra* note 12, at 1822.

Experts who are government advisors, including licensed professionals, constitute a subset of government speakers. In public accounts, Dr. Anthony Fauci has come to personify such speakers that follow professional expertise. By contrast, Dr. Scott Atlas embodies the character of an expert government speaker whose advice contradicts the knowledge community's insights.[117] When these speakers communicate with the public, they speak both as health professionals and as public officials. This dual status gives their messages more credibility than lay officials' speech and heightens the risk of harm when those messages depart from expert consensus, "especially if they are couched in the form of advice or commands."[118]

Because government speech usually falls outside of First Amendment protection, it is not treated in the same way as private speech in public discourse.[119] This makes the analogy with professional relationships possible, because "[t]he normative tradeoff between free speech and liability for harm does not have to mirror public discourse when government speakers act as advice-givers. Indeed, . . . 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."[120] Like the knowledge asymmetry in the professional relationship, the power imbalance between government speakers and the public complicates the public's ability to identify bad advice and undermines democratic accountability for government speech.[121]

Scholars have begun to explore various solutions to the rising tide of government misinformation that falls outside of the scope of First Amendment protections.[122] Analogizing to the professional relationship, malpractice liability is a potential option where government officials also speak as experts.[123] Government speakers do not easily fit into the binary of professional speech and public discourse. Akin to the professional relationship, the communication of accurate information is at stake when government experts speak.[124] Government

[117] *See, e.g.*, Noah Weiland, Sheryl Gay Stolberg, Michael D. Shear & Jim Tankersley, *A New Coronavirus Adviser Roils the White House with Unorthodox Ideas*, N.Y. TIMES (Sept. 9, 2020), https://nyti.ms/2EXgEyB (reporting Dr. Atlas's "embrace of herd immunity" and recommendation that asymptomatic individuals not be tested after COVID-19 exposure).

[118] Haupt & Parmet, *supra* note 12, at 1828-29.

[119] *Id.* at 1829.

[120] *Id.*

[121] *Id.* at 1831.

[122] *Id.* at 1833; *see, e.g.*, NORTON, *supra* note 116, at 26 (exploring constitutional and political solutions to government misinformation); Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 882 (2020) (arguing government propaganda violates First Amendment); Henricksen, *supra* note 12 (manuscript at 114) (describing state legislatures' attempts to combat government disinformation, including criminalizing officials' election-related lies that incite violence).

[123] *See* Haupt & Parmet, *supra* note 12, at 1833.

[124] *Id.* at 1843.

speakers, moreover, "are not appropriately characterized as part of public discourse to begin with."[125]

*****

My focus for the remainder of this Article will be on the speech of licensed professionals outside of the professional relationship. Whereas professional speech ought to be narrowly defined to justify the significant limitations placed upon it,[126] public discourse ought to be broadly defined to enable a robust exchange of ideas. However, as we approach the boundaries of public discourse, where the advice given by licensed professionals starts to look like professional advice outside of the professional relationship, the strong interest in this robust exchange of ideas begins to weaken. Consequently, the question arises whether—and if so, how—pseudoprofessional advice should be regulated.

II. THEORIZING EXPERT SPEECH

This Part conceptualizes approaches to expert speech. To do so, it first discusses and rejects the marketplace theory, based on the classic Holmesian notion of a "free trade in ideas" as a suitable approach to expert speech.[127] It then considers the idea that harm ought to play a more prominent role in assessing free speech interests. Surveying relevant First Amendment case law, it illustrates that considerations of harm, while undertheorized, are not entirely foreign to speech doctrine.[128] However, as Schauer explains, the treatment of harm in free speech theory has shifted over time. Some scholars justified speech protection because they deemed speech "largely harmless, or . . . as a category, less harmful than non-speech conduct."[129] Others conceded speech's potential to cause harm but rejected constraints on speech by characterizing such harm as "indirect or otherwise more complex."[130] Scholars who have sought to address speech-related harms more recently have largely "focused, often in so-called hate speech contexts, on the harms of epithets, insults, and advocacy, and only

---

[125] *Id.*

[126] *See* Haupt, *Limits*, *supra* note 34, at 185-88 ("[P]rofessional speech can only bear the weight of these doctrinal peculiarities if it is narrowly defined. . . . The law constrains professional speech to ensure that clients and patients can receive accurate, comprehensive, and reliable advice in accordance with the insights of the relevant knowledge community.").

[127] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

[128] *See* Brown, *supra* note 17, at 957 (arguing Supreme Court has "coherent and defensible, but never acknowledged, approach to free-speech protection" that allows government "to prevent genuine social harm that is not associated with the spread of an idea").

[129] Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231, 249 n.90 (2017) [hereinafter Schauer, *Collective Knowledge*].

[130] *Id.*

rarely on the harms of falsity as such."[131] Consequently, mis- and disinformation and their resulting harms remain underexplored by First Amendment commentators.[132] This discussion seeks to help fill that gap with respect to harm caused by pseudoprofessional advice.

Whereas the potential for harm within the professional relationship is recognized, and the legal guardrails discussed earlier are designed to prevent such harm,[133] the idea that significant (physical) harm can result from bad advice-giving outside of the professional relationship seems underappreciated. Accordingly, the current concepts of speech harm are unresponsive to the scenario of grave harm caused by pseudoprofessional advice. In order to more fully integrate concerns about harm into the treatment of expert speech, this Part connects the approach proposed by Blocher focused around justified true belief[134] and the theory of professional speech built on the idea of the professions as knowledge communities.[135] Joining knowledge and harm avoidance, I suggest, provides the best theoretical basis for thinking about the normative interests implicated by pseudoprofessional advice.

A. *The Marketplace of Ideas*

Though once "virtually canonized,"[136] the marketplace of ideas justification for speech protection has fallen somewhat out of favor.[137] Despite its continued rhetorical appeal,[138] its central promise of delivering "truth" remains elusive. In

---

[131] *Id. See generally* JEREMY WALDRON, THE HARM IN HATE SPEECH (2012).

[132] *See* Schauer, *Collective Knowledge*, *supra* note 129, at 249 n.90.

[133] *See supra* Section I.A (describing licensure, malpractice, and fiduciary duties as checks on harm resulting from professional speech).

[134] *See* Blocher, *supra* note 21, at 444.

[135] Haupt, *Professional Speech*, *supra* note 6, at 1241-42 (introducing concept of knowledge communities as theoretical basis for First Amendment treatment of professional speech).

[136] William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995).

[137] Blocher, *supra* note 21, at 441 ("Developments in psychology, economics, history, sociology, and other scholarly fields have drawn attention to the host of problems—cognitive limitations, motivated reasoning, racism, sexism, resource inequalities, and the like—that make it impossible for the marketplace of ideas to reliably deliver on its promise of identifying 'truth.'"); Schauer, *Collective Knowledge*, *supra* note 129, at 250 (noting "search for truth/marketplace" theory "has not fared well when subject to close analytical and empirical scrutiny, however popular it may be with the Supreme Court, with other courts, and in civil liberties advocacy and rhetoric" (footnote omitted)); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 899 n.16 (2010) [hereinafter Schauer, *Facts*]. *But see, e.g.*, Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595, 595-96 (2011).

[138] *See, e.g.*, Schauer, *Facts*, *supra* note 137, at 910-11 ("Although it has thus become almost *de rigeur* in academic circles to treat the empirical instrumental epistemic claims of the marketplace of ideas metaphor as a relic that has not survived exposure to modern science, it retains a surprising resilience in public civil libertarian rhetoric." (footnote omitted)).

the context of professional speech, the marketplace theory has always been tenuous.[139] As between professionals and clients or doctors and patients, there is no "competition of the market" to which ideas are subjected in order to reveal truth.[140] Expert advice, and other areas of speech where accurate information flows, are one-way streets.[141] They are not about the exchange of ideas. Rather, ideas only flow in one direction. With respect to *NIFLA*, discussed earlier, Post noted "the breathtaking inanity of Thomas's invocation of the 'marketplace of ideas' in the context of professional speech."[142]

However, Post rightly explains that "[o]f course, there are contexts in which we do wish to preserve a marketplace of ideas for the exchange of professional views. Professional and scholarly journals are a good example."[143] I have elsewhere described this as an "epistemic marketplace"[144] inside of professional discourse:

> There exists a marketplace of ideas internal to each profession . . . [for] the formation of professional knowledge . . . . Within the discourse of the profession, the acceptance of professional insights will depend on the rules established by the profession. Scientific insights, for example, will be subjected to peer review and hypotheses will be subjected to the test of falsification. These internal processes serve a purpose akin to that of the Holmesian marketplace of ideas. But, to the extent that such a marketplace of ideas exists as what we might call an epistemic marketplace, and that

[139] *See* Blocher, *supra* note 21, at 471 ("But when it comes to certain kinds of speech—those made in the context of a professional relationship, for example—accuracy is not left to the market." (footnote omitted)); Haupt, *Professional Speech*, *supra* note 6, at 1273 ("In the realm of professional speech, the classic Holmesian notion of a 'free trade in ideas' would seem to have little purchase." (footnote omitted)); Post, NIFLA, *supra* note 12, at 1083 ("The marketplace of ideas is incompatible with the competent practice of medicine."); *see also* Schauer, *Collective Knowledge*, *supra* note 129, at 235-36 (arguing that "truth-defining" understanding of marketplace, though consistent with Holmes's philosophy, "is implausible in the context of factual, scientific, and other ideas").

[140] Haupt, *Professional Speech*, *supra* note 6, at 1243 ("The professional does not seek to subject her professional opinion to 'the competition of the market' when speaking within the confines of the professional-client relationship." (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).

[141] *Cf.* Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231, 300-01 (2021) (discussing public health advice and commercial speech); Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem That Won't Go Away*, 41 LOY. L.A. L. REV. 181, 193, 224-25 (2007).

[142] Post, NIFLA, *supra* note 12, at 1083 n.68.

[143] *Id.*

[144] Haupt, *Professional Speech*, *supra* note 6, at 1244, 1275 ("Within the discourse of the knowledge community itself—that is, outside the professional-client relationship—a marketplace of ideas exists, which we might call an epistemic marketplace. Professional standards are generated by testing insights in that marketplace.").

professional standards are generated by testing insights on that marketplace, nonprofessionals do not participate in it.[145]

But what about the marketplace of ideas outside of the professional context? Here, the pandemic example reveals that the marketplace theory is unsatisfactory when applied to expert speech outside of the professional context. Speech and counterspeech in this model would compete to ultimately result in reliable advice. But expertise is grounded in knowledge communities' insights. However, First Amendment doctrine, in what I suggest is a theoretically problematic move, transforms expert opinions in public discourse into opinions.[146] But good and bad health advice—like good and bad professional advice more generally—are not just two equally valid, and certainly not equally reliable, opinions. The premise of this doctrinal move is equality among speakers in public discourse. This is a strong argument, based in democratic theory, for nonexperts in public discourse.[147] But the theoretical justification is much weaker when experts speak. Consider, for example, Dr. Sanjay Gupta's three-hour long conversation with Joe Rogan, whose enormously popular podcast is a well-known source of frequent pandemic misinformation.[148] Dr. Gupta continued to speak as an expert on a topic of his expertise, communicating the insights of the professional knowledge community. The knowledge asymmetry that characterizes the professional relationship continues to exist outside of it. Experts do not lose their expertise in public discourse, despite the First Amendment's doctrinal fiction. In short, it does not make a lot of sense to treat everyone equally as a matter of speech theory when in fact—as a matter of expert knowledge—they are not.

Moreover, where good and bad information are treated as equal, only those individuals with access to professional advice may be able to make safe choices.[149] Under the marketplace theory, harm tends to fall on the most vulnerable. The marketplace of ideas "allows a great deal of harm to be inflicted (likely against already marginalized groups) while speech markets work themselves pure."[150] But in the contemporary online speech ecosystem, where much of the mis- and disinformation proliferates at scale on social media platforms, the incentive structure might be that they never actually do "work

[145] *Id.* at 1275 (footnote omitted).

[146] *See* POST, DEMOCRACY, *supra* note 70, at 44 (suggesting First Amendment protection for expert speech prevents government from creating standards of competence and reliability).

[147] *See supra* Section I.C.

[148] Sanjay Gupta, *Dr. Sanjay Gupta: Why Joe Rogan and I Sat Down and Talked—For More Than 3 Hours*, CNN: HEALTH (Oct. 14, 2021, 9:58 AM), https://www.cnn.com/2021/10/13/health/sanjay-gupta-joe-rogan-experience/index.html [https://perma.cc/TT8U-ZB59].

[149] Claudia E. Haupt, *Assuming Access to Professional Advice*, 49 J.L. MED. & ETHICS 531, 532 (2021) [hereinafter Haupt, *Assuming Access*] ("Current First Amendment doctrine is fairly unproblematic for those who can afford expert advice, but it makes expert advice much costlier where health provider access is needed to obtain good advice.").

[150] Blocher, *supra* note 21, at 454.

themselves pure."[151] As a present-day example, consider Spotify's reaction to several artists pulling their music to protest the platform's hosting of Joe Rogan's podcast, which spreads coronavirus misinformation.[152] The core of the business model for online platforms is user engagement.[153] It is not the production of knowledge or truth.[154] Accordingly, the more controversial the content on the platforms is, the better the platform will be able to capture and hold users' attention. Whether the content that so proliferates causes harm, however, is not of interest to the platforms themselves. On this point, consider only the *Wall Street Journal*'s investigative reporting on the Facebook Files, suggesting that the company knew of the extent of harm caused by speech hosted on its platform.[155]

For all of these reasons, the marketplace of ideas is an inadequate way to think about expert speech in public discourse more generally and pseudoprofessional advice in particular.

B. *Harm and the First Amendment*

Despite its enormous importance, the role of harm in First Amendment theory remains largely neglected.[156] As Schauer notes, "The First Amendment has

---

[151] *See, e.g.*, Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1226-27 (2016) (explaining platforms' undisclosed algorithms and operations lead to knowledge asymmetries and inability to verify information); Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 515 (2019) (arguing companies like Facebook that engage in "behaviorally targeted advertising" have financial motives adverse to user interests); Andrew F. Tuch, *A General Defense of Information Fiduciaries*, 98 WASH. U. L. REV. 1897, 1927-33 (2021) (discussing business model).

[152] *See, e.g.*, Lauren Hirsch & Michael J. de la Merced, *The Joe Rogan Debate Poses an Existential Question for Spotify*, N.Y. TIMES (Feb. 1, 2022), https://www.nytimes.com/2022/01/31/business/joe-rogan-spotify.html (reporting Spotify's addition of "content advisory" disclaimer and COVID-19 information but denial of responsibility for uploaded content).

[153] *See generally* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016) (discussing history of social media as advertising platforms).

[154] *See* Claudia E. Haupt, *Platforms as Trustees: Information Fiduciaries and the Value of Analogy*, 134 HARV. L. REV. F. 34, 36 (2020) (noting "speech on platforms is not connected to a body of knowledge" and suggesting platforms are unlike professionals in this respect, making professional fiduciary analogy unsatisfactory); *see also* Sheryl Gay Stolberg & Davey Alba, *Surgeon General Assails Tech Companies over Misinformation on Covid-19*, N.Y. TIMES (Sept. 12, 2021), https://www.nytimes.com/2021/07/15/us/politics/surgeon-general-vaccine-misinformation.html?action=click&module=RelatedLinks&pgtype=Article (discussing report finding tech companies' and traditional media's proliferation of COVID-19 misinformation worsened public health crisis).

[155] *The Facebook Files*, WALL ST. J. (2021), https://www.wsj.com/articles/the-facebook-files-11631713039 ("Facebook Inc. knows, in acute detail, that its platforms are riddled with flaws that cause harm, often in ways only the company fully understands.").

[156] Notable exceptions include Brown, *supra* note 17, at 999, 1009 (proposing harm principle for speech harm and moderation cases); Kendrick, *supra* note 16, at 114 (arguing

always had a delicate relationship with harm."[157] Contemporary free speech doctrine is mostly blind to harm caused by speech.[158] A prominent standpoint continues to assume that speech is either harmless or deserving of protection irrespective of its potential harm.[159] On this reasoning, distinct from other liberties, the harm principle thus cannot justify limiting free speech.[160] Moreover, the Supreme Court's expanding interpretation of First Amendment protection has increasingly drowned out tort liability for harmful speech—for example, by severely limiting the tort of intentional infliction of emotional distress.[161] Justice Samuel Alito, the sole dissenter in *Snyder v. Phelps*, pointed out that this leaves no redress for considerable harm caused by speech.[162] Similarly, the Court rejected harm-based analyses in *Brown v. Entertainment Merchants Ass'n*,[163] which involved violent video games,[164] and *United States v. Stevens*,[165] a case about animal crush videos.[166] And, of course, the classic debates over pornography centered around the idea of harm.[167] Yet, *United States v. Alvarez*,[168] which held unconstitutional the Stolen Valor Act's imposition of liability for falsely claiming in public discourse to have received military decorations or medals, including the Congressional Medal of Honor, appears to leave some space for considerations of harm.[169] In a concurrence in

First Amendment should not protect harmful speech); Schauer, *Harm(s)*, *supra* note 14, at 83; and Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635, 643 (1993) [hereinafter Schauer, *Phenomenology*] (rejecting "lesser harm hypothesis" that speech causes less harm than conduct).

[157] Schauer, *Harm(s)*, *supra* note 14, at 81.

[158] *See, e.g.*, Brown, *supra* note 17, at 954 ("Constitutional law has developed a firm rule prohibiting the regulation of speech based on its content, no matter what the alleged harm might be."); Schauer, *Collective Knowledge*, *supra* note 129, at 248 n.90 (observing free speech theory considers speech less harmful than other conduct, if not harmless).

[159] *See* Schauer, *Harm(s)*, *supra* note 14, at 111.

[160] Brown, *supra* note 17, at 954 (describing scholarly consensus that freedom of speech is exception to harm principle).

[161] *See* Snyder v. Phelps, 562 U.S. 443, 457-58 (2011) (holding First Amendment protected Westboro Baptist Church protest at military service member's funeral).

[162] *Id.* at 475 (Alito, J., dissenting) ("Respondents' outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered. In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner.").

[163] 564 U.S. 786 (2011).

[164] *Id.* at 804-05 (finding prohibition on sale of violent video games to minors unconstitutional).

[165] 559 U.S. 460 (2010).

[166] *Id.* at 470 (rejecting government's proposed balancing test that weighs speech's value against its cost to society).

[167] *See* Schauer, *Harm(s)*, *supra* note 14, at 104. *See generally* CATHARINE A. MACKINNON, ONLY WORDS (1993).

[168] 567 U.S. 709 (2012).

[169] *Id.* at 726 (discussing lack of harm addressed by statute).

the judgment, Justice Stephen Breyer, joined by Justice Elena Kagan, suggested the following: "[M]any statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful. Those prohibitions, however, tend to be narrower than the [Stolen Valor Act], in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims."[170] Among other prohibitions, Justice Breyer discussed the torts of fraud, defamation, and intentional infliction of emotional distress.[171]

The Supreme Court's treatment of different sources and types of harm in the context of speech has been uneven. Examining the *Stevens*, *Snyder*, and *Entertainment Merchants* trilogy, Schauer suggests that "[i]n none of these cases would a claim of harmlessness have been taken seriously, and thus the three cases together, all coming down in favor of the speaker and against the restriction, represent the Court's most recent and sustained confrontation with speech-created harm."[172] While these cases "present[ed] clear harms, [they] involved harms of very different types."[173] Whereas the Court's earlier cases tended to exaggerate harms that flow from speech, these three cases involve "reasonably patent harm."[174] Schauer explains:

> Animals were really mutilated to make the videos that prompted the enactment of the statute in *Stevens*, the effects on victims of the persistent glorification of violence to impressionable minors is at least plausible, and no one who has lost a close relative, especially a young one, can fail to understand the genuine pain that the Snyders must have endured when an already tragic event was hijacked by someone else's nutty cause.[175]

In another line of cases, publishers were held not liable for harm caused by bad information in their books. In one classic case, *Winter v. G.P. Putnam's Sons*,[176] plaintiffs who became ill after picking and eating mushrooms relying on a book published by the defendant unsuccessfully sought to recover.[177] Courts

---

[170] *Id.* at 734 (Breyer, J., concurring).

[171] *Id.*

[172] Schauer, *Harm(s)*, *supra* note 14, at 83.

[173] *Id.*

[174] *Id.* at 94-95. Schauer provides several examples of "cases in which the alleged harmfulness of the speech at issue was, to put it mildly, hardly clear." *Id. See generally* Wooley v. Maynard, 430 U.S. 705 (1977); Cohen v. California, 403 U.S. 15 (1971); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Brandenburg v. Ohio, 395 U.S. 444 (1969); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919). In these cases, Schauer argues, "the dangers alleged to come from speech are frequently exaggerated." Schauer, *Harm(s)*, *supra* note 14, at 95.

[175] Schauer, *Harm(s)*, *supra* note 14, at 95.

[176] 938 F.2d 1033 (9th Cir. 1991).

[177] *Id.* at 1037.

have similarly rejected a variety of other speech-based tort claims.[178] But whereas these cases typically concerned the liability of publishers for what might be considered pseudoprofessional advice, a court also denied a claim for malpractice against a dentist dispensing advice on television.[179] In contrast to publishers' liability, the harm-focused perspective built on a conception of knowledge communities might treat this situation differently.

The harm perspective helpfully illustrates the unique position pseudoprofessional advice takes among different types of potentially harmful speech in public discourse. The source of harm caused by pseudoprofessional advice is the licensed professional's speech in public discourse. The listener, in following this advice, will potentially suffer harm. This invokes the typically problematic distinction between speech and conduct. Arguably, the professional is not engaged in conduct that harms the listener. If one were to follow the speech-conduct distinction, where only conduct results in legally cognizable harm actionable without offending the First Amendment, pseudoprofessional advice would not be captured. In short, why worry about the harm caused by speech if we can impose liability to remedy harm caused by conduct? However, this vantage point misses the speech nature of advice where the client or patient engages in conduct in reliance on the expert's advice.[180] Aside from general problems with the speech-conduct distinction,[181] it fundamentally misses the

[178] *See, e.g.*, Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) (finding publisher not liable to plaintiff who was injured trying to make tools by following book's instructions); Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1217-18 (D. Md. 1988) (holding publisher not liable to nursing student who injured herself by using remedy from textbook); Gorran v. Atkins Nutritionals, Inc., 464 F. Supp. 2d 315, 319 (S.D.N.Y. 2006) (rejecting plaintiff dieter's product liability, negligent misrepresentation, and deceptive conduct claims because defendant corporation's products were not defective or dangerous and diets consisted of advice and ideas which, while controversial, were protected by First Amendment), *aff'd*, 279 F. App'x 40 (2d Cir. 2008); Smith v. Linn, 563 A.2d 123, 126-27 (Pa. Super. Ct. 1989) (finding diet book publisher not liable for death allegedly caused by diet because diet book is not product for purposes of products liability), *aff'd*, 587 A.2d 309 (Pa. 1991).

[179] Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc., 952 P.2d 768, 773-74 (Colo. App. 1997).

[180] On this point, compare the majority's treatment of speech in Pickup v. Brown, 740 F.3d 1208, 1227 (9th Cir. 2014) (analyzing professional speech at issue on speech-conduct continuum), with Judge Diarmuid O'Scannlain's dissent in that case, *id.* at 1215-16 (O'Scannlain, J., dissenting) (asking, in context of conversion therapy, "by what criteria do we distinguish between utterances that are truly 'speech,' on the one hand, and those that are, on the other hand, somehow 'treatment' or 'conduct'?").

[181] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7, at 825-32 (2d ed. 1988) (describing inconsistency of Supreme Court's speech-conduct distinction doctrine). *See generally* Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427 (2015).

social relationship between advice-giving professional and listener.[182] And as a matter of theory, it problematically assumes "that speech is less immediately dangerous than conduct."[183] In the case of pseudoprofessional advice, the harm is a direct function of the content of the professionals' speech.

In its direct connection between the content of the speaker's advice and the listener's harm, the harm inflicted by pseudoprofessional advice is different from other speech harms. Schauer suggests that "often the harms occasioned by speech are attributed to the listener, whose thin skin is allegedly the source and cause of the problem, rather than what some speaker has spoken."[184] But in the context of pseudoprofessional advice, it is not the thin skin of the listener that is the problem. Rather, the knowledge asymmetry between speaker and listener is the key to understanding how harm can manifest. As mentioned, the source of potential harm is the licensed professional's departure from the knowledge community's insights and the resulting bad, and potentially harmful, advice.

Schauer notes that the Court seemed more sensitive to the harm in *Snyder* than in *Entertainment Merchants* and *Stevens*.[185] He hypothesizes that this might be because the harm was "more patent and immediate," the situation of a soldier killed on duty abroad "presented a special reason for the Court's sympathy," or the harm "was connected with actual identifiable human beings, presenting once again the tendency of people, including Justices, to see harm in individual cases with faces and names more than in aggregates and statistics."[186] This tendency is unproblematic if the harm caused by pseudoprofessional advice is an injury inflicted on one individual who relies on bad advice. However, it may present a special challenge to assessing harm to groups of people when the number of individuals afflicted is in the hundreds of thousands, as is the case with the public health harm during the pandemic.[187] This makes it necessary to disaggregate harm caused by pseudoprofessional advice into individual harm and collective or societal (for example, public health) harm. In fact, this issue correlates with the enduring question of physicians' responsibility to nonpatients.[188] Scholars

---

[182] Both within and outside of the professional relationship, the harmful act itself is often performed by the listener acting on the professional's advice. This makes the professional's advice different from other forms of harmful speech that do not cause (physical) injuries. For a discussion of physical and nonphysical consequences of harmful speech, see Schauer, *Phenomenology*, *supra* note 156, at 646-49.

[183] *Id.* at 640 (quoting MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 5 (1984)).

[184] Schauer, *Harm(s)*, *supra* note 14, at 82.

[185] *Id.* at 95-96.

[186] *Id.* at 96.

[187] *See* Julie Bosman & Mitch Smith, *U.S. Covid Death Toll Surpasses 900,000 as Omicron's Spread Slows*, N.Y. TIMES (Feb. 4, 2022), https://www.nytimes.com/2022/02/04/us/us-covid-deaths.html.

[188] *See infra* Section IV.A; *see also* William M. Sage, *Relational Duties, Regulatory Duties, and the Widening Gap Between Individual Health Law and Collective Health Policy*,

have observed that "physicians' responsibilities for the health of the community, while technically acknowledged, frequently end up muddled or neglected."[189]

It is also critical to recognize that access to expert advice is unevenly distributed. "Those who lack access must place higher trust in widely-available information . . . because they have no more reliable alternative."[190] If harm caused by pseudoprofessional advice remains unredressed because the First Amendment provides a shield against liability for harm caused by speech, the costs will also be borne by those without access.[191] Thus, "First Amendment doctrine places a higher burden on those who can least afford expert advice and who are most reliant on experts in public discourse."[192] This is but one example illustrating the distributive effects of contemporary First Amendment jurisprudence.[193] An important aspect of recognizing the connection between access to professional advice and harm is that vulnerable groups may disproportionately bear the costs of pseudoprofessional advice.[194]

C. *Justified True Belief*

In a thoughtful amendment to the marketplace of ideas, Blocher suggests that free speech theory be reoriented around justified true belief.[195] He starts from the premise that the marketplace approach has failed in its promise to deliver "truth."[196] Moreover, he notes that in the modern speech environment, "there is widespread anxiety about truth and the ability of speech—especially but not exclusively online speech—to counter falsehoods and lies."[197] Indeed, the posttruth problem was exacerbated by the pandemic, which made it both more

96 GEO. L.J. 497, 500 (2008); Richard S. Saver, *Physicians' Elusive Public Health Duties*, 99 N.C. L. REV. 923, 925 (2021) ("[T]he question of physicians' responsibilities for the health of non-patients, more salient in the era of COVID-19, continually vexes courts, policy makers, and scholars.").

[189] Saver, *supra* note 188, at 926.

[190] Haupt, *Assuming Access*, *supra* note 149, at 532.

[191] *See* Schauer, *Harm(s)*, *supra* note 14, at 108 ("And harms, of course, are costs, even if not always financial ones. . . . Whenever the First Amendment prevails in a case of harmful speech, it means . . . that some harm will go unredressed. But an unredressed harm is a cost, and the question then arises as to how that cost will or should be allocated.").

[192] Haupt, *Assuming Access*, *supra* note 149, at 532.

[193] *See* Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 959-60 (2020).

[194] Note, however, that the pandemic has also illustrated the possibility that political resistance, rather than lack of access to expertise, can result in harmful outcomes, as we have seen in connection with mask mandates and vaccine efforts. *See, e.g.*, Haupt, *Assuming Access*, *supra* note 149, at 539.

[195] Blocher, *supra* note 21, at 444.

[196] *Id.* at 441 (describing biases, racism, resource inequality, and other cognitive and socioeconomic limitations on truth).

[197] *Id.*

salient and more dangerous in its ability to cause significant physical harm.[198] Rather than "truth," Blocher argues that the epistemological tripartite definition of knowledge be moved to the center of speech theory.[199]

Ultimately, Blocher explains that "[t]his is not a purely normative, theoretical mission—it is intertwined with current doctrinal and scholarly controversies regarding professional and expert speech, institutionalism, and a general focus on social practices in First Amendment doctrine."[200] This insight will be particularly relevant when considering the knowledge asymmetry between speakers and the knowledge communities they belong to on the one hand and listeners on the other hand in the context of pseudoprofessional advice.

In its application, however, Blocher remains committed to distinguishing between professional speech and public discourse.[201] Indeed, he explicitly offers the following caveats: "Art, political opinion, and other important forms of free speech—or, for that matter, epistemic claims made in public discourse—may be protected for reasons not grounded in their 'truth'";[202] and: "In public political discourse, for example, it might be more important to adopt a pathological frame and prevent any line-drawing among speakers and speech (even false speech . . .), while other contexts would permit and even demand exactly that."[203] Thus, the question is whether pseudoprofessional advice shares more features with speech in public discourse or with professional speech to foreground knowledge and circumscribe speech accordingly. I will return to this question in Part III. For now, I submit that the justified true belief approach and its focus on knowledge can usefully be combined with the theory of knowledge communities as an approach to pseudoprofessional advice.

D. *Knowledge Communities*

Understanding the professions as knowledge communities shapes the justifications for First Amendment protection. Moreover, this conceptualization helps delineate the scope of that protection, providing the theoretical basis for professional regulation as well as the imposition and extent of tort liability for professional malpractice.[204] Focusing on knowledge communities provides a

---

[198] *See supra* notes 100-01 and accompanying text (discussing vaccine safety misinformation).

[199] Blocher, *supra* note 21, at 443-44 ("[B]ecause the value of free speech is partly an epistemological question, it is worth considering that for generations of epistemologists, the most common lodestar is not truth—the central concern of the Holmesian approach to free speech—but *knowledge*." (footnotes omitted)).

[200] *Id.* at 446.

[201] *See id.* at 446-47.

[202] *Id.* at 447 (footnote omitted).

[203] *Id.* at 495.

[204] Haupt, *Professional Speech*, *supra* note 6, at 1241-42 (noting learned professions' purpose is to generate and disseminate knowledge, legitimizing regulation of professional speech).

slightly different perspective, though one complementary to Blocher's theory.[205] Blocher explains the connection as follows: "For purposes of the knowledge-based approach, what matters is that the standards and practices of the relevant knowledge communities—whether they be scientific, academic, medical, journalistic, or otherwise—provide the standards against which the speech that claims their mantle must be judged."[206] The professions are thus centered around shared knowledge as knowledge communities, and the individual professional is tied to their knowledge community, "serv[ing] as the conduit between the [profession] and the client."[207] The content of professional advice and harm following from bad advice are tied back to the policing of boundaries by the relevant community.[208] This theory primarily captures the role of professionals within the professional relationship, but as I suggest here, it can also be extended to pseudoprofessional advice. It is more limited than other frameworks of expert speech, however, because it maintains professional licensing as the regulatory hook tying the individual professional to the knowledge community.

Professional knowledge communities are bound together by shared ways of knowing and reasoning. Thus, "[p]rofessionals speak not only for themselves but also as members of a learned profession."[209] Whereas previous scholarship has focused on protection of the profession's knowledge and the professional relationship against outside interference,[210] my focus here is on the profession's ability to police its own knowledge among its members. These members are bound together, despite possible disagreement on certain issues, because "their role as professionals traditionally implies their subscription to a body of knowledge that is shared among their peers."[211] This results in "shared notions of validity and a common way of knowing and reasoning."[212] Moreover, knowledge communities share professional norms and values.[213] Therefore, "[t]he connection to a knowledge community is a distinctive feature of the role of professionals."[214]

Importantly, the shared notions of validity and common ways of knowing and reasoning are employed in the generation of new insights, which typically takes place outside of the professional relationship in conversations among

---

[205] *See* Blocher, *supra* note 21, at 483 ("The search for valid justifications in a knowledge-based approach to the First Amendment might map onto these efforts to enumerate and justify special treatment of institutions, professions, social practices and the like." (footnotes omitted)).

[206] *Id.* at 487 (footnotes omitted).

[207] Haupt, *Professional Speech*, *supra* note 6, at 1254.

[208] *See* Haupt, *Unprofessional Advice*, *supra* note 45, at 678.

[209] Haupt, *Professional Speech*, *supra* note 6, at 1242.

[210] *See, e.g.*, *id.* at 1245; Post, *Informed Consent*, *supra* note 6, at 939; Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 843 (2019).

[211] Halberstam, *supra* note 6, at 772.

[212] Haupt, *Professional Speech*, *supra* note 6, at 1251 (footnote omitted).

[213] *Id.*

[214] *Id.*

professionals.[215] Moreover, "[t]he professional is understood to be acting under a commitment to the ethical and intellectual principles governing the profession and is not thought of as free to challenge the mode of discourse or the norms of the profession while remaining within the parameters of the professional discussion."[216] Unlike speakers in public discourse, members of professional knowledge communities are set apart through licensing, a process of professional discipline, malpractice liability, and fiduciary duties.[217]

Self-regulating professions constituted around shared knowledge are different from public discourse so that, in contrast to private speakers in public discourse, limits on pseudoprofessional advice can be theoretically justified. The core of the professional's activity remains advice-giving within the professional relationship. But the nature of the professions also helps to evaluate licensed professionals' advice-giving activities outside of the professional relationship, with a focus on the connection between knowledge and harm.

The lens of knowledge communities is useful to elucidate the connection between knowledge and harm. Professional advice has social value because professionals have knowledge that their clients or patients lack but need in order to make important life decisions. Yet, the source of this great benefit can also be the source of significant harm. The knowledge asymmetry in the professional relationship can only be overcome if the professional dispenses, and the client or patient receives, advice that is comprehensive and accurate according to the insights of the relevant knowledge community. The reliance on this knowledge for important decisions demands that the client or patient can trust the professional provides good advice. But the knowledge asymmetry remains outside of the professional relationship; licensed professionals shed neither their knowledge nor their formal credential—which signals reliability of their expertise and ties them to the knowledge community—in public discourse.

III. EXPERTISE AT THE EDGE OF PUBLIC DISCOURSE

Through the lens of knowledge communities, this Part theorizes licensed professionals' advice-giving at the edge of public discourse. In so doing, it maps the normative interests of speakers and listeners as expert speech in public discourse approximates advice-giving outside of the professional relationship. What makes pseudoprofessional advice particularly tricky is the fact that the knowledge asymmetries between professionals and nonprofessionals continue to exist outside of the professional relationship. Jack Balkin posits that "what falls within public discourse and what falls outside of it does not depend on the content of the speech. Rather, it depends on a characterization of social

[215] *Id.* at 1275 ("Within the discourse of the profession, the acceptance of professional insights will depend on the rules established by the profession."); *see also supra* notes 143-45 and accompanying text.

[216] Halberstam, *supra* note 6, at 834.

[217] *See infra* Section IV.C.

relationships."[218] The social relationship between professional and client or patient in a professional relationship is relatively straightforward to characterize. But a licensed professional relinquishes neither their expertise nor their formal licensing credential outside of the professional context, resulting in a social relationship that can still be characterized by knowledge asymmetries and listener reliance on expertise. Content plays an important role, too, in describing the extent to which statements in public discourse resemble professional advice-giving, align with the knowledge community's insights, and risk harm to listeners. Bad advice, in short, can be the source of significant harm. This places pseudoprofessional advice in a more difficult to define area at the edge of public discourse.

The traditional normative justifications for speech protection are autonomy interests of the speaker and listener, marketplace interests, and democratic self-government interests, though they map onto speech in public discourse in a slightly different way than onto professional speech.[219] Similarly, the role of experts, particularly of licensed professionals, in public discourse ought to be examined along those lines. Thus, I follow the maxim that no single approach best justifies speech protection,[220] and some justifications are weaker than others in the context of pseudoprofessional advice. More speech has proven an insufficient remedy as expertise is drowned out, dispelling the marketplace justification for speech protection.[221] Ironically, "the persistence of the belief that a good remedy for false speech is more speech, or that truth will prevail in the long run, may itself be an example of the resistance of false factual propositions to argument and counterexample."[222] To what extent do the normative interests involved here mirror the interests underlying speech in the professional relationship? Focusing on the role of knowledge communities allows a reexamination of the normatively appropriate extent of speech protection, and its conceivably justified limits, when licensed professionals dispense pseudoprofessional advice to the public.

A. *Autonomy Interests*

Knowledge asymmetries, to reiterate, define the professional relationship. In the health context, for example, the patient seeks the doctor's advice to obtain knowledge the patient otherwise lacks.[223] At the same time, autonomy interests demand that the ultimate decision to act on professional advice rests with the client or patient.[224] This most fundamentally requires that clients or patients are

---

[218] Balkin, *supra* note 151, at 1214.

[219] Haupt, *Professional Speech*, *supra* note 6, at 1269.

[220] *See generally* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

[221] *See supra* Section II.A.

[222] Schauer, *Facts*, *supra* note 137, at 910-11.

[223] *See supra* note 25 and accompanying text.

[224] Haupt, *Professional Speech*, *supra* note 6, at 1243.

able to make important life decisions for themselves. In the medical context, the classic formulation can be found in *Canterbury v. Spence*[225]: the patient needs professional advice to gain "enlightenment with which to reach an intelligent decision."[226] The interest thus protected is the patient's decisional autonomy, the ability "to chart his course."[227] This is also true for other kinds of professional advice.[228] But lies, misinformation, and other departures from professional insights impede the client or patient's personal autonomy because they do not receive the knowledge necessary to make their own informed decision.[229]

The characteristic knowledge asymmetry between licensed professionals and laypeople persists outside of the professional relationship, including in public discourse. In light of the democratization of knowledge and crisis of expertise,[230] where reliable advice becomes increasingly difficult to identify, listener autonomy interests may justify some narrow regulatory interventions when licensed professionals communicate expertise to the public. This Section considers listener and speaker autonomy interests in turn, arguing that listener autonomy provides a stronger normative justification for limiting pseudoprofessional advice than speaker autonomy. But as the following discussion suggests, limited interventions anchored in preserving the link between the licensed professional and the knowledge community can be justified under both interests.

1. Listener Autonomy

The starting point for examining the role of listener autonomy is the recognition that, just like in the professional relationship and notwithstanding contrary doctrinal fictions of speaker equality,[231] a knowledge asymmetry exists in public discourse between experts and nonexperts. This places pseudoprofessional advice at the edge of public discourse because this premise challenges a fundamental assumption underlying public discourse—speaker equality.[232] Likewise, an information asymmetry exists between commercial

[225] 464 F.2d 772 (D.C. Cir. 1972).

[226] *Id.* at 780.

[227] *Id.* at 781 ("To enable the patient to chart his course understandably, some familiarity with the therapeutic alternatives and their hazards becomes essential.").

[228] *See, e.g.*, Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 580 (1998).

[229] *See* Blocher, *supra* note 21, at 442.

[230] *See generally* TOM NICHOLS, THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS (2017).

[231] *See* POST, DEMOCRACY, *supra* note 70, at 47 (explaining speaker equality is "specifically and emphatically absent in the case of professional clientele").

[232] *See id.* at 23 ("Within public discourse, . . . the First Amendment ascribes autonomy equally to speakers and to their audience, so that the rule of caveat emptor applies."); Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 444 (2019).

speakers and listeners.[233] Commercial speech doctrine traditionally has focused on the listener's need for accurate information.[234] While there are important differences between commercial speech and professional speech,[235] there are salient parallels between commercial speech and pseudoprofessional advice. Commercial speech, like pseudoprofessional advice, is disseminated to the public at large.[236] It is concerned with the flow of accurate information to the public and is not considered part of public discourse.[237] As Helen Norton points out, "First Amendment law sometimes takes a listener-centered approach; this has been the case . . . in commercial and professional speech settings."[238] But, as just mentioned, neither commercial nor professional speech is considered part of public discourse. And, as Post explains, "the state does underwrite expertise *outside* of public discourse; that is the lesson of malpractice suits and state proscriptions of misleading commercial speech. But we seem reluctant to allow the state analogously to underwrite expertise within public discourse."[239] Yet, the same normative interests of the listener can sometimes extend into public discourse. Thus, I situate pseudoprofessional advice at the edge of public discourse. Here, too, the flow of accurate information, in the form of professional knowledge, to the listener should be of primary concern.[240] This is not merely about the "fear that people would make bad decisions if given truthful information," a concern the Supreme Court has dismissed in the past,[241] but rather the individual's inability to make a choice due to the absence of truthful information.

In some respects, listeners in public discourse are in a more vulnerable position than listeners within the professional relationship, and likely more vulnerable than listeners in a commercial speech context. Just like in the professional relationship, listeners hearing advice in public discourse typically

---

[233] *See* Haupt, *Professional Speech*, *supra* note 6, at 1268.

[234] *Id.* ("In contrast to speech as part of public discourse, the focus of commercial speech, like that of professional speech, is its informational value.").

[235] *See id.* at 1264-68.

[236] *See, e.g.*, POST, DEMOCRACY, *supra* note 70, at 46 ("[C]ommercial speech tends to be addressed to the general public in advertisements that are placed in newspapers or radio or other media that are widely distributed.").

[237] *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 4 (2000).

[238] Norton, *supra* note 232, at 443-44.

[239] Robert Post, *Understanding the First Amendment*, 87 WASH. L. REV. 549, 561 (2012) [hereinafter Post, *Understanding*].

[240] *Cf.* Norton, *supra* note 232, at 441-42 ("Law sometimes . . . puts *listeners'* interests first in settings where those listeners have less information or power than speakers. This 'listener-centered' approach understands the First Amendment to permit the government to regulate the speech of comparatively knowledgeable or powerful speakers when that expression frustrates their listeners' autonomy, enlightenment, and self-governance interests . . . .").

[241] Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002).

will be "unable themselves independently to evaluate its quality."[242] As the Court noted in *Dent*, most patients lack the necessary expertise to evaluate a physician's credentials and must rely on "the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications."[243] In the professional relationship, listeners will be on notice: clients and patients usually know that they have entered into a professional relationship by seeking out professional advice.[244] Outside of this relationship, listeners cannot equally rely on advice they receive, even if it is disseminated by licensed professionals. Moreover, as already noted, lack of access to professional advice puts some listeners at much higher risk than others.[245]

Critically, too, listeners may not be aware that licensed professionals are not bound by the same norms as within the relationship when they speak to the public. Reliance on licensed professionals, however misplaced, thus puts listeners in a relatively weak position to make good choices for themselves. Such reliance interests should not be assumed too quickly, to be sure. But licensed professionals disseminating pseudoprofessional advice will likely attract reliance, which can in turn result in harm.[246] The professional license as an officially sanctioned ex ante marker of competence seems particularly relevant to this social relationship.

A critic might argue that the license is an imprecise indicator of the knowledge asymmetry. Rather, one could suggest that the speaker's education—whether the speaker went to medical school or law school and holds an MD or JD, for example—is more closely related to the source of their expertise. This approach, while plausible, has both theoretical and practical problems. First, imposing restrictions on speech for all medical or law school graduates because they ought to know better seems overinclusive as a matter of First Amendment theory. Moreover, listener reliance is more likely prompted by the licensing credential because it is easily recognizable and signifies state imprimatur. In addition, obtaining a professional license requires an affirmative act by the professional who opts into the profession, attendant with its privileges and duties. This affirmative act, by which ethical duties of the profession are assumed, makes imposing restrictions more defensible. And ethically, this approach tracks the

---

[242] POST, DEMOCRACY, *supra* note 70, at 47.

[243] Dent v. West Virginia, 129 U.S. 114, 122-23 (1889).

[244] "Usually" does not mean always, and sometimes uncertainties about the existence of a professional relationship will arise. *See, e.g.*, O'Neill v. Montefiore Hosp., 202 N.Y.S.2d 436, 440 (App. Div. 1960) (discussing question of physician-patient relationship where physician spoke to patient on phone); Mead v. Legacy Health Sys., 283 P.3d 904, 910 (Or. 2012) (en banc) (articulating test for existence of physician-patient relationship); Lection v. Dyll, 65 S.W.3d 696, 715 (Tex. App. 2001) (examining whether physician-patient relationship existed when physician on call via phone diagnosed patient and specified treatment).

[245] *See supra* notes 190-94 and accompanying text.

[246] *See supra* notes 4-5 and accompanying text (describing harm caused by unproven COVID-19 remedies and vaccine misinformation).

view of the profession.[247] This makes licensure and discipline rather than the academic degree the most plausible and defensible regulatory access point.

2. Speaker Autonomy

Within the professional relationship, speaker autonomy is circumscribed by the knowledge community's standards. The professional does not speak only for themselves, but as a member of a profession. The importance of the professional autonomy interest to speak as a member of the profession and according to the profession's insights comes into sharp relief when the First Amendment is used as a shield to guard against state interference that contradicts professional knowledge.[248] The personal autonomy interest to speak one's mind, however, is subordinated to the professional autonomy interest, which focuses instead on speaking "according to the standards of the profession" and with the aim of "uphold[ing] the integrity of its knowledge community. Physicians, for instance, should not be compelled to speak in a way that undermines their profession's scientific insights."[249] This usually reflects both the interests of the individual professional and the knowledge community to which they belong.[250]

Outside of the professional relationship, the professional speaks merely as one speaker among many. Thus, there exists a tension between the professional role and the individual speaker's autonomy interest to speak their mind. In other words, professionals would have to give up some degree of speaker autonomy if there were limits on the content of their speech. But here, too, professional licensing provides a link to the knowledge community that the professional does not shed in public discourse. Instead of state regulation challenging both the professional and the knowledge community from the outside, pseudoprofessional advice challenges the knowledge community from within. Moreover, the knowledge community's interests might be understood to circumscribe the individual's autonomy interests and to align advice with professional knowledge.[251]

Connecting this to harm, the idea that speech causes lesser harm than conduct (think "sticks and stones") "is often a component of various autonomy-based or other individualistic accounts of free speech" because it is otherwise difficult to

---

[247] *See, e.g.*, *Ethical Physician Conduct in the Media*, *supra* note 98 ("Understand that as physicians, they will be taken as authorities when they engage with the media and therefore should ensure that the medical information they provide is: (i) accurate; (ii) inclusive of known risks and benefits; (iii) commensurate with their medical expertise; (iv) based on valid scientific evidence and insight gained from professional experience.").

[248] *See* Haupt, *Unprofessional Advice*, *supra* note 45, at 673.

[249] Haupt, *Professional Speech*, *supra* note 6, at 1272-73.

[250] *See id.* at 1273.

[251] *Cf. id.* at 1272 ("The professional not only speaks for herself, but also as a member of a learned profession—that is, the knowledge community. And that community has an interest of its own.").

justify the special protection harmful speech enjoys.[252] This echoes the earlier discussion of the speech-conduct distinction.[253]

In the case of pseudoprofessional advice, the question is whether the knowledge community, which "has an interest of its own,"[254] can police this interest in a way that limits its members' autonomy to speak their mind. Whereas outside interference with professional knowledge is a key concern of professional speech, internal resistance to professional knowledge is the problem of pseudoprofessional advice. There are other instances in which rejection of a shared knowledge basis and common ways of knowing and reasoning place a professional outside of the knowledge community.[255] In both instances, however, the underlying interest is that the knowledge community remains free to "develop and refine the specialized knowledge that is its essence and the source of its social value."[256] This justification is also reflected in professional organizations' self-understanding, as for example articulated in the AMA Code of Medical Ethics concerning physician interactions with the media, which states that "[p]hysicians should . . . [a]lways remember that they are physicians first and foremost, and must uphold the values, norms, and integrity of the medical profession."[257]

Conceivably, disclaimers could ameliorate some of these concerns. Requiring a professional to be clear about whether their advice aligns with the knowledge community's insights could be considered more speech permissive from the speaker autonomy perspective than a regulatory intervention while still providing sufficient notice for the listener to tailor their exercise of autonomy in reaching a decision accordingly. However, without risk of discipline for not doing so, disclaimers would be entirely up to the discretion of the speaker. And it seems unlikely that they would voluntarily limit their autonomy to speak.

B. *Democratic Self-Government Interests*

Experts speaking in public discourse are not subject to the limits on speech in the professional relationship because speakers are considered equals.[258] Indeed, a "traditionally strong notion of equality continues to pervade our understanding of the First Amendment. The justification is based in democratic theory: a fundamental belief in equality of speakers and opinions in public discourse is

---

[252] Schauer, *Phenomenology*, *supra* note 156, at 640-41.

[253] *See supra* notes 180-83 and accompanying text (explaining speech-conduct distinction fails to recognize harm caused by pseudoprofessional speech).

[254] Haupt, *Professional Speech*, *supra* note 6, at 1272.

[255] Haupt, *Unprofessional Advice*, *supra* note 45, at 676 (distinguishing external outliers, who "refus[e] to follow [profession's] shared ways of knowing and reasoning," from internal outliers).

[256] Haupt, *Professional Speech*, *supra* note 6, at 1272.

[257] *Ethical Physician Conduct in the Media*, *supra* note 98.

[258] *See, e.g.*, POST, DEMOCRACY, *supra* note 70, at 23; Balkin, *supra* note 151, at 1215; Haupt, *Unprofessional Advice*, *supra* note 45, at 682; Norton, *supra* note 232, at 444-45.

necessary for equal participation, which in turn forms the basis of democracy."[259] By contrast, in the professional setting, one could consider the lack of equality among speakers and, even more characteristically for that relationship, the lack of equality between speakers and listeners, to be necessarily "undemocratic."[260] Professional knowledge and expertise more generally break the assumption of equality, which is further undermined by licensing.[261] But professional knowledge 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 where it otherwise would not exist. Thus, precisely by virtue of its undemocratic nature, [professional knowledge] has the potential to advance democratic public discourse."[262]

But Schauer notes that "although factual truth is important, surprisingly little of the free speech tradition is addressed directly to the question of the relationship between a regime of freedom of speech and the goal of increasing public knowledge of facts or decreasing public belief in false factual propositions."[263] Likewise, Blocher emphasizes expert knowledge's manner of introduction and treatment in public discourse.[264] Pseudoprofessional advice does not communicate professional knowledge. Here, the combination of the justified true belief theory and the focus on knowledge communities and their connection to licensed professionals reveals the severing of doctrine from normative interests. Democratic self-government, in short, does not benefit from bad advice. It does not further democratic competence or "cognitively empower[] public opinion."[265] Arguably, however, the situation is even worse. One might say that detached from the connection to the knowledge community's insights, the licensed professional's advice is as good as anyone else's. But, due

---

[259] Haupt, *Licensing Knowledge*, *supra* note 39, at 540.

[260] *Id.* at 541; *see also* Ronald K.L. Collins & David M. Skover, *The Guardians of Knowledge in the Modern State: Post's Republic and the First Amendment*, 87 WASH. L. REV. 369, 375 (2012) ("[C]ompetency itself is not democratic; it is anti-democratic.").

[261] Haupt, *Licensing Knowledge*, *supra* note 39, at 539.

[262] *Id.* at 541; *see also* Schauer, *Facts*, *supra* note 137, at 902 ("[I]n general, truth is, *ceteris paribus*, better than falsity, . . . knowledge is, *ceteris paribus*, better than ignorance, and . . . a society with more true belief is, *ceteris paribus*, better than one with less belief in the truth or than one with more beliefs that are actually false.").

[263] Schauer, *Facts*, *supra* note 137, at 902.

[264] Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 WASH. L. REV. 409, 430 (2012) (posing "related and important questions such as how expert knowledge is disseminated *into* public discourse, how it is or should be treated once it arrives there, whether knowledge dissemination itself requires disciplinarity, and what institutions and social practices besides universities are engaged in disseminating expert knowledge").

[265] POST, DEMOCRACY, *supra* note 70, at 40-41 (discussing information value of commercial speech); *see also* Haupt, *Professional Speech*, *supra* note 6, at 1276 (applying similar reasoning to professional speech).

to their licensed status, professionals might appear more trustworthy.[266] In addition, pseudoprofessional advice is capable of undermining trust in experts more so than trust in nonexperts.[267] From the public's perspective, pseudoprofessional advice dilutes professional knowledge by making the knowledge community's insights appear more contested than they actually are.

On the other hand, this situation differs from a well-informed expert's legitimate critique of professional consensus. If professionals want to challenge the profession's insights but cannot do so within the professional relationship, there must be space for challenges outside of it.[268] The tradeoff is that the public may still rely on their potentially misguided or brilliant suggestions. This seems like the most problematic objection to deal with as it connects to the speaker's autonomy interest to challenge the status quo. Problematically, this challenge could occur from a more informed stance than from the nonexpert public. This is where the normative boundaries are blurry and line-drawing becomes difficult. In particular, with respect to innovation and policy change over time, democratic self-government will likely benefit from dissenting voices.

As already discussed, while the marketplace of ideas is unhelpful as an approach to expert speech generally, there remains an epistemic marketplace within the profession where professionals generate new insights through arguments based on agreed-upon methods.[269] Still, challenging orthodoxy from the outside might further innovation. The "professional[] ahead of the curve" is a potentially valuable voice that should not be silenced because they depart from the current state of professional knowledge.[270] Airing unorthodox ideas outside of the knowledge community can provide an avenue to push knowledge in unexpected directions and help educate the public about cutting-edge research that might advance professional insights. But this tradeoff to favor innovation also can 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.[271] Again, the COVID-19 pandemic provides a cautionary

---

[266] *See* Tilburt et al., *supra* note 11, at 201 ("Dr. Oz claims he is all about trust. 'The currency that I deal in is trust . . . and it is trust that has been given to me . . . by an audience that has watched over six hundred shows.'" (omissions in original) (quoting Michael Specter, *Columbia and the Problem of Dr. Oz*, NEW YORKER (Apr. 23, 2015), https://www.newyorker.com/news/daily-comment/columbia-and-the-problem-of-dr-oz)).

[267] *See, e.g.*, Szalinski, *supra* note 95 (noting "fringe doctors'" role in undermining COVID-19 vaccination efforts).

[268] Haupt, *Professional Speech*, *supra* note 6, at 1256; *see also* Post, NIFLA, *supra* note 12, at 1083 n.68 (citing academic journals as "marketplace of ideas for the exchange of professional views").

[269] *See supra* note 145 and accompanying text.

[270] Haupt & Parmet, *supra* note 12, at 1827.

[271] *See, e.g.*, *supra* notes 95-96 and accompanying text (discussing doctors promoting ivermectin and hydroxychloroquine COVID-19 treatments against medical community's advice).

tale as the scientific process has unfolded, at times confusing the public.[272] But whereas updating knowledge within the discourse of the profession is based on shared ways of knowing and reasoning, challenges in public discourse are not necessarily based on a shared methodology, and untested advice can result in serious harm.

C. *Trust*

To prevent abuses of trust within the professional relationship, professionals are bound by fiduciary duties. Professionals such as lawyers and physicians are among the traditional fiduciaries.[273] The basis for a fiduciary relationship as traditionally conceptualized lies in the personal connection between professional and client.[274] Thus, trust in licensed professionals outside of the professional relationship is misplaced. Consequently, interrogating pseudoprofessional advice may be an occasion to rethink professionals' fiduciary duties. Whereas traditionally, the fiduciary relationship between professionals and their clients is limited to these two parties, there may be instances in which the public interest might play a role. There are certain fiduciary relationships that may have duties to the public, but as a general rule, "[f]iduciary duties are anchored in the interests of the parties to the relationship rather than the public's interests."[275]

Professionals, however, are among those fiduciaries whose duties may be broader:

> Members of the professions are expected to use their entrusted power to meet society's needs as well as the needs of particular entrustors or other professionals. A private hospital and its medical membership may have fiduciary relationships to needy patients in the area in which the patients live, if no other hospital exists in the area.[276]

In the public health context, this seems particularly relevant. Professionals have certain characteristics that distinguish them from other fiduciaries—among others, "they are experts in the services they offer."[277] Yet, they are faced with

---

[272] *See* Haupt, *Assuming Access*, *supra* note 149, at 534; *see also* 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 ("The public disagreements and debates played out in public, instead of at obscure conferences, give the false impression that science is arbitrary or that scientists are making things up as they go along.").

[273] FRANKEL, *supra* note 76, at 42. *But see* Gunter v. Huddle, 724 So. 2d 544, 546 (Ala. Civ. App. 1998) ("[A] physician-patient relationship is *not* a fiduciary relationship as a matter of law."); Carlson v. SALA Architects, Inc., 732 N.W.2d 324, 332 (Minn. Ct. App. 2007) (holding architect not per se fiduciary).

[274] *See* Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring); *see also supra* note 76 and accompanying text./.,

[275] FRANKEL, *supra* note 76, at 166.

[276] *Id.* at 36.

[277] *Id.* at 43.

a "dual-loyalty problem."[278] In the case of physicians, for example, a tension between individual patient welfare and public health goals will typically be resolved in favor of the individual patient.[279] Whereas "traditionally, professionals offer a public service," for which they could be held to have fiduciary duties, "the emphasis on public service has been muted in the past few decades" in favor of an "emphasis on fiduciary service as business."[280] However, the idea that professionals are fiduciaries continues to induce public reliance on professionals' speech in public discourse.[281] Unless fiduciary duties gain more traction in the context of pseudoprofessional advice,[282] the element of trusting licensed professionals will continue to be relevant.

Within the profession, moreover, the role of the public's trust is also important. Thus, "[s]ome fiduciaries organize associations in which members undertake to limit their behavior and monitor their practices. In exchange, the associations vouch for the members' trustworthiness. Professional organizations, such as the American Bar Association and the American Medical Association, serve such a purpose."[283] Membership in these professional organizations thus serves to reduce the risk of professionals inflicting harm through incompetent advice.[284] The governing of speech by private organizations does not raise the same free speech issues as regulation by licensing bodies because private organizations are not state actors and therefore are not bound by the First Amendment.[285] Thus, even commentators who are skeptical of disciplinary action agree that private bodies can police the content of their members' statements to the public.[286]

IV. CHARTING ALTERNATIVE APPROACHES

As the normative discussion has demonstrated, the current balance between speech protection and liability for harm is not sufficiently responsive to concerns raised by pseudoprofessional advice. Translating the normative interests just examined into doctrinal prescriptions, this Part identifies and interrogates three alternatives to the current framework to address the problem of pseudoprofessional advice. It first discusses tort liability for harm caused by pseudoprofessional advice, the least speech-protective option. It then turns to the

---

[278] Saver, *supra* note 188, at 932.

[279] *Id.*

[280] FRANKEL, *supra* note 76, at 43.

[281] *See id.* ("[T]he image and expectation of fiduciaries who are professionals has not disappeared. These professional services are crucial to society and the power of these professionals both on entrustors and on society cannot be exaggerated.").

[282] *Cf.* Saver, *supra* note 188, at 971-72 (discussing potential recalibration of physicians' fiduciary duties to account for public health).

[283] FRANKEL, *supra* note 76, at 31.

[284] *See id.*

[285] Coleman, *supra* note 13, at 143-44.

[286] *See, e.g.*, *id.* at 33.

most speech-protective option of adding more speech. Finally, it considers the regulatory intervention of professional discipline for disseminating pseudoprofessional advice. Ultimately, I suggest that neither the torts solution nor the speech solution offer appropriate pathways to address pseudoprofessional advice; instead the regulatory approach is most responsive to the underlying normative concerns.

A. *A Torts Solution for a Speech Problem*

This Section interrogates whether expanding malpractice or other tort liability for licensed professionals giving advice outside of the professional relationship might be feasible. From a doctrinal perspective, pseudoprofessional advice would have to fit within the elements of a tort. Within the professional relationship, bad advice that results in harm is subject to malpractice liability.[287] As a form of negligence, malpractice must satisfy the familiar elements of that tort, requiring breach of a duty that is causally connected to the plaintiff's injury.[288] But typically, a professional's duty exists only within the professional relationship.[289] Courts appear generally hesitant to "impose open-ended, affirmative duties to act for the welfare of the community."[290]

One court articulated a three prong test to determine duties to nonpatient third parties for purposes of negligence liability:

> a plaintiff must establish three elements: (1) a duty on the part of the defendant to conform his conduct to a standard of care arising from his relationship with the plaintiff, (2) a failure of the defendant to conform his conduct to the requisite standard of care required by the relationship, and (3) an injury to the plaintiff proximately caused by the breach.[291]

Though there are some exceptions,[292] most famously expounded with respect to the duties of a psychiatrist by the California Supreme Court in *Tarasoff v.*

---

[287] Haupt, *Professional Speech*, *supra* note 6, at 1276.

[288] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. b (AM. L. INST. 2012).

[289] For an overview of duties implicated by the doctor-patient relationship, see *id.* § 41 cmt. h ("Unlike most duties, the physician's duty to the patient is explicitly relational: physicians owe a duty of care to *patients*.").

[290] Saver, *supra* note 188, at 932 (noting doctor-patient relationship conflicts with case law's "expansive wording in describing physicians' public health obligations").

[291] Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991).

[292] *See, e.g.*, Hofmann v. Blackmon, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970) (recognizing physician's duty to warn patient's family of contagious disease); Shepard v. Redford Cmty. Hosp., 390 N.W.2d 239, 241 (Mich. Ct. App. 1986) (finding defendant owed patient's son duty of care as "foreseeable potential victim of defendant's conduct"); Skillings v. Allen, 173 N.W. 663, 663-64 (Minn. 1919) (holding physician could be liable to infected third parties relying on claim that patient with scarlet fever was not infectious to visitors); Bradshaw v. Daniel, 854 S.W.2d 865, 866 (Tenn. 1993).

Regents of the University of California,[293] it seems difficult to stretch the professional's duty beyond the professional relationship.[294] The other problematic element when advice is generally disseminated is causation. It strains doctrine to expand malpractice liability to all professionals speaking in public discourse, though certain types of misinformation might fit into other torts.[295] And for some groups of experts, these arguments might be easier to make. For example, government speakers are in a somewhat different position than private experts in public discourse.[296]

The torts framework, however, is not particularly well-suited to address the larger problem. While tort liability may provide a remedy for the injured party (i.e., the plaintiff in the tort action), it is unlikely to remedy societal harm incurred by the spreading of bad advice.[297] The deterrence and corrective justice aspects of tort law are much less likely to function in an environment where, once pseudoprofessional advice is articulated, it goes viral by inchoate actors' repeated sharing on social media platforms.[298] In other words, the most immediate—and given the doctrinal constraints of tort law just discussed, likely the most elusive—effect would be compensatory damages for harm.

From an institutional competence perspective, moreover, courts may be poorly situated to address the divergence between licensed professionals' speech and professional knowledge.[299] Tort litigation will involve the courts in lengthy battles over potentially fast-changing professional expertise that might be better resolved within the profession.[300] While ex post tort liability for individual

[293] 551 P.2d 334, 347-48 (Cal. 1976) (expanding mental health professionals' duty to warn to threatened third parties); *see also* Bardoni v. Kim, 390 N.W.2d 218, 220, 226 (Mich. Ct. App. 1986) (following *Tarasoff*); Munstermann v. Alegent Health-Immanuel Med. Ctr., 716 N.W.2d 73, 77 (Neb. 2006) (same); State v. Agacki, 595 N.W.2d 31, 33 (Wis. Ct. App. 1999) (same). *But see* Tedrick v. Cmty. Res. Ctr., Inc., 920 N.E.2d 220, 228 (Ill. 2009) (rejecting reasoning in *Tarasoff*).

[294] *See* Saver, *supra* note 188, at 932-38 (discussing physicians' common law duties to public, including limited impact of *Tarasoff*).

[295] *See, e.g.*, Henricksen, *supra* note 12 (manuscript at 116) ("One's conduct and words constitute fraud on the public where they (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.").

[296] *See supra* note 120 and accompanying text.

[297] *Cf.* Saver, *supra* note 188, at 968-69 ("At least as a matter of common law, more robust recognition of physicians' public health duties seemingly represents a radical shift in doctrine.").

[298] *See supra* notes 92-94, 100-05 and accompanying text (discussing spread of misinformation on social media and platforms' failure to contain it).

[299] *See* Saver, *supra* note 188, at 969 ("Legislatures and regulatory bodies may be better equipped than courts to consider the social and policy consequences of broadening duty rules and the full range of interests at stake beyond those of the immediate litigants.").

[300] *See* Post, *Understanding*, *supra* note 239, at 561 ("We would feel queasy if the state were to intervene authoritatively to settle the conflicting pronouncements of the dueling experts that routinely fill our news media.").

harms suffered does not exclude ex ante regulatory interventions, it is not by itself suited to address the problem of pseudoprofessional advice.

B. *A Speech Solution for a Torts Problem*

From the speech perspective, the preferred way to address potentially harmful bad advice is more speech.[301] Or, to put it in Justice Anthony Kennedy's language in *Alvarez*: "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[302] In light of the problems with the marketplace of ideas, however, adding more speech in the form of private speech in public discourse would be insufficient.[303] But another avenue to add more speech would entail expanding access to professional advice. Whereas leaving it to public discourse to provide reliable expertise is not a promising strategy to combat pseudoprofessional advice, expanding access would provide more professional advice. Improving access to advice is the least doctrinally disruptive and most speech-protective response. Though unquestionably a colossal policy challenge, as illustrated for example by the enormous efforts surrounding the Affordable Care Act, creating broader access to professional advice does not demand a change in First Amendment interpretation.[304]

As a theoretical matter, broadening access to professional advice may be necessary to justify the stark contrast between limits on speech in the professional relationship and the relative absence of limits on speech in public discourse.[305] In addition to—sometimes mistakenly—assuming speaker equality, "[a] core assumption of First Amendment theory . . . . is the availability of access to expert advice. This assumption, however, is erroneous because access to health advice in fact is unevenly distributed."[306] Continuing concerns about the lack of adequate access to medical[307] and legal services[308] vividly illustrate this point. Disparities in access mirror racial inequities, and vulnerable communities face the greatest barriers to obtaining medical[309] and legal advice.[310]

---

[301] *See, e.g.*, Coleman, *supra* note 13, at 141-42.

[302] United States v. Alvarez, 567 U.S. 709, 727 (2012).

[303] *See supra* Section II.A.

[304] Haupt, *Assuming Access*, *supra* note 149, at 538.

[305] *Id.* at 532.

[306] *Id.*

[307] *See generally* UWE E. REINHARDT, PRICED OUT: THE ECONOMIC AND ETHICAL COSTS OF AMERICAN HEALTH CARE (2019).

[308] *See generally* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004).

[309] *See, e.g.*, Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 772 (2020) (arguing Black mothers face "institutional discrimination in the provision of health care").

[310] *See, e.g.*, Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1268 (2016).

Another avenue of adding more speech without expanding access to professional services might be a public option for supplying good advice, such as an aggressive public rollout of expertise by administrative agencies. (One recent memorable example was the FDA's "[y]ou are not a horse" tweet trying to combat misinformation around the drug ivermectin.)[311] But this alternative, too, may be only partially successful. First, it depends on political willingness to take on the role of providing expertise. Second, assuming that a competent agency was able to disseminate advice, the government's message may easily get lost among the flood of viral memes and widespread mis- and disinformation.

Neither of these options would avoid the public dissemination of potentially harmful advice by licensed professionals, and neither would remedy harms that occur when individuals follow this advice. Ultimately, expanding access to professional advice is an important policy goal for independent reasons, but it will be insufficient to address the problem of pseudoprofessional advice.

C. *A Regulatory Solution*

Finally, professional licensing bodies could monitor the boundaries of professional expertise outside of the professional relationship by imposing disciplinary action for pseudoprofessional advice. For example, the Federation of State Medical Boards issued a statement in 2021 warning licensed physicians that they are at risk of losing their license for spreading COVID-19 misinformation.[312] This move is supported by several state medical boards,[313]

---

[311] U.S. FDA (@US_FDA), TWITTER (Aug. 21, 2021, 7:57 AM), https://twitter.com/US_FDA/status/1429050070243192839?s=20 [https://perma.cc/LL7A-J24R] ("You are not a horse. You are not a cow. Seriously, y'all. Stop it.").

[312] *FSMB: Spreading COVID-19 Vaccine Misinformation May Put Medical License at Risk*, *supra* note 11.

[313] The state medical boards of Illinois, Maine, Mississippi, New Mexico, Vermont, and Washington are examples. *See Notice that Advice or Treatment Regarding Covid-19 Must Conform with Evidence-Based Medicine and Standards of Care*, ILL. DEP'T OF FIN. & PRO. REGUL., https://www.idfpr.com/Forms/COVID19/IDFPR%20statement-physicians.pdf [https://perma.cc/N86Y-VAGB] (last visited Mar. 17, 2023); Maroulla S. Gleaton, *Covid-19 Misinformation: A Position Statement*, ME. BD. OF LICENSURE IN MED. (2021), https://www.maine.gov/md/about/newsletter/2021fall [https://perma.cc/XYW5-RWWD]; Kenneth Cleveland, *Medical Misinformation or Disinformation Policy*, MISS. ST. BD. OF MED. LICENSURE (Sept. 7, 2021), https://www.msbml.ms.gov/sites/default/files/news/Medical%20Misinformation%20Policy%2009%202021.pdf [https://perma.cc/94M8-P9XQ]; *New Mexico Medical Board Position Statement—COVID Disinformation*, N.M. MED. BD., https://www.nmmb.state.nm.us// [https://perma.cc/S7ZS-SPR4] (last visited Mar. 17, 2023); *Position Statement on Unprofessional Conduct and COVID-19*, VT. DEP'T OF HEALTH (Nov. 3, 2021), https://www.healthvermont.gov/sites/default/files/documents/pdf/BMP-Policies-COVID-19PositionStatement-11032021.pdf [https://perma.cc/5N67-K5K4]; *COVID-19 Misinformation*, WASH. MED. COMM'N, https://wmc.wa.gov/sites/default/files/public/COVID-19/COVID-19%20Misinformation%20Position%20Statement.pdf [https://perma.cc/NX9W-TCRR] (last visited Mar. 17, 2023).

certifying boards,[314] professional organizations and medical societies,[315] as well as several other professional groups such as physician assistant[316] and nursing[317]

[314] *See, e.g.*, *ABD Statement on COVID-19 Misinformation*, AM. BD. OF DERMATOLOGY, https://www.abderm.org/public/announcements/abd-statement-on-covid-19-misinformation.aspx [https://perma.cc/8FA6-TKQA] (last visited Mar. 17, 2023); *ABEM Statement on Physician Misinformation*, AM. BD. OF EMERGENCY MED. (Aug. 21, 2020), https://www.abem.org/public/news-events/news/2020/08/21/abem-statement-on-physician-misinformation [https://perma.cc/7SJ5-JQ7W]; *ABMS Issues Statement Supporting Role of Medical Professionals in Preventing COVID-19 Misinformation*, AM. BD. OF MED. SPECIALTIES (Sept. 13, 2021), https://www.abms.org/news-events/abms-issues-statement-supporting-role-of-medical-professionals-in-preventing-covid-19-misinformation/ [https://perma.cc/9V8X-X6SM]; *ABU Statement on COVID-19 Misinformation*, AM. BD. OF UROLOGY (Sept. 14, 2021), https://www.abu.org/news/latest-news/193-abu-statement-on-covid-19-misinformation [https://perma.cc/6FZF-EEGS] (citing *American Board of Medical Specialties Supports Role of Medical Professionals in Preventing COVID-19 Misinformation*, AM. BD. OF MED. SPECIALTIES, https://www.abu.org/images/pdfs/ABMS_Statement_Supporting_Role_of_Medical_Professionals_In_Preventing_COVID-19_Misinformation.pdf [https://perma.cc/NT4H-44TL] (last visited Mar. 17, 2023)); *American Board of Medical Genetics and Genomics Statement on Dissemination of COVID-19 Misinformation*, AM. BD. OF MED. GENETICS & GENOMICS (Oct. 13, 2021), http://www.abmgg.org/pdf/American%20Board%20of%20Medical%20Genetics%20and%20Genomics%20Statement%20on%20Dissemination%20of%20COVID.pdf [https://perma.cc/Z48W-64BT]; *American Board of Pathology Statement About Certified Pathologists Promulgating Medical Disinformation*, AM. BD. OF PATHOLOGY (Sept. 3, 2021), https://www.abpath.org/index.php/announcements/556-american-board-of-pathology-statement-about-certified-pathologists-promulgating-medical-disinformation [https://perma.cc/T3ZU-8R4P]; *Joint Statement from the American Board of Family Medicine, American Board of Internal Medicine, and American Board of Pediatrics on Dissemination of Misinformation by Board Certified Physicians About COVID-19*, AM. BD. OF FAM. MED. (Sept. 9, 2021, 11:56 AM), https://www.theabfm.org/about/communications/news/joint-statement-american-board-family-medicine-american-board-internal [https://perma.cc/5SSA-A295]; Press Release, Am. Bd. of Internal Med., Joint Statement on Dissemination of Misinformation (Sept. 9, 2021), https://www.abim.org/media-center/press-releases/joint-statement-on-dissemination-of-misinformation [https://perma.cc/PNA5-RXPZ]; Press Release, Warren Newton, President & CEO, Am. Bd. of Fam. Med.; Richard J. Baron, President & CEO, Am. Bd. of Internal Med.; David G. Nichols, President & CEO, Am. Bd. of Pediatrics, Statement About Dissemination of COVID-19 Misinformation (Sept. 9, 2021), https://www.abp.org/news/press-releases/statement-about-dissemination-covid-19-misinformation [https://perma.cc/V6L5-YVC6]; *Statement Regarding Dissemination of COVID-19 Misinformation*, AM. BD. OF OBSTETRICS & GYNECOLOGY (Sept. 27, 2021), https://www.abog.org/about-abog/news-announcements/2021/09/27/statement-regarding-dissemination-of-covid-19-misinformation [https://perma.cc/84H9-6UYL].

[315] *See, e.g.*, Alyson Sulaski Wyckoff, *Board-Certified Physicians Who Spread COVID Vaccine Misinformation Risk Certification*, AM. ACAD. OF PEDIATRICS (Sept. 10, 2021), https://publications.aap.org/aapnews/news/15622/Board-certified-physicians-who-spread-COVID?searchresult=1 [https://perma.cc/6QSK-LC9X]; *AAFP Applauds Recommendation Regarding Physicians Spreading COVID-19 Misinformation*, AM. ACAD. OF FAM. PHYSICIANS (Sept. 9, 2021), https://www.aafp.org/news/media-center/statements/aafp--recommendation-covid-misinformation.html [https://perma.cc/RV3M-6GWC]; *Official Statement of the*

organizations. But there is also mounting political opposition: legislation introduced in at least fourteen states targets licensing boards that threaten to use their authority to curb misinformation spread by licensed professionals.[318] Moreover, early-stage litigation is challenging a California law permitting regulators to discipline physicians spreading misinformation.[319] While one federal district court declined to enjoin AB 2098,[320] another district court issued a preliminary injunction without addressing the First Amendment claim.[321]

As a preliminary matter, and to acknowledge the theoretical rather than empirical nature of this discussion, professional licensing has long been debated for several reasons, mostly related to improper tailoring of licensing regimes.[322] Improper tailoring results in a disconnect between licensing and knowledge, such that "[t]he mere fact that someone is licensed to practice medicine does not

Society of Critical Care Medicine: Misinformation About COVID-19 Prevention and Treatment, SOC'Y OF CRITICAL CARE MED., https://www.sccm.org/getattachment/About-SCCM/Media-Relations/SCCM-Statement-COVID19-Misinformation.pdf?lang=en-US [https://perma.cc/3MYB-QLWY].

[316] *See, e.g.*, *NYSSPA Statement on Dissemination of Misinformation*, N.Y. ST. SOC'Y OF PHYSICIAN ASSISTANTS (Sept. 13, 2021), https://cdn.ymaws.com/www.nysspa.org/resource/resmgr/documents/advocacy/nysspa_statement_on_dissemin.pdf [https://perma.cc/S5VJ-76H8].

[317] *See, e.g.*, *Policy Statement: Dissemination of Non-Scientific and Misleading COVID-19 Information by Nurses*, NAT'L COUNCIL OF ST. BDS. OF NURSING (Dec. 2, 2021), https://www.ncsbn.org/public-files/PolicyBriefDisseminationofCOVID19Info.pdf [https://perma.cc/4FZB-8MN6].

[318] *See, e.g.*, Blake Farmer, *Medical Boards Pressured To Let It Slide When Doctors Spread Covid Misinformation*, KAISER HEALTH NEWS (Feb. 15, 2022), https://khn.org/news/article/medical-boards-pressured-to-let-it-slide-when-doctors-spread-covid-misinformation/ [https://perma.cc/TWL8-UVHJ] (reporting Republican lawmakers' threats to disband Tennessee Board of Medical Examiners).

[319] Steven Lee Myers, *A Federal Court Blocks California's New Medical Misinformation Law*, N.Y. TIMES (Jan. 26, 2023), https://www.nytimes.com/2023/01/26/technology/federal-court-blocks-california-medical-misinformation-law.html (reporting on district court decision enjoining law on Fourteenth Amendment vagueness grounds but leaving First Amendment question unaddressed); Steven Lee Myers, *California Approves Bill To Punish Doctors Who Spread False Information*, N.Y. TIMES (Aug. 29, 2022), https://www.nytimes.com/2022/08/29/technology/california-doctors-covid-misinformation.html; Steven Lee Myers, *Is Spreading Medical Misinformation a Doctor's Free Speech Right?*, N.Y. TIMES (Nov. 30, 2022), https://www.nytimes.com/2022/11/30/technology/medical-misinformation-covid-free-speech.html?smid=url-share.

[320] McDonald v. Lawson, No. 22-cv-01805, 2022 WL 18145254, at *11, *16 (C.D. Cal. Dec. 28, 2022) ("Against this backdrop, the court finds AB 2098 regulates professional conduct, and any burden it imposes on speech is incidental to a doctor's or physician's proscribed treatment for COVID-19. . . . While *NIFLA* voided the professional speech doctrine as a categorial rule, it did not abrogate California's ability to regulate licensed professionals any time those measures relate to the provision of professional advice.").

[321] Høeg v. Newsom, Nos. 22-cv-01980, 22-cv-02147, 2023 WL 414258, at *12 n.11 (E.D. Cal. Jan. 25, 2023).

[322] Haupt, *Licensing Knowledge*, *supra* note 39, at 523-24.

guarantee that they are scientifically competent."[323] As currently implemented, professional licensing frequently is only a rough indicator of knowledge, and professional discipline is often focused on factors outside of professional knowledge and practice. Though in theory, licensed professionals are subject to professional discipline where members of the profession "evaluate whether their peers meet the community's professional standard,"[324] discipline is frequently unrelated to professional expertise. For example, Nadia Sawicki noted that medical boards "often focus on character-related misconduct, including criminal misconduct, that bears only a tangential relation to clinical quality and patient care."[325] By contrast, as Richard Saver pointed out, "There is a noteworthy dearth of professional licensure actions for conduct involving harm to non-patients and the health of the community."[326] The current licensing and discipline regimes should be improved to better serve their goal of ensuring competent advice from licensed professionals by focusing enforcement efforts on expertise. Just like properly conceptualized licensing regimes are consistent with the First Amendment,[327] properly tailored professional discipline of licensed professionals is consistent with the free speech interest underlying pseudoprofessional advice.

While the medical community increasingly favors disciplinary sanctions against professionals for disseminating misinformation outside of the professional relationship,[328] scholars have noted that "[t]here is precedent for both medical professional societies and boards of medical licensing to take action when physicians violate their ethical responsibilities in nonclinical

---

[323] Post, NIFLA, *supra* note 12, at 1803 n.65.

[324] Haupt, *Limits*, *supra* note 34, at 190.

[325] Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. HEALTH CARE L. & POL'Y 285, 287 (2010); *see also* Coleman, *supra* note 13, at 125 ("For example, physicians have been disciplined for criminal conduct such as shoplifting, income tax fraud, and possession of marijuana for personal use."); Saver, *supra* note 188, at 939-40 ("[P]hysician discipline for *any* licensure statute violation remains quite rare. . . . The overwhelming majority of serious medical licensure actions involve complaints of physicians impaired by drugs and alcohol, engaged in sexual relations with patients, and other quality of care concerns."). *See generally* Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CALIF. L. REV. 1567 (2017).

[326] Saver, *supra* note 188, at 940; *see also* Tilburt et al., *supra* note 11, at 202-03 (discussing "medical profession's inefficacy in actually sanctioning [its] most rogue members" and asserting that "[w]hile medical boards and licensing persist, they arguably persist as weak vestiges of a robust ideal").

[327] *See* Haupt, *Licensing Knowledge*, *supra* note 39, at 507.

[328] *See* Coleman, *supra* note 13, at 115 ("Within the medical community, there have been increasing calls for revoking these physicians' medical licenses or subjecting them to other disciplinary penalties."). This recent trend can be seen among professional licensing bodies across national boundaries. *See, e.g.*, Lex Harvey, *Toronto Physician, Co-Founder of Canadian Covid Care Alliance, Under Investigation by Medical Regulator*, TORONTO STAR (Jan. 28, 2022), https://www.thestar.com/news/canada/2022/01/21/toronto-physician-co-founder-of-canadian-covid-care-alliance-under-investigation-by-medical-regulator.html (reporting investigation of Canadian physician recommending ivermectin).

contexts."[329] Others have expressed skepticism about the constitutionality of such disciplinary measures. Carl Coleman, for example, argues that "imposing disciplinary penalties on physicians for speech that takes place outside a physician-patient relationship would almost certainly be unconstitutional."[330] He contends that such measures would survive constitutional scrutiny only in the case of actual malice, that is, "if a board can establish that a physician has disseminated information that she knows to be false or with reckless disregard as to its truthfulness."[331]

Coleman's descriptively accurate treatment exposes the normative incoherence of current free speech doctrine. He asserts that "focusing on the harms that could result from the content of physicians' statements is not a promising strategy."[332] Instead, the "least restrictive" and therefore constitutionally appropriate response is counterspeech.[333] This assessment highlights precisely the disconnect between doctrine and normative interests. Counterspeech, as explained, is an insufficient remedy, and so doctrinal insistence on its availability as a less restrictive means is normatively beside the point.[334] In addition, the absence of a robust understanding of harm in free speech theory leads to its quick dismissal, disregarding its normative importance. The focus on knowledge communities and the harm avoidance function achieved by their ability to enforce discipline for professional knowledge outside of the professional relationship, on the other hand, aligns normative and doctrinal interests.

In principle, the regulatory approach fits across knowledge communities. However, there are distinctions among them. Lawyers spreading political lies, perhaps most prominently Rudolph Giuliani, have been subject to professional

---

[329] Pizzo et al., *supra* note 112, at 723-24 ("[M]any state licensing boards and professional societies have adopted policies providing for action against physicians who provide non-evidence-based testimony as expert witnesses in litigation. . . . The same rationale supports action against physicians who violate the standards of professionalism in policy advisory roles.").

[330] Coleman, *supra* note 13, at 115. Coleman further argues:

> Even if courts agree that such speech can lead to harmful public health consequences, they are unlikely to view disciplinary actions as the least restrictive way to respond to that risk. Nor are they likely to agree that limitations on public speech can be justified under licensing boards' authority to regulate professional conduct or to set conditions on how the benefits of a medical license are used. In addition, giving licensing boards broad authority to regulate the content of physicians' public statements would have dangerous policy implications, as it could inhibit physicians from raising legitimate concerns about existing standards of care.

Id. (footnotes omitted).

[331] *Id.* at 4.

[332] *Id.* at 18.

[333] *Id.* ("Because counterspeech is available as an alternative policy option, courts are unlikely to find that disciplinary action is the least restrictive means of achieving the state's public health goals.").

[334] *See supra* Section II.A.

sanctions.[335] Commenting on the Giuliani case, Bruce Green and Rebecca Roiphe noted that "[l]awyers don't sacrifice their constitutional rights completely when they join the bar. Their expressive freedom can be constrained, but only when the government has a compelling reason to do so."[336] They grapple with the distinction between the lawyer's role in representing clients and their public statements, pointing out that "[w]hat is unclear is whether lawyers can be punished for lying on public media when they are speaking as private citizens, in situations where nonlawyers, though subject to moral condemnation, would be constitutionally protected from government sanction."[337] The problem of pseudoprofessional advice is the advice-giving to the public. This is distinct from sanctions related to the practice of law which may include disciplinary sanctions, but also other sanctions for a lawyer's role as an officer of the court, for example under Rule 11 of the Federal Rules of Civil Procedure,[338] as recently imposed in the same context against Sidney Powell (of dubious "release the Kraken" fame[339]) and other lawyers for "historic and profound abuse of the judicial process."[340] Lawyers, however, can also give pseudoprofessional advice.

The best approach is a regulatory solution that tracks the professional knowledge communities' ways of knowing and reasoning. In terms of institutional competence, the self-regulating professions are better situated than the courts in the torts approach.[341] In the dynamic development of knowledge, they can better respond according to their ways of knowing and reasoning and

---

[335] *See In re* Giuliani, 146 N.Y.S.3d 266, 283 (App. Div. 2021) (suspending attorney from practice in New York). With respect to Giuliani's First Amendment claim, the court noted: "While there are limits on the extent to which a lawyer's right of free speech may be circumscribed, these limits are not implicated by the circumstances of the knowing misconduct that this Court relies upon in granting interim suspension in this case." *Id.* at 270. Giuliani's Washington, D.C., license was subsequently suspended, too. *See* Jaclyn Diaz, *An Appeals Court Has Suspended Rudy Giuliani's Ability To Practice Law in D.C.*, NPR (July 8, 2021, 1:15 AM), https://www.npr.org/2021/07/08/1014047881/an-appeals-court-has-suspended-rudy-giulianis-ability-to-practice-law-in-d-c [https://perma.cc/EE27-NBFW].

[336] Bruce A. Green & Rebecca Roiphe, Opinion, *As the Giuliani Case Goes Forward, Courts Should Think Deeply About the First Amendment*, WASH. POST (June 25, 2021, 1:29 PM) [hereinafter Green & Roiphe, *Giuliani Case*], https://www.washingtonpost.com/opinions/2021/06/25/suspend-giulianis-law-license-dont-chill-free-speech/; *see also* Green & Roiphe, *Lawyers and the Lies They Tell*, *supra* note 13, at 53-54, 56.

[337] Green & Roiphe, *Giuliani Case*, *supra* note 336.

[338] FED. R. CIV. P. 11 (requiring good faith in representations to court and providing sanctions for violations).

[339] *See, e.g.*, Davey Alba, *'Release the Kraken,' a Catchphrase for Unfounded Conspiracy Theory, Trends on Twitter*, N.Y. TIMES (Nov. 23, 2020), https://www.nytimes.com/2020/11/17/technology/release-the-kraken-a-catchphrase-for-unfounded-conspiracy-theory-trends-on-twitter.html.

[340] King v. Whitmer, 556 F. Supp. 3d 680, 688 (E.D. Mich. 2021) (sanctioning attorney for misleading federal court and public with claims of election fraud, thereby "*debasing the judicial process*").

[341] *See supra* Section IV.A.

calibrate their intervention accordingly—or decide not to intervene at all on highly internally contested, emergent issues, which the professions themselves are in the best position to evaluate. Licensing and professional discipline properly focused on competence and knowledge share underlying interests of expert speech. This is most clearly true in the professional relationship. But the interests can also extend beyond the confines of that relationship in the case of pseudoprofessional advice. Indeed, the Supreme Court has acknowledged the connection between licensing regimes passed under the states' police powers and the public interest beyond the individual client or patient.[342] More than a century ago, the Court in fact considered it "too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health."[343]

Finally, the remaining question is what makes the regulatory approach superior to the torts approach. Why is it defensible to impose discipline, up to perhaps a loss of the license to practice? This leaves it up to the knowledge community to police the content of its own knowledge rather than the courts. Professional discipline addresses potential harm and does not require actual harm; discipline happens ex ante whereas tort liability happens ex post. Moreover, it does not "amount to the total prohibition of the circulation of an opinion."[344] The speaker is still free to express their opinion, but not in the role of a licensed professional. Licensing signifies and communicates the connection between the professional and their knowledge community. When the connection between the knowledge community and the individual professional is so strained, the professional effectively places themselves outside of the community. With that, they risk losing the link that is represented by the license to practice as a member of the knowledge community.

CONCLUSION

Concerns about snake oil salesmen are well-established.[345] Bad advice disseminated to the public is hardly a new phenomenon. For a long time, the consensus in free speech theory and doctrine has been that the harms of regulating such phenomena are greater than the benefits. In the interest of protecting free speech, we had to live with a certain likelihood of harm. But a deadly pandemic has upended these fundamental assumptions. Consider the altered stakes. In 2017, Schauer illustrated the harmful consequences of false beliefs with the following example: "If people believe that immunization is harmful, and if that belief is false, then some number of children will contract

[342] *See, e.g.*, Dent v. West Virginia, 129 U.S. 114, 122-23 (1889).

[343] Watson v. Maryland, 218 U.S. 173, 176 (1910).

[344] Vincent Blasi, *Shouting "Fire!" in a Theater and Vilifying Corn Dealers*, 39 CAP. U. L. REV. 535, 542 (2011) ("[A] sufficient showing of predicted harm can justify regulations of speech that do not . . . amount to the total prohibition of the circulation of an opinion . . . .").

[345] *See* Bambauer, *supra* note 70, at 74-76.

diseases they would otherwise not have contracted."[346] The harm that pseudoprofessional advice discouraging vaccinations can create in a marketplace where the remedy is more speech during a pandemic makes the underlying theoretical shortcomings tangible.

The context of the contemporary public health crisis caused by the coronavirus pandemic sharpens the contours of this problem, but it exists independent of the current crisis. In the prepandemic past, the lack of access to professional advice was one important reason to follow generally available advice. This is true for health and legal advice, among others. In the prepandemic past, a handful of licensed professionals routinely disseminated advice that did not align with professional insights, and sometimes, this has resulted in calls for professional discipline and loss of licensure.[347] Now, the problem has become more salient. The harm from ingesting uncontrolled amounts of hydroxychloroquine or ivermectin is much greater than relying on the proverbial "apple a day."

To be sure, professional discipline for pseudoprofessional advice addresses only a small slice of the problem. But it is both theoretically important to interrogate the stark contrast between professional speech and speech in public discourse, and practically relevant to consider the legal basis of professional discipline. As this Article has demonstrated, aligning the doctrinal and normative interests underlying free speech, the extent of its protection and its limits, results in justifiable interventions when licensed professionals disseminate pseudoprofessional advice.

---

[346] Schauer, *Collective Knowledge*, *supra* note 129, at 248.

[347] *See, e.g.*, Julia Belluz, *Why Dr. Oz Can Say Anything and Keep His Medical License*, VOX (June 24, 2014, 3:30 PM), https://www.vox.com/2014/6/24/5838690/why-is-dr-oz-still-a-doctor [https://perma.cc/Z63C-BP2C].