IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

BARBARA LOE ARTHUR, **Plaintiff,** **vs.** **PAUL A. OFFIT, M.D., et al.,** **Defendants.**	**Case No. 1:09-CV-1398 (CMH/TRJ)**

MOTION TO DISMISS BY AMY WALLACE AND CONDÉ NAST PUBLICATIONS INC.

Defendants Amy Wallace and Condé Nast Publications Inc. ("CNP") (hereinafter, collectively, "the Magazine Defendants"), by and through undersigned counsel and pursuant to Rules (12)(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure and Local Civil Rule 7(A), hereby move this Court for an order dismissing the Complaint against them for failure to state a claim upon which relief may be granted and, as to Ms. Wallace, for want of personal jurisdiction. As grounds for their motion, the Magazine Defendants state as follows:

1. This action arises out of a brief passage in a lengthy article in *Wired* magazine profiling defendant Paul Offit, a Philadelphia pediatrician and infectious disease specialist who has become a lightening rod for criticism and scathing attack in the contentious public debate over the benefits and risks of systematic child vaccination. In this context, the article mentions one of Dr. Offit's most prominent critics, plaintiff Barbara Loe Arthur (known publicly as Barbara Loe Fisher), the co-founder and president of one of the most influential groups that oppose mandatory universal immunization. The article, which was written by Ms. Wallace, a freelance

journalist, and published by CNP, quotes an exasperated Dr. Offit responding to Ms. Fisher's commentary by saying that "'Kaflooey theories' make him crazy" and that Ms. Fisher "makes him particularly nuts as in 'You just want to scream'" because 'She lies.'"

2. Plaintiff contends that, by quoting Dr. Offit's statement "She lies," the Magazine Defendants have published a false statement of fact and have committed defamation *per se*. Through this action, she seeks $1 million in compensatory damages as well as punitive damages.

3. It is evident, however, that plaintiff cannot obtain the relief she seeks even if all well-pleaded factual allegations are accepted as true and the reasonable inferences derived therefrom are viewed in the light most favorable her. Under controlling state and federal law in this jurisdiction, the challenged remark by Dr. Offit, about a matter of substantial public concern, is not actionable as defamation because it is neither capable of being understood as stating actual facts nor of being proven true or false. It is, therefore, an expression of opinion that is immune from civil liability under the common law of Virginia, the Constitution of this Commonwealth, and the First Amendment of the United States Constitution.

4. Furthermore, Ms. Wallace is not subject to the jurisdiction of this court under Virginia law because she does not regularly do or solicit business in Virginia, does not engage in any other persistent course of conduct here, and does not derive substantial revenue from goods used or consumed or services rendered in this Commonwealth, as required by Section 8.01-328.1(A)(4) of Virginia Code. Nor would the exercise of jurisdiction over Ms. Wallace comport with the requirements of the Due Process Clause of the Fourteenth Amendment, as she lacks the requisite "minimum contacts" with the Commonwealth.

WHEREFORE, and for the reasons more fully set forth in the accompanying memorandum of law, and upon the accompanying Declaration of Amy Wallace, the Magazine

Defendants respectfully request that the Court dismiss plaintiff's Complaint as to them in its entirety and with prejudice.

Dated: January 22, 2010

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

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Counsel for Amy Wallace and Condé Nast Publications Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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DECLARATION OF AMY WALLACE

Amy Wallace, pursuant to 28 U.S.C. § 1746, states as follows:

1. I am a defendant in the captioned action and I make this Declaration in support of the motion to dismiss the Complaint against me for lack of personal jurisdiction. Except as expressly indicated to the contrary, I have personal knowledge of the facts set forth herein and I would be competent to testify to these facts at a hearing or trial in this action.

2. I am a freelance journalist and am also an editor at large at *Los Angeles Magazine*. I reside and maintain my office in the State of California, where I have lived and worked since 1989. My previous employers have included *Portfolio* magazine, the *Los Angeles Times*, *The Atlanta Journal-Constitution* and *The New York Times*.

3. I have never lived or worked in the Commonwealth of Virginia. I do not own real estate in the Commonwealth of Virginia. I do not hold bank accounts, own personal property or rent property situated in the Commonwealth of Virginia. I do not conduct business in the Commonwealth of Virginia, or derive any income from the Commonwealth of Virginia.

4. I worked in the District of Columbia for one year after graduating college in 1984, (from Fall 1984 through Fall 1985), as well as three summers during college. During those periods, I lived in either Maryland or the District of Columbia. I may have visited the Northern Virginia suburbs of Washington on occasion during those periods, but have not done so since then. In addition, I have since that time travelled to Washington, D.C.; while I have not stayed in Virginia nor conducted any work in Virginia on any of those trips, I have arrived and departed from either Reagan National Airport or Dulles Airport en route to or from the District of Columbia.

5. I prepared the article in question in this action as a freelance writer for Wired Magazine, which I understand also is headquartered in California. It is my understanding that Wired does not have any offices in the Commonwealth of Virginia and, in any event, none of the Wired staff I dealt with in connection with the article was based in or appeared to have any connection to Virginia.

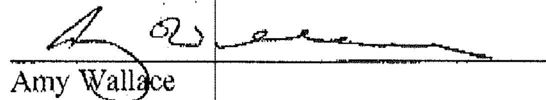
6. I did not travel to the Commonwealth of Virginia in connection with preparation of the published article that is the subject of this action. I interviewed the plaintiff in a telephone call from my office in Los Angeles. I also sent plaintiff two emails concerning our telephone interview, one of which simply forwarded my contact information – in California. The article does not quote from that telephone interview, and instead describes a speech plaintiff gave expressing her views at a conference sponsored by a group called Autism One. That conference took place in Chicago, Illinois.

7. To the best of my knowledge, information and belief, I did not interview or speak by telephone with any other persons located in Virginia in connection with my preparation of the article in question.

8. Because I do not regularly do or solicit business, or engage in any other persistent course of conduct, or derive substantial revenue from goods used or consumed or services rendered, in this Commonwealth, I respectfully request that the Court grant my motion to dismiss for lack of personal jurisdiction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 21, 2010



Amy Wallace

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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BARBARA LOE ARTHUR, **Plaintiff,** **vs.** **PAUL A. OFFIT, M.D., et al.,** **Defendants.**	**Case No. 1:09-CV-1398 (CMH/TRJ)**

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY AMY WALLACE AND CONDÉ NAST PUBLICATIONS INC.

Defendants Amy Wallace and Condé Nast Publications Inc. ("CNP") (hereinafter, collectively, "the Magazine Defendants"), by and through undersigned counsel and pursuant to Local Civil Rule 7(F), hereby submit this memorandum of law in support of their jointly filed motion to dismiss for failure to state a claim and Ms. Wallace's motion to dismiss for want of personal jurisdiction. For the reasons that follow, they respectfully request that the Court dismiss plaintiff's Complaint with prejudice. *See* FED. R. CIV. P. 12(b)(2), 12(b)(6).

PRELIMINARY STATEMENT

This action arises out of a brief passage in a lengthy magazine article profiling defendant Paul Offit, a Philadelphia pediatrician and infectious disease specialist. The article focuses on the heated public debate over mandatory vaccinations of infants, children and adolescents. It describes both Dr. Offit's advocacy of such vaccinations and the "grassroots movement that opposes the systematic vaccination of children and the laws that require it" on the grounds that

vaccines cause autism and other ills. Compl. Ex. A at 3.[1] As the article notes, Dr. Offit, a vaccine inventor himself, has become the "main target" of often vituperative attacks by the anti-vaccine movement. *Id.* Because he views these attacks as based on "pseudo-science" that is unsupported and dangerous to the public's health, he vocally "calls to account" those whose views he believes are "bogus" and appeal to fear rather than scientific evidence. *Id.* at 3, 5, 11 (hence the article's title, "An Epidemic of Fear: One Man's Battle Against the Anti-Vaccine Movement").

One of his critics – who appears in only a few paragraphs of the lengthy article – is the plaintiff, Barbara Loe Arthur (known publicly as Barbara Loe Fisher), "the cofounder and president of the National Vaccine Information Center," which is "the largest, oldest, and most influential of the watchdog groups that oppose universal vaccination." *Id.* at 8. The article describes a speech Ms. Fisher gave at an autism conference in Chicago that "mentioned Offit frequently" and "cast him as a man who walks in lockstep with the pharmaceutical companies and demonizes caring parents." *Id.* In response, Offit is quoted as saying that "'Kaflooey theories' make him crazy" and that Ms. Fisher "makes him particularly nuts, as in 'You just want to scream'" because 'She lies.'" *Id.* at 9. *See also id.* (Ms. Fisher "'inflames people against me. And wrongly. I'm in this for the same reason she is. I care about kids.'").

The context of this article – describing the heated back and forth in the debate over vaccinations – makes it clear that Dr. Offit's remark, which is simply quoted by the Magazine Defendants, reflects his *opinion* of Ms. Fisher's characterizations of the scientific evidence

[1] For the convenience of both the Court and the parties, the Magazine Defendants have submitted herewith (as Exhibit 1) a high-quality, color reproduction of the article at issue, which is easier to read than the black-and-white, photocopied pages of the magazine that were appended to the Complaint as "Exhibit A." As they are otherwise identical, the pagination of both exhibits is the same.

regarding vaccinations and her views about associated public health policy. Nevertheless, Ms. Fisher has now filed suit claiming that the two-word quotation "She lies" constitutes a false statement of *fact* about her that will cause people to conclude she is not a person of honesty or integrity. Because a trio of Fourth Circuit cases makes clear that expressing such an opinion – *i.e.*, that someone is lying or cannot be trusted – will not give rise to defamation liability, the Complaint fails to state a claim as a matter of law and should be dismissed with prejudice. Furthermore, as to Ms. Wallace, the Complaint should be dismissed for want of personal jurisdiction because she lacks a sufficient connection to the Commonwealth of Virginia to support this Court's exercise of jurisdiction under state law and the Due Process Clause of the Fourteenth Amendment.

BACKGROUND

Defendant CNP publishes a number of nationally circulated magazines, including *The New Yorker*, *Vanity Fair*, *Architectural Digest*, *GQ*, and, as is relevant here, *Wired*. *See* Compl. ¶ 14; *see also* http://www.condenast.com. Defendant Amy Wallace is a freelance writer who has lived and worked in California since 1989. Compl. ¶ 13. This action arises from an article published in the November 2009 issue of *Wired* and on its Internet website, Wired.com. Compl. ¶¶ 2, 8(b), 15. Entitled "An Epidemic of Fear: One Man's Battle Against the Anti-Vaccine Movement," the article appeared under the byline of Ms. Wallace. *Id.*; *see also* Compl. Ex. A (copy of article).

The article is a profile of defendant Paul Offit, M.D., who is a "leading national advocate for mandatory vaccination" and someone "to whom many in government, industry, and the media turn for information." Compl. ¶¶ 2, 12. Dr. Offit is a "physician . . . employed by the Children's Hospital of Philadelphia" and is "a Professor and Chief of Infectious Diseases in the

Department of Pediatrics [at] the University of Pennsylvania School of Medicine." Compl. ¶ 8(c). Dr. Offit is also the co-inventor of a vaccination for rotavirus, *id.* ¶ 11, a disease which causes severe diarrhea and dehydration in young children, sometimes resulting in hospitalization and/or death.

The article's profile of Dr. Offit is placed in the larger context of the significant public debate over systematic vaccination of children recommended by the Centers for Disease Control and Prevention, including Dr. Offit's advocacy in favor of the vaccine protocol and opponents' often sharp criticism both of Dr. Offit's position on this issue as well as of him personally. Compl. Ex. A. According to the article, "Offit has become the main target of a grassroots movement that opposes the systematic vaccination of children and the laws that require it," claiming that vaccines can cause autism and/or otherwise injure children. *Id.* at 3. In response, the article reports, Dr. Offit "boldly states – in speeches, in journal articles, and in his 2008 book *Autism's False Prophets* – that vaccines do not cause autism or autoimmune disease or any of the other chronic conditions that have been blamed on them," an assertion he "supports . . . with meticulous evidence." *Id.* at 3. As plaintiff describes it, the article "depicts" Dr. Offit "as a lone and heroic pediatrician/scientist who is the primary public voice in favor of mandatory vaccination, a position described as rational and science-based." Compl. ¶ 17.

The article reviews in detail the history of how widespread vaccinations have eradicated diseases like smallpox, polio, rubella, measles, and the bacteria that causes Hib meningitis. Compl. Ex. A at 5. The article also describes several recent scientific studies concluding that parents' decisions to opt out of vaccination programs have resulted in increased outbreaks of serious diseases – including, for example, pertussis (whooping cough – "a highly contagious bacterial disease that causes violent coughing and is potentially lethal to infants"), the incidence

of which has increased from 1,000 cases in 1976 to 24,000 cases in 2004. *Id.* (describing studies in *The New England Journal of Medicine* and *Pediatrics*); *see also id.* at 10 (describing 2005 outbreak of measles in Indiana, principally related to lack of vaccinations among those infected). The article also examines the possibility that parents in the anti-vaccine camp, who first see evidence of autism at the same age as many vaccines are administered (18 to 24 months), are "ignor[ing] the old dictum 'correlation does not imply causation' and stubbornly persist[ing] in associating proximate phenomena." *Id.* at 5. And, the article addresses several studies in which "scientists *have* chased down some of th[e] theories" advanced by the anti-vaccine movement, but have not found any link between vaccines and conditions like autism. *Id.* at 8; *see also id.* at 7 (describing two studies published in the April 2009 issue of the journal *Nature* that "analyzed the genes of almost 10,000 people and identified a common genetic variant present in approximately 65 percent of autistic children"); *id.* at 11 ("science must somehow prove a negative – that vaccines don't cause autism – which is not how science typically works").

At bottom, the article observes that "[b]eing rational takes work, education, and a sober determination to avoid making hasty inferences, even when they appear to make perfect sense." *Id.* at 5; *see also id.* (invoking Carl Sagan's conclusion that: "Science loses ground to pseudo-science because the latter seems to offer more comfort."). The article thus comes out "in favor of the general safety of vaccines and a presumed medical necessity for mandatory vaccination." Compl. ¶ 2.

In addition to an extended discussion of the merits of the vaccination issue, the article also describes the harsh personal attacks lodged against Dr. Offit by his opponents. Its first sentence states, "To hear his enemies talk, you might think Paul Offit is the most hated man in America." Compl. Ex A. at 3. As the article goes on to describe, Dr. Offit's critics point to the royalty he

receives for having co-invented the rotavirus vaccine as "Exhibit A in the case against" him, supposedly "proving his irredeemable bias and his corrupted point of view." *Id.* at 10; *see also id.* at 3 (quoting anti-vaccine advocate's description of Dr. Offit as someone who "whores for the pharmaceutical industry"); *id.* at 7 (describing how anti-vaccine advocates contend that "doctors like Paul Offit are paid shills of the drug industry"); *id.* at 8 (reporting view of critic that Dr. Offit "was in the pocket of Big Pharma"). The article also describes how he has been physically threatened by critics, *see id.* at 3 (describing an email warning, "I will hang you by your neck until you are dead!"); *id.* at 10 (describing online remarks by host of program on "AutismOne radio" that "it would 'be nice' if Offit 'was dead'"), as well as how he is the subject of a hostile website (pauloffit.com) and how people regularly tamper with the Wikipedia entry for him, *id.* at 3.

It is in this context that, as part of the 7,500-plus word profile, a few paragraphs are devoted to one of his critics, plaintiff Barbara Loe Fisher. *Id.* at 8-9. Ms. Fisher "is the co-founder and acting president of the National Vaccine Information Center," a "non-profit organization dedicated . . . to defending patients' rights to voluntary, fully informed consent to vaccination." Compl. ¶ 10. According to the Complaint, Ms. Fisher has written three books on the subject of vaccinations, has served on a number of governmental advisory committees, edits a biweekly newsletter, publishes frequent articles, and appears regularly on "national radio and television programs, including all major networks" to advocate her position. *Id.* The article portrays Ms. Fisher as the anti-vaccine "movement's brain" and describes her organization as "the largest, oldest, and most influential of the watchdog groups that oppose universal vaccination." Compl. Ex. A at 8. The article characterizes Ms. Fisher as a "skilled debater," who "has long been the media's go-to interview for what some in the autism arena call 'parents rights'" and whose speech at an autism conference in Chicago was delivered with "characteristic flair." *Id.* at 8-9. In that

speech, plaintiff "mentioned Offit frequently" and "cast him as a man who walks in lockstep with the pharmaceutical companies and demonizes caring parents." *Id.* at 8.[2]

As plaintiff's Complaint aptly puts it, "Offit disagrees adamantly with the . . . positions taken by Plaintiff Fisher and advocated by her and by NVIC." Compl. ¶ 12. In response to those positions, Dr. Offit is *quoted* in the article as saying that "'Kaflooey theories' make him crazy" and that Ms. Fisher "makes him particularly nuts as in 'You just want to scream'" because "'She lies.'" *Id.* at ¶ 20. *See also id.* Ex. A at 9 (Ms. Fisher "'inflames people against me. And wrongly. I'm in this for the same reason she is. I care about kids. Does she think that Merck is paying me to speak about vaccines? Is *that* the logic?,' he asks, exasperated.").

In her Complaint, plaintiff contends that, by quoting Dr. Offit's statement "she lies," the Magazine Defendants have published a false statement of fact and have committed defamation *per se*, causing her to appear "odious, infamous, and ridiculous." Compl. ¶¶ 21, 29. However, a trio of Fourth Circuit cases makes clear that including a remark by one of the key participants in a heated public-health debate stating that his adversary "lies" is not an actionable defamation. Indeed, both the nature of the statement – including that it was quoting an advocate with a particular scientific viewpoint and policy position – and the statement's context – a very brief

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[2] In plaintiff's regular sharp criticism of Dr. Offit, whom she derisively calls "Dr. Proffit," *see* http://www.nvic.org/NVIC-Vaccine-News/December-2008/Vaccines,-Politics-Media-Both-Sides.aspx (last visited January 21, 2010), she has herself asserted that he is guilty of "distortion of facts that ***perpetuate a lie***," in advocating for vaccinations, *see* http://www.nvic.org/Myths-and-Facts.aspx (last visited January 21, 2010) (emphasis added). She also has routinely claimed that those who do not subscribe to her viewpoint are "deceiving" the public and are engaged in a "big lie." *See, e.g.*, NVIC Press Release, *To Sixty Minutes Viewers* (Oct. 26, 2004), *available at* posted at http://www.nvic.org/nvic-archives/pressrelease/sixtyminutes.aspx (last visited January 21, 2010) (complaining that *60 Minutes II* broadcast was inaccurate, biased, and guilty of "***deceiving***" the public); NVIC Press Release, *Congress Set to Bail Out Big Pharma in Secret* (Nov. 15, 2005), *available at* http://www.nvic.org/nvic-archives/pressrelease/bailoutbigpharma.aspx (last visited January 21, 2010) (quoting Fisher describing drug companies' position as "***big lie***") (emphases added).

passage in a lengthy description of an ongoing, heated public health controversy – confirms that this is a protected expression of opinion. Accordingly, plaintiff has failed to state a cause of action, and the Complaint should be dismissed with prejudice. In addition, because, as demonstrated in her accompanying declaration, defendant Amy Wallace lacks the necessary connection to the Commonwealth of Virginia to establish personal jurisdiction, the Complaint should be dismissed as to her for that reason as well.

ARGUMENT

A. The Complaint Fails to State a Claim for Which Relief May Be Granted Because, Viewed in Context, The Quoted Remark Is Not an Actionable Defamatory Statement.

1. Defamation claims should be carefully examined under Rule 12(b)(6) to assure that the challenged statements are legally actionable.

Rule 12(b)(6) of the Federal Rules of Civil Procedure requires dismissal of a complaint for failure to state a claim where, as here, a plaintiff cannot obtain the relief she seeks even if all well-pleaded factual allegations are accepted as true and the reasonable inferences derived therefrom are viewed in the light most favorable to her. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, --- F.3d ----, 2009 WL 5126224, at *1 (4th Cir. Dec. 29, 2009). Dismissal is proper where such a conclusion is apparent from the face of the pleading and from a review of "other sources courts ordinarily examine when ruling on [such] motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). In evaluating such motions, courts do not credit the plaintiff's "legal conclusions, [recitations of] elements of a cause of action, and bare assertions devoid of further factual enhancement," and must "decline to consider 'unwarranted inferences, unreasonable conclusions, or arguments'" contained in the complaint. *Nemet Chevrolet, Ltd.*, --- F.3d at ----, 2009 WL 5126224, at *3 (citation omitted).

The importance of "evaluat[ing] complaints early in the process" in response to Rule 12(b)(6) motions has been emphasized by the Supreme Court and the Fourth Circuit in recent months as a way to deal with "the recognized problems created by 'strike suits' and the high costs of frivolous litigation." *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (citing, *inter alia*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). Moreover, because the defense of baseless *defamation* claims imposes an additional cost, in the form of potentially deterred speech, federal courts have historically given close scrutiny to pleadings in libel actions. *See* 5B Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE 3D § 1357 ("When the claim alleged is a traditionally disfavored 'cause of action,' such as . . . libel, or slander, the courts [tend] to construe the complaint by a somewhat stricter standard and [are] more inclined to grant a Rule 12(b)(6) motion to dismiss."). As a result, courts in Virginia and the Fourth Circuit routinely dismiss at the outset defamation claims that are based on constitutionally protected speech by media defendants.[3]

2. A statement is actionable only if it reasonably can be interpreted as stating actual facts that can be readily proven as true or false.

Because of their effect on speech about important matters of public concern, defamation claims are circumscribed by the constitution and common law of Virginia, as well as by the First Amendment to the U.S. Constitution.[4] Here, the publication at issue indisputably involves a

[3] *See, e.g.*, *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 182 (4th Cir. 1998) (affirming dismissal of libel claim "[b]ecause the challenged statements are constitutionally protected"); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1091-92 (4th Cir. 1993) (same); *Freedlander v. Edens Broad., Inc.*, 734 F. Supp. 221, 224 (E.D. Va. 1990) (dismissing libel claim after weighing "first amendment interest in protecting public speech"), *aff'd*, 923 F.2d 848 (4th Cir. 1991); *Yeagle v. Collegiate Times*, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998) (affirming dismissal of libel claim "subject to principles of freedom of speech arising under the First Amendment").

[4] Although this action relates to the multistate publication of an allegedly defamatory statement, and thus potentially presents a choice-of-law issue, the Court may presume for present purposes that the law of Virginia – where plaintiff is domiciled and where this Court sits – will

matter of substantial public concern – namely, the safety of vaccines and the risks and benefits of childhood immunization protocols.[5] As a result, the constitutional and common law protections – under both Commonwealth and federal law – here are at their zenith. *See Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1091-92 (4th Cir. 1993) ("[T]he First Amendment's press and speech clauses greatly restrict the common law where the defendant is a member of the press, the plaintiff is a public figure, or the subject matter of the supposed libel touches on a matter of public concern. Where, as here, all of these considerations are present, the constitutional protection of the press reaches its apogee.") (citation omitted); *Chaves v. Johnson*, 230 Va. 112, 119, 335 S.E.2d 97, 102 (1985) ("[A]rticle 1, section 12 of the Constitution of Virginia protect[s] the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander.").

To state a claim for defamation in Virginia, a plaintiff must plead that the defendant (i) published (ii) an actionable statement (iii) with the requisite degree of intent. *See, e.g., Marroquin v. ExxonMobil Corp.*, No. 1:08-CV-391 (CMH), 2009 WL 1529455, at *8 (E.D. Va. May 27, 2009) (citing *Chapin*, 993 F.2d at 1092). Whether a statement is "actionable" is a threshold determination to be decided as a matter of law by the court. *Id.* That legal determination requires the court to assess, *inter alia*, whether the statement can "reasonably be interpreted as *stating actual facts*," as well as whether it "contain[s] a *provably false* factual connotation." *Yeagle v. Collegiate Times*, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998)

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provide the substantive rules of decision for the issues raised by this motion. *See Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 613 (9th Cir. 1975); *Barron v. Ford Motor Co. of Canada Ltd.*, 965 F.2d 195, 197 (7th Cir. 1992).

[5] *See Snyder v. Phelps*, 580 F.3d 206, 219-20 (4th Cir. 2009) ("'Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community.'") (citation omitted); *United Med. Labs. v. CBS*, 404 F.2d 706, 711 (9th Cir. 1968) (statements about matters "affecting public health . . . [are] of such inherent public concern and stake that there could be no possible question" that they merit full First Amendment protection).

(emphasis added). *See also Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 132-33, 575 S.E.2d 858, 861-62 (2003) (statements must be "capable of being proven true or false" to be actionable); *SRA Int'l, Inc. v. McLean*, No. 1:07-CV-0935 (CMH), 2007 WL 4766697, at *1 (E.D. Va. Dec. 6, 2007) ("'[S]peech which does not contain a provably false factual connotation, or a statement which cannot reasonably be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action.'") (citations omitted); *Marroquin*, 2009 WL 1529455, at *8 ("Statements of opinion are 'relative in nature and depend largely upon the speaker's viewpoint,' whereas statements of fact are those which are 'capable of being proven true or false.'") (citation omitted).

As a result, these two complementary requirements for actionable defamation – (1) a statement of actual fact that is (2) capable of being proven true or false – operate together to immunize speakers against liability for expressions of "opinion."[6] Indeed, both the Virginia constitution and the First Amendment to the U.S. Constitution compel the imposition of these twin requirements protecting expressions of opinion. *See Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 47, 670 S.E.2d 746, 750 (2009) (Virginia Constitution); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (U.S. Constitution); *Fuste*, 265 Va. at 132, 575 S.E.2d at 861 (expressions of opinion "are protected by the First Amendment of the Constitution of the United States and

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[6] While the common law traditionally applied the maxim "truth is a defense" to defamation, it is now the case in libel actions involving a statement about a matter of public concern that the plaintiff is constitutionally required to prove falsity. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986). Thus, where, as here, a statement is neither factual nor capable of being proven true or false, the plaintiff would be unable to meet that burden as a matter of law. Moreover, even where the burden of proving falsity could theoretically be met, a public figure like Ms. Fisher has the added (and exceptionally demanding) constitutional obligation to demonstrate with clear and convincing evidence that the defendant in fact had a "'subjective awareness of [the] probable falsity'" of the statement yet published it anyway. *See, e.g., Hatfill v. New York Times Co.*, 532 F.3d 312, 317 (4th Cir. 2008) (citations omitted), *cert. denied*, 129 S. Ct. 765 (2008).

Article 1, § 12 of the Constitution of Virginia"); *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 293-94 (4th Cir. 2008) ("The First Amendment['s] . . . safeguard includes protection for 'rhetorical hyperbole, a vigorous epithet' and 'loose, figurative, or hyperbolic language,'" which "is necessary to 'provide[ ] assurance that public debate will not suffer for lack of imaginative expression . . . .") (quoting *Milkovich*, 497 U.S. at 20-21).[7]

In analyzing this issue, courts must focus on both "the plain language of the statement" and "the context and general tenor of its message," keeping in mind that the "'verifiability of the statement'" is a touchstone "because a statement not subject to objective verification is not likely to assert actual facts." *Snyder v. Phelps*, 580 F.3d 206, 219 (4th Cir. 2009) (citations omitted). A statement is therefore nonactionable as a matter of law when – considering its language, context, and tenor – the speaker is "plainly express[ing] 'a subjective view, an interpretation, a theory, conjecture or surmise, rather than . . . claim[ing] to be in possession of objectively verifiable . . . facts.'" *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 186 (4th Cir. 1998) (citation omitted) (affirming order granting motion to dismiss).

3. Accusations that a person lies or is untrustworthy are regularly held to be nonactionable statements of opinion.

A trio of Fourth Circuit rulings have specifically addressed defamation claims arising out of allegations of lying and/or dishonesty like the claim asserted here by plaintiff. In each case it was alleged that a defendant had wrongfully called into question the plaintiff's veracity,

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[7] While *Milkovich* made clear that not everything labeled "opinion" was constitutionally exempt from defamation liability, *see Milkovich*, 497 U.S. at 21 (observing that even a statement that starts "In my opinion . . ." may sometimes be "sufficiently factual to be susceptible of being proved true or false . . . [based upon] a core of objective evidence"), it left these basic requirements intact, *id.* at 19-20 (First Amendment requires that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law" and further forbids liability for "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual") (citations omitted).

integrity, or credibility through statements that the plaintiff "present[s] lies as truth," will "lie to suit [an] agenda," disseminates "fiction, innuendo, half-truths, exaggerations and fabrications," or is otherwise unworthy of "trust." *See Faltas v. State Newspaper*, 155 F.3d 557 (4th Cir. 1998) (unpublished), *aff'g* 928 F. Supp. 637, 641 (D.S.C. 1996); *Schnare v. Ziessow*, 104 Fed. App'x 847, 849 (4th Cir. 2004) (unpublished); *Lapkoff v. Wilks*, 969 F.2d 78, 80 (4th Cir. 1992). And, in each case it was held as a matter of law – both in the trial court and on appeal – that the challenged statements were nonactionable expressions of opinion under Virginia and/or federal law, rather than statements of fact that were capable of being proven true or false.

Much like this case, *Faltas* involved a defamation claim arising out of the controversial position taken by the plaintiff on a scientific issue – in that case, questioning the validity of a study that had suggested a "biological predisposition to homosexuality" in a certain percentage of the population. 928 F. Supp. at 646. In an op-ed article published in *The State* newspaper, the plaintiff, a physician, advanced an alternative explanation for the hormonal variations the study had identified in the brain activity of gay men, positing that they were the likely result of conduct the men had engaged in to "facilitat[e] a different behavior," such as taking estrogen. *Id.* at 641 (citation omitted). When the newspaper subsequently published a critical letter to the editor in which the writer asserted that the plaintiff is someone who "will lie to suit her agenda" and who "views her status as [a] physician as an opportunity to present lies as truth," the plaintiff sued the newspaper's publisher and the letter's author for defamation. *Id.* (citation omitted).

In language equally applicable to the facts here, the district court observed that the term "lie" had been "used in the context of challenging plaintiff's position on a given controversial subject as to which 'experts' obviously disagree, often in less than collegial tones." *Id.* at 648. Thus, in light of the context surrounding this scientific debate – "a highly controversial topic as

to which emotions and verbal exchanges often ran hot," *id.* at 649 – the court concluded as a matter of law that "the letter is an impassioned response to the positions taken by [the plaintiff], and nothing more." *Id.* at 648. The Court rejected plaintiff's argument that a different result was required by *Milkovich*, in which the challenged newspaper column had "nine or more [times] . . . indicated the plaintiff had lied, under oath," at a specific hearing. *Id.* at 647-48 (citing *Milkovich*, 479 U.S. at 6-7). The *Faltas* Court found that the alleged "lie" in *Milkovich* concerned a specific statement about a discrete incident that had "occurred on a given date at a given time," that the defendant had personally observed, and that was therefore "an 'objectively verifiable event.'" *Id.* at 648. By contrast, the allegation of lying in *Faltas* was simply a "challenge" as to "the validity of plaintiff's statistical analysis or [as to] whether she had adequate, if any, support for one of her conclusions." *Id.* The court concluded:

> [The letter-writer's] statements that plaintiff would "lie to suit her agenda" and would "present lies as truth," in context, translate to either an accusation that plaintiff baldly states conclusions without any data or that she has intentionally misinterpreted the available statistics to support her view of the issue, or both. In other words, at worst, [the] letter can be interpreted as stating that plaintiff manipulated or ignored statistics.

Id. at 649. That, the court said, was a quintessential example of a statement that would be understood as an expression of opinion, rather than fact. *See id.* ("When it comes to 'imaginative expression' and 'rhetorical hyperbole,' few terms have enjoyed so frequent an association in the common culture as the terms 'lie' and 'statistic.'").[8] On appeal, the Fourth Circuit summarily

[8] Illustrating its view that scientific conclusions and statistics can be both manipulated and the subject of opinionated debate, the Court quoted the famous comment attributed to Benjamin Disraeli in Mark Twain's *Autobiography* that "'[t]here are three kinds of lies: lies, damned lies and statistics.'" *Faltas*, 928 F. Supp. at 649 n.9 (quoting *The Oxford Dictionary of Quotations*, 4th Ed. at 249 (Oxford Univ. Press 1992)).

affirmed the dismissal of plaintiff's Complaint, expressly adopting "the reasoning of the district court." *See* 155 F.3d at 557.

In the most recent case in the trio, *Schnare*, the challenged statements were published in the magazine *Dog News* and involved a dispute over changes to the American Kennel Club's "breed standards" for Labrador Retrievers. 104 Fed. App'x at 847-48. The defendant was a prominent critic of the revisions who had unsuccessfully sued the American Kennel Club to block their implementation and who wrote a series of articles for *Dog News*. Specifically, he wrote that the plaintiff, an advocate for the new standards, had "perpetrated" a series of "half-truths, innuendoes and outright lies" and had submitted in the prior litigation over the standards an "affidavit . . . [that] contains some sixty pages of fact and fiction, innuendo, half-truths, exaggerations and fabrications" as well as "more than enough lies, fabrications and inaccuracies to cast a serious doubt on the value of the entire document." *Id.* at 849-50.

The plaintiff sued the magazine and the article's author for defamation, claiming that the article had falsely "accuse[d] him of perjury." *Id.* at 850. The trial court (Brinkema, J.) held that the statements, viewed in context, were expressions of opinion and therefore nonactionable as a matter of law. *Id.* The Fourth Circuit affirmed, explaining that the statements, "which on their face are accusations of lying," were "actually vigorous and angry expressions of disagreement" and that, in the context of this article, published against the backdrop of a vituperative dispute, "this 'accusation' of lying" was "just an 'expression of outrage.'" *Id.* at 851-52. Importantly, that context included the fact that the plaintiff had previously accused the defendant of seeking "to revise the breed standard [in a contrary manner] for his own financial gain" and that the defendant's published statements were a response to that charge. *Id.* at 851. At bottom, the Court of Appeals concluded that the "context of [the] article, with its snide tone, stern quotations, and

responsive posture, alert the reader to the hyperbolic nature of the statements" and that they were "no more than a 'lusty and imaginative expression of the contempt felt' toward [the author's] adversary in the controversy about revising the breed standard." *Id.* at 852-53 (citation omitted).[9]

In the final case in the trio, *Lapkoff*, an automobile finance executive said to a car salesman's new boss: "personally, I . . . wouldn't trust him as far as I can throw him." 969 F.2d at 82.[10] Taking account of "the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made," the Fourth Circuit found that such an allegation was not an actionable defamation under Virginia law. *Id.* The Court of Appeals concluded that the comment about the plaintiff's trustworthiness, though no doubt harmful to the plaintiff, was "clearly . . . opinion because it is a relative statement completely dependent on [the defendant's] obvious bias toward" the plaintiff and therefore a listener, especially given the context, "'could have only regarded it as an opinion.'" *Id.*

Applying these same principles, this Court recently held to be nonactionable opinion the statement that a plaintiff "'was not to be trusted,'" concluding that the context surrounding the remark – an acrimonious dispute between former colleagues turned competitors – made it

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[9] In reaching this conclusion in *Schnare*, the Fourth Circuit discussed at length the First Circuit's decision in *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 730-31 (1st Cir. 1992). *See* 104 Fed. App'x at 852. *Phantom Touring* involved an article about "a musical comedy version of 'The Phantom of the Opera,' that was confused with the hugely successful Broadway show. The article stated that the producers of the musical comedy benefitted from the confusion, questioned whether advertisers made the distinction clear to the ticket-buying public, and quoted a drama critic as describing the show as 'a rip-off, a fraud, [and] a scandal.'" *Id.* (citing *Phantom Touring*, 953 F.2d at 726). The Fourth Circuit in *Schnare* embraced *Phantom Touring*'s conclusion that, in the context of "'a kind of verbal debate between [the author] and those persons responsible for [the comedy 'Phantom'],'" the "'assertion of deceit reasonably could be understood only as [the author's] personal conclusion'" and "'not as a statement of fact.'" *Id.* (quoting *Phantom Touring*, 953 F.2d at 730).

[10] The speaker (the auto finance executive) was apparently referring to the plaintiff's prior association with a car dealership that had submitted fraudulent loan applications to the executive's company. *Lapkoff*, 969 F.2d at 80. The statement was alleged to have caused the plaintiff to lose his job at his new dealership. *Id.*

apparent that the speaker was expressing a personal viewpoint rather than an objectively verifiable fact. *SRA Int'l, Inc.*, 2007 WL 4766697, at *1.

Courts outside this circuit likewise have routinely found published comments of the sort at issue here to be protected expressions of opinion rather than statements of fact. For instance, in *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995), the defendant news organization had quoted an attorney as saying that the plaintiff – a psychologist who frequently testified as an expert witness regarding the unreliability of children's testimony about sexual abuse – was "[l]ying" when the psychologist had said that his qualifications as an expert were never in question. *Id.* at 367. In determining whether the statement was actionable, the context in which the statement was made was central to the Ninth Circuit's analysis. The court concluded that "[b]ecause how one proves child abuse is a highly controversial subject, the audience to a discussion of defense tactics in child abuse cases would expect emphatic language on both sides . . . [and] would be likely to recognize that the statements did not represent provable assertions." *Id.* Furthermore, the court said, the imprecision inherent in generalized allegations of "lying" makes proof of falsity by resort to "a core of objective evidence" nearly impossible. *See id.* ("[T]he term 'lying' applies to a spectrum of untruths including 'white lies,' 'partial truths,' 'misinterpretation,' and 'deception.' As a result, the statement is no more than . . . 'a vigorous epithet used by those who considered [the plaintiff's] position extremely unreasonable'" and is therefore nonactionable.).

More recently, a Louisiana appellate court reached the same conclusion. In *Wood v. Del Giorno*, 974 So. 2d 95, 100 (La. Ct. App. 2007), *writ denied*, 977 So. 2d 933 (La. 2008), the court considered the defendant's remark on a radio program that the plaintiff was "a fraud and a liar," including that it was made "in the context of a heated discussion over a controversial topic" –

namely, the humaneness of commercial "canned hunts," wherein "animals are kept in fenced enclosures and 'hunted' and killed by paying customers." *Id.* at 97 n.1. The Court concluded as a matter of law that the statement could not "be understood to convey to the average listener that [the plaintiff] is a person lacking moral character or untruthful in his business practices" because of the overall tenor and setting in which the statement was made. *Id.* at 100. *See also, e.g., Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1441 (9th Cir. 1995) ("An allegation that a judge is intellectually dishonest . . . cannot be proved true or false by reference to a 'core of objective evidence.'") (citation omitted); *Piersall v. SportsVision of Chicago*, 595 N.E.2d 103, 104, 107 (Ill. Ct. App. 1992) (statement by owner of cable television program that former commentator is a "liar[]" who "said things . . . [he] knew were not true" is nonactionable opinion, particularly because there are "no specific facts at the root of [the] statement . . . capable of being objectively verified as true or false"); *Andres v. Brown*, No. 276473, 2008 WL 684794, at *3 (Mich. Ct. App.) ("I am tired of you lying," "you are lying," and "you're a liar" are statements of nonactionable opinion in context of public meeting over property owner's zoning compliance when made in response to owner's assertion of good-faith efforts), *aff'd on other grounds*, 755 N.W. 2d 631 (Mich. 2008); *Roe v. Doe*, No. 09-CV-0682, 2009 WL 1883752, at *11 (N.D. Cal. June 30, 2009) (statements by sports franchise owner that former coach "tried to rip [him] off" and "deceived" him "connote subjective judgments, and therefore constitute mere opinion, not factual assertions").

4. Viewed in context, the quoted remark "she lies" cannot reasonably be interpreted as stating actual facts.

In this case, the article's quotation of Dr. Offit's comment that Ms. Fisher "lies" cannot reasonably be understood to suggest, as the Complaint alleges, that Ms. Fisher is "a person lacking honesty and integrity . . . [who should be] shunned or excluded by those who seek information and opinion upon which to rely." Compl. ¶ 29. Rather, as in the cases cited *supra*,

the context of the remark – in a lengthy article describing an emotional and highly charged debate about an important public issue over which Dr. Offit and Ms. Fisher have diametrically opposed views – plainly signals to readers that they should "expect emphatic language on both sides," *Underwager*, 69 F.3d at 367, and should accordingly understand that the magazine is merely reporting Dr. Offit's personal opinion of Ms. Fisher's views.

In particular, the language immediately surrounding the challenged statement, in which Dr. Offit decries "Kaflooey theories" that make him "want to scream," is precisely the kind of "loose, figurative" language that tends to "negate[ ] any impression that the speaker is asserting actual facts." *Snyder*, 580 F.3d at 220. Against this contextual backdrop, the declaration "she lies" is plainly understood as an outpouring of exasperation and intellectual outrage over Ms. Fisher's ability to gain traction for ideas that Dr. Offit believes are seriously misguided, and not as a literal assertion of fact. *Schnare*, 104 Fed. App'x at 851-52 ("A reasonable reader would . . . recognize this 'accusation' of lying as just an 'expression of outrage.'"). In other words, the remark by Dr. Offit is, on its face, merely an "'imaginative expression of the contempt felt' toward his adversary," *id.* at 852-53 (citation omitted), which can only be viewed as "an impassioned response to the positions taken by [that adversary], and nothing more," *Faltas*, 928 F. Supp. at 648.

Indeed, from the perspective of CNP and Ms. Wallace, this impassioned response by Dr. Offit toward Ms. Fisher – who has herself previously directed precisely this kind of hyperbolic rhetoric at her opponents, including when she publicly accused Dr. Offit of "perpetuat[ing] a lie" about vaccine policy, *see* note 2 *supra* – was itself illustrative of the rough-and-tumble nature of the controversy over childhood inoculations and therefore worthy of mention in the *Wired* article, which sought to highlight, among other things, the intense nature of the vaccine debate.

Given that context, publishing the quotation from Dr. Offit that Ms. Fisher "lies" is simply not actionable. Such a statement is much like the assertions of commercial inferiority that the Virginia Supreme Court considered in *Chaves* and dismissed as nonactionable because the remarks – that the plaintiff had "no past experience and [charged customers] an unjustifiably high fee" – were merely "relative statement[s] of opinion, grounded upon the speaker's obvious bias." 230 Va. at 116-19, 335 S.E.2d at 100-01. So, too, here is the comment by Dr. Offit the very sort that, in the context of a heated and very public scientific debate, would "fall on [listeners'] ears like repetitive drumbeats." *Id.* at 119, 335 S.E.2d at 101. It plainly is no more than a relative charge based upon Dr. Offit's evident viewpoint (avowedly antithetical to Ms. Fisher's) and thus could not reasonably be interpreted as stating actual facts.

5. Viewed in context, the quoted remark "she lies" is not capable of being proven true or false.

Moreover, in the context of the *Wired* article, the statement "she lies" lacks the *provably false* content that is required to support a defamation action. Not only does plaintiff's claim of the statement's falsity invite an open-ended inquiry into Ms. Fisher's veracity, but it also threatens to ensnare the Court in the thorny and extremely contentious debate over the perceived risks of certain vaccines, their theoretical association with particular diseases or syndromes, and, at bottom, which side of this debate has "truth" on their side. That is hardly the sort of issue that would be subject to verification based upon a "core of objective evidence." *See Milkovich*, 497 U.S. at 21.

Indeed, the same prospect of litigation over unresolved – and perhaps unresolvable – scientific arguments was among the reasons that the accusations of lying in *Faltas* were deemed to be nonactionable. *See* 928 F. Supp. at 649 ("[T]he underlying issue was not one easily susceptible (if at all) to 'proof' one way or the other."). Courts have a justifiable reticence about venturing into the thicket of scientific debate, especially in the defamation context. *See Dilworth*

v. Dudley, 75 F.3d 307, 310-11 (7th Cir. 1996) ("[J]udges are not well equipped to resolve academic controversies . . . and scholars have their own remedies for unfair criticisms of their work – the publication of a rebuttal. . . . [W]here one scholar calls another a 'crank' for having taken a position that the first scholar considers patently wrongheaded, the second does not have a remedy in defamation."); *Klein v. Victor*, 903 F. Supp. 1327, 1334 (E.D. Mo. 1995) (dismissing libel claim against book publisher and author in part because "[w]hat one social scientist considers to be 'pseudo-scientific' another could consider legitimate, but, in the context used here, neither can be tested or proven").[11]

Ms. Fisher may wish to defend in Court the credibility of her conclusions about the dangers of vaccines, the validity of the evidence she offers in support of those theories, and the policy choices that flow from those views – as well as her own credibility for having advanced those positions. These, however, are academic questions that are not the sort of thing that courts or juries resolve in the context of a defamation action. Rather, an actual statement of fact that is capable of being proven true or false is required as a matter of law. In this context, plaintiff has not alleged such a statement and has therefore failed to state a claim upon which relief may be granted. Accordingly, her Complaint must be dismissed.

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[11] *See also Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) ("Scientific controversies must be settled by the methods of science rather than by the methods of litigation. More papers, more discussion, better data, and more satisfactory models – not larger awards of damages – mark the path toward superior understanding of the world around us.") (citation omitted); *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 326 (S.D.N.Y. 2006) ("Courts cannot inquire into the validity of scientific works, for '[a]ny unnecessary intervention by the courts in the complex debate and interplay among the scientists that comprises modern science can only distort and confuse.'") (citations omitted), *aff'd*, 279 Fed. App'x 40 (2d Cir. 2008); *Auvil v. CBS 60 Minutes*, 836 F. Supp. 740, 742 (E.D. Wash. 1993) (finding for defendant in disparagement action arising out of broadcast about use of Alar, a possible carcinogen, on apples, because scientific "evidence was ambiguous" and plaintiffs could not meet their burden of proving falsity) (citation omitted), *aff'd*, 67 F.3d 816 (9th Cir. 1995).

B. The Court Lacks Personal Jurisdiction Over Ms. Wallace.

The Complaint should be dismissed as to Ms. Wallace for the further reason that the Court lacks personal jurisdiction over her. In a diversity action such as this, a federal court may exercise jurisdiction over a defendant only insofar as authorized by the law of the state in which the court sits, as limited by the constitutional requirements of due process. *See New Wellington Fin. Corp. v. Flagship Resort Dev. Corp.*, 416 F.3d 290, 294 (4th Cir. 2005) ("Because federal courts exercise personal jurisdiction in the manner provided by state law, we first decide whether Virginia state law authorizes jurisdiction over the defendant; if so, we then must determine whether exercise of such jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment."). *See also, e.g.*, *Young v. New Haven Advocate*, 315 F.3d 256, 261 (4th Cir. 2002).

Thus, a due process "minimum contacts" inquiry is unnecessary unless the Court first finds that the requirements of the Virginia's long-arm statute have been met. *See New Wellington Fin. Corp.*, 416 F.3d at 294 n.6; *see also Blue Ridge Bank v. Veribanc, Inc.*, 755 F.2d 371, 373 (4th Cir. 1985) ("'[I]nsistence that th[e] particulars [of the long-arm statute] be satisfied even in those situations where it could plausibly be argued that a lesser standard would meet due process requirements is a course mandated by legislative judgment.'") (citation omitted); *DeSantis v. Hafner Creations, Inc.*, 949 F. Supp. 419, 423 (E.D. Va. 1996) ("[A] non-resident defendant's contacts with Virginia could fulfill the dictates of due process, yet escape the literal grasp of Virginia's long-arm statute."). *Accord Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 205 (1st Cir. 1994) (observing that personal jurisdiction challenge in defamation action "might more appropriately be dispatched on th[e] basis" of state long-arm statute, rather than on constitutional grounds).

If the plaintiff cannot establish that an out-of-state defendant's conduct meets the jurisdictional prerequisites, the action must be dismissed as to that defendant. *See New Wellington Fin. Corp.*, 416 F.3d at 294. The fact that a court has personal jurisdiction over a publisher, here CNP, does not create jurisdiction over its freelance reporter, Ms. Wallace; rather, jurisdiction over the reporter must be assessed separately. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("Each defendant's contacts with the forum State must be assessed individually."); *Bochan v. La Fontaine*, 68 F. Supp. 2d 692, 699 n.25 (E.D. Va. 1999) ("A publisher's contacts must be evaluated separately from an author's contacts; jurisdiction does not necessarily exist over an author even where it does exist over a publisher.").

In this case, jurisdiction is untenable under both Virginia law and the Due Process Clause. As an initial matter, plaintiff acknowledges that the only prong of Virginia's long-arm statute potentially relevant in the present circumstances is the provision that authorizes a court to exercise personal jurisdiction over a person

> as to a cause of action arising from the person's . . . [c]ausing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth.

VA. CODE § 8.01-328.1(A)(4); *see* Compl. ¶ 8 ("This Court has personal jurisdiction over Defendants under Va. Code § 8.01-328.1(A)(4)."). The exercise of jurisdiction under this statute "has two requirements: (1) a tortious injury in Virginia caused by an act or omission outside of Virginia; and (2) a relationship between the defendant and the Commonwealth which exists in any one of three ways which are specified in § (4)." *Blue Ridge Bank*, 755 F.2d at 373.

Even assuming *arguendo* that the first statutory requirement is satisfied,[12] plaintiff cannot establish the requisite relationship between Ms. Wallace and Virginia that the second prong of Section 8.01-328.1(A)(4) requires. As reflected in the declaration by Ms. Wallace filed contemporaneously herewith ("Wallace Decl."), she has no such regular, persistent, or ongoing connections with Virginia. Ms. Wallace, a California resident for the past twenty-one years, has never lived or worked in Virginia, Wallace Decl. at ¶¶ 2-3; she does not own real estate or hold tangible or intangible personal property situated in Virginia, *id.* at ¶ 3; she does not do business in Virginia, *id.*; and none of her income is derived from business conducted in the Commonwealth, *id.* Moreover, Ms. Wallace wrote the Article at issue in this action in California for a national magazine that maintains its editorial operations in California, and none of Ms. Wallace's reporting and writing was done in Virginia. *Id.* at ¶ 5-6.

Indeed, Ms. Wallace's only contacts with Virginia during the entire time she was reporting and writing the challenged article – and, in fact, the only such contacts with the Commonwealth that she can recall at any time in the past twenty-five years (aside from passing through Reagan National Airport or Dulles Airport while en route elsewhere) – involved two emails and one telephone conversation with Ms. Fisher, who lives and works in Northern Virginia. *Id.* at ¶¶ 4-7. Although Ms. Fisher is quoted briefly in the article, none of those statements was made in Virginia; rather, the comments by plaintiff that were included in the article were made at an autism conference held in Chicago, Illinois. *Id.* at ¶ 6. As discussed *supra*, Ms. Fisher was not the focus of the article, which was a profile of a Pennsylvania doctor and his role in a nationwide controversy in which Ms. Fisher, among numerous others, has participated.

[12] For the reasons stated *supra*, the Magazine Defendants dispute that plaintiff sustained any tortious injury.

On these facts, it cannot be found that Ms. Wallace "regularly does or solicits business" in Virginia, that she "engages in any other persistent course of conduct" here, or that she "derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth." *See* VA. CODE § 8.01-328.1(A)(4). By comparison, in *DeSantis* this Court found jurisdiction lacking where the defendant, an alleged patent infringer, had far more (and more frequent) contacts with the Commonwealth than Ms. Wallace does here – namely, shipping "three products [worth about $300] to Virginia residents over the course of the [prior] twelve months," purchasing "national advertisements" in a publication circulated in Virginia on two or three occasions, and "distribut[ing] . . . an undetermined number of free color catalogues" in the state. 949 F. Supp. at 426. The Court found these contacts to be "at best, sporadic" and plainly insufficient to satisfy any of the relationship requirements of Section 8.01-328.1(A)(4). *Id.* at 426-27. In particular, it found that "the placement of a national advertisement, even if repeated, does not constitute a 'persistent course of conduct'" because it did not constitute an "'ongoing interaction with the forum state.'" *Id.* at 426 (citation omitted).

Interpreting an identical provision of the District of Columbia long-arm statute in a libel action against a magazine publisher and a freelance reporter, the D.C. Circuit found jurisdiction over the reporter to be lacking because "writing an article for a publication that is circulated throughout the nation, including the District, hardly constitutes doing or soliciting business, or engaging in a persistent course of conduct, within the District." *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1300 (D.C. Cir. 1996) (citing *Keeton*, 465 U.S. at 781 n.13). Indeed, the reporter in that case, Craig Unger, had even twice written articles for D.C.-based publications (*The Washington Post* and *The New Republic*) – unlike Ms. Wallace, who has never written for a Virginia-based publication – yet the court still found no basis for jurisdiction over Mr. Unger

under the D.C. analogue to Section 8.01-328.1(A)(4). *Id.* at 1301 ("If 'regularly' and 'persistent' are to have any meaning, sale of two articles to District-based publications over a career in journalism cannot amount to 'regularly' doing business or to a 'persistent' course of conduct."). *See also Barry v. Whalen*, 796 F. Supp. 885, 890 (E.D. Va. 1992) ("non-resident defendants . . . [were] not properly before the Court" where there was no evidence they had "conducted business in Virginia, engaged in a persistent course of conduct involving Virginia, or derived substantial revenue from business carried on in Virginia," as required by Section 8.01-328.1(A)(4)). Simply put, plaintiff in this case cannot get past the jurisdictional threshold established by the Virginia legislature with respect to Ms. Wallace, and dismissal is warranted.

In any event, it is evident that Ms. Wallace's contacts with Virginia also are insufficient to meet even the minimums necessary to comport with the Due Process Clause. For instance, in *Barry*, the Court found that two defendants lacked sufficient contacts with Virginia to support personal jurisdiction even though the alleged causes of action arose from their participation in telephone interviews with a newspaper regarding an inmate in a Virginia prison, knowing that their comments would be published in Virginia. *Id.* The Court concluded that "[m]inuscule contacts such as telephone conversations, telex messages, and letters . . . [were] insufficient to form a basis for *in personam* jurisdiction" as a matter of constitutional law. *Id. See, e.g.*, *Young*, 315 F.3d at 263-64 (Connecticut reporters' authorship of allegedly libelous articles posted by publisher on Internet site was not undertaken with manifest intent of targeting readers in Virginia and plaintiff therefore failed to establish sufficient minimum contacts with Virginia); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997) ("Although the place that the plaintiff feels the alleged injury is plainly relevant to the inquiry, it must ultimately be accompanied by the defendant's own contacts with the state if jurisdiction over the defendant is

to be upheld."); *cf. Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (finding no due process violation where California court exercised personal jurisdiction over Florida-based tabloid reporter and editor in defamation action brought by California actress, given that article's focus was on her to such a degree that journalists' "actions were *expressly aimed* at California" and journalists knew actress would feel any injury "in the State in which she lives and works and in which the[ir newspaper] has its largest circulation") (emphasis added).

For these additional reasons, the complaint against Ms. Wallace should be dismissed for lack of personal jurisdiction.

CONCLUSION

For the foregoing reasons, the Magazine Defendants respectfully request that the Court dismiss plaintiff's Complaint as to them with prejudice.

Dated: January 22, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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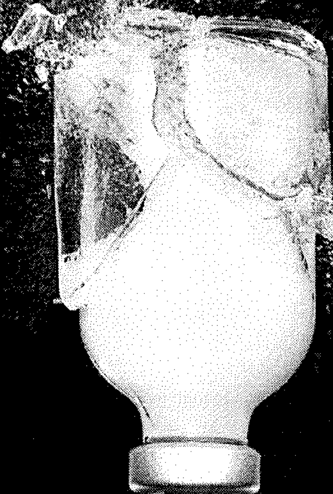
Exhibit 1

An Epidemic of Fear

One man's battle against the anti-vaccine movement. by Amy Wallace

PHOTOGRAPH BY ANDREW ZUCKERMAN



1 2 9

To hear his enemies talk,

you might think Paul Offit is the most hated man in America. A pediatrician in Philadelphia, he is the coinventor of a rotavirus vaccine that could save tens of thousands of lives every year. Yet environmental activist Robert F. Kennedy Jr. slams Offit as a "biostitute" who whores for the pharmaceutical industry. Actor Jim Carrey calls him a profiteer and distills the doctor's attitude toward childhood vaccination down to this chilling mantra: "Grab 'em and stab 'em." Recently, Carrey and his girlfriend, Jenny McCarthy, went on CNN's *Larry King Live* and singled out Offit's vaccine, RotaTeq, as one of many unnecessary vaccines, all administered, they said, for just one reason: "Greed." ¶ Thousands of people revile Offit publicly at rallies, on Web sites, and in books. Type *pauloffit.com* into your browser and you'll find not Offit's official site but an anti-Offit screed "dedicated to exposing the truth about the vaccine industry's most well-paid spokesperson." Go to Wikipedia to read his bio and, as often as not, someone will have tampered with the page. The section on Offit's education was once altered to say that he'd studied on a pig farm in Toad Suck, Arkansas. (He's a graduate of Tufts University and the University of Maryland School of Medicine). ¶ Then there are the threats. Offit once got an email from a Seattle man that read, "I will hang you by your neck until you are dead!" Other bracing messages include "You have blood on your hands" and "Your day of reckoning will come." A few years ago, a man on the phone ominously told Offit he knew where the doctor's two children went to school. At a meeting of the Centers for Disease Control and Prevention, an anti-vaccine protester emerged from a crowd of people holding signs that featured Offit's face emblazoned with the word TERRORIST and grabbed the unsuspecting, 6-foot-tall physician by the jacket. ¶ "I don't think he wanted to hurt me," Offit recalls. "He was just excited to be close to the personification of such evil." Still, whenever Offit gets a letter with an unfamiliar return address, he holds the envelope at arm's length before gingerly tearing it open. "I think about it," he admits. "Anthrax."

So what has this award-winning 58-year-old scientist done to elicit such venom? He boldly states—in speeches, in journal articles, and in his 2008 book *Autism's False Prophets*—that vaccines do not cause autism or autoimmune disease or any of the other chronic conditions that have been blamed on them. He supports this assertion with meticulous evidence. And he calls to account those who promote bogus treatments for autism—treatments that he says not only don't work but often cause harm.

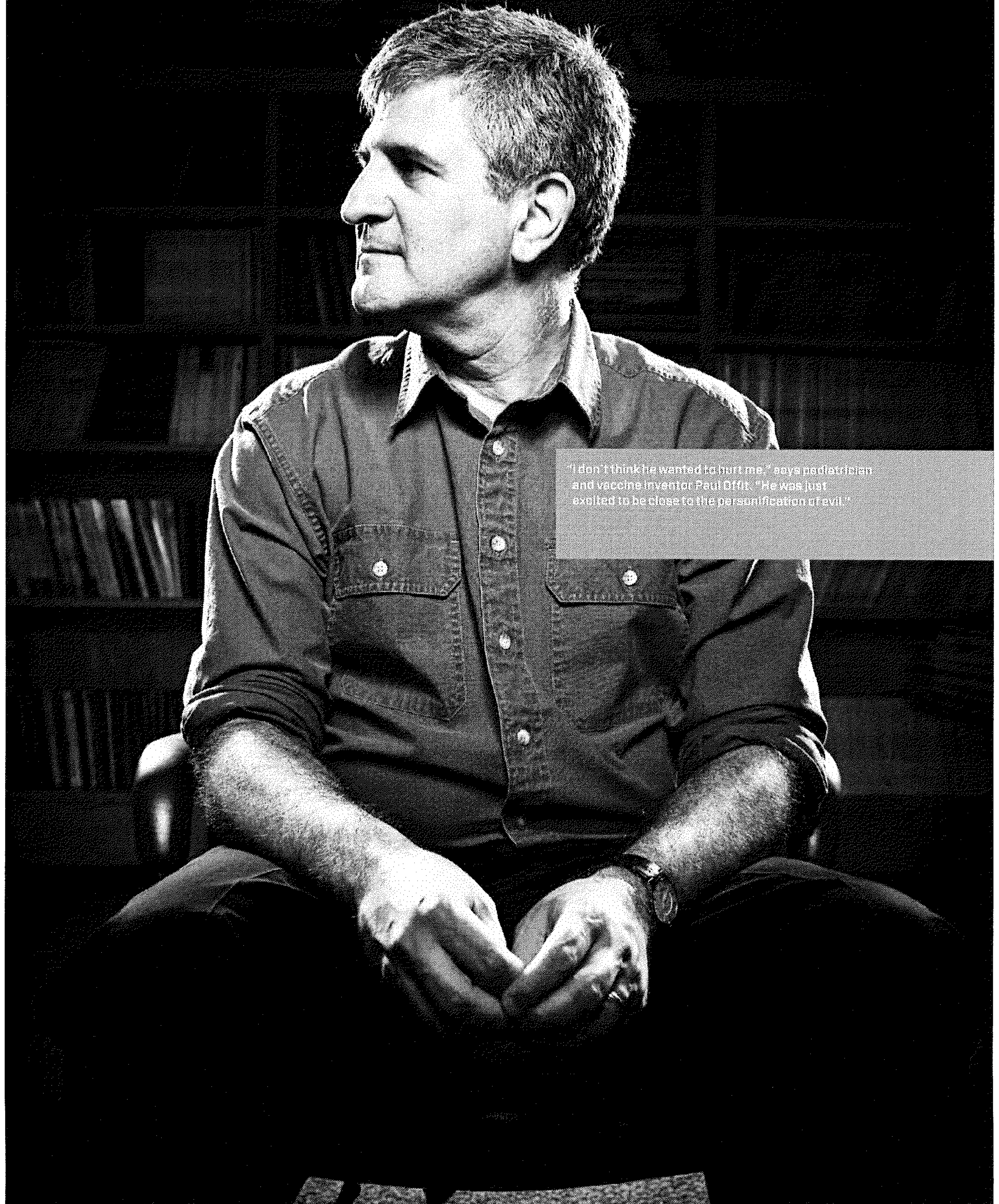
As a result, Offit has become the main target of a grassroots movement that opposes the systematic vaccination of children and the laws that require it. McCarthy, an actress and a former *Playboy* centerfold whose son has been diagnosed with autism, is the best-known leader of the movement, but she is joined by legions of well-organized supporters and sympathizers.

This isn't a religious dispute, like the debate over creationism and intelligent design. It's a challenge to traditional science that crosses party, class, and religious lines. It is partly a reaction to Big Pharma's blunders and PR missteps, from Vioxx to illegal marketing ploys, which have encouraged a distrust of experts. It is also, ironically, a product of the era of instant communication and easy access to information. The doubters and deniers are empowered by the Internet (online, nobody knows you're not a doctor) and helped by the mainstream media, which has an interest in pumping up bad science to create a "debate" where there should be none.

In the center of the fray is Paul Offit. "People describe me as a vaccine advocate," he says. "I see myself as a science advocate." But in this battle—and make no mistake, he says, it's a pitched and heated battle—"science alone isn't enough ... People are getting hurt. The parent who reads what Jenny McCarthy says and thinks, 'Well, maybe I shouldn't get this vaccine,' and their child dies of Hib meningitis," he says, shaking his head. "It's such a fundamental failure on our part that we haven't convinced that parent."

Consider: In certain parts of the US, vaccination rates have dropped so low that occurrences of some children's diseases are approaching pre-vaccine levels for the first time ever. And the number of people who choose not to vaccinate their children (so-called philosophical exemptions are available in about 20 states, including Pennsylvania, Texas, and much of the West) continues to rise. In states where such opting out is allowed, 2.6 percent of parents did so last year, up from 1 percent in 1991,

PHOTOGRAPH BY Peter Yang



"I don't think he wanted to hurt me," says pediatrician and vaccine inventor Paul Offit. "He was just excited to be close to the personification of evil."

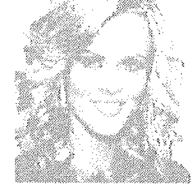
The Misinformants

according to the CDC. In some communities, like California's affluent Marin County, just north of San Francisco, non-vaccination rates are approaching 6 percent (counterintuitively, higher rates of non-vaccination often correspond with higher levels of education and wealth).

That may not sound like much, but a recent study by the *Los Angeles Times* indicates that the impact can be devastating. The *Times* found that even though only about 2 percent of California's kindergartners are unvaccinated (10,000 kids, or about twice the number as in 1997), they tend to be clustered, disproportionately increasing the risk of an outbreak of such largely eradicated diseases as measles, mumps, and pertussis (whooping cough). The clustering means almost 10 percent of elementary schools statewide may already be at risk.

In May, *The New England Journal of Medicine* laid the blame for clusters of disease outbreaks throughout the US squarely at the feet of declining vaccination rates, while nonprofit health care provider Kaiser Permanente reported that unvaccinated children were 23 times more likely to get pertussis, a highly contagious bacterial disease that causes violent coughing and is potentially lethal to infants. In the June issue of the journal *Pediatrics*, Jason Glanz, an epidemiologist at Kaiser's Institute for Health Research, revealed that the number of reported pertussis cases jumped from 1,000 in 1976 to 26,000 in 2004. A disease that vaccines made rare, in other words, is making a comeback. "This study helps dispel one of the commonly held beliefs among vaccine-refusing parents: that their children are not at risk for vaccine-preventable diseases," Glanz says.

"I used to say that the tide would turn when children started to die. Well, children have started to die," Offit says, frowning as he ticks off recent fatal cases of meningitis in unvaccinated children in Pennsylvania and Minnesota. "So now I've changed it to 'when *enough* children start to die.' Because obviously, we're not there yet."



Jenny McCarthy

"Many people ask me if I had to do it all over again with a new baby, would I vaccinate? The answer is no. Hell no. Most parents who know they have a vaccine-injured child usually are that adamant about it."

"I USED TO SAY THAT THE TIDE WOULD TURN WHEN CHILDREN STARTED TO DIE. Well, children have started to die."

The rejection of hard-won knowledge is by no means a new phenomenon. In 1905, French mathematician and scientist Henri Poincaré said that the willingness to embrace pseudo-science flourished because people "know how cruel the truth often is, and we wonder whether illusion is not more consoling." Decades later, the astronomer Carl Sagan reached a similar conclusion: Science loses ground to pseudo-science because the latter seems to offer more comfort. "A great many of these belief systems address real human needs that are not being met by our society," Sagan wrote of certain Americans' embrace of reincarnation, channeling, and extraterrestrials. "There are unsatisfied medical needs, spiritual needs, and needs for communion with the rest of the human community."

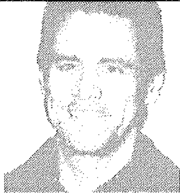
Looking back over human history, *rationality* has been the anomaly. Being rational takes work, education, and a sober determination to avoid making hasty inferences, even when they appear to make perfect sense. Much like infectious diseases themselves—beaten back by decades of effort to vaccinate the populace—the irrational lingers just below the surface, waiting for us to let down our guard.

Before smallpox was eradicated with a vaccine, it killed an estimated 500 million people. And just 60 years ago, polio paralyzed 16,000 Americans every year, while rubella caused birth defects and mental retardation in as many as 20,000 newborns. Measles infected 4 million children, killing 3,000 annually, and a bacterium called *Haemophilus influenzae* type b caused Hib meningitis in more than 15,000 children, leaving many with permanent brain damage. Infant mortality and abbreviated life spans—now regarded as a third world problem—were a first world reality.

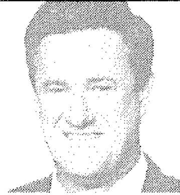
Today, because the looming risk of childhood death is out of sight, it is also largely out of mind, leading a growing number of Americans to worry about what is in fact a much lesser risk: the ill effects of vaccines. If your newborn gets pertussis, for example, there is a 1 percent chance that the baby will die of pulmonary hypertension or other complications. The risk of dying from the pertussis vaccine, by contrast, is practically nonexistent—in fact, no study has linked DTaP (the three-in-one immunization that protects against diphtheria, tetanus, and pertussis) to death in children. Nobody in the pro-vaccine camp asserts that vaccines are risk-free, but the risks are minute in comparison to the alternative.

Still, despite peer-reviewed evidence, many parents ignore the math and agonize about whether to vaccinate. Why? For starters, the human brain has a natural tendency to pattern-match—to ignore the old dictum "correlation does not imply causation" and stubbornly persist in associating proximate phenomena. If two things coexist, the brain often tells us, they must be related. Some parents of autistic children noticed that their child's condition began to appear

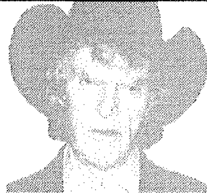
Prominent voices in the anti-vaccine crusade.



Jim Carrey
"With many states like Minnesota now reporting one in 80 children affected with autism, can we afford to trust those who serve two masters or their logic that tells us 'one size fits all' when it comes to vaccines?"

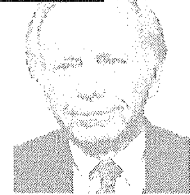


Joe Scarborough
"I can't prove it, but intuitively, you look at the spike [in autism], you look at thimerosal, there is no doubt in my mind ... we're gonna find out that thimerosal causes, in my opinion, autism."



Don Imus
"As everybody on the planet knows, thimerosal is a neurotoxin. Injecting it at the levels they do and used to do, and still do, by the way, into the bloodstreams of infants must do something."

Robert F. Kennedy Jr.
"It's time for the CDC to come clean with the American public. Its tactics of deception and obfuscation are jeopardizing the credibility of the entire vaccine program and posing an enormous danger to public health."



Joe Lieberman
"Parents still have to be very careful in the application of vaccines to their kids. That's what I've asked my kids to do with my grandkids."

shortly after a vaccination. The conclusion: "The vaccine must have caused the autism." Sounds reasonable, even though, as many scientists have noted, it has long been known that autism and other neurological impairments often become evident at or around the age of 18 to 24 months, which just happens to be the same time children receive multiple vaccinations. Correlation, perhaps. But not causation, as studies have shown.

And if you need a new factoid to support your belief system, it has never been easier to find one. The Internet offers a treasure trove of undifferentiated information, data, research, speculation, half-truths, anecdotes, and conjecture about health and medicine. It is also a democratizing force that tends to undermine authority, cut out the middleman, and empower individuals. In a world where anyone can attend what McCarthy calls the "University of Google," boning up on immunology before getting your child vaccinated seems like good, responsible parenting. Thanks to the Internet, everyone can be their own medical investigator.

There are anti-vaccine Web sites, Facebook groups, email alerts, and lobbying organizations. Politicians ignore the movement at their peril, and, unlike in the debates over creationism and global warming, Democrats have proved just as likely as Republicans to share misinformation and fuel anxiety.

US senators John Kerry of Massachusetts and Chris Dodd of Connecticut have both curried favor with constituents by trumpeting the notion that vaccines cause autism. And Robert F. Kennedy Jr., a scion of the most famous Democratic family of all, authored a deeply flawed 2005 *Rolling Stone* piece called "Deadly Immunity." In it, he accused the government of protecting drug companies from litigation by concealing evidence that mercury in vaccines may have caused autism in thousands of kids. The article was roundly discredited for, among other things, overestimating the amount of mercury in childhood vaccines by more than 100-fold, causing *Rolling Stone* to issue not one but a prolonged series of corrections and clarifications. But that did little to unring the bell.

The bottom line: Pseudo-science preys on well-intentioned people who, motivated by love for their kids, become vulnerable to one of the world's oldest professions. Enter the snake-oil salesman.

When a child is ill, parents will do anything to make it right. If you doubt that, just spend a day or two at the annual conference of the nonprofit organization Autism One, a group built around the conviction that autism is caused by vaccines. It shares its agenda with other advocacy groups like the National Autism Association, the Coalition for SafeMinds, and McCarthy's Generation Rescue. All these organizations cite similar anecdotes—children who appear to shut down and exhibit signs of autistic behavior immediately after being vaccinated—as proof. Autism One, like others, also points to rising rates of autism—what many parents call an epidemic—as evidence that vaccines are to blame. Finally, Autism One asserts that the condition is preventable and treatable, and that it is the toxins in vaccines and the sheer number of childhood vaccines (the CDC recommends 10 vaccines, in 26 doses, by the age of 2—up from four vaccines in 1983) that combine to cause disease in certain sensitive children.

Their rhetoric often undergoes subtle shifts, especially when the scientific evidence becomes too overwhelming on one front or another. After all, saying you're against *all* vaccines does start to sound crazy, even to a parent in distress over a child's autism. Until recently,

How to Win an Argument About Vaccines
The anti-immunization crowd clings to well-worn myths. Arm yourself with facts.

1 MYTH: Vaccines cause autism.
FACT: Until 2001, vaccines included thimerosal, a preservative containing ethylmercury. Mercury, of course, can cause neurological damage. But there's scientific consensus that the amount once used in vaccines—around 50 micrograms per 0.5-ml dose—was far short of toxic. And autism rates have continued to climb, suggesting that there's either a different cause or, more likely, that a better understanding of the condition has increased diagnoses. A comprehensive review of the research, conducted in 2004 by the prestigious Institute of Medicine, found no evidence of a connection between vaccines and autism. None.

2 MYTH: Giving too many vaccines overwhelms a child's immune system. FACT: This argument echoes the "too much of a good thing" chestnut, but there's no science behind it. With millions of vaccines administered every year, a handful of allergic reactions do happen. But severe cases are so rare that the CDC cannot calculate a statistical risk for the population—the numbers are just too small.

3 MYTH: Vaccines cause diabetes.
FACT: This idea relies on the flawed work of one doctor, who gathered data on a slew of vaccines and failed to follow standard study protocols. No other study—including those using the same data—could reproduce the results. The CDC and the Institute of Medicine have both dismissed any possible link. This argument also ignores the obvious and well-established fact that diabetes rates in children are climbing because obesity rates are climbing.

4 MYTH: Vaccines are no longer necessary, because the diseases are no longer a threat. FACT: The opposite is true. Because of vaccines, diseases that once killed millions are now invisible. But if only a few families stop vaccinating, the illnesses could reemerge in a community. And the diseases are horrible—mumps and *Haemophilus influenzae* type b cause meningitis, which can lead to deafness, epilepsy, and cognitive impairment. Measles can lead to encephalitis, blindness, and death.

5 MYTH: Scientists are divided about the safety of vaccines.
FACT: By any measure of scientific consensus, there is total agreement: Vaccines are safe, effective, and necessary. Twelve studies have shown that the measles/mumps/rubella vaccine is safe. Many other studies have disproved the theory that the Hib shot is toxic. The few dissenters get lots of attention, but it's always the same old names.

6 MYTH: Aluminum in vaccines is just as toxic as mercury.
FACT: Aluminum, the most common metal in nature, is perfectly safe in small amounts. (A dose of antacid has about 1,000 times as much as a vaccine does.) Aluminum salts are used in vaccines to increase antibody response. They make it possible to use less vaccine less often.
—Erin Biba

Autism One's Web site flatly blamed "too many vaccines given too soon." Lately, the language has gotten more vague, citing "environmental triggers."

But the underlying argument has not changed: Vaccines harm America's children, and doctors like Paul Offit are paid shills of the drug industry.

To be clear, there is no credible evidence to indicate that any of this is true. None. Twelve epidemiological studies have found no data that links the MMR (measles/mumps/rubella) vaccine to autism; six studies have found no trace of an association between thimerosal (a preservative containing ethylmercury that was used in vaccines until 2001) and autism, and three other studies have found no indication that thimerosal causes even subtle neurological problems. The so-called epidemic, researchers assert, is the result of improved diagnosis, which has identified as autistic many kids who once might have been labeled mentally retarded or just plain slow. In fact, the growing body of science indicates that the autistic spectrum—which may well turn out to encompass several discrete conditions—may largely be genetic in origin. In April, the journal *Nature* published two studies that analyzed the genes of almost 10,000 people and identified a common genetic variant present in approximately 65 percent of autistic children.

But that hasn't stopped as many as one in four Americans from believing vaccines can poison kids, according to a 2008 survey. And outreach by grassroots organizations like Autism One is a big reason why.

At this year's Autism One conference in Chicago, I flashed more than once on Carl Sagan's idea of the power of an "unsatisfied medical need." Because a massive research effort has yet to reveal the precise causes of autism, pseudo-science has stepped aggressively into the void. In the hallways of the Westin O'Hare hotel, helpful salespeople strove to catch my eye as I walked past a long line of booths pitching everything from vitamins and supplements to gluten-free cookies (some believe a gluten-free diet alleviates the symptoms of autism), hyperbaric chambers, and neuro-feedback machines.

To a one, the speakers told parents not to despair. Vitamin D would help, said one doctor and supplement salesman who projected the equation NO VACCINES + MORE VITAMIN D = NO AUTISM onto a huge screen during his presentation. (If only it were that simple.) Others talked of the powers of enzymes, enemas, infrared saunas, glutathione drips, chelation therapy (the controversial—and risky—administration of certain chemicals that leech metals from the body), and Lupron (a medicine that shuts down testosterone synthesis).

Offit calls this stuff, much of which is unproven, ineffectual, or downright dangerous, "a cottage industry of false hope." He didn't attend the Autism One conference, though his name was frequently invoked. A California woman with an 11-year-old autistic son told me, aghast, that she'd personally heard Offit say you could safely give a child 10,000

vaccines (in fact, the number he came up with was *100,000*—more on that later). A mom from Arizona, who introduced me to her 10-year-old "recovered" autistic son—a bright, blue-eyed, towheaded boy who hit his head on walls, she said, before he started getting B-12 injections—told me that she'd read Offit had made $50 million from the RotaTeq vaccine. In her view, he was in the pocket of Big Pharma.

The central message at these conferences boils down to this: "The medical establishment doesn't care, but we do." Every vendor I talked to echoed this theme. And every parent expressed a frustrated, even desperate belief that no one in traditional science gives a hoot about easing their pain or addressing their theories—based on day-to-day parental experience—about autism's causes.

Actually, scientists *have* chased down some of these theories. In August, for example, *Pediatrics* published an investigation of a popular hypothesis that children with autism have a higher incidence of gastrointestinal problems, which some allege are caused by injected viruses traveling to the intestines. Jenny McCarthy's foundation posits that autism stems from these bacteria, as well as heavy metals and live viruses present in some vaccines. Healing your child, therefore, is a matter of clearing out the "environmental toxins" with, among other things, special diets. The *Pediatrics* paper found that while autistic kids suffered more from constipation, the cause was likely behavioral, not organic; there was no significant association between autism and GI symptoms. Moreover, gluten- and dairy-free diets did not appear to improve autism and sometimes caused nutritional deficiencies.

But researchers, alas, can't respond with the same forceful certainty that the doubters are able to deploy—not if they're going to follow the rules of science. Those tenets allow them to claim only that there is no evidence of a link between autism and vaccines. But that phrasing—what sounds like equivocation—is just enough to allow doubts to not only remain but to fester. Meanwhile, in the eight years since thimerosal was removed from vaccines (a public relations mistake, in Offit's view, because it seemed to indicate to the public that thimerosal *was* toxic), the incidences of autism continue to rise.

In the wake of the latest thimerosal studies, most of the anti-vaccination crowd—even Autism One, despite the ever-changing rhetoric on its Web site—has shifted their aim away from any particular vaccine to a broader, fuzzier target: the sheer number of vaccines that are recommended. It sounds, after all, like common sense. There must be something risky about giving too many vaccines to very young children in too short a time. Opponents argue that for some children the current vaccine schedule creates a "toxic overload."

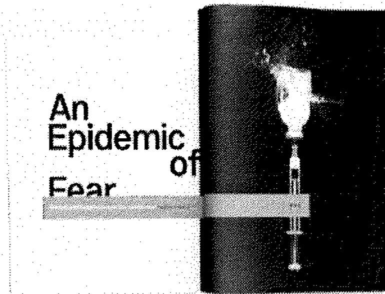
"I'm not anti-vaccine," McCarthy says. "I'm anti-toxin." She stops just short of calling for an outright ban. McCarthy delivered the keynote address at the Autism One conference this year, just as she had in 2008. She drew a standing-room-only crowd, many of whom know her not from her acting but from her frequent appearances on TV talk shows, Oprah Winfrey's Web site, and Twitter (@JennyfromMTV). McCarthy has authored two best-selling books on "healing" autism and is on the board of the advocacy group Generation Rescue (motto: "Autism is reversible"). With her stream-of-consciousness rants ("Too many toxins in the body cause neurological problems—look at Ozzy Osbourne, for Christ's sake!") and celebrity allure, she is the anti-vaccine movement's most popular pitchman and prettiest face.

Barbara Loe Fisher, by contrast, is indisputably the movement's brain. Fisher is the cofounder and president of the National Vaccine Information Center in Vienna, Virginia, the largest, oldest, and most influential of the watchdog groups that oppose universal vaccination. At the Autism One conference, Fisher took the podium with characteristic flair. As she often does, Fisher began with the story of her son Chris, who she believes was damaged by vaccines at the age of two and a half. A short film featuring devastating images of sick kids—some of them seemingly palsied, others with tremors, others catatonic—drove the point home. The film, accompanied by Bryan Adams' plaintive song "(Everything I Do) I Do It For You," ended with this message emblazoned on the screen: "All the children in this video were injured or killed by mandatory vaccinations."

Against this backdrop, Fisher, a skilled debater who often faces down articulate, well-informed scientists on live TV, mentioned Offit frequently. She called him the leading "pro-forced-vaccination proponent" and cast him as a man who walks in lockstep with the pharmaceutical companies and demonizes caring parents. With the likely introduction of a swine flu vaccine later this year, Fisher added, Americans needed to wake up to the "draconian laws" that could force every citizen to either be vaccinated or quarantined. That isn't true—the swine flu vaccine, like other flu vaccines, will be administered on a voluntary basis. But no matter: Fisher's argument turns vaccines from a public health issue into one of personal choice, an unwritten bit of the Bill of Rights.

In her speech, Fisher borrowed from the Bible, George Orwell, and the civil rights movement. "The battle we are waging," she said, "will determine what both health and freedom will look like in America." She closed by quoting the inscription above the door of the Holocaust Memorial Museum in Washington, DC: "The first to perish were the children." And then she brought it home: "If we believe in compassion, if we believe in the future, we will do whatever it takes to give our children back the future that | CONTINUED ON PAGE 165

"THE CHOICE NOT TO GET A VACCINE IS NOT A CHOICE TO TAKE NO RISK. It's just a choice to take a different risk."



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is their birthright." The audience cheered as the words sank in: *Whatever it takes.* "*No* forced vaccination," Fisher concluded. "*Not* in America."

Paul Offit has a slightly nasal voice and a forceful delivery that conspire to make him sound remarkably like Hawkeye Pierce, the cantankerous doctor played by Alan Alda on the TV series *M*A*S*H*. As a young man, Offit was a big fan of the show (though he felt then, and does now, that Hawkeye was "much cooler than me"). Offit is quick-witted, funny, and—despite a generally mild-mannered mien—sometimes so assertive as to seem brash. "Scientists, bound only by reason, are society's true anarchists," he has written—and he clearly sees himself as one. "Kaflooey theories" make him crazy, especially if they catch on. Fisher, who has long been the media's go-to interview for what some in the autism arena call "parents rights," makes him particularly nuts, as in "You just want to scream." The reason? "She lies," he says flatly.

"Barbara Loe Fisher inflames people against me. And wrongly. I'm in this for the same reason she is. I care about kids. Does she think Merck is paying me to speak about vaccines? Is *that* the logic?" he asks, exasperated. (Merck is doing no such thing). But when it comes to mandating vaccinations, Offit says, Fisher is right about him: He is an adamant supporter.

"We have seat belt rules," he says. "Seat belts save lives. There was never a question about that. The data was absolutely clear. But people didn't use them until they were required to use them." Furthermore, the decision not to buckle up endangers only you. "Unless you fly through the window and hit somebody else," he adds. "I believe in mandates. I do."

We are driving north (seat belts on) across Philadelphia in Offit's gray 2009 Toyota Camry, having just completed a full day of rounds at Children's Hospital. Over the past eight hours, Offit has directed a team of six residents and med students as they evaluated more than a dozen children with persistent infections. He pulls into the driveway of the comfy four-bedroom Tudor in the suburbs where his family has lived for the past 13 years. It's a nice enough house, with a leafy green yard and a two-car garage where a second Toyota Camry (this one red, a year older, and belonging to his wife, Bonnie) is already parked. Let's just say that if Offit has indeed made $50 million from RotaTeq, as his critics love to say, he is hiding it well.

Offit acknowledges that he received a payout—"several million dollars, a lot of money"—when his hospital sold its stake in RotaTeq last year for $182 million. He continues to collect a royalty each year. It's a fluke, he says—an unexpected outcome. "I'm not embarrassed about it," he says. "It was the product of a lot of work, although it wasn't why I did the work, nor was it, frankly, the reward for the work."

Similarly, the suggestion that pharmaceutical companies make vaccines hoping to pocket huge profits is ludicrous to Offit. Vaccines, after all, are given once or twice or three times in a lifetime. Diabetes drugs, neurological drugs, Lipitor, Viagra, even Rogaine—stuff that a large number of people use every day—*that's* where the money is.

That's not to say vaccines aren't profitable: RotaTeq costs a little under $4 a dose to make, according to Offit. Merck has sold a total of more than 24 million doses in the US, most for $69.59 a pop—a 17-fold markup. Not bad, but pharmaceutical companies do sell a lot of vaccines at cost to the developing world and in some cases give them away. Merck committed $75 million in 2006 to vaccinate all children born in Nicaragua for three years. In 2008, Merck's revenue from RotaTeq was $665 million. Meanwhile, a blockbuster drug like Pfizer's Lipitor is a $12 billion-a-year business.

To understand exactly why Offit became a scientist, you must go back more than half a century, to 1956. That was when doctors in Offit's hometown of Baltimore operated on one of his legs to correct a club foot, requiring him to spend three weeks recovering in a chronic care facility with 20 other children, all of whom had polio. Parents were allowed to visit just one hour a week, on Sundays. His father, a shirt salesman, came when he could. His mother, who was pregnant with his brother and hospitalized with appendicitis, was unable to visit at all. He was 5 years old. "It was a pretty lonely, isolating experience," Offit says. "But what was even worse was looking at these other children who were just horribly crippled and disfigured by polio." That memory, he says, was the first thing that drove him toward a career in pediatric infectious diseases.

There was something else, too. From an early age, Offit embraced the logic and elegance of the scientific method. Science imbued a chaotic world with an order that he found reassuring.

"What I loved about science was its reason. You have data. You stand back and you discuss the strengths and weaknesses of that data. There's just something very calming about that," he says. "You formulate a hypothesis, you establish burdens of proof, you subject your hypothesis to rigorous testing. You've got 20 pieces of a 1,000-piece puzzle ... It's beautiful, really."

There were no doctors in the Offit family; he decided to become the first. In 1977, when he was an intern at the Children's Hospital of Pittsburgh, he witnessed the second event that would determine his career path: the death of a little girl from a rotavirus infection (there was, as yet, no vaccine). The child's mother had been diligent, calling her pediatrician just a few hours after the girl's fever, vomiting, and diarrhea had begun. Still, by the time the girl was admitted, she was too dehydrated to have an intravenous line inserted. Doctors tried everything to rehydrate her, including sticking a bone marrow needle into her tibia to inject fluids. She died on the table. "I didn't realize it killed children in the United States," Offit says, remembering how the girl's mother, after hearing the terrible news, came into the room and held her daughter's hand. "That girl's image was always in my head."

The third formative moment for Offit came in the late 1980s, when he met Maurice Hilleman, the most brilliant vaccine maker of the 20th century. Hilleman—a notoriously foulmouthed genius who toiled for years in the Philadelphia labs of Merck—invented vaccines to prevent measles, mumps, and rubella (and later came up with the combination of the three, the MMR). He

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created vaccines for hepatitis A and B, Hib, chicken pox, pneumococcus, and meningococcus. He became Offit's mentor; Offit later became Hilleman's biographer.

Offit believes in the power of good storytelling, which is why he writes books, five so far. He dearly wants to pull people into the exciting mysteries that scientists wrestle with every day. He wants us all to understand that vaccines work by introducing a weakened strain of a particular virus into the body—a strain so weak that it cannot make us sick. He wants us to revel in this miracle of inoculation, which causes our immune systems to produce antibodies and develop "memory cells" that mount a defense if we later encounter a live version of that virus.

It's easy to see why Offit felt a special pride when, after 25 years of research and testing, he and two colleagues, Fred Clark and Stanley Plotkin, joined the ranks of the vaccine inventors. In February 2006, RotaTeq was approved for inclusion in the US vaccination schedule. The vaccine for rotavirus, which each year kills about 600,000 children in poor countries and about 40 children in the US, probably saves hundreds of lives a day.

But in certain circles, RotaTeq is no grand accomplishment. Instead, it is offered as Exhibit A in the case against Offit, proving his irredeemable bias and his corrupted point of view. Using this reasoning, of course, Watson and Crick would be unreliable on genetics because the Nobel Prize winners had a vested interest in genetic research. But despite the illogic, the argument has had some success. Consider the CDC's Advisory Committee on Immunization Practices, which reviews new vaccines and administration schedules: Back in the late '90s and early '00s, Offit was a member of the panel, along with experts in infectious diseases, virology, microbiology, and immunology. Now the 15-person panel is made up mostly of state epidemiologists and public-health officials.

That's not by accident. According to science journalist Michael Specter, author of the new book *Denialism: How Irrational Thinking Hinders Scientific Progress, Harms the Planet and Threatens Our Lives*, the controversy surrounding vaccine safety has made lack of expertise a requirement when choosing members of prominent advisory panels on the issue. "It's shocking," Specter says. "We live in a country where it's actually a detriment to be an expert about something." When expertise is diminished to such an extent, irrationality and fear can run amok.

Hence the death threats against Paul Offit. Curt Linderman Sr., the host of "Linderman Live!" on AutismOne Radio and the editor of a blog called the Autism File, recently wrote online that it would "be nice" if Offit "was dead."

I'd met Linderman at Autism One. He'd given his card to me as we stood outside the Westin O'Hare talking about his autistic son. "We live in a very toxic world," he'd told me, puffing on a cigarette.

It was hard to argue with that.

Despite his reputation, Offit has occasionally met a vaccine he doesn't like. In 2002, when he was still a member of the CDC's advisory committee, the Bush administration was lobbying for a program to give the smallpox vaccine to tens of thousands of Americans. Fear of bioterrorism was rampant, and everyone voted in favor—everyone except Offit. The reason: He feared people would die. And he didn't keep quiet about his reservations, making appearances on *60 Minutes II* and *The NewsHour with Jim Lehrer*.

The problem with the vaccine, he said, is that "one in every million people who gets it dies." Moreover, he said, because smallpox is visible when its victims are contagious (it is marked by open sores), outbreaks—if there ever were any—could be quickly contained, and there would be plenty of time to begin vaccinations then. A preventive vaccine, he said, "was a greater risk than the risk of smallpox."

Ah, risk. It is the idea that fuels the anti-vaccine movement—that parents should be allowed to opt out, because it is their right to evaluate risk for their own children. It is also the idea that underlies the CDC's vaccination schedule—that the risk to public health is too great to allow individuals, one by one, to make decisions that will impact their communities. (The concept of herd immunity is key here: It holds that, in diseases passed from person to person, it is more difficult to maintain a chain of infection when large numbers of a population are immune.)

Risk is also the motivating idea in Offit's life. This is a man, after all, who opted to give his own two children—now teenagers—the flu vaccine before it was recommended for their age group. Why? Because the risk of harm if his children got sick was too great. Offit, like everyone else, will do anything to protect his children. And he wants Americans to be fully educated about risk and not hoodwinked into thinking that dropping vaccines keeps their children safe. "The choice not to get a vaccine is *not* a choice to take no risk," he says. "It's just a choice to take a *different* risk, and we need to be better about saying, 'Here's what that different risk looks like.' Dying of Hib meningitis is a horrible, ugly way to die."

Getting the measles is no walk in the park, either—not for you or those who come near you. In 2005, a 17-year-old Indiana girl got infected on a trip to Bucharest, Romania. On the return flight home, she was congested, coughing, and feverish but had no rash. The next day, without realizing she was contagious, she went to a church gathering of 500 people. She was there just a few hours. Of the 500 people present, about 450 had either been vaccinated or had developed a natural immunity. Two people in that group had vaccination failure and got measles. Thirty-two people who had not been vaccinated and therefore had no resistance to measles also got sick. Did the girl encounter each of these people face-to-face in her brief visit to the picnic? No. All you have to do to get the measles is to inhabit the airspace of a contagious person within two hours of them being there.

The frightening implications of this kind of anecdote were illustrated by a 2002 study published in *The Journal of Infectious Diseases*. Looking at 3,292 cases of measles in the Netherlands, the study found that the risk of contracting the disease was lower if you were completely unvaccinated and living in a highly vaccinated community than if you were completely vaccinated and living in a relatively unvaccinated community. Why? Because vaccines don't always take. What does that mean? You can't minimize your individual risk unless your herd, your friends and neighbors, also buy in.

Perceived risk—our changing relationship to it and our increasing intolerance of it—is at the crux of vaccine safety concerns, not to mention related fears of pesticides, genetically modified food, and cloning. Sha-

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ron Kaufman, a medical anthropologist at UC San Francisco, observes that our concept of risk has evolved from an external threat that's out of our control (think: statistical probability of a plane crash) to something that can be managed and controlled if we just make the right decisions (eat less fat and you'll live longer). Improved diagnostic tests, a change in consumer awareness, an aging society determined to stay youthful—all have contributed to the growing perception that risk (of death, illness, accident) is our responsibility to reduce or eliminate. In the old order, risk management was in the hands of your doctor—or God. Under the new dispensation, it's all up to you. What are the odds that your child will be autistic? It's your job to manage them, so get thee to the Internet, and fast.

The thimerosal debacle exacerbated this tendency, particularly when the American Academy of Pediatrics and the Public Health Service issued a poorly worded statement in 1999 that said "current levels of thimerosal will not hurt children, but reducing those levels will make safe vaccines even safer." In other words, there's no scientific evidence whatsoever, but you never know.

"When science came out and said, 'Uh-oh, there may be a risk,' the stage was already set," Kaufman says, noting that many parents felt it was irresponsible *not* to have doubts. "It was Pandora's box."

The result is that science must somehow prove a negative—that vaccines don't cause autism—which is not how science typically works. Edward Jenner invented vaccination in 1796 with his smallpox inoculation; it would be 100 years before science, such as it was, understood *why* the vaccine worked, and it would be even longer before the specific cause of smallpox could be singled out. Until the cause of autism is discovered, scientists can establish only that vaccines are safe—and that threshold has already been met.

The government is still considering funding more research trials to look for a connection between vaccines and autism. To Kaufman, there's some justification for this, given that it may be the only way to address everyone's doubts. But the thimerosal panic suggests that, if bungled, such trials could make a bad situation worse. To scientists like Offit, further studies are also a waste of precious scientific resources, not to mention taxpayers' money. They take funding away from more pressing matters, including the search for autism's real cause.

A while back, Offit was asked to help put together a reference text on vaccines. Specifically, his colleagues wanted him to write a chapter that assessed the capacity of the human immune system. It was a hypothetical exercise: What was the maximum number of vaccines that a person could handle? The point was to arm doctors with information that could reassure parents. Offit set out to determine two factors: how many B cells, which make antibodies, a person has in a milliliter of blood and how many different epitopes, the part of a bacterium or virus that is recognized by the immune system, there are in a vaccine. Then, he came up with a rough estimate: a person could handle 100,000 vaccines—or up to 10,000 vaccines at once. Currently the most vaccines children receive at any one time is five.

He also published his findings in *Pediatrics*. Soon, the number was attached to Offit like a scarlet letter. "The 100,000 number makes me sound like a madman. Because that's the image: 100,000 shots sticking out of you. It's an awful image," Offit says. "Many people—including people who are on my side—have criticized me for that. But I was naive. In that article, I was being asked the question and that *is* the answer to the question."

Still, he hasn't backed off. He feels that scientists have to work harder at winning over the public. "It's our responsibility to stand up for good science. Though it's not what we're trained to do," he says, admitting that his one regret about *Autism's False Prophets* is that it didn't hold scientists accountable for letting fear of criticism render them mute. "Get out there. There's no venue too small. As someone once said, it would be a very quiet forest indeed if the only birds that sang were those that sang best."

So Offit keeps singing. Isn't he afraid of those who wish him harm? "I'm not that brave," he says. "If I really thought my life was at risk or my children's lives were at risk, I wouldn't do it. Not for a second." Maybe, he acknowledges, he's in denial.

Later, I ask his wife the same question. When it comes to her husband's welfare, Bonnie Offit is fiercely protective. A pediatrician with a thriving group practice, she still makes time to monitor the blogosphere. (Her husband refuses to read the attacks.) She wants to believe that if you "keep your finger on the pulse," as she puts it, you can keep your loved ones safe.

Still, she worries. On the day I find myself sitting at her dining room table, every front page in the nation features an article about George Tiller, the abortion doctor gunned down at his church in Wichita, Kansas. When her husband leaves the room, Bonnie brings up the killing. "It upsets me," she says, looking away. "I didn't even tell him that. But it absolutely upsets me."

Her husband, meanwhile, still rises every morning at 4 am and heads to his small, tidy study in a spare bedroom. Every morning, he spends a couple of hours working on what will be his sixth book, a history of the anti-vaccine movement. Offit gets excited when he talks about it.

In 19th-century England, he explains, Jenner's smallpox vaccine was known to be effective. But despite the Compulsory Vaccination Act of 1853, many people still refused to take it, and thousands died unnecessarily. "That was the birth of the anti-vaccine movement," he says, adding that then—as now—those at the forefront "were great at mass marketing. It was a print-oriented society. They were great pamphleteers. And by the 1890s, they had driven immunization rates down to the 20 percent range."

Immediately, smallpox took off again in England and Wales, killing 1,455 in 1893. Ireland and Scotland, by contrast, "didn't have any anti-vaccine movement and had very high immunization rates and very little incidence of smallpox disease and death," he says, taking a breath. "You'd like to think we would learn."

Offit wants the book to be cinematic, visually riveting. He believes, fervently, that if he can hook people with a good, truthful story, maybe they will absorb his hopeful message: The human race has faced down this kind of doubt before.

His battle is, in at least one respect, probably a losing one. There will always be more illogic and confusion than science can fend off. Offit's idea is to inoculate people one by one, until the virus of fear, if not fully erased, at least recedes.

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