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Chad G. Marzen

Michael Conklin

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CORONAVIRUS “CURES” AND THE COURTS

CHAD G. MARZEN*
MICHAEL CONKLIN**

ABSTRACT

The coronavirus pandemic has drastically affected nearly every aspect of American life. Unfortunately, it has also created an opportunity for those willing to exploit vulnerable citizens by selling fake “cures.” This Article analyzes a lawsuit against televangelist Jim Bakker for doing just that. This Article also calls for increased protection for individuals when a global health pandemic and national emergency have been declared. This Article advocates a novel proposal—the enacting of a federal statute making it a felony for an individual to knowingly sell a fraudulent cure for any disease that has been designated a pandemic by the World Health Organization and in which the President of the United States has designated a national emergency.

The following federal criminal statute is proposed:

Whoever, having devised or intending to devise any scheme or artifice to defraud, for the express knowing purpose of obtaining money or property by means of false or fraudulent pretenses, representations, or promises of a cure for a disease designated by the World Health Organization as a global pandemic and designated by the President of the United States as a national emergency pursuant to the provisions of the National Emergencies Act, shall be fined not more than \$2,000,000 or imprisoned not more than 50 years, or both.

This potent statute will help deter individuals such as Jim Bakker from fraudulently selling “cures” during a pandemic crisis. Additionally, it will serve as a preventative measure in limiting the spread of a deadly pandemic disease such as coronavirus.

* Associate Professor of Legal Studies in Business, Florida State University. This author can be reached at cmarzen@fsu.edu.

** Powell Endowed Professor of Business Law, Angelo State University. This author can be reached at mconklin@angelo.edu.

TABLE OF CONTENTS

INTRODUCTION	3
I. THE CORONAVIRUS PANDEMIC	6
<i>A. The Rise of Coronavirus</i>	6
<i>B. Fear of Coronavirus in the United States</i>	8
II. CORONAVIRUS “CURES”	9
<i>A. James Bakker, the “Silver Sol Liquid,” and Other “Cures”</i>	9
<i>B. State of Missouri v. Bakker Lawsuit</i>	12
<i>C. Missouri Merchandising Practices Act</i>	13
<i>D. Jim Bakker’s Potential Liability</i>	15
III. PROPOSED FEDERAL CRIMINAL STATUTE—“CURES” DURING A PANDEMIC AND NATIONAL EMERGENCY	17
<i>A. Vulnerability and Fear During a Pandemic</i>	17
<i>B. Proposed Statute</i>	19
CONCLUSION	22

INTRODUCTION

The coronavirus pandemic has ground much of American life to a standstill. As of this date, thousands of cases have been confirmed in the United States.¹ In response to this still unfolding crisis, curfews have been implemented,² schools throughout the country have closed,³ colleges and universities have moved to online instruction,⁴ restaurants and bars have either closed or transitioned to takeout only,⁵ courts have moved to online hearings,⁶ and even the United States Supreme Court has closed.⁷ A new era of “social distancing” to prevent the spread of the virus has begun.⁸ These

¹ See James Glanz et al., *Coronavirus Could Overwhelm U.S. Without Urgent Action, Estimates Say*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/interactive/2020/03/20/us/coronavirus-model-us-outbreak.html> [<https://perma.cc/V8VA-8VKA>].

² See Ronn Blitzer, *Curfews, Closures and More: What the Government Can and Can't Do in a Health Emergency*, FOX NEWS (Mar. 19, 2020), <https://www.foxnews.com/politics/curfews-closures-and-more-what-the-government-can-and-cant-do-in-a-health-emergency> [<https://perma.cc/Q9WK-B25S>].

³ See Erin Richards, *Trump: States Can Cancel Standardized Tests*, USA TODAY (Mar. 24, 2020, 12:33 PM), <https://www.usatoday.com/story/news/education/2020/03/20/coronavirus-trump-standardized-tests-canceled-school-closing/2885842001/> [<https://perma.cc/WN95-DKSW>].

⁴ See Chris Quintana, *US Colleges Scrambled to React to the Coronavirus Pandemic. Now Their Very Existence is in Jeopardy.*, USA TODAY (Mar. 22, 2020, 9:58 PM), <https://www.usatoday.com/story/news/education/2020/03/20/coronavirus-college-students-online-class-graduation-commencement-refund/2876589001/> [<https://perma.cc/9UME-779P>].

⁵ See Anna Wiederkehr, *Coronavirus is Hitting Restaurants Hard, Even in States that Haven't Shut Them Down*, FIVETHIRTYEIGHT (Mar. 19, 2020, 2:58 PM), <https://fivethirtyeight.com/features/coronavirus-is-hitting-restaurants-hard-even-in-states-that-havent-shut-them-down/> [<https://perma.cc/6S9P-CSFQ>].

⁶ See Bryce Newberry, *Texas Judges Will Be Able to Conduct Court Online as Coronavirus Spreads*, KVUE (Mar. 19, 2020, 10:36 PM), <https://www.kvue.com/article/news/local/texas-judges-will-be-able-to-conduct-court-online-as-coronavirus-spreads/269-7e34fe91-24cd-46ae-9964-f6be80af4fc5> [<https://perma.cc/CH5V-LU6J>].

⁷ See Katie Bart & Kalvis Golde, *Supreme Court's Closure Could be First Disease-Related Shuttering in a Century (Updated)*, SCOTUSBLOG (Mar. 12, 2020, 5:27 PM), <https://www.scotusblog.com/2020/03/supreme-courts-closure-could-be-first-disease-related-shuttering-in-a-century/> [<https://perma.cc/AFE5-7BQ7>].

⁸ See Scottie Andrew, *Here's Everything You Need to Know About Social Distancing*, CNN (Mar. 21, 2020, 5:17 PM), <https://www.cnn.com/2020/03/21/health/social-distancing-coronavirus-faq-wellness-trnd/index.html> [<https://perma.cc/KLX3-AZ5W>].

changes—and the uncertainty of what future measures may become necessary—have created an environment filled with fear and anxiety.⁹

Given that the particular coronavirus that causes COVID-19 is a novel virus, there is currently no vaccine available.¹⁰ A number of American companies are working on treatments or vaccines, including Gilead Sciences,¹¹ GlaxoSmithKline,¹² Inovio Pharmaceuticals,¹³ and Moderna.¹⁴ And researchers throughout the world, including in Germany,¹⁵ Israel,¹⁶ and China,¹⁷ are working on the path toward a vaccine.

⁹ See Tyler Kingkade, *Coronavirus is a 'Personal Nightmare' for People with OCD and Anxiety Disorders*, NBC NEWS (Mar. 20, 2020, 7:00 AM), <https://www.nbcnews.com/news/us-news/coronavirus-personal-nightmare-people-ocd-anxiety-disorders-n1164066> [https://perma.cc/2PEN-A28P].

¹⁰ See *COVID-19 Frequently Asked Questions*, U.S. FOOD & DRUG ADMIN. (Aug. 13, 2020), <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-frequently-asked-questions> [https://perma.cc/PL94-J5Y2].

¹¹ See Sydney Lupkin, *Might the Experimental Drug Remdesivir Work Against COVID-19?*, NPR (Mar. 21, 2020, 7:19 AM), <https://www.npr.org/sections/health-shots/2020/03/21/819099156/might-the-experimental-drug-remdesivir-work-against-covid-19> [https://perma.cc/7UA6-5YMP].

¹² See Anna Smith, *GSK Recruits Clover Biopharmaceuticals in Latest Coronavirus Effort*, PHARMATIMES (Feb. 25, 2020), http://www.pharmatimes.com/news/gsk_recruits_clover_biopharmaceuticals_in_latest_coronavirus_effort_1326917 [https://perma.cc/YU5B-NDVU].

¹³ See Tarryn Mento, *Inovio Pharmaceuticals Fast-Tracking Human Trials, Working on 1 Million Doses of Coronavirus Vaccine*, KPBS (Mar. 20, 2020), <https://www.kpbs.org/news/2020/mar/20/inovio-pharmaceuticals-coronavirus-vaccine/> [https://perma.cc/BTP8-U2LX].

¹⁴ See Megan Cerullo, *Drugmaker Moderna's Coronavirus Vaccine Ready for Human Testing*, CBS NEWS (Feb. 25, 2020, 2:10 PM), <https://www.cbsnews.com/news/coronavirus-vaccine-moderna-human-testing/> [https://perma.cc/P4UU-Z4UB].

¹⁵ See Katrin Bennhold & David E. Sanger, *U.S. Offered 'Large Sum' to German Company for Access to Coronavirus Vaccine Research, German Officials Say*, N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/2020/03/15/world/europe/coronavirus-vaccine-us-germany.html> [https://perma.cc/BG2Y-UFZA].

¹⁶ See Maayan Jaffe-Hoffman, *Israeli Scientists: 'In a Few Weeks, We Will Have a Coronavirus Vaccine'*, JERUSALEM POST (Apr. 13, 2020, 11:24 AM), <https://www.jpost.com/HEALTH-SCIENCE/Israeli-scientists-In-three-weeks-we-will-have-coronavirus-vaccine-619101> [https://perma.cc/L2TQ-V9RX].

¹⁷ See Linda Lew, *Coronavirus Vaccine Trials: Chinese Volunteers Recount Their Experiences*, S. CHINA MORNING POST (Mar. 22, 2020, 8:00 AM), <https://www.scmp.com/news/health/article/2020/03/22/coronavirus-vaccine-trials-chinese-volunteers-recount-their-experiences>

Amidst these efforts, there are individuals who claim to have found a “cure” for coronavirus.¹⁸ Notable among these is the famous televangelist Jim Bakker,¹⁹ who has promoted a “cure” for the virus called the “Silver Solution.”²⁰ On March 6, 2020, the United States Food and Drug Administration (FDA) sent a letter to Bakker outlining alleged violations of the Federal Trade Commission Act of 1914 and calling for him to “immediately cease making claims that are not supported by competent and reliable scientific evidence.”²¹ On March 10, 2020, Missouri Attorney General Eric Schmitt filed a lawsuit against Bakker in Missouri state court requesting a restraining order and permanent injunction barring Bakker from selling “Silver Solution” as a coronavirus cure.²²

In the wake of potential coronavirus scams, this Article not only analyzes the Bakker lawsuit but calls legislators in a declared global pandemic and national health emergency to increase protection for individuals.²³ This Article advocates a novel proposal—the enacting of a federal statute making it a felony for an individual

www.scmp.com/news/china/science/article/3076284/coronavirus-vaccine-trials-chinese-volunteers-recount-their [<https://perma.cc/LMM5-NFH6>].

¹⁸ See Christine Hauser & Johnny Diaz, *F.D.A. Warns 7 Companies to Stop Claiming Silver and Other Products Treat Coronavirus*, N.Y. TIMES (Mar. 9, 2020), <https://www.nytimes.com/2020/03/09/health/fda-letter-coronavirus-cures.html> [<https://perma.cc/XE8N-DGZZ>].

¹⁹ See Tim Funk, *Fallen PTL Preacher Jim Bakker is Back With a New Message About the Apocalypse*, CHARLOTTE OBSERVER (Feb. 19, 2018, 4:34 PM), <https://www.charlotteobserver.com/living/religion/article200297074.html> (last visited Sept. 17, 2020).

²⁰ Meagan Flynn, *A Disgraced Televangelist Promoted an Alleged Cure to Coronavirus. Missouri is Now Suing Him.*, WASH. POST (Mar. 11, 2020, 7:57 AM), <https://www.washingtonpost.com/nation/2020/03/11/jim-bakker-coronavirus-cure/> [<https://perma.cc/9VKH-YCF9>]; see Hauser & Diaz, *supra* note 18.

²¹ Warning Letter from William A. Correll, Dir., Off. of Compliance, Ctr. for Food Safety & Applied Nutrition, and Richard A. Quaresima, Acting Assoc. Dir., Div. of Advert. Pracs., Fed. Trade Comm’n, to The Jim Bakker Show (Mar. 6, 2020), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/jim-bakker-show-604820-03062020> [<https://perma.cc/E3SR-6CGU>].

²² AG Schmitt, *AG Schmitt Files Suit Against Jim Bakker for Selling Fake “Coronavirus Cure,”* ERIC SCHMITT MO. ATT’Y GEN. (Mar. 10, 2020, 1:03 PM), <https://ago.mo.gov/home/news/2020/03/10/ag-schmitt-files-suit-against-jim-bakker-for-selling-fake-coronavirus-cure> [<https://perma.cc/E7DG-9M46>].

²³ See *infra* Sections II.B, III.B.

to knowingly sell a fraudulent cure for any disease that has been designated a pandemic by the World Health Organization (WHO) and the United States President.²⁴ During national emergency times, such a statute will assertively deter individuals from attempts to exploit the most vulnerable among us.²⁵

I. THE CORONAVIRUS PANDEMIC

A. *The Rise of Coronavirus*

Coronaviruses are a family of zoonotic viruses (transmittable from animals to humans).²⁶ Previous versions of coronaviruses include the Severe Acute Respiratory Syndrome (SARS-CoV) first reported in 2002, which infected 8,098 and killed 744 worldwide.²⁷ Another example is the Middle East Respiratory Syndrome (MERS-CoV) first reported in 2012 which infected more than 2,500 and killed 860 worldwide.²⁸ This current version, COVID-19, is an abbreviation for “coronavirus disease 2019.”²⁹ Common symptoms of a COVID-19 infection are similar to the common cold including respiratory symptoms.³⁰ Pneumonia, kidney failure, and death can occur in more severe cases.³¹

Coronavirus is transmitted when respiratory droplets from an infected person are spread to the mouths and noses of others.³² It is also possible to contract the disease by someone touching an infected surface and then touching their mouth or nose, but this is not the primary method of contagion.³³ Although the exact R0 (quantified level of contagion) has yet to be calculated, scientists predict that

²⁴ See *infra* Section III.B.

²⁵ See *infra* text accompanying notes 152–55.

²⁶ Vince McLeod, *COVID-19: A History of Coronavirus*, LAB MANAGER (Mar. 16, 2020), <https://www.labmanager.com/lab-health-and-safety/covid-19-a-history-of-coronavirus-22021> [<https://perma.cc/5AXJ-D3SG>].

²⁷ *Id.*

²⁸ *Id.*

²⁹ AJ Willingham, *Pandemic, COVID-19 and All the Coronavirus Terms You Need to Know*, CNN (Mar. 11, 2020, 5:19 PM), <https://www.cnn.com/2020/03/05/us/coronavirus-definitions-terms-glossary-trnd/index.html> [<https://perma.cc/Y5EE-RG6P>].

³⁰ McLeod, *supra* note 26.

³¹ *Id.*

³² *How it Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> [<https://perma.cc/ZM9G-CVL8>].

³³ *Id.*

coronavirus is between 2 and 2.5 which would make it more contagious than the seasonal flu but less contagious than measles.³⁴

The first known case of the COVID-19 coronavirus can now be traced back to November 17, 2019, in China, weeks before the Chinese government announced the new disease.³⁵ The first reported case of a COVID-19 infection in the U.S. was in Washington, on January 15, 2020.³⁶ The WHO declared coronavirus a pandemic on March 11, 2020.³⁷ By March 12, 2020 it had spread to over 100 countries.³⁸ As of March 25, 2020, coronavirus has infected over 400,000 people and killed over 18,000 worldwide.³⁹ In the United States, it has infected over 59,000 and killed over 800.⁴⁰ Viruses that cause influenza generally subside in warmer months, but scientists are uncertain if coronavirus will respond the same way.⁴¹

³⁴ Morgan McFall-Johnsen & Aria Bendix, *An Average Coronavirus Patient Infects at Least 2 Others. To End the Pandemic, that Crucial Metric Needs to Drop Below 1—Here’s How We Get There*, BUS. INSIDER (Apr. 18, 2020, 12:44 PM), <https://www.businessinsider.com/coronavirus-contagious-r-naught-average-patient-spread-2020-3> [<https://perma.cc/5XCD-SK7V>].

³⁵ Helen Davidson, *First Covid-19 Case Happened in November, China Government Records Show—Report*, GUARDIAN (Mar. 13, 2020, 2:39 PM), <https://www.theguardian.com/world/2020/mar/13/first-covid-19-case-happened-in-november-china-government-records-show-report> [<https://perma.cc/V2ZP-FEXL>].

³⁶ *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> [<https://perma.cc/2ZWY-796F>].

³⁷ Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/4EZD-VXVN>].

³⁸ Praveen Duddu, *Coronavirus Now in More Than 100 Countries: Covid-19 World Update*, PHARMA. TECH. (Mar. 12, 2020), <https://www.pharmaceutical-technology.com/news/coronavirus-countries-cross-100-covid-19-world-update/> [<https://perma.cc/X425-YP8B>].

³⁹ See John Elflein, *Number of Coronavirus (COVID-19) Cases, Recoveries, and Deaths Worldwide as of March 26, 2020*, STATISTA (Mar. 26, 2020), <https://www.statista.com/statistics/1087466/covid19-cases-recoveries-deaths-worldwide/> [<https://perma.cc/59ZB-GPWX>].

⁴⁰ See Mitch Smith et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Mar. 25, 2020, 12:03 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [<https://perma.cc/K8NB-FKPF>].

⁴¹ Sarah Gibbens, *Will Warming Spring Temperatures Slow the Coronavirus Outbreak?*, NAT’L GEOGRAPHIC (Mar. 6, 2020), <https://www.nationalgeographic.com/science/2020/02/what-happens-to-coronavirus-covid-19-in-warmer-spring-temperatures/> [<https://perma.cc/A7KF-3V7D>].

While COVID-19 has far exceeded the infection and death tolls of other coronaviruses such as SARS and MERS, it is still less deadly than other historic outbreaks.⁴² Worldwide, the Swine Flu in 2009–2010 killed 200,000, the Hong Kong Flu in 1968–1970 killed 1,000,000, the Asian Flu in 1957–1958 killed 1,100,000, and the Spanish Flu in 1918–1919 killed 40–50 million.⁴³

B. Fear of Coronavirus in the United States

It is well-established that there is much fear and anxiety among Americans related to the coronavirus outbreak.⁴⁴ An Associated Press—NORC Center for Public Affairs research poll of 1,003 American adults found that approximately sixty-six percent were at least somewhat concerned that either they or a loved one might be infected by coronavirus.⁴⁵

This fear and anxiety is conveyed at several levels—first, fear is manifested through the hoarding of supplies.⁴⁶ Shortages of antiviral face masks appeared as the virus started its spread through China.⁴⁷ Shortages of hand sanitizer, disinfecting wipes, and other cleaning supplies then followed.⁴⁸ Most recently, communities throughout the country have been facing shortages of toilet paper.⁴⁹

⁴² See Nicholas LePan, *Visualizing the History of Pandemics*, VISUAL CAPITALIST (Mar. 14, 2020), <https://www.visualcapitalist.com/history-of-pandemics-deadliest/> [<https://perma.cc/NC94-ZJNR>].

⁴³ *Id.*

⁴⁴ See Justine Coleman, *Americans' Coronavirus Fears Spike: Poll*, THE HILL (Mar. 19, 2020, 11:23 AM), <https://thehill.com/policy/healthcare/public-global-health/488427-americans-coronavirus-fears-spike-poll> [<https://perma.cc/4A7Y-P55D>].

⁴⁵ *Id.*

⁴⁶ Taylor Telford & Abha Bhattarai, *Long Lines, Low Supplies: Coronavirus Chaos Sends Shoppers into Panic-Buying Mode*, WASH. POST (Mar. 2, 2020, 7:26 PM), <https://www.washingtonpost.com/business/2020/03/02/grocery-stores-coronavirus-panic-buying/> [<https://perma.cc/Q2E3-RBS5>].

⁴⁷ See Associated Press, *Coronavirus Fear Touches Off a Global Run on Face Masks*, KUSI NEWS (Feb. 28, 2020, 8:30 AM), <https://www.kusi.com/coronavirus-fear-touches-off-a-global-run-on-face-masks/> [<https://perma.cc/YED3-JMB5>].

⁴⁸ See Ganda Suthivarakom, *Coronavirus Has Caused a Hand Sanitizer Shortage. What Should You Do?*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/11/smarter-living/wirecutter/coronavirus-hand-sanitizer.html> [<https://perma.cc/D5UG-5TNN>].

⁴⁹ See Michael Corkery & Sapna Maheshwari, *Is There Really a Toilet Paper Shortage?*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/business/toilet-paper-shortage.html> [<https://perma.cc/8SYW-HN95>].

In addition, there is fear concerning the financial markets, job losses, and the possibility of a recession.⁵⁰ In the span of over a month, the Dow Jones Industrial Average lost over thirty-five percent of value.⁵¹ Layoffs have already begun at a number of companies,⁵² with many more likely to follow.⁵³ More and more analysts and commentators are noting that a recession is highly likely due to the virus,⁵⁴ and there is even more discussion of the possibility of a depression as a result of the crisis.⁵⁵

II. CORONAVIRUS “CURES”

A. *James Bakker, the “Silver Sol Liquid,” and Other “Cures”*

In the 1980s, Jim Bakker, along with then wife Tammy Faye Bakker, was a high profile televangelist.⁵⁶ The Bakkers’ success resulted in a lavish lifestyle including multiple homes, a private

⁵⁰ See Heather Long & Jena McGregor, *Recession Fears Grow as Wall Street Investors Brace for a Wild Week for Stocks*, WASH. POST (Mar. 1, 2020, 5:10 PM), <https://www.washingtonpost.com/business/2020/03/01/fear-markets-economy/> [<https://perma.cc/NZJ6-79CN>]; Jessica Menton, *‘I’m Too Old to Find a New Career’: More than Half of Americans Fear Job Losses*, USA TODAY (Aug. 7, 2020, 12:01 AM), <https://www.usatoday.com/story/money/2020/08/07/unemployment-benefit-more-than-half-americans-fear-job-losses/3301149001/> [<https://perma.cc/J2TH-JNSS>].

⁵¹ See Michael B. Sauter & Samuel Stebbins, *How the Current Stock Market Collapse Compares with Others in History*, USA TODAY (Mar. 21, 2020, 3:31 PM), <https://www.usatoday.com/story/money/2020/03/21/stock-market-collapse-how-does-todays-compare-others/2890885001/> [<https://perma.cc/B2HV-MJLY>].

⁵² See Rebecca Rainey, *Coronavirus Layoffs Surge Across America, Overwhelming Unemployment Offices*, POLITICO (Mar. 17, 2020, 7:43 PM), <https://www.politico.com/news/2020/03/17/coronavirus-layoffs-america-unemployment-134819> [<https://perma.cc/7K5R-MWEU>].

⁵³ See Julia Horowitz, *A Fresh Wave of Coronavirus Job Losses is About to Come Crashing Down*, CNN BUS. (Mar. 22, 2020, 8:00 AM), <https://www.cnn.com/2020/03/22/investing/stocks-week-ahead/index.html> [<https://perma.cc/G7D3-5H5T>].

⁵⁴ See Mike Patton, *U.S. On Brink of 34th Recession: Expected to Be Severe*, FORBES (Mar. 23, 2020, 4:43 PM), <https://www.forbes.com/sites/mikepatton/2020/03/23/us-on-brink-of-34th-recession-expected-to-be-severe/#617be4172e11> [<https://perma.cc/9YM7-XF3X>].

⁵⁵ See Ben White, *Fears Mount of a Coronavirus-Induced Depression*, POLITICO (Mar. 23, 2020, 8:40 PM), <https://www.politico.com/news/2020/03/23/great-depression-coronavirus-induced-calamity-145304> [<https://perma.cc/8TC5-EHMR>].

⁵⁶ Lauren Effron et al., *The Scandals that Brought Down the Bakkers, Once Among US’s Most Famous Televangelists*, ABC NEWS (Dec. 20, 2019, 4:34 AM), <https://abcnews.go.com/US/scandals-brought-bakkers-uss-famous-televangelists/story?id=60389342> [<https://perma.cc/JX2T-9XVD>].

jet, and a \$50,000 doghouse.⁵⁷ The Bakkers built a 500-room hotel and waterpark in South Carolina.⁵⁸ To finance the operation, Jim Bakker oversold “lifetime partnerships” to the theme park.⁵⁹ This led to an indictment on eight counts of mail fraud and fifteen counts of wire fraud.⁶⁰ Jim Bakker was convicted on all counts and sentenced to forty-five years in prison, later reduced to eight.⁶¹ Upon his release he started a new ministry and television show, “The Jim Bakker Show,” where he sells “end of the world” survival products—such as five-gallon buckets of freeze-dried food—in preparation for “the end of days.”⁶²

Even before the coronavirus outbreak, the market for unproven alternative medicines was worth over €30 billion worldwide.⁶³ The coronavirus outbreak has created an opportunity for those who would attempt to profit from the hysteria.⁶⁴ Alt-right provocateur and InfoWars radio show host Alex Jones was served a cease-and-desist order from the New York Attorney General for selling “toothpaste, dietary supplements, creams, and several other products as treatments to prevent and cure the coronavirus.”⁶⁵ As of March 6, 2020, the FDA has issued warning letters to seven firms for selling coronavirus cures, including “The Jim Bakker Show.”⁶⁶ Facebook

⁵⁷ *Id.*; David Weiss, *Disgraced Preacher Jim Bakker’s New Doomsday Pitch*, NEWSWEEK MAG. (Mar. 27, 2016, 1:38 PM), <https://www.newsweek.com/2016/04/08/televangelist-jim-bakker-back-440991.html> [<https://perma.cc/TZ3U-X477>].

⁵⁸ Effron et al., *supra* note 56.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ David Robert Grimes, *Beware the Snake-Oil Merchants of Alternative Medicine—Your Life Could Depend on It*, IR. TIMES (Mar. 6, 2018, 6:00 AM), <https://www.irishtimes.com/life-and-style/health-family/beware-the-snake-oil-merchants-of-alternative-medicine-your-life-could-depend-on-it-1.3405985> [<https://perma.cc/HM7P-A2ZQ>].

⁶⁴ Judy McMeekin & Anand Shah, *FDA Protects Patients and Consumers from Fraud During COVID-19*, U.S. FOOD & DRUG ADMIN. (July 20, 2020), <https://www.fda.gov/news-events/fda-voices/fda-protects-patients-and-consumers-fraud-during-covid-19> [<https://perma.cc/873Q-XESQ>].

⁶⁵ Press Release, N.Y. State Off. Att’y Gen., Attorney General James Orders Alex Jones to Stop Selling Fake Coronavirus Treatments, (Mar. 12, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-orders-alex-jones-stop-selling-fake-coronavirus-treatments> [<https://perma.cc/MXY4-VKRY>].

⁶⁶ *Fraudulent Coronavirus Disease 2019 (COVID-19) Products*, U.S. FOOD & DRUG ADMIN. (2020), <https://www.fda.gov/consumers/health-fraud-scams/fraudulent-coronavirus-disease-2019-covid-19-products> [<https://perma.cc/GPU4-D7AD>].

has been removing posts by individuals selling products such as essential oils that claim to protect against or cure the coronavirus.⁶⁷ Amazon has also been removing product listings that claim to cure the coronavirus.⁶⁸ Another controversial televangelist, Kenneth Copeland, has been promoting a “cure” by simply instructing his viewers to touch their television screens and recite a prayer.⁶⁹

Silver Solution—the product in question in the Jim Bakker temporary restraining order—“retains the characteristic properties of silver found in colloidal silver.”⁷⁰ The National Institutes of Health reports that “[s]cientific evidence doesn’t support the use of colloidal silver dietary supplements for any disease or condition.”⁷¹ The FDA has warned that colloidal silver is “not generally recognized as safe and effective [The] FDA is not aware of any substantial scientific evidence that supports the use of OTC colloidal silver ingredients or silver salts for these disease conditions.”⁷²

It is interesting to note that the television program and online store present the purchasing process as a “donation.”⁷³ Items are shown as an “offer” and through April of 2020, the purchaser

(including the seven firms given warnings as of March 6, 2020: Xephyr LLC dba N-ergetics, GuruNanda, LLC, Quinessence Aromatherapy Ltd, Vivify Holistic Clinic, Colloidal Vitality LLC, The Jim Bakker Show, and Herbal Amy Inc.).

⁶⁷ Megan Graham, *Multilevel Marketing Sellers are Using Coronavirus to Push Oil and Vitamin Sales on Facebook*, CNBC (Mar. 14, 2020, 10:40 PM), <https://www.cnbc.com/2020/03/13/facebook-multilevel-marketing-sellers-use-coronavirus-to-sell-oils.html> [<https://perma.cc/5HWD-ZY3L>].

⁶⁸ Daisy Hernandez, *No, You Can’t Buy a Coronavirus Cure on Amazon*, POPULAR MECHS. (Feb. 24, 2020), <https://www.popularmechanics.com/science/health/a31049592/fake-coronavirus-cures-sale-amazon/> [<https://perma.cc/FC8U-GS6R>].

⁶⁹ Jason Lemon, *Conservative Pastor Claims He ‘Healed’ Viewers of Coronavirus Through Their TV Screens*, NEWSWEEK (Mar. 12, 2020, 4:43 PM), <https://www.newsweek.com/conservative-pastor-claims-he-healed-viewers-coronavirus-through-their-tv-screens-1492044> [<https://perma.cc/DNW3-ZGZK>].

⁷⁰ *Silver Sol Liquid*, NOW FOODS, <https://www.nowfoods.com/supplements/silver-sol-liquid> [<https://perma.cc/4UKC-6JT2>].

⁷¹ *Colloidal Silver*, NAT’L CTR. FOR COMPLEMENTARY & INTEGRATIVE HEALTH (Apr. 2017), <https://www.nccih.nih.gov/health/colloidal-silver> [<https://perma.cc/4HEP-6G25>].

⁷² *Over-the-Counter Drug Products Containing Colloidal Silver Ingredients or Silver Salts*, 64 Fed. Reg. 44,653, 44,654 (codified at 21 C.F.R. pt. 310).

⁷³ *Petition for Temp. Restraining Ord., Preliminary and Permanent Injunction, Civ. Penalties, and Other Relief*, at 7, *Missouri v. Bakker*, No. 20SN-CC00084 (Stone Cnty Cir. Ct. Mar. 10, 2020) [hereinafter *Petition for TRO*]. Note that the term “donate” is misleading because purchasers can only deduct on their taxes the amount over the minimum as a charitable contribution. Weiss, *supra* note 57.

choose the amount they wanted to pay subject to a defined minimum.⁷⁴ For example, to purchase two bottles of “Bee Alive CoQ10” the purchaser had to input their price in the “Choose Amount” box.⁷⁵ An amount of “\$90.00 or more” is required.⁷⁶ The website has since been revisited and standard, fixed prices are now used.

B. State of Missouri v. Bakker *Lawsuit*

On March 6, 2020, before the Missouri Attorney General’s Application for Temporary Restraining Order,⁷⁷ the FDA and Federal Trade Commission (FTC) issued warning letters to Jim Bakker and other entities selling coronavirus “cure[s].”⁷⁸ Jim Bakker’s warning letter states in part that:

FDA has determined that these products are unapproved new drugs sold in violation of the Federal Food, Drug, and Cosmetic Act (FD&C Act), 21 U.S.C. § 355(a). Furthermore, these products are misbranded drugs under section 502 of the FD&C Act, 21 U.S.C. § 352. The introduction or delivery for introduction of these products into interstate commerce is prohibited under section 301(a) and (d) of the FD&C Act, 21 U.S.C. § 331(a) and (d).... [T]here are currently no vaccines, potions, lotions, lozenges or other prescription or over-the-counter products available to treat or cure coronavirus disease 2019 (Covid-19).⁷⁹

On March 10, 2020, the Missouri Attorney General filed an Application for Temporary Restraining Order against Jim Bakker and Morningside Church Productions, Inc., d/b/a Jim Bakker Show Ministry.⁸⁰ Defendants are accused of violating the Missouri Merchandising Practices Act for “... falsely promising to consumers that Silver Solution can cure, eliminate, kill or deactivate coronavirus and/or boost elderly consumers’ immune system and help keep them healthy when there is, in fact, no vaccine, pill, potion or other product available to treat or cure coronavirus disease 2019 (COVID-19).”⁸¹ The Application for Temporary Restraining Order

⁷⁴ *Store*, THE JIM BAKKER SHOW, <https://store.jimbakkershow.com/> [https://perma.cc/Y23P-FDJY].

⁷⁵ *Bee Alive CoQ10 Bonus Offer*, THE JIM BAKKER SHOW, <https://store.jimbakkershow.com/product/bee-alive-coq10-bonus-offer/> [https://perma.cc/RGS3-V8XR].

⁷⁶ *Id.*

⁷⁷ Petition for TRO, *supra* note 73, at 1.

⁷⁸ *Id.* at 8–9.

⁷⁹ *Id.* at 9.

⁸⁰ *Id.* at 1.

⁸¹ *Id.* at 2.

documents the claims made on a February 12, 2020, edition of “The Jim Bakker Show” with guest Sherrill Sellman, a “... Naturopathic Doctor and mind-body psychotherapist”:⁸²

Bakker: This influenza that is now circling the globe, you’re saying that silver solution would be effective.

Sellman: Well, let’s say it hasn’t been tested on this strain of the coronavirus, but it has been tested on other strains of the coronavirus and has been able to eliminate it within 12 hours.

Bakker: Yeah.

Sellman: Totally eliminate it, kills it. Deactivates it.

Bakker: Yeah.

Sellman: And it boosts your immune system so then you can support the recovery, ‘cause when you kill the virus then the immune system comes into action to clear it out, so you want a vibrant immune system as well as an ability to deactivate these viruses.

Sellman: Silver Sol has been proven by the government that it has the ability to kill every pathogen it has ever been tested on including SARS and HIV.

Bakker then offers Silver Sol products for viewers should they offer donations to the show at levels such as \$80 or \$125.⁸³

The Missouri Application for Temporary Restraining Order also references material on “The Jim Bakker Show” website touting the benefits of Silver Solution regarding coronavirus.⁸⁴

C. Missouri Merchandising Practices Act

The Missouri Merchandising Practices Act (MMPA), which authorizes the previously discussed restraining order,⁸⁵ was enacted in 1967.⁸⁶ Before then, only private legal remedies were available, which imposed significant financial and evidential burdens on would-be plaintiffs under *caveat emptor*.⁸⁷ In 1985 and 1986, the MMPA was amended in many relevant ways to the Bakker case.⁸⁸ The Attorney General was granted prosecutorial authority and cease and desist authority.⁸⁹ The previous exemption regarding “any advertisement

⁸² *Id.* at 6–8.

⁸³ *Id.* at 7. *See* Weiss, *supra* note 57 (regarding the misleading use of the word “donate”).

⁸⁴ Petition for TRO, *supra* note 73, at 6.

⁸⁵ *Id.* at 4.

⁸⁶ William Webster et al., *Combatting Consumer Fraud in Missouri: The Development of Missouri’s Merchandising Practices Act*, 52 MO. L. REV. 365, 368 (1987).

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *Id.* at 393.

which is subject to and in compliance with the rules and regulations of and the statutes administered by the Federal Trade Commission” was deleted.⁹⁰ The Attorney General was granted the “authority to issue and serve extra-judicial orders to cease unlawful activities.”⁹¹ Finally, the reach of the statute was extended to include unlawful practices “in or from the state of Missouri.”⁹² This allows for jurisdiction over a Missouri company harming out-of-state citizens.⁹³ The MMPA defines an unlawful practice as follows:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce ... in or from the state of Missouri⁹⁴

The MMPA does not require all the elements of common law fraud to be proven.⁹⁵ For example, the common law requirement of “scienter” or the intent to defraud, is not necessary in an MMPA action.⁹⁶ However, in the event of a willful and knowing intent to defraud, the MMPA provides for class E felony criminal prosecutions.⁹⁷

The MMPA allows private civil action for compensatory damages, punitive damages, attorneys’ fees, and equitable relief.⁹⁸ Missouri case law allows for inconvenience damages under an MMPA claim as well.⁹⁹ Missouri case law also allows for emotional distress damages under an MMPA claim.¹⁰⁰

⁹⁰ *Id.* at 370 (quoting MO. REV. STAT. § 407.020(1) (Supp. 1967)).

⁹¹ *Id.* at 397.

⁹² MO. REV. STAT. § 407.020.1 (2020).

⁹³ Michael B. Barnett, Note, *The Plaintiffs’ Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 MO. L. REV. 207, 212 (2010).

⁹⁴ § 407.020.1.

⁹⁵ *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 899–900 (Mo. Ct. App. 2003).

⁹⁶ *State ex rel. Webster v. Cornelius*, 729 S.W.2d 60, 64 (Mo. Ct. App. 1987).

⁹⁷ § 407.020.3 (“Any person who willfully and knowingly engages in any act, use, employment or practice declared to be unlawful by this section with the intent to defraud shall be guilty of a class E felony.”).

⁹⁸ MO. REV. STAT. § 407.025.1–.2.

⁹⁹ *Crank v. Firestone Tire & Rubber Co.*, 692 S.W.2d 397, 403 (Mo. Ct. App. 1985) (“[W]hen the inconvenience is coupled with a compensable element of damage, the inconvenience occasioned by the breach may be compensated where it is supported by the evidence and shown with reasonable certainty.”).

¹⁰⁰ *Lewellen v. Franklin*, 441 S.W.3d 136, 147 (Mo. 2014) (en banc) (Consumer damages were awarded for “stress of being unable to make her loan payments” and “fear that she would go to jail.”).

The MMPA was drafted using intentionally broad and vague language “so that violators cannot evade liability due to ‘overly meticulous definitions.’”¹⁰¹ As one court describes, “[The MMPA is meant to] cover every practice imaginable and every unfairness to whatever degree.”¹⁰²

The MMPA’s strict liability, possibility for punitive damages, attorneys’ fees provision, and far reaching breadth have resulted in criticism from some in the legal field.¹⁰³ The MMPA has been used to sue for candy packaging that is properly labeled by weight, but contains too much empty space in the packaging,¹⁰⁴ car salesman puffery such as claiming a car was “luxury” and “premium,”¹⁰⁵ and inadequate quality “Extra Virgin Olive Oil” in salad dressing.¹⁰⁶ Critics claim that the MMPA has evolved into a “weapon of mass litigation” and has turned St. Louis into a “judicial hellhole.”¹⁰⁷ While every state has a consumer protection statute,¹⁰⁸ the MMPA is so broad that it leads to plaintiff forum shopping in Missouri and a legal climate ranking of 49th out of 50.¹⁰⁹

D. Jim Bakker’s Potential Liability

Jim Bakker’s claims on his television show and website have the potential for significant liability under the MMPA.¹¹⁰ Given the veracity and specificity of Bakker’s claims—and the trust that some consumers place on what he says—it is not hard to imagine a scenario where someone who is part of an at-risk population for coronavirus practices no cautionary measures based on the false belief that Silver Solution is protecting them.¹¹¹ Or worse, someone who tests positive for coronavirus may improperly believe that Silver Solution has cured them and go out and infect others.

¹⁰¹ Barnett, *supra* note 93, at 213 (quoting *Schuchmann v. Air Servs. Heating & Air Conditioning*, 199 S.W.3d 228, 233 (Mo. Ct. App. 2006)).

¹⁰² *Ports Petroleum Co. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. 2001) (en banc).

¹⁰³ Stefon David, “*Can I Sue For That?: The Overstretched Missouri Merchandising Practices Act*,” BUS., ENTREPRENEURSHIP & TAX L. REV. F. (Apr. 12, 2019), <https://mulaw.missouri.edu/betr/2019/04/12/can-sue-overstretched-missouri-merchandising-practices-act/> [https://perma.cc/GJAJ-FAZF].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Barnett, *supra* note 93, at 211.

¹⁰⁹ David, *supra* note 103.

¹¹⁰ *Id.*

¹¹¹ Lemon, *supra* note 69.

Given the nature of virus spread, the MMPA's provisions on class action lawsuits could be relevant.¹¹²

The MMPA's provision for punitive damages may be especially relevant to a Jim Bakker lawsuit.¹¹³ First, it incentivizes potential plaintiffs who otherwise would have little reason to file suit regarding an \$80 purchase.¹¹⁴ The purpose of punitive damages is to punish the defendant and deter future behavior when mere compensatory damages are inadequate.¹¹⁵ Punitive damages require that the defendant commit either a "wanton, willful, or outrageous act, or [demonstrate] reckless disregard for an act's consequences (from which evil motive is inferred)."¹¹⁶ And the plaintiff must prove this based on the heightened burden of proof of "clear and convincing" evidence.¹¹⁷ This standard could create a particularly interesting situation in a potential case against Jim Bakker. While seeking compensatory damages under the MMPA for fraud, intent is not a required element.¹¹⁸ Punitive damages, however, require a "culpable mental state."¹¹⁹

Probing the psyche of a defendant is an inherently subjective endeavor. But in Jim Bakker's case, the *mens rea* element poses additional issues as the claims were made on a religious television program.¹²⁰ Jim Bakker has made a number of ambitious claims such as how "electromagnetic pulses" will kill up to ninety-five percent of humanity.¹²¹ It would be difficult for a jury—by "clear and convincing evidence"—to determine if Jim Bakker actually believes the claims he makes, and therefore is not willfully defrauding people.¹²² There is precedent in Missouri for considering the "financial vulnerability" of plaintiffs in calculating potential

¹¹² MO. REV. STAT. § 407.025.6 (2020).

¹¹³ David, *supra* note 103.

¹¹⁴ § 407.025.2.

¹¹⁵ *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 771 (Mo. 2007) (en banc) (quoting *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. 1996)) ("The well-established purpose of punitive damages is to inflict punishment and to serve as an example and a deterrent to similar conduct.").

¹¹⁶ *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 635 (Mo. 2004) (en banc).

¹¹⁷ *Id.*

¹¹⁸ *State ex rel. Webster v. Cornelius*, 729 S.W.2d 60, 64 (Mo. Ct. App. 1987).

¹¹⁹ *See Werremeyer*, 134 S.W.3d at 635.

¹²⁰ *See Lemon*, *supra* note 69.

¹²¹ *Weiss*, *supra* note 57.

¹²² *See Werremeyer*, 134 S.W.3d at 635.

punitive damage awards.¹²³ It is estimated that sixty percent of the five million viewers of “The Jim Bakker Show” are elderly women.¹²⁴ Any punitive damages award would be subject to constitutional due process protections and Missouri’s statutory protections.¹²⁵ Finally, all of Jim Bakker’s assets are reportedly in his second wife Lori Beth’s name.¹²⁶

III. PROPOSED FEDERAL CRIMINAL STATUTE—“CURES” DURING A PANDEMIC AND NATIONAL EMERGENCY

The federal government has a number of tools available to prevent some of the harm a pandemic causes.¹²⁷ But in times of crises, additional measures are also necessary to prevent harm—not only from the disease itself—but from those who seek to profit by exploiting the most vulnerable citizens.¹²⁸ A federal statute creating a felony in cases where an individual knowingly sells a fraudulent cure for any disease that has been designated a pandemic by the WHO and in which the President of the United States has designated a national emergency addresses a more sinister side of pandemics: individuals taking advantage of the fear of another to profit by fraud.

A. Vulnerability and Fear During a Pandemic

A pandemic with a dangerous virus, like coronavirus, exposes many vulnerabilities.¹²⁹ A particular vulnerability with coronavirus is

¹²³ See *Krysa v. Payne*, 176 S.W.3d 150, 157 (Mo. Ct. App. 2005).

¹²⁴ Weiss, *supra* note 57.

¹²⁵ MO. REV. STAT. § 510.265.1 (2020) (“No award of punitive damages against any defendant shall exceed the greater of: (1) Five hundred thousand dollars; or (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant.”).

¹²⁶ Weiss, *supra* note 57.

¹²⁷ See National Emergencies Act of 1976, Pub. L. No. 94-412, 90 Stat. 1255 (codified at 50 U.S.C. §§ 1601–1651)); *Regulations and Laws that May Apply During a Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 3, 2016), <https://www.cdc.gov/flu/pandemic-resources/planning-preparedness/regulations-laws-during-pandemic.htm> [<https://perma.cc/9W73-4V42>] [hereinafter *Regulations and Laws*] (“During a pandemic, certain legal authorities, policies and regulations may apply and serve as the foundation for the US Department of Health and Human Services (HHS) to respond.”).

¹²⁸ See Hauser & Diaz, *supra* note 18.

¹²⁹ See Dylan Scott, *Coronavirus Is Exposing All of the Weaknesses in the US Health System*, VOX (Mar. 16, 2020, 7:30 AM), <https://www.vox.com/policy-and>

how easily it appears the virus is transmitted.¹³⁰ There is also the vulnerability that the entire health care system of the United States could be overrun with patients to treat,¹³¹ similar to the crisis that has occurred in Italy.¹³²

Those with preexisting medical conditions and individuals over sixty are the most vulnerable to severe complications and death from the coronavirus.¹³³ The global death rate for coronavirus is likely someplace between one and five percent.¹³⁴ While the elderly and those over sixty are most vulnerable, individuals in their twenties¹³⁵ as well as thirties¹³⁶ have died as a result of the coronavirus. These vulnerabilities have created a general sense of fear among many Americans.¹³⁷

-politics/2020/3/16/21173766/coronavirus-covid-19-us-cases-health-care-system (last visited Sept. 17, 2020).

¹³⁰ See Smriti Mallapaty, *Why Does the Coronavirus Spread So Easily Between People?*, NATURE (Mar. 11, 2020), <https://www.nature.com/articles/d41586-020-00660-x> [<https://perma.cc/L7N6-VAGC>].

¹³¹ See Scott, *supra* note 129.

¹³² See Denise Chow & Emmanuelle Saliba, *Italy Has a World-Class Health System. The Coronavirus Has Pushed it to the Breaking Point*, NBC NEWS (Mar. 19, 2020, 7:47 AM), <https://www.nbcnews.com/health/health-news/italy-has-world-class-health-system-coronavirus-has-pushed-it-n1162786> [<https://perma.cc/W8B8-UNST>].

¹³³ See Dawn Kopecki, Noah Higgins-Dunn & Hannah Miller, *CDC Tells People Over 60 or Who Have Chronic Illnesses Like Diabetes to Stock Up on Goods and Buckle Down for a Lengthy Stay at Home*, CNBC (Mar. 13, 2020, 12:39 PM), <https://www.cnbc.com/2020/03/09/many-americans-will-be-exposed-to-coronavirus-through-2021-cdc-says.html> [<https://perma.cc/X8YD-4YNY>].

¹³⁴ See Andy Kiersz et al., *One Chart Shows 10 Countries' Current Coronavirus Death Rates, Based on Known Cases and Deaths. Italy's is Highest: Nearly 10%*, BUS. INSIDER (Mar. 24, 2020, 3:44 PM), <https://www.businessinsider.com/coronavirus-death-rates-by-country-based-on-case-fatality-ratio-2020-3> [<https://perma.cc/VXC5-DJXC>].

¹³⁵ See Lee Brown, *20-Year-Old Coronavirus Victim Was Told 'No Need to Worry' by Doctors*, N.Y. POST (Mar. 19, 2020, 11:26 AM), <https://nypost.com/2020/03/19/20-year-old-coronavirus-victim-was-told-no-need-to-worry-by-doctors/> [<https://perma.cc/3UTA-CW46>].

¹³⁶ See Josh Haskell, *Coronavirus: 34-Year-Old Southern California Man Remembered as Beloved Friend After Dying of COVID-19*, ABC 7 NEWS (Mar. 24, 2020), <https://abc7news.com/health/covid-19-34-year-olds-death-should-be-a-wake-up-call-friend-says/6046195/> [<https://perma.cc/JQU5-GC6W>].

¹³⁷ See Melody Hahm, *Americans Fear the Coronavirus—But Most Aren't Changing Their Behavior, Poll Finds*, YAHOO FIN. (Mar. 18, 2020), <https://finance.yahoo.com/news/harris-poll-on-americans-and-coronavirus-104636493.html> [<https://perma.cc/Z54H-65V9>].

B. Proposed Statute

A federal statute creating a felony in cases where an individual knowingly sells a fraudulent cure for any disease that has been designated a pandemic by the WHO and for which the President of the United States has designated a national emergency serves to protect the public during vulnerable times.¹³⁸ Such a statute encompasses two primary triggers. First, the disease must be officially designated a pandemic by the WHO.¹³⁹ Second, the President of the United States must designate a “national emergency” as designated by the National Emergencies Act.¹⁴⁰

Excellent models of such a statute are the statutes encompassing mail fraud and wire fraud. Under 18 U.S.C. § 1341, the mail fraud statute,¹⁴¹ it is a crime to devise or intend to devise a scheme

¹³⁸ See National Emergencies Act of 1976, Pub. L. No. 94-412, 90 Stat. 1255 (codified at 50 U.S.C. §§ 1601–1651)); Heath Kelly, *The Classical Definition of a Pandemic Is Not Elusive*, 89 BULL. WORLD HEALTH ORG.[WHO], 540, 540 (2011), <https://www.who.int/bulletin/volumes/89/7/11-088815.pdf?ua=1> [<https://perma.cc/E9TT-LWUW>].

¹³⁹ See Kelly, *supra* note 138, at 540–41.

¹⁴⁰ See National Emergencies Act of 1976, Pub. L. No. 94-412, 90 Stat. 1255 (codified at 50 U.S.C. §§ 1601–1651)).

¹⁴¹ See 18 U.S.C. § 1341. The statute states the following:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing ... shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Id.

to defraud and to use the mail to execute, or attempt to execute, the scheme to defraud.¹⁴² Wire fraud¹⁴³ is closely related to mail fraud and requires the use of a telephone call or electronic communication to execute, or attempt to execute, a scheme to defraud.¹⁴⁴

Mail and wire fraud charges have been utilized by federal prosecutors with regard to fraudulent cures for cancer and other diseases.¹⁴⁵ In *United States v. Daniel*, federal prosecutors charged a licensed medical doctor, Dr. Christine Daniel, with two counts of wire fraud and two counts of mail fraud for developing and promoting several “herbal” products, including “C-Extract,” that purportedly could cure or treat certain diseases ranging from “cancer, multiple sclerosis, Alzheimer’s Disease, Parkinson’s Disease, diabetes, and hepatitis.”¹⁴⁶ The indictment noted that the doctor and her employees claimed one of the herbal products cured cancer sixty percent of the time, while a stronger product cured cancer eighty percent of the time.¹⁴⁷ The indictment also alleged that

¹⁴² See *Schmuck v. United States*, 489 U.S. 705, 721 (1989) (“There are two elements in mail fraud: (1) having devised or intending to devise a scheme to defraud (or perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts).”).

¹⁴³ See 18 U.S.C. § 1343. The statute states the following:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Id.

¹⁴⁴ See *United States v. Faulkner*, 17 F.3d 745, 771 (5th Cir. 1994) (“The offense of wire fraud requires proof of a scheme to defraud and the use of interstate wire communications in furtherance of the scheme.”).

¹⁴⁵ See, e.g., *United States v. Daniel*, No. CR 09-00993 MMM, 2010 WL 11507585, at *1 (C.D. Cal. July 28, 2010).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

several customers diagnosed with cancer paid thousands of dollars for the herbal products and subsequently died.¹⁴⁸ In 2011, Dr. Daniel was convicted of eleven criminal counts and two years later, in 2013, was sentenced to fourteen years in federal prison.¹⁴⁹

We thus propose the following federal criminal statute to protect the vulnerable from fraudulent medical cures during global pandemic crises:

Whoever, having devised or intending to devise any scheme or artifice to defraud, for the express knowing purpose of obtaining money or property by means of false or fraudulent pretenses, representations, or promises of a cure for a disease designated by the World Health Organization as a global pandemic and designated by the President of the United States as a national emergency pursuant to the provisions of the National Emergencies Act, shall be fined not more than \$2,000,000 or imprisoned not more than 50 years, or both.

This statute is even more stringent than the mail fraud and wire fraud statutes,¹⁵⁰ and proposes a potential fifty-year prison sentence for individuals who fraudulently sell “cures” for qualifying diseases. It also includes a higher fine than mail or wire fraud, up to \$2,000,000.¹⁵¹ This potent statute presumably will have the effect of deterring individuals from fraudulently selling “cures” during a pandemic crisis and will serve as a valuable tool in the federal toolbox of emergency measures.¹⁵²

In addition to protecting vulnerable citizens from financial loss, the proposed statute will also help reduce the spread of disease in the event of a pandemic.¹⁵³ First, the statute will reduce the dissemination of inaccurate information at a time when misinformation

¹⁴⁸ *Id.* at *2–3.

¹⁴⁹ See Press Release, United States Attorney’s Office Central District of California, *San Fernando Valley Doctor Who Sold Bogus Cancer ‘Cure’ To Victims Across the Nation Sentenced to 14 Years in Federal Prison*, U.S. DEP’T OF JUST. (May 17, 2013), <https://www.justice.gov/usao-cdca/pr/san-fernando-valley-doctor-who-sold-bogus-cancer-cure-victims-across-nation-sentenced> [https://perma.cc/YS5G-BLAM].

¹⁵⁰ See 18 U.S.C. §§ 1341, 1343.

¹⁵¹ See §§ 1341, 1343.

¹⁵² See *Regulations and Laws*, *supra* note 127.

¹⁵³ See Aengus Bridgman et al., *The Causes and Consequences of COVID-19 Misperceptions: Understanding the Role of News and Social Media*, 1 HARV. KENNEDY SCH. MISINFORMATION REV. 6 (June 2020) (“COVID-19 misperceptions are also powerfully associated with *lower* levels of social distancing compliance.”) (emphasis in original).

can lead to behaviors that increase disease transmission.¹⁵⁴ Second, the statute will reduce the risk of disease spread from people who erroneously believe they have immunized themselves or have ready access to a cure.¹⁵⁵

CONCLUSION

The coronavirus crisis illustrates the necessity of protecting the most vulnerable in society.¹⁵⁶ Unfortunately, during a time of crisis, individuals may claim to know the “cure” for a disease and try to profit from the fear of others.¹⁵⁷ Congress is aggressively attempting to address the crisis, debating an approximately \$2 trillion stimulus proposal.¹⁵⁸

As Congress considers further measures to address the coronavirus crisis, they have an opportunity to aggressively stamp out fraud and also provide a tool for prosecutors to prosecute those who may financially take advantage of others by selling fraudulent medical cures for novel and dangerous diseases in a time of crisis. As proposed in this Article, Congress should enact a federal statute making it a felony for an individual to knowingly sell a fraudulent cure for any disease that has been designated a pandemic by the WHO and for which the President of the United States has designated a national emergency.¹⁵⁹ This step will aggressively deter such conduct in the future and play a role in limiting the spread of a deadly pandemic disease such as the coronavirus.¹⁶⁰

¹⁵⁴ See *id.*; *Social Distancing*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> [<https://perma.cc/NN94-Q2LU>] (“[K]eeping space between you and others is one of the best tools we have to avoid being exposed to this virus and slowing its spread in communities.”).

¹⁵⁵ See Hauser & Diaz, *supra* note 18.

¹⁵⁶ See *supra* Section III.A; Hauser & Diaz, *supra* note 18.

¹⁵⁷ See *supra* Section II.A; Hauser & Diaz, *supra* note 18.

¹⁵⁸ See Gregg Re, *White House, Senate Reach Late-Night Deal on Massive \$2T Coronavirus Stimulus Package*, FOX NEWS (Mar. 25, 2020), <https://www.foxnews.com/politics/senate-coronavirus-stimulus-bill-lindsey-graham-democrats-vote> [<https://perma.cc/KKG6-XP89>].

¹⁵⁹ See *supra* Part III.

¹⁶⁰ See Brendan Krisel, *Phony Coronavirus Treatment Scams Need Harsh Punishment: Schumer*, PATCH (May 19, 2020, 9:07 AM), <https://patch.com/new-york/new-york-city/harsh-fines-needed-coronavirus-treatment-scams-schumer-says> [<https://perma.cc/EGU8-DUGH>].