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When Truth Is Not Truth: Thoughts on Teaching in an Era of Alternative Facts

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When Truth Is Not Truth: Thoughts on Teaching in an Era of “Alternative Facts”

Joy Kanwar[†]

“Truth Isn’t Truth.”¹

- Rudy Giuliani, Personal Attorney for President Trump

INTRODUCTION

Philosophers have long debated whether “objective truth” exists at all.² Since the time of Protagoras (a teacher of lawyers) and Plato, debates have raged over whether truth is a relative concept, in which human beings “must create their own meanings and truths,” (Protagoras’s view), or whether truth itself has an “objective meaning which does not vary from time to time or from place to place” (Plato’s view).³ Over centuries, the fixed meaning of truth predominated in Western thought,⁴ but modern philosophers, building off of the work of nineteenth and twentieth-century scientists showing that the “truths about the physical universe were themselves constantly open to question

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1. Rebecca Morin & David Cohen, *Giuliani: ‘Truth isn’t truth’*, POLITICO (Aug. 19, 2018), <https://www.politico.com/story/2018/08/19/giuliani-truth-todd-trump-788161> [https://perma.cc/NV6P-SJM4].

2. See Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237, 1238 (1988).

3. *Id.*

4. Eastern philosophies, on the other hand, have long envisioned truth as both relative and absolute. For example, in Vedic thought, and later in Mahayana Buddhist thought, both principles co-exist as poles in the human experience, with absolute truth considered the ultimate truth. Attaining the latter concept is conventionally known as enlightenment.

and change,” have reanimated relativistic principles of truth in the modern imagination.⁵ The purpose of this symposium Article is not to resolve a millennia-long philosophical debate, but to understand what legal educators should know about our students and how we can frame our teaching in an era where more people appear to believe in their own version of the facts, their personal truths.⁶ In Part I of this Article, I explore why people believe in their own personal truths at the expense of objective truth. In Part II, I address how that is increasing in the era of “fake news”⁷ and “alternative facts,”⁸ and what impact that might have on lawyers. Finally, in Part III, I consider whether and how legal educators and their institutions should take on the burden of teaching aspiring lawyers to think about false discourse, while still understanding the nuances required in advocacy and the bounds of their ethical obligations.

I. WHY WE DO NOT CHALLENGE FALSEHOODS: A DEEPER DIVE INTO A HUMAN TENDENCY

“[N]o one was interested in the facts. They preferred the invention because this invention expressed and corroborated their hates and fears so perfectly.”⁹

- James Baldwin, from *Notes on a Native Son*

Most people do not seek truth; they merely seek a truth that works for them. What causes and contributes to this phenomenon? First, developmental psychologists have shown that many people inherently lack interest in finding more information about any given subject than

5. Wangerin, *supra* note 2, at 1238.

6. See MICHIKO KAKUTANI, *THE DEATH OF TRUTH: NOTES ON FALSEHOOD IN THE AGE OF TRUMP* 18 (2018).

7. *Fake News*, COLLINS ENGLISH DICTIONARY (2019), <https://www.collinsdictionary.com/dictionary/english/fake-news> [https://perma.cc/XJ6Q-TA5B] (“[F]alse, often sensational, information disseminated under the guise of news reporting.”); see also Mark Verstraete, Derek E. Bambauer, & Jane R. Yankowitz Bambauer, *Identifying and Countering Fake News*, Arizona Legal Studies Discussion Paper No. 17-15 (Aug. 3, 2017); David C. Hambrick & Madeleine Marquardt, *Cognitive Ability and Vulnerability to Fake News: Researchers Identify a Major Risk Factor for Pernicious Effects of Misinformation*, SCI. AM. (Feb. 6, 2018), <https://www.scientificamerican.com/article/cognitive-ability-and-vulnerability-to-fake-news/> [https://perma.cc/8XN3-C4E6].

8. Aaron Blake, *Kellyanne Conway Says Donald Trump’s Team Has ‘Alternative Facts.’ Which Pretty Much Says It All*, WASH. POST (Jan. 22, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/kellyanne-conway-says-donald-trumps-team-has-alternate-facts-which-pretty-much-says-it-all/?utm_term=.5de4a01339f5,warn [https://perma.cc/76FA-PH32] (referring to a conversation between Kellyanne Conway and television journalist, Chuck Todd).

9. JAMES BALDWIN, *NOTES ON A NATIVE SON* 110 (1984).

what they are provided. These studies show that, at a young age, most students in traditional American schools learn not to question the information that teachers give them; students are often told that there is a right and wrong (dualistic) way to look at a subject, and that the teachers are espousing the right way.¹⁰ This extends, of course, to all types of fact gathering, whether at home, from peers, or at school. Interestingly, those who rebel against authority at a young age do not primarily do so by seeking additional information that might run counter to what they are being told; they simply disengage completely, opting to focus on things in which they are more inherently interested.¹¹

As they grow, this tendency continues until “information deficits”¹² become an element of adult life. “Information deficits” are gaps or misperceptions arising out of a lack of interest or knowledge in the subject-matter in question.¹³ Much of the concern around these deficits is that they calcify and do not allow for correction. As S.I. Strong cautions, “it is unclear how rational debate can proceed if empirical evidence holds no persuasive value.”¹⁴

In their scholarship about political misperceptions, Brendan Nyhan and Jason Reifler write that even “exposure to accurate information may not be enough” to counteract individual or institutional adherence to alternative facts.¹⁵ Therefore, “corrections” do not do much to change people’s minds about what they want to believe.¹⁶ Misperceptions “often fit comfortably in people’s worldviews in this sense by seeming to confirm people’s prior beliefs.”¹⁷ Even when presented with two sides of an argument (as has become the hallmark of news channels everywhere), “citizens are likely to resist or reject arguments and evidence

10. See Wangerin, *supra* note 2, at 1246–47 (discussing William Perry’s work on the nine stages of educational development in W. PERRY, *FORMS OF INTELLECTUAL AND ETHICAL DEVELOPMENT IN THE COLLEGE YEARS: A SCHEME* (1970)); see also Michael McSherry, *Incentivizing Moral Development in Law School: The Benefits of Personal Moral Growth Moving Forward*, 13 U. ST. THOMAS L.J. 134, 158 (2016) (discussing Lawrence Kohlberg’s six stages of moral development).

11. This is not only true in the American educational system, but can be found as a trend in other Western educational systems. See, e.g., Sally Murray et al., *Student Disengagement from Primary Schooling: A Review of Research and Practice*, MONASH U. (Nov. 2004), <http://www.cassfoundation.org/2016/wp-content/uploads/2016/07/StudentDisengagement.pdf> [<https://perma.cc/HE5B-WJH5>] (referring to similar trends in Australian and Canadian primary and middle school education).

12. See S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137, 138 (2017) (citing Brendan Nyhan & Jason Reifler, *The Roles of Information Deficits and Identity Threat in the Prevalence of Misperceptions*, J. ELECTIONS, PUB. OP. & PARTIES 1, 2 (2018)).

13. See Strong, *supra* note 12, at 138.

14. *Id.* at 137.

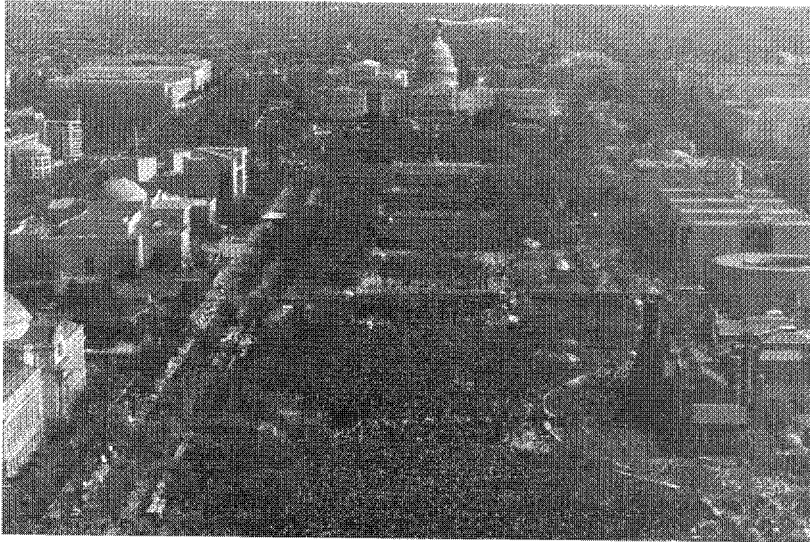
15. See Nyhan & Reifler, *supra* note 12, at 2.

16. See Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 304 (2010).

17. See Nyhan & Reifler, *supra* note 12, at 2.

contradicting their opinions—a view that is consistent with a wide array of research.”¹⁸

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18. See *id.* at 2. But see Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 67 (2014) (finding that “surprise validators,” meaning people that a subject would trust otherwise, imparting information in contrast to the subject’s worldview may be considered a valid source of information).

19. Brian F. Schaffner & Samantha Luks, *This is What Trump Voters Said When Asked to Compare His Inauguration Crowd with Obama’s*, WASH. POST (Jan. 25, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/25/we-asked-people-which->

For example, consider a *Washington Post* study in which 1388 American adults were shown photographs of the crowd size from two separate presidential inaugurations (at the top, President Obama's in January 2009 and, at the bottom, President Trump's in January 2017).²⁰ Here, two phenomena took place. First, half the group was asked which photo belonged to which inauguration.²¹ As the questioners expected, people who politically supported either candidates Trump or Clinton in the 2016 presidential election claimed that the crowd for their party's president was bigger.²² Of course, the objectively true answer is that the January 2009 Obama inauguration, pictured above, had more attendees. In this case, the study found that 41% of Trump voters, 8% of Clinton voters, and 21% of people who did not vote in the 2016 election gave the wrong answer.²³

Second, and more tellingly, the other half of the study group was not asked about any particular president, but rather simply "which photo has more people?"²⁴ Here, 15% of Trump voters responded that there were more people in the photo from Trump's inauguration than Obama's, whereas 2% of Clinton voters and 3% of non-voters thought the same.²⁵ The researchers thought that this may track a mental process political psychologists call "expressive responding,"²⁶ in which the respondents knowingly give a false response that expresses their worldview.²⁷ This is consistent with the literature on the role of information deficits in decision making,²⁸ and shows that more than a few people may prefer to believe then-White House Press Secretary Sean Spicer's claim that "this

inauguration-crowd-was-bigger-heres-what-they-said/?noredirect=on&utm_term=.25858627ea39
[<https://perma.cc/V8W8-CFVF>].

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *Id.*

25. Schaffner & Luks, *supra* note 19.

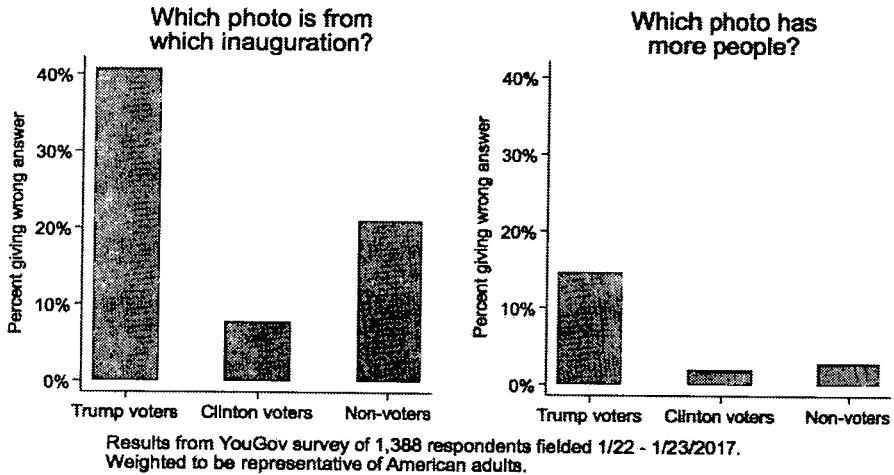
26. *Id.* (citing John G. Bullock et al., *Partisan Bias in Factual Beliefs about Politics*, 10 Q. J. POL. SCI. 519 (2015)).

27. *See* Schaffner & Luks, *supra* note 19.

28. *See* Strong, *supra* note 12, at 138 (citing Nyhan & Reifler, *supra* note 12, at 2). Dan M. Kahan and the Yale Law School's Cultural Cognition Project have been studying the "American Culture War of Fact" for many years as well. *See* Dan M. Kahan et al., *The Second National Risk and Culture Study: Making Sense of – and Making Progress In – the American Culture War of Fact* (Report release date: Sept. 27, 2007; Revised: Oct. 3, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017189 [<https://perma.cc/7UBJ-MEZF>].

was the largest audience to ever witness an inauguration—period—both in person and around the globe.”²⁹

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Further, psychologist Ira Hyman looked closer at the second study, and found support in psychological literature from the last century that offers another, not entirely inconsistent, possibility.³¹ In Solomon Asch’s 1956 study on “independence and conformity,” Asch tested a single individual’s belief against a unanimous (but objectively wrong) majority.³² In that study, the subject drew a correct conclusion about something objectively verifiable (in that case, it was the length of a line versus the length of other lines), but then would change his or her mind after hearing others incorrectly answering the same question.³³ The more others gave the wrong answer, the more the subject took into account what others thought and changed their answer, even when the person’s initial belief had been right.³⁴ Asch called this the “conformity effect.”³⁵ In his post-experiment interviews, Asch found both that people realized that the majority were making errors but did not want to challenge those errors, and—separately—that the subjects began to doubt themselves and

29. See Schaffner & Luks, *supra* note 19.

30. *Id.*

31. See Ira Hyman, *Crowd Size, Line Length, and Conformity*, PSYCHOL. TODAY (Jan. 20, 2017), <https://www.psychologytoday.com/us/blog/mental-mishaps/201701/crowd-size-line-length-and-conformity> [<https://perma.cc/ZF6E-HXGG>].

32. *Id.*

33. *See id.*

34. *See id.*

35. *See id.*

“worried they were experiencing an illusion.”³⁶ Other recent studies have borne out the concept that “repetition increased the subjects’ perception of the truthfulness of false statements, even for statements they *knew* to be false.”³⁷

Information deficits impact how people respond to external information: a group confronted with the same event may find completely different—sometimes completely opposing—lessons to learn from it. And, “[e]ven in the face of the very same information, we ‘see’ from different perspectives, disagreeing about ‘the facts,’ what they are and what they mean, and about what, if anything, we can and should do to change the current state of affairs.”³⁸ Ultimately, this is emphasized even more by what is perhaps the most important facet of the human experience: we are vastly complex beings.³⁹

II. IS TODAY’S HYPER-CONNECTED CULTURE IMPACTING THIS TREND—AND IS IT AFFECTING THE PUBLIC PERCEPTION OF LAWYERS?

“[The Internet] supports the mainstay of all villages, gossip. It constructs proliferating meeting places for the free and unstructured exchange of messages which bear a variety of claims, fancies and suspicions, entertaining, superstitious, scandalous, or malign. The chances that many of these messages will be true are low, and the probability that the system itself will help anyone to pick out the true ones is even lower.”⁴⁰

- Bernard Williams

36. *Id.*

37. Hambrick & Marquardt, *supra* note 7.

38. See Gerald P. Lopez, *Transform—Don’t Just Tinker With—Legal Education*, 23 CLINICAL L. REV. 471, 529 (2017).

39. See Robert J. Rubinson, *Attorney Fact-Finding, Ethical Decision-Making and the Methodology of Law*, 45 ST. LOUIS U. L.J. 1185, 1212 (2001).

40. RALPH KEYES, *THE POST-TRUTH ERA: DISHONESTY AND DECEPTION IN CONTEMPORARY LIFE* 196 (2004).

“When people no longer seek the truth even when it is at their fingertips, we move into uncharted territory.”⁴¹

Although fake news is not a new concept at all,⁴² modern technology “greases the skids of post-truthfulness.”⁴³ In our hyper-connected world, where any piece of information is merely a few clicks away, it is difficult to effectively discover and track objective truth. A few trends immediately come to mind. These, combined with the amount of information that anyone can reasonably sift through, leads us to use “mental shortcuts,” or heuristics, to process information.⁴⁴

First, our twenty-four-hour news cycle demands attention and vigilance. Likely as a response to an appearance of bias, news shows have moved to the model of “hot-takes,” in which two sides of an argument are presented in real time, “pitted against” one another so that viewers or readers can make up their own minds about which point of view they agree upon.⁴⁵ However, as noted in Part I, studies have shown that “citizens are likely to resist or reject arguments and evidence contradicting their [own] opinions,” meaning that an individual’s initial, often “gut” reaction, is the point of view that they will seek to confirm, whether or not the facts surrounding the topic supports it.⁴⁶ Here, according to Edward Glaeser and Cass Sunstein, only “surprise validators” imparting information will have an effect on a person’s point of view.⁴⁷ For example, imagine Rush Limbaugh surprisingly presenting evidence in support of climate-change scientists.

Second, in recent years, public discourse has moved from traditional to social media, even for those with the most power.⁴⁸ With this, the rise in fake news and constant charges of bias aimed at even the most diligent reporters has presented a new and significant challenge in terms of locating the truth in factual matters.⁴⁹ Here, I will certainly agree with Carl Bernstein that a journalist’s obligation is to find “the best obtainable

41. Philip N. Meyer, *A Tale of 2 Stories: When It Comes to Facts and the Law, Justice Isn't Always Reflected If We Exist in a Hall of Mirrors*, 103 A.B.A. J. 22, 24 (2017), http://www.abajournal.com/magazine/article/alternative_facts_law_justice_reality [<https://perma.cc/VXU2-9C95>].

42. See the brilliant article in this issue by Cathren Page, *An “Astonishingly Excellent” Solution to Super-Fake Narratives*, 58 WASHBURN L. J. 673 (2019) (tracing back the history of this term).

43. KEYES, *supra* note 40, at 197.

44. See Rubinson, *supra* note 39, at 1210; see also Lawrence M. Solan, *Four Reasons to Teach Psychology to Legal Writing Students*, 22 J.L. & POL'Y 7, 7–8 (2013).

45. See Nyhan & Reifler, *supra* note 16, at 304.

46. *Id.*

47. See Glaeser & Sunstein, *supra* note 18, at 67.

48. See Cheryl E. Chambers, *From the Star Chamber to the Separation of Powers*, 90 N.Y. ST. B.J. 14, 18 (2018).

49. *See id.*

version of the truth,”⁵⁰ which is located somewhere in the loci of factors: some psychological, some economic, and some related to access to proprietary information.⁵¹ Nevertheless, even under such a measure, the fourth estate—the press—is under attack, whether in print, television, or online.⁵² While the First Amendment protects a wide range of views—including much of what would qualify as “fake news”⁵³—to let citizens determine what to believe, the Founders also believed that citizens themselves would strive to be moral, rational, and truth-seeking.⁵⁴ But the complication comes when citizens cannot even determine what is real,⁵⁵ or in some cases, *who* is real.⁵⁶

These trends in increased disinformation come at the same time that the non-lawyer’s perception of the legal profession is already dire. In a 2015 Gallup poll, 34% of those polled rated attorneys’ honesty and ethical standards as “low” or “very low,” with only 4% rating the same

50. Kellia Ramares, *Journalistic Objectivity: “Getting the Best Obtainable Version of the Truth”*, GLOBAL RES. (Nov. 19, 2010), <https://www.globalresearch.ca/journalistic-objectivity-getting-the-best-obtainable-version-of-the-truth/22003> [https://perma.cc/6KG8-QWYB]; see also Eric Black, *Carl Bernstein Makes the Case for ‘The Best Obtainable Version of the Truth’*, MINN. POST (Apr. 17, 2015), <https://www.minnpost.com/eric-black-ink/2015/04/carl-berstein-makes-case-best-obtainable-version-truth/> [https://perma.cc/NB3T-K9GC].

51. Ramares, *supra* note 50 (“Among the economic limitations are the fact that many databases and expert reports are proprietary, and especially at the level of community journalism, we may not have the funds to access them. Government agencies may refuse us access to documents we ask for in a Freedom Of Information Act request, and we don’t have the legal resources to fight the government in court.”).

52. Mark A. Cohen, *The Future Lawyer*, FORBES (May 30, 2017), <https://www.forbes.com/sites/markcohen1/2017/05/30/the-future-lawyer/#2b4a3e191d18> [https://perma.cc/2CGY-6T5N] (“Defending a free press has long been a mission for lawyers. Social media has broadened that ongoing challenge . . . [it] is rapidly eclipsing traditional media, providing a global platform for ‘alternative facts,’ propaganda, and misinformation masquerading as ‘news.’”)

53. Clay Calvert & Austin Vining, *Filtering Fake News Through A Lens of Supreme Court Observations and Adages*, 16 FIRST AMEND. L. REV. 153, 170 (2017) (“At the most rudimentary level, fake news is a speech-based phenomenon. . . . The First Amendment, thus, is relevant to the extent that curtailing fake news entails government action targeting its producers and/or disseminators.”).

54. See Ashley Messenger, *The Epistemic and Moral Dimensions of Fake News and The First Amendment*, 16 FIRST AMEND. L. REV. 328, 330 (2017).

55. See *id.* at 337 (“If ‘knowledge’ is ‘true, justified belief,’ then one who wishes to have knowledge must care about whether that belief is justified. Fake news can create belief, but it’s not true. If the audience doesn’t realize the information isn’t true or hasn’t evaluated whether the belief is justified, then people may think they have knowledge, but they don’t—and that undermines the quality of the decision making in our society.”).

56. For example, consider the case of “bot” messages, like those used by Russian hackers during the 2016 Presidential elections (and for quite some time before and since). Kathryn Watson, *Russian Bots Still Interfering in U.S. Politics After Election, Says Expert Witness*, CBS NEWS (Mar. 30, 2017), <https://www.cbsnews.com/news/russian-bots-still-interfering-in-u-s-politics-after-election-expert/> [https://perma.cc/EA35-WWR5]; see also Neil MacFarquhar, *A Powerful Russian Weapon: The Spread of False Stories*, N.Y. TIMES (Aug. 28, 2016), <https://www.nytimes.com/2016/08/29/world/europe/russia-sweden-disinformation.html> [https://perma.cc/8376-6VJM?type=image].

standard as “very high.”⁵⁷ In other studies, a large majority of those polled ranked lawyers at the bottom of the list of professionals that contribute to the well-being of society, despite not finding any issue with lawyer competency.⁵⁸ Some lawyers are rightly concerned that “the less our fellow citizens know about how our courts work, and how the law works and affects all our lives outside the courthouse, the less faith they will have—or can legitimately have—in the rule of law at the foundation of our society and our freedom.”⁵⁹ But this may also be an opportunity for lawyers—and law students and legal educators—to grapple with what we can do within our worlds to educate ourselves and others on facts and combat disinformation that undermines the rule of law.⁶⁰

III. WHAT CAN WE DO IN THE LEGAL ACADEMY TO HELP OUR LAW STUDENTS NAVIGATE THIS BRAVE NEW “POST-TRUTH” WORLD?

“The greatest triumphs of propaganda have been accomplished, not by doing something, but by refraining from doing. Great is truth, but still greater, from a practical point of view, is silence about truth.”⁶¹

- Aldous Huxley

57. David VandeWaa, *Overcoming the Negative Stigma Associated with Attorneys*, LAFLEUR (Oct. 11, 2016), <https://lafleur.marketing/blog/overcoming-the-negative-stigma-associated-with-attorneys/> [<https://perma.cc/ZTN7-Y8MZ>].

58. *See id.* (“The Pew Research Center also found that not only are lawyers at the bottom of the list of professions who ‘contribute a lot to society’s well-being’ (behind clergy, artists, journalists, and even business executives), but their reputation is falling—from 23% who thought they contributed a lot to society in 2009 down to a mere 18% in 2013: a significant decline in just 4 years and steadily losing ground to business executives.”); Robert A. Clifford, *The Public’s Perception of Attorneys: A Time to Be Proactive*, 50 DEPAUL L. REV. 1081, 1083 (2001) (“It appears that the preliminary results indicate that the public does not view competency as an issue. The public’s disaffection is rooted in lawyers’ winning-at-all-costs tactics and in their profit-seeking orientation. At the very least, this latest snapshot of the public’s attitude confirms that there is a need for improvement. In doing so, we can work on some specific initiatives such as improving client communications, strengthening professional responsibility codes, promoting continuing legal education, revising law school curricula, enforcing disciplinary violations, mandating mentoring, and monitoring lawyer advertising.”).

59. Lucian T. Pera, *Fight Fake News*, 54 TENN. B.J. 3, 10 (2018).

60. *See* Chambers, *supra* note 48, at 18 (“Our modern society, with a 24-hour news cycle, appearance of fake news and constant charges of bias, presents a significant and new challenge to judicial independence. In the 21st century, the judiciary must be responsive to these dynamic changes in our society. The information revolution ushered in by internet interconnectivity creates new opportunities for government transparency and citizen engagement. A strong rule of law relies on public trust in the faithful and fair execution of the laws and the swift administration of justice.”).

61. ALDOUS HUXLEY, *BRAVE NEW WORLD*, at Foreword (1946).

*“At a time when public skepticism abounds, trust in the courts and the rule of law is diminishing, and the specter of fake news looms large, those with the tools to analyze complex issues, evaluate facts, and meaningfully solve real problems will be in increasingly higher demand.”*⁶²

In her work, scholar S.I. Strong has called on the community of “lawyers, judges, legislators, and anyone interested in deliberative democracy” to meet the challenge of addressing the nature of facts in these unprecedented times.⁶³ This task extends to legal educators, who are responsible for guiding and setting an example for society’s future lawyers. Although it presents its own particular challenges, the educational landscape also offers opportunities to grapple with these issues early so that law students have a foundation and framework to understand how to use facts ethically and persuasively.

A. Modeling Behavior and Presenting Frameworks

For many incoming students, law school is a great unknown. Rumors in college, media depictions, and an array of other sources set expectations for what aspiring lawyers can anticipate from their law school experience. Without a framework for what to expect, “[s]tudents enter law school assuming they will learn what they come to call ‘black letter law.’”⁶⁴ The reality of law school can be overwhelming for some students, and some scholars feel that ideas such as “personal values or feelings”⁶⁵ are overlooked, and large classroom lecture settings communicate the message that individuals and their problems do not matter in the eyes of the law.⁶⁶ In addition, students can easily become bogged down in a seemingly endless amount of new and complex information, tracking centuries of legal history and theory. They start to make choices about what they assume is valuable to their professors, and many scholars have noted a pattern of “right-wrong” thinking that

62. Claire Botnick & Cort VanOstran, *Practice Makes Perfect: New Practitioners’ Perspectives on Trends in Legal Education*, 53 WASH. U. J.L. & POL’Y 135, 137 (2017).

63. Strong, *supra* note 12, at 137.

64. Kristen K. Robbins-Tiscione, *A Call To Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 337 (2011).

65. Wangerin, *supra* note 2, at 1266 (“Too much of what goes on around the law school and in the legal classroom seeks to tutor students in strategies for avoiding, for ignoring, for somehow subverting the unquantifiable, the inexact, the emotionally charged, those things which still pass in my mind under the label ‘human.’”) (quoting SCOTT TUROW, ONE L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL 297 (1977)).

66. See Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals*, 39 WM. & MARY L. REV. 457, 479 (1998); see also Wangerin, *supra* note 2, at 1266.

mirrors early stages of educational development.⁶⁷ Wangerin writes that “[o]ne of the most dangerous forms of escape . . . is the ‘escape into commitment,’ . . . [where] commitment is sought as an escape from development, not as a forward step,” but rather as “a desire to return to dualistic thinking.”⁶⁸

Most first-year law students are often unaware that such ethical issues can exist in the cases they confront.⁶⁹ Because they were not asked to address such issues,⁷⁰ students who might recognize a potential conflict of interest or social justice concern in an assigned case may choose not to even raise a question about it.⁷¹ This indicates a willingness of law students to “wear blinders” when it comes to being ethically diligent, primarily because they do not think—or yet know—it is important.⁷² This leads to a continuation of the information deficits that S.I. Strong finds so societally harmful,⁷³ to say nothing of how such deficits might affect a client facing a life-changing legal decision.⁷⁴ As their legal education continues, law students come to find their tasks becoming more complex and multi-faceted. If their professors do not force them to acknowledge and tackle that complexity in detail, it is natural for them to fall back on their intuition, now more informed in legal matters and concepts, rather than dive deeply into the facts of a case and how they might be construed differently by various parties.⁷⁵

The first step legal educators can take is to talk to students about what they expect in the classroom. By modeling respect for the students in the classroom and openness to dialogue, educators can set the tone for reasoned debate. In fact, “before the students become lawyers and represent clients, they will mirror the values we model in their conduct

67. Wangerin, *supra* note 2, at 1246–47; *see also* McSherry, *supra* note 10, at 158.

68. Wangerin, *supra* note 2, at 1270.

69. Frances C. DeLaurentis, *When Ethical Worlds Collide: Teaching Novice Legal Writers to Balance the Duties of Zealous Advocacy and Candor to the Tribunal*, 7 DREXEL L. REV. 1, 22 (2014).

70. *See id.* at 22–23.

71. *See id.* Professor McMurtry-Chubb addresses just this issue in an enlightening piece in this issue in which she provides a useful model for tracking legal and ethical issues at once, Teri McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 WASHBURN L. J 531 (2019).

72. DeLaurentis, *supra* note 69, at 22.

73. Strong, *supra* note 12, at 138.

74. DeLaurentis, *supra* note 69, at 22; *see* Strong, *supra* note 12, at 138.

75. Students come to find that it is not just case law as determined by a judge that is fact dependent, but that all sources of lawmaking, whether executive, administrative, regulatory or legislative depend on facts as well. *See, e.g.*, Shalev Roisman, *Presidential Fact-finding*, 72 VAND. L. REV. 825 (2019); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 548 (1965); William Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 894–97 (2013).

toward us and toward one another,” and we should teach in a way that strives to respect individual identity.⁷⁶

Second, it is also important to demonstrate a framework, or “scaffolding,” for students to understand the rules of law, but also the rules of engagement. Students will benefit enormously from understanding that fact application to rules is not rote but rather requires a higher order of thinking, an ability to analogize and distinguish rather than purely memorize or apply. Often, they will see this demonstrated through Socratic dialogue (although some may be too scared to notice at the time) as the case method works as both “examination and cross-examination” to test a student on “‘the power of legal reasoning’ rather than law as a science or a mastery of a fixed body of knowledge.”⁷⁷ Students should understand that legal reasoning is core to actual lawyering and not simply a “logic game”⁷⁸ to test their knowledge of a subject on a particular day.

Students will also very likely notice the interplay between facts and law within a legal writing course. Kristen Robbins-Tiscione tells us that “[i]t becomes clear that in legal writing, at least, the rule of law is not fixed; it can be articulated in a number of ways.”⁷⁹ She notes that “[a]s students observe colleagues citing different cases in support of the same legal rules and analogizing to different cases to predict the outcome in the same case,”⁸⁰ students become worried and “their task becomes complicated, confusing and uncertain.”⁸¹ Here, the professor can make a big impact on students by guiding them through the concepts of how facts can be used—objectively or persuasively—but within the bounds of their ethical obligations (no omission or revision of *material* facts, although all facts do not have to be presented). It also matters that ethics are not routinely discussed in first-year courses and are often left to a single professional responsibility course in the law school curriculum.⁸²

In both seminar and larger classes, it is also possible to promote a more engaged and curious community of law students. One such suggestion, made by none other than Justice Louis Brandeis, is simply

76. See Lerman, *supra* note 66, at 479.

77. See Martha Minow, *Marking 200 Years of Legal Education: Traditions of Change, Reasoned Debate, and Finding Differences and Commonalities*, 130 HARV. L. REV. 2279, 2284–85 (2017) (internal quotation omitted).

78. See Lerman, *supra* note 66, at 463.

79. Robbins-Tiscione, *supra* note 64, at 338.

80. *Id.*

81. *Id.*

82. DeLaurentis, *supra* note 69, at 22.

“more speech.”⁸³ This means an increase of discourse in the legal education context, where professors create a space for questions and critical inquiry, driven by student initiative rather than the professor’s pre-conceived framework for the discussion. This can instill an aspirational view of the law in more students,⁸⁴ and it is especially important that all faculty “accord questions [of ethics and diligence] attention and respect.”⁸⁵ Through our teaching, we impart messages to our students about what counts in law and help our students construct legal frameworks and place facts and ideas within them. These frameworks are the lenses through which they view lawyering. “If we avoid using words such as ethical, professional, right, wrong, and truth, we send a message that those concepts are irrelevant to the enterprise.”⁸⁶

B. Mentoring

Like modeling behavior, professors mentoring students in an official capacity can also help further this goal. Either one-on-one or in small groups, mentors can guide students in all aspects of practice. They can, for example, reinforce the strategic thinking and processes that go into the representation of a client, something that cannot be sufficiently taught in a large class setting.⁸⁷ Through a mentor’s guidance, law students can learn that being a lawyer is not simply a profession: it is a body of ideas, an ethical approach to practice, a way in which they conduct themselves in all aspects of life.⁸⁸

83. *Whitney v. California*, 274 U.S. 357, 377 (1927) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”) (Brandeis J., concurring); *see also* Strong, *supra* note 12, at 138.

84. *See* Botnick & VanOstran, *supra* note 62, at 138.

85. Eleanor W. Myers, “*Simple Truths*” about Moral Education, 45 AM. U. L. REV. 823, 851 (1996).

86. *Id.*

87. Clifford, *supra* note 58, at 1082 (“Mentoring . . . impacts the public’s image of lawyering.”).

88. *Id.*

C. Engaging in (Cross-Disciplinary) Learning

“[T]he legal community should not only take account of data from a wide range of disciplines, including those that may have been overlooked in the past, it should also coordinate research agendas and findings with other sectors of civil society seeking to improve the quality of contemporary political discourse.”⁸⁹

Learning about learning is also key. Scholars believe we should bring together theories from other disciplines to understand how we process information,⁹⁰ and thereby respond to the rise of alternative facts.⁹¹ Professor Lawrence Solan has written about the importance of bringing psychology into the classroom, including how to understand heuristics and how various cognitive biases work.⁹² First, it is quite reasonable to think about why law students might rely on mental shortcuts, particularly when faced with processing an enormous amount of new information. He notes that “people routinely use intellectual shortcuts to simulate the results of logical reasoning, saving time and reducing cognitive load.”⁹³ However, the bargain “comes with a price,”⁹⁴ which is that sometimes engaging in heuristics brings with it a propensity to rely on biases.

Among the types of biases Solan outlines, two are key for understanding how to teach law students to identify their own propensities: confirmation bias and correspondence bias. Confirmation bias is a tendency not to see past beliefs we already hold, which impairs our ability to see the other side’s point of view.⁹⁵ Here, “it is essential

89. See Strong, *supra* note 12, at 145–46 (footnotes omitted); see also Minow, *supra* note 77, at 2288 (“[L]egal education since World War II has increasingly drawn upon other disciplines. These include microeconomics, behavioral economics, history, political science, decision analysis, philosophy, psychology, and organizational behavior. These and other disciplines inform legal scholarship and even what it means to ‘think like a lawyer.’”) (internal citation omitted).

90. See Solan, *supra* note 44, at 7–8; Myers, *supra* note 85, at 850; Wangerin, *supra* note 2, at 1266; Lerman, *supra* note 66, at 479; Robbins-Tiscione, *supra* note 64, at 337–38; Daniel S. Medwed, *The Good Fight: The Egocentric Bias, the Aversion to Cognitive Dissonance, and American Criminal Law*, 22 J. L. & POL’Y 137 (2013).

91. Strong, *supra* note 12, at 138.

92. See Solan, *supra* note 44, at 7–8; see also Anne E. Mullins, *Opportunity in the Age of Alternative Facts*, 58 WASHBURN L.J. 577 (2019) (indicating that few formal courses exist incorporating cognitive theory into the law school classroom). Professor Mullins has previously written on psychology and heuristics in judicial opinions. See Anne E. Mullins, *Jedi or Judge: How the Human Mind Redefines Judicial Opinions*, 16 WYO. L. REV. 325 (2016) (observing that effective persuasion necessarily appeals to the reader’s unconscious mind through information collateral to or even substantively irrelevant to the actual dispute); Anne E. Mullins, *Subtly Selling the System: Where Psychological Influence Tactics Lurk in Judicial Writing*, 48 U. RICH. L. REV. 1111 (2014) (examining persuasion in judicial writing through a cognitive theoretical framework).

93. See Solan, *supra* note 44, at 7.

94. *Id.*

95. See *id.* at 20–23.

that students learn to take opposing arguments seriously and to counter them. This often requires them to fight the tendency to discount counterarguments as weak, a consequence of the confirmation bias.”⁹⁶ For example, if they are taught to see it, students being taught interviewing skills⁹⁷ will learn to head off confirmation bias right from the beginning. “It is not that all clients are liars. Rather, it is that the client’s narrative is often an incomplete and somewhat biased account of the facts, largely because the client also discounts evidence that tends to disconfirm the story.”⁹⁸

Further, correspondence bias is what “[p]sychologists call the tendency to overemphasize the extent to which conduct emanates from a person’s character” rather than from circumstances.⁹⁹ Here, too, students can learn much from the way in which we might presume a person’s character traits lead to certain conduct without fully examining the facts at play.¹⁰⁰ Solan believes that:

exposing students to the psychological mechanisms that could inhibit effective writing, (and advocacy more generally) may help them to internalize the point more fully, and to have a better chance of incorporating it into their sense of what it means to advocate well from a very early stage in their careers.¹⁰¹

By teaching psychological techniques in the classroom, we can reinforce the connection between law and facts. As Philip Meyer puts it:

I tell students in my first-year classes the practice of law anticipates the interaction between law and facts; legal doctrine matters only as applied to “the facts.” If we exist exclusively in a hall of mirrors where there are no actual facts but only alternative facts, then there may be judgment but not justice.¹⁰²

D. Encouraging Students to See All Sides through Participation in Clinical Opportunities and Negotiations

Another step is reinforcing student’s participation in clinics, during which they must consider multiple, real-life perspectives simultaneously, rather than in a vacuum.¹⁰³ Scholar Gerald Lopez emphasizes that:

clinical programs demand students perceive the world variously (from a client’s, an agency’s, a tribunal’s perspective), all at once, not to the

96. *Id.* at 23.

97. This is suggested in the next part as another helpful way to train students to see all sides of the story.

98. *Id.*

99. *Id.* at 24.

100. *See id.*

101. *Id.*

102. Meyer, *supra* note 41, at 24.

103. *See* Lerman, *supra* note 66, at 465; *see also* Lopez, *supra* note 38, at 530.

exclusion of one another. And they demand students grasp how different frames highlight some problems and solutions and not others, with varying degrees of effectiveness, difficult to measure in advance of unfolding events.¹⁰⁴

But he warns that as “transformative as clinical education at its best can be . . . it cannot alone provide the answer legal education seeks in transforming itself.”¹⁰⁵

Because of their real-life nature, scholar Lisa Lerman also considers clinics to be the best opportunity in law school for students to think about ethical issues:

many law students desire analytical conclusions and . . . some teachers emphasize the teaching of rules because they like analytical conclusions. . . . Socrates urged teachers and students to abandon this goal. One way to move the dialogue of ethics classes beyond this logic game, he suggested, is to work on ethical issues in clinics . . . [where] students really do have to figure out what they want to do.¹⁰⁶

Further, scholars have also looked to negotiation skills as helping develop fact analysis in students.¹⁰⁷ Like clinical experiences, which can develop students’ skills of looking at complex and multifaceted issues, negotiations build fact analysis skills because problem-solving is dependent upon understanding the wants and needs of all the parties involved. Here, Strong notes that “mechanisms that increase trust between conflicting groups may lead members of one group to become more willing to listen to facts presented by members of another group, even if those facts conflict with the longstanding beliefs of the first group.”¹⁰⁸

E. Students Educating Others and Modeling Respectful Dialogue

“[L]aw schools’ longstanding commitment to teaching and modeling a respect for dialogue, for hearing both or all sides, for refraining from judgment until one has truly listened, or as it is more often called, for legal process, and for the reasoned debate which follows . . . which carries with it the irreducible equality of human worth.”¹⁰⁹

Finally, law students can answer the call from judges, practitioners, and academics alike and fill the information gap for others. Justice

104. Lopez, *supra* note 38, at 531.

105. *Id.*

106. Lerman, *supra* note 66, at 465 (internal quotations omitted).

107. See Solan, *supra* note 44, at 7–8; Strong, *supra* note 12, at 138.

108. Strong, *supra* note 12, at 143.

109. Botnick & VanOstran, *supra* note 62, at 138.

Cheryl Chambers wrote impassioned about the role that the bench and the bar can play in this regard:

More than at any other time in U.S. history, people today have the tools to be informed about the legal process. This is an opportunity for bench and the bar to inform, educate and advocate for intellectual curiosity. In former Chief Judge Judith S. Kaye's 1996 lecture, *Safeguarding a Crown Jewel*, she emphasized the role of lawyers, legal educators and journalists in educating the public about how our legal system functions. A well-informed population can better interpret and evaluate the jurisprudence coming out of judicial decisions. Judge Kaye called on members of the bar to communicate to the public the importance of the judiciary, while also clarifying its role.¹¹⁰

This is no less true for law students, who are positioned between non-lawyer and practitioner, and have the ability to connect to both worlds. The dialogue-driven orientation fostered in law school can also help law students talk to (and model for) younger members of our society. For example, initiatives like the Marshall-Brennan Constitutional Literacy Project¹¹¹ give law students the opportunity to teach high school students about important Supreme Court cases that affect students' daily lives, and allow them to help the high school students develop "the 21st century skills of creativity, problem solving, collaboration, and critical thinking—skills that are necessary to support an empowered, active, questioning democratic citizenry."¹¹² Apart from the hands-on experience that clinics and direct mentoring might provide law students, teaching also provides "personal development," and the opportunity to impact the next generation of citizens.¹¹³

Martha Minow calls on law schools to participate in this effort, as well. The mission to further the dialogue-driven directives of law schools extends to how such educational institutions—and even the traditional institutions of the legal profession—can play a role in working directly with the public to enhance the impact that the law has on the world stage.¹¹⁴ By strengthening the importance of more public-oriented goals within the law school system, law students can also begin to understand the vital role that lawyers play throughout the world, not just in the traditional, mainstream view of attorneys. Minow tells us, law schools could do more work evaluating the legitimacy and effectiveness of the administrative state and constitutional democracies, and devising

110. Chambers, *supra* note 48, at 18 (internal citations omitted).

111. *Marshall-Brennan Constitutional Literacy Project*, AM. U. WASH. C. L., <https://www.wcl.american.edu/impact/initiatives-programs/marshallbrennan/> [<https://perma.cc/ZTN7-Y8MZ>] (last visited Apr. 22, 2019).

112. *Id.*

113. See McSherry, *supra* note 10, at 158.

114. Minow, *supra* note 77, at 2290.

improvements for governing public and private institutions.¹¹⁵ By doing so, educators would move students towards the understanding of the legal profession as a public service, knowledge of which can help alter and further shape the world in which they live. Thus, instead of merely seeing the requirements of the profession as advocating for a particular client or employer, students might begin to see their role as advocating for *all* citizens, within the confines of an individual-focused and precedent-based intellectual structure. Educators can push students to more readily consider the big picture of the issues discussed in class, and reveal to students how their own ideologies and perspectives lead to decisions that bleed into the general population—meaning the influence of any given student, if rigorous and passionate enough—can truly alter the communities in which they live. On this note, Minow believes that “law schools . . . would do well to strengthen techniques for determining truth and enhancing impartiality by governments.”¹¹⁶

Likewise, instilling this sense of responsibility can help motivate students to further inform the public about how the judicial process works.¹¹⁷ This not only encourages the students to move forward professionally with an optimistic view of the law, but also helps to further educate the public about how to better interpret and evaluate the jurisprudence coming out of judicial decisions.¹¹⁸ The more that the judiciary’s role is clarified to the masses, the more faith people will naturally have in it. This in turn might drive them to seek out more facts, simply by nature of further understanding how such facts affect the decisions that impact their own lives.

F. Final Thoughts

Dialogic structure is of course susceptible to the same issue that plagues most people: we rely on biases inherent in human nature. However, there are some ways to combat even that, to the extent possible.

First, more speech, or better yet, more inclusive discourse in the classroom setting, can create a rapport between students on opposite sides of the aisle of any given issue and increase trust. As that trust builds over time, both sides will be willing to listen to facts presented by the other side, even if those facts conflict with longstanding beliefs of the

115. *Id.*

116. *Id.* at 2296.

117. Chambers, *supra* note 48, at 18.

118. *Id.* at 18.

listeners.¹¹⁹ Second, as Glaeser and Sunstein found, messages must come from sources seen as credible.¹²⁰ Thus, legal educators must build up that credibility, not just in terms of how students see them as an authority figure in the classroom, but how students see one another, as well.¹²¹ Students should be just as engaged when a classmate is asking or answering a question as when their professor is doing the same. The only way to increase such credibility is through direct engagement with one another on an intellectual and moral level. This allows Glaeser's and Sunstein's "surprising validators" to come into play, in which unexpected information—such as information that is even directly contradictory to one's own perspective—can seem more reasonable, simply because it is coming from a highly-reputable source.¹²² The more professors can make themselves and their students such reputable sources, the less students will dismiss the arguments of their counterparts if they do not overlap with their own. This reduces polarization, rather than promoting it.¹²³ If one of the big problems with information dissemination today is the ability for people to choose the echo chamber of facts that they are exposed to, engagement with the "other side" in a safe, inviting academic space can be a way to minimize the deficits that are seen in the general public's discussions of civil, social, and political issues. People want the comfort of an echo chamber, where they feel safe and their opinions feel validated. As legal educators, we must warmly pull them out of this comfort zone where we can—and the most obvious context starts in law school.

IV. CONCLUSION

"What is it in us that seeks the truth? Is it our minds or is it our hearts?"¹²⁴

- Jake Tyler Brigance, A Time to Kill

How do we, as a society—and legal educators in particular—respond to the rise of a post-truth society and promote engagement in civil discourse and continued fact-finding? It is time for legal educators to raise our own expectations for both our students and ourselves, and address our current cultural and political climate to protect the rule of

119. See Strong, *supra* note 12, at 143.

120. Glaeser & Sunstein, *supra* note 18, at 67.

121. See *id.*

122. See *id.* at 91.

123. See *id.*

124. A TIME TO KILL (Warner Bros. 1996); JOHN GRISHAM, A TIME TO KILL (1989).

law. “Truth” may not be one thing to all, but it is still a cornerstone to our deliberative democracy and deserves our most careful regard.

