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## ESSAY

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### ALTERNATIVE FACTS AND THE POST-TRUTH SOCIETY: MEETING THE CHALLENGE

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S.I. STRONG<sup>†</sup>

*During times of universal deceit, telling the truth becomes a revolutionary act.*  
– George Orwell, 1984

In the hours following the 2017 U.S. presidential inauguration, the world was introduced to the concept of “alternative facts,” a term that quickly became synonymous with a willingness to persevere with a particular belief either in complete ignorance of, or with a total disregard for, reality.<sup>1</sup> The increasing incidence of alternative facts in the popular and political arena creates a critical conundrum for lawyers, judges, legislators, and anyone interested in deliberative democracy, since it is unclear how rational debate can proceed if empirical evidence holds no persuasive value.

Although the concept of a “post-truth society” only truly entered the cultural consciousness within the last year,<sup>2</sup> social scientists from a variety of fields, most notably political science and psychology, have long been

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<sup>†</sup> Manley O. Hudson Professor of Law, University of Missouri; Adjunct Professor, Georgetown Law Center; Ph.D. (law), University of Cambridge (U.K.); D.Phil., University of Oxford (U.K.); J.D., Duke University; M.P.W., University of Southern California; B.A., University of California, Davis.

<sup>1</sup> See Eric Bradner, *Conway: Trump White House Offered “Alternative Facts” on Crowd Size*, CNN (Jan. 23, 2017), <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/> [https://perma.cc/67JJ-2NPR] (reporting a discussion between Trump advisor Kellyanne Conway and *Meet the Press* host Chuck Todd, in which Conway defended White House Press Secretary Sean Spicer’s description of the size of the crowd at the inauguration as an “alternative fact” rather than a “falsehood”).

<sup>2</sup> See Amy B. Wang, “Post-Truth” Named 2016 Word of the Year by Oxford Dictionaries, WASH. POST (Nov. 16, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/?utm\\_term=.12aaa7361b38](https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/?utm_term=.12aaa7361b38) [https://perma.cc/V75E-LTLH] (“Oxford Dictionaries has selected ‘post-truth’ as 2016’s international word of the year, after the contentious ‘Brexit’ referendum and an equally divisive U.S. presidential election caused usage of the adjective to skyrocket, according to the Oxford University Press.”).

interested in how and why individuals and institutions adopt behaviors or beliefs that are patently at odds with observable reality. These scholars' often startling conclusions provide important insights for lawyers and policymakers struggling to adapt to unprecedented legal and political challenges.

Traditionally, scholars have characterized political misperceptions as "information deficits" arising out of individuals' "lack of interest in or knowledge of politics."<sup>3</sup> Under this view, the best response, according to no less eminent an authority than Justice Brandeis, "is more speech."<sup>4</sup>

Lawyers tend to find this approach extremely attractive given their belief, honed through years of training, that the best form of persuasion is through content-based arguments (so-called "hard evidence").<sup>5</sup> Unfortunately, two political scientists, Brendan Nyhan and Jason Reifler, have empirically demonstrated that "more speech" does not in fact cure certain types of political misperceptions and may in some cases be counterproductive.<sup>6</sup> Their research shows that "misperceptions are not just an information problem," which means that "[e]xposure to accurate information may not be enough" to counteract individual or institutional adherence to alternative facts.<sup>7</sup>

If those findings were not sufficiently sobering, Nyhan and Reifler also discovered that attempts to correct misinformation can actually strengthen political misperceptions among those who are most strongly committed to

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<sup>3</sup> Brendan Nyhan & Jason Reifler, *The Roles of Information Deficits and Identity Threat in the Prevalence of Misperceptions* 1, 3 (Nov. 11, 2016) (unpublished manuscript) [hereinafter Nyhan & Reifler, *Roles*], <http://www.dartmouth.edu/~nyhan/opening-political-mind.pdf> [https://perma.cc/T36Q-HG59].

<sup>4</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis & Holmes, JJ., concurring), *overruled in part on other grounds by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *see also* Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 65 (2014) (quoting *Whitney* for the proposition that "[o]ne of the underlying principles of a system of freedom of expression, and indeed of democracy itself, is that if 'there be time to expose through discourse the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence'"); Nyhan & Reifler, *Roles*, *supra* note 3 (manuscript at 2) ("To the extent that misperceptions are rooted mainly in failures of information delivery, presenting corrective messages in convenient and accessible formats should reduce misperceptions.").

<sup>5</sup> *See* Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1398 (2013) (noting *logos* tends to be considered hierarchically superior to *ethos* and *pathos* in classical rhetoric); Katherine R. Kruse, *Engaged Client-Centered Representation of the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 584 (2011) ("What the lawyer does—what the lawyer has been trained to do and has expertise in doing—is to sort the facts of that human problem or situation into a series of legal categories: claims, defenses, procedures, and evidentiary proof.").

<sup>6</sup> *See* Nyhan & Reifler, *Roles*, *supra* note 3 (manuscript at 3) (noting that their "findings provide some indication that some misinformed individuals may already be at least tacitly aware of the correct information but uncomfortable acknowledging it. If so, misperceptions are not just an information problem; the threatening nature of certain facts may also inhibit people from acknowledging the true state of the evidence on controversial issues").

<sup>7</sup> *Id.* at 1, 3.

their initial position.<sup>8</sup> This phenomenon is of course extremely problematic given the increasingly polarized nature of U.S. society,<sup>9</sup> and it helps explain why various attempts to correct the factual record during the 2016 presidential campaign and the early days of the current administration have been less successful than one might expect. Nyhan and Reifler's data has subsequently been used by Edward Glaeser and Cass Sunstein as the basis for a metric to evaluate when attempts to correct political misperceptions do more harm than good.<sup>10</sup>

Nyhan and Reifler's work provides other critical lessons for the legal community. For example, Nyhan and Reifler found that people are more likely to maintain factually inaccurate beliefs if the information is offered in a manner that facilitates counter-argument.<sup>11</sup> Resistance to change is particularly pronounced when people are presented with both sides of a controversy, as is routinely the case in legal and political debates.<sup>12</sup> Journalists also use the point-counterpoint approach,<sup>13</sup> which again helps to explain why media reports about factual inaccuracies during the recent presidential campaign had very little effect on voter perceptions and practices.<sup>14</sup>

Nyhan and Reifler also empirically confirmed several propositions derived from the field of psychology. For example, their research demonstrated not only that "the threatening nature" of certain facts appeared to "inhibit people from acknowledging the true state of the evidence on controversial issues" but also that people's preexisting views were "likely to contribute to misperceptions about controversial issues."<sup>15</sup> In particular, Nyhan and Reifler

<sup>8</sup> Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 304 (2010) [hereinafter Nyhan & Reifler, *Corrections*].

<sup>9</sup> See James E. Campbell, Opinion, *The Source of America's Political Polarization? It's Us*, L.A. TIMES (June 30, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-campbell-political-polarization-20160627-snap-story.html> [<https://perma.cc/W8JD-PMG9>] ("Even those who enjoy a spirited argument suffer from polarization fatigue. But there is no relief coming. Americans are highly polarized and have grown more so.")

<sup>10</sup> See Glaeser & Sunstein, *supra* note 4, at 73-90 (detailing formation of the metric and the results produced).

<sup>11</sup> See Nyhan & Reifler, *Roles*, *supra* note 3 (manuscript at 1) (noting that people may have misperceptions as a result of encountering information "in formats that easily allow for counter-argument").

<sup>12</sup> See Nyhan & Reifler, *Corrections*, *supra* note 8, at 304 ("[P]eople typically receive corrective information within 'objective' news reports pitting two sides of an argument against each other . . . . In such cases, citizens are likely to resist or reject arguments and evidence contradicting their opinions—a view that is consistent with a wide array of research." (citations omitted)).

<sup>13</sup> *Id.*

<sup>14</sup> See Craig Silverman, *The Backfire Effect: More on the Press's Inability to Debunk Bad Information*, COLUM. JOURNALISM REV. (June 17, 2011), [http://www.cjr.org/behind\\_the\\_news/the\\_backfire\\_effect.php](http://www.cjr.org/behind_the_news/the_backfire_effect.php) [<https://perma.cc/P2TZ-B2L9>] ("[T]he backfire effect makes it difficult for the press to effectively debunk misinformation. We present facts and evidence, and it often does nothing to change people's minds. In fact, it can make people dig in even more.")

<sup>15</sup> Nyhan & Reifler, *Roles*, *supra* note 3 (manuscript at 1-3).

proved that “[d]irectionally motivated reasoning,” meaning “biases in information processing that occur when one wants to reach a specific conclusion,” plays a significant role in how people interpret information involving political issues.<sup>16</sup> As they note, “Misperceptions often fit comfortably in people’s worldviews . . . by seeming to confirm people’s prior beliefs.”<sup>17</sup>

This latter statement refers to a concept known as “confirmation bias,” which is one of many types of cognitive distortions that psychologists study. Confirmation bias is defined as the unconscious but pervasive human propensity to filter out information that contradicts an existing belief and instead retain only information that confirms that belief.<sup>18</sup> Other types of cognitive distortions that have been shown to affect legal and political decisionmaking include positive illusions, hindsight bias, contrast bias, procrastination bias, omission bias, normality bias, and the status quo bias.<sup>19</sup> Because these phenomena operate on an unconscious level, they are particularly difficult to identify and challenge.<sup>20</sup> The situation is further exacerbated by the “bias blind spot,” which is reflected in the fact that research subjects “were readily persuaded of the aggregate pattern of behavior

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<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.* (citation omitted).

<sup>18</sup> See Lawrence M. Solan, *Four Reasons to Teach Psychology to Legal Writing Students*, 22 J.L. & POL’Y 7, 19-20 (2014) (“People tend to seek information that they consider supportive of favored hypotheses or existing beliefs and to interpret information in ways that are partial to those hypotheses or beliefs. Conversely, they tend not to seek and perhaps even to avoid information that would be considered counterindicative with respect to those hypotheses or beliefs and supportive of alternative possibilities.” (quoting Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 177 (1998))).

<sup>19</sup> See Nick Bostrom & Toby Ord, *The Reversal Test: Eliminating Status Quo Bias in Applied Ethics*, 116 ETHICS 656, 660 (2006) (“Psychologists and experimental economists have found extensive evidence for the prevalence of status quo bias in human decision making.”); Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 643 (2003) (“[N]ormality bias—a tendency for people to react more strongly to bad outcomes that spring from abnormal circumstances than to otherwise identical outcomes that spring from more ordinary circumstances—permeates the legal landscape. In fact, the normality bias is so strong that it swamps the influence of another well-documented bias—the omission bias—when the two biases push in different directions.”); Jean R. Sternlight & Jennifer K. Robbennolt, *Psychology and Effective Lawyering: Insights for Legal Educators*, 64 J. LEGAL EDUC. 365, 370-71 (2015) (noting that “[a]ttorneys can make better predictions and more effectively advise clients if they know,” among other things, how positive illusions, anchoring, and hindsight bias “influence judgments and decisions made by attorneys, clients, neutrals and others”); Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1134 (2010) (noting that status quo bias, contrast bias, and procrastination bias may affect individuals’ judgment in certain circumstances).

<sup>20</sup> See William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 9 (1988) (noting that “the status quo bias is not a mistake—like a calculation error or an error in maximizing—that once pointed out is easily recognized and corrected. The bias is considerably more subtle”).

(and the reasons for it), but seemed unaware (and slightly skeptical) that they *personally* would fall prey” to any particular bias.<sup>21</sup>

Unconscious bias (sometimes referred to as implicit bias or hidden bias) exists in all areas of life, including both the personal and the political.<sup>22</sup> Some scholars, including Debra Lyn Bassett and Elayne Greenberg, suggest that the best way to minimize unconscious bias is by attacking the issue head on through education and related consciousness-raising techniques.<sup>23</sup> Other experts, most notably Ralph Richard Banks and Richard Thompson Ford, believe that focusing on unconscious bias can misdescribe the relevant issues and avoid more important substantive concerns.<sup>24</sup> Banks and Ford’s analysis appears particularly persuasive in the current context, since it is unlikely that telling purveyors of alternative facts that they are operating under the influence of various unconscious biases will increase the quality of deliberative debate, particularly given the volatility of the contemporary political environment and the low regard that supporters of alternative facts appear to have for scientific research and scholarly endeavors.<sup>25</sup> As a result, the better course of action may be to focus on the method of communication, consistent with Nyhan and Reifler’s observation that “the way in which information is delivered could substantially reduce misperceptions” about a particular political practice or event.<sup>26</sup>

Although Nyhan and Reifler do not themselves provide any recommendations on how to proceed, Glaeser and Sunstein, building directly on Nyhan and Reifler’s work, suggest that the best way to combat political misperceptions is through the use of “surprising validators,” meaning individuals and institutions that are credible to persons operating under the

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<sup>21</sup> *Id.*; see also Solan, *supra* note 18, at 10 (discussing “the bias blind spot, which prevents us from taking our own biases as seriously as we do the biases of others”).

<sup>22</sup> See, e.g., Jeffrey J. Rachlinski & Gregory S. Parks, *Implicit Bias, Election ‘08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 683-88 (2010) (discussing how implicit racial bias manifested itself in the 2008 presidential election).

<sup>23</sup> See Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1572-73 (2013) (providing examples of techniques that “reflect promise in overriding unconscious biases”); Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and ‘Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 105 (2015) (arguing that implicit biases in the workplace can be overcome through education).

<sup>24</sup> See Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter? Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1121-22 (2009) (suggesting that the recent emphasis on implicit racial bias is misguided and that such emphasis “may obscure, or even undermine, the substantive goals of racial justice”).

<sup>25</sup> See David Morgan, *Government Science Goes Rogue on Twitter*, CBS NEWS (Jan. 26, 2017), <http://www.cbsnews.com/news/government-science-goes-rogue-on-twitter-resist/> [<https://perma.cc/HGB5-WBPM>] (discussing efforts by federal agencies to disseminate scientific information following an executive gag order).

<sup>26</sup> Nyhan & Reifler, *Roles*, *supra* note 3 (manuscript at 1).

misperception(s) in question.<sup>27</sup> According to Glaeser and Sunstein, the inherent authority of the sources counterbalances the negative perception of the content of the message, thereby allowing the error to be corrected.<sup>28</sup> Bassett similarly suggests “exposure to actual admired exemplars who are counter-stereotypical” as a means of combatting misperceptions arising out of unconscious bias.<sup>29</sup>

While this solution may succeed in some circumstances and is indeed consistent with classical rhetorical principles regarding the importance of *ethos* in legal and political argument,<sup>30</sup> it does not contemplate the possibility that some individuals or institutions may be incapable of absorbing information contrary to their own beliefs, even in situations where the authority of the speaker is beyond cavil.<sup>31</sup> Sunstein has suggested in other writings that certain types of political misperceptions and unconscious biases might be resolved through the assistance of a strong executive branch.<sup>32</sup> However, he limited that proposal to situations where “officials within that branch can be trusted to make decisions with careful reference to the facts” (emphasis his),<sup>33</sup> which is not currently the case.<sup>34</sup>

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<sup>27</sup> See Glaeser & Sunstein, *supra* note 4, at 67 (“Messages need to come from sources that are seen as credible to the relevant audience and not as likely to be lying (and especially not doing so out of desperation). When balanced information produces polarization, it is in part because people credit information that is consistent with their preexisting convictions while dismissing information that is inconsistent with those convictions. But when information that is unwelcome (in the sense that it casts doubt on one’s prior beliefs) comes from someone who is highly credible and difficult to dismiss, a change in view is more likely. In this respect, surprising validators can overcome asymmetric Bayesianism.”); see also *id.* at 91 (“Surprising validators have special credibility to precisely the people who would otherwise be inclined to dismiss them.”).

<sup>28</sup> *Id.* at 67, 91.

<sup>29</sup> Bassett, *supra* note 23, at 1573.

<sup>30</sup> See Greene, *supra* note 5, at 1398 (suggesting *ethos* is hierarchically superior to *pathos* but hierarchically inferior to *logos* in Aristotelian rhetoric). Interestingly, appeals to *pathos* have increased in recent years, which may explain the devaluation of *logos* among proponents of alternative facts. See David M. Zlotnik, *The Buddha’s Parable and Legal Rhetoric*, 58 WASH. & LEE L. REV. 957, 1000 n.222 (2001) (“More recently, outsider and narrative scholarship has brought *pathos* into the picture, intentionally using the power of stories to create scholarship that makes the reader feel as well as think.”).

<sup>31</sup> See, e.g., Amy B. Wang, *Trump Lashes Out at “So-Called Judge” Who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm\\_term=.722b18158d63](https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.722b18158d63) [<https://perma.cc/LX78-VERX>] (discussing presidential statements characterizing a federal district court judge as a “so-called judge”).

<sup>32</sup> See Cass Sunstein, *Partyism*, 2015 U. CHI. LEGAL F. 1, 22.

<sup>33</sup> *Id.*

<sup>34</sup> See Bradner, *supra* note 1 (noting that Trump advisor Kellyanne Conway asserted the 2017 inauguration crowd was larger than that of the 2009 inauguration, although “[a]erial photos—a 2009 shot from Getty compared to 2017 shots from television broadcasts—show former President Barack Obama’s 2009 inauguration appeared to draw a much larger crowd than the one at Trump’s inauguration, while Washington’s mass transit ridership and Nielsen television ratings also show Obama’s first inauguration was a larger draw”).

Misperceptions arising out of inter-group conflict, including what Sunstein has called political “partyism,”<sup>35</sup> could be addressed by focusing on what social psychologists Carolyn and Muzafer Sherif refer to as “superordinate goals,” meaning “goals which are compelling and highly appealing to members of two or more groups in conflict but which cannot be attained by the resources and energies of the groups separately. In effect, they are goals attained only when groups pull together.”<sup>36</sup>

Finding common ground and common goals is a standard technique used by those engaged in integrative negotiation,<sup>37</sup> and numerous academics, including Carrie Menkel-Meadows and Lawrence Susskind, have suggested that these types of communicative techniques, originally developed in the conflict resolution field, can offer useful models for democratic deliberation, particularly to the extent those mechanisms counteract standard adversarial (distributive) paradigms, where one party’s gain is another party’s loss.<sup>38</sup> Although this strand of research does not necessarily address core concerns about pervasive misconceptions, it does detail how trust might be built between different constituencies so as to trigger application of Glaeser and Sunstein’s theory of surprising validators.<sup>39</sup> In other words, 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.

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35 “Partyism” leads individuals to conclude that any idea that comes from the other political party is wrong and should be resisted to the utmost degree. Sunstein, *supra* note 32, at 1.

36 Catherine Smith, *Unconscious Bias and “Outsider” Interest Convergence*, 40 CONN. L. REV. 1077, 1087-88 (2008) (quoting Muzafer Sherif, *Superordinate Goals in the Reduction of Intergroup Conflict*, 63 AM. J. SOC. 349, 349-50 (1958)); *see also* Smith, *supra* (describing the Sherifs’ acclaimed study, “The Summer Camp Experiments,” which showed how superordinate goals can minimize intergroup conflict and increase cooperation).

37 Robert J. Condlin, *The “Nature” of Legal Dispute Bargaining*, 17 CARDOZO J. CONFLICT RESOL. 393, 396-97, 421-22 & n.107 (2016).

38 *See* Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 348-49 (2004) (exploring “the use of alternative legal, political and social problem solving institutions that draw on conflict resolution theory and practice. These institutions suggest that forms of ‘consensus building,’ which are both ‘principled’ as well as based on ‘bargaining’ models (when bargaining does not necessarily entail compromise), may provide useful models for democratic participation and political decision making sharply demarcated from the processes we currently use”); Lawrence E. Susskind, *Consensus Building, Public Dispute Resolution, and Social Justice*, 35 FORDHAM URB. L.J. 185, 190-91 (2008) (suggesting “that a commitment to consensus building in public decision-making . . . would in fact, deepen our embrace of democratic principles”); *see also* Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 196 (2002) (noting, *inter alia*, that the “nastier” adversarial bargainers become, the lower their effectiveness ratings).

39 *See* Glaeser & Sunstein, *supra* note 4, at 67 (“Individuals who believe that the messenger is a truth teller largely have their beliefs buttressed, while individuals who are skeptical think that the message is deceitful, which reinforces and even increases their skepticism.”).

The preceding discussion provides a brief glimpse into how the legal community might rely on empirical research to determine how best to address problems created by the proliferation of alternative facts. The preceding examples focus on general issues relating to the alternative fact phenomenon, but similar types of interdisciplinary analyses can be used in specific settings. For example, psychology has been used to consider how personal and political misperceptions and misstatements affect the use of war powers,<sup>40</sup> which is an issue that could again become important in the coming months and years.

Those seeking to understand and respond to the increasing use of alternative facts need not limit themselves to the social sciences. Empirical research from the hard sciences can also be brought to bear on contemporary concerns. For example, neuroscience can be used to explain certain aspects of the prevailing political climate through reference to a phenomenon known as “the winner effect.” As Jayne Barnard notes,

Scientists now recognize that an animal engaged in some form of combat, if victorious, will exit the competition with an elevated level of testosterone. The higher the hormone level, the more willing the winner is to engage in further combat. This cycle continues until the winner becomes overloaded with testosterone and, rather than going forward as a canny and effective combatant, becomes a foolish and risk-defying one. Annihilation often follows. The impact of testosterone, moreover, does not stop with animals in the wild. It has recently been measured, and the “winner effect” observed, among traders in the City of London.<sup>41</sup>

Although empiricists have not yet studied the winner effect in political settings, Barnard has applied these principles to the corporate world, most notably to chief executive officers (CEOs) who run afoul of the law.<sup>42</sup> Not only does Barnard’s and other scholars’ work demonstrate that “the winner effect” applies to verbal combat as well as to physical combat, it also provides chilling insights into both the causes and future of contemporary political debate, particularly as it is played out in conventional and social media. While Barnard recognizes that it may be difficult to identify a solution to concerns arising from “the winner effect,” since the issue may be triggered “at the

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<sup>40</sup> See Ganesh Sitaraman & David Zions, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 547-71 (2015) (discussing the problem of decisionmaking bias in matters regarding armed conflict and identifying structures already in place that help mitigate the problem).

<sup>41</sup> Jayne W. Barnard, *Shirking, Opportunism, Self-Delusion and More: The Agency Problem Lives On*, 48 WAKE FOREST L. REV. 745, 747 (2013).

<sup>42</sup> *Id.*; see also *id.* at 768 (noting that those prone to the winner effect typically feel “powerful and yet invisible, seeming to believe their misconduct would never be uncovered,” which generates a “feeling of invulnerability” that leads to taking “extraordinary—and often escalating—risks”); *id.* at 768-69 (noting white-collar criminals, including CEOs, often “enjoy a sense of superiority and dominance over others” and “like to demonstrate their power and influence in public, self-affirming ways”).

molecular level,” she explicitly states that the first step to remedying a problem is recognizing that it exists.<sup>43</sup>

This Essay has sought to do precisely that by using empirical research to demonstrate that conventional means of responding to legal and political misconceptions (i.e., content-oriented speech aimed at those who are believed to have simply failed to hear the relevant information) are no longer capable of fostering and promoting rational discourse.<sup>44</sup> While some of the current difficulties arise as a result of unconscious bias, those types of cognitive distortions are difficult to address directly, and the better option may be to approach the issue from a communication perspective—that is, by focusing on how information is delivered.<sup>45</sup> Not only is that type of response supported by empirical research, it also has the benefit of placing the power of change in the hands of those who most desire it.<sup>46</sup>

Focusing on the method of communication may require a fundamental reimagining of how legal and political argument can and should be structured if democratic debate in the United States is to survive and thrive. When determining how best to proceed, reformers need to adopt a robust interdisciplinary approach to ensure the development of a process that is capable of addressing psychological, neurological, and social factors driving the alternative fact phenomenon. In so doing, the 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,<sup>47</sup> it should also coordinate research agendas and findings with other sectors of civil society seeking to improve the quality of contemporary political discourse.<sup>48</sup> Only through this type of

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<sup>43</sup> *Id.* at 770.

<sup>44</sup> See *supra* notes 6–10 and accompanying text.

<sup>45</sup> Communication scholarship is both vast and diverse. For an overview of the scholarship, see generally NAT’L COMM. ASS’N, COMMUNICATION SCHOLARSHIP AND THE HUMANITIES (2007).

<sup>46</sup> See Nyhan & Reifler, *Roles*, *supra* note 3 (manuscript at 2) (noting that pervasive misconceptions are not based on information deficits and that a change in the method of communication may be the only way to reduce those misperceptions); see also Silverman, *supra* note 14 (noting that attempts to correct political misperceptions can backfire).

<sup>47</sup> For example, communications theory can provide important insights into the socialization of conflict and how rumors and misperceptions are disseminated in today’s digital society. See, e.g., Robin Brown, *The Contagiousness of Conflict: E.E. Schattschneider as a Theorist of the Information Society*, 5 INFO., COMM. & SOC’Y 258 (2002) (arguing that political scientist Elmer Eric Schattschneider’s work on the socialization of conflict offers important lessons for contemporary audiences); Jill A. Edy & Erin E. Risley-Baird, *Misperceptions as Political Conflict: Using Schattschneider’s Conflict Theory to Understand Rumor Dynamics*, 10 INT’L J. COMM. 2596, 2597 (2016) (“People subscribing to a false belief are not only receivers of messages but producers.”).

<sup>48</sup> For example, journalists are currently seeking to partner with the legal and academic communities to promote well-informed political dialogue. See, e.g., Jay Rosen, *Prospects for the American Press Under Trump, Part Two*, PRESSTHINK (Dec. 30, 2016, 3:53 PM), <http://pressthink.org/2016/12/prospects-american-press-trump-part-two/> [<https://perma.cc/SP9U-LLBJ>]

well-researched response can the legal community overcome the political, legal, and communicative challenges of a post-truth society and navigate the brave new world in which we all find ourselves.<sup>49</sup>

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(providing suggestions from PressThink, an organization associated with the journalism school at New York University, that journalists “[m]ake common cause with scholars”).

<sup>49</sup> See Andrew Postman, *My Dad Predicted Trump in 1985—It’s Not Orwell, He Warned, It’s Brave New World*, GUARDIAN (Feb. 2, 2017), <https://www.theguardian.com/media/2017/feb/02/amusing-ourselves-to-death-neil-postman-trump-orwell-huxley> [https://perma.cc/K2J2-XQXF] (discussing NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* (1985), which anticipated the current legal and political dilemma).