News Is Not Always Truth and Truth Is Not Always News

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"Fake news" has become the bully's favorite name for people and things he does not like. And by repeating the term so often, journalists, scholars and lawyers have begun to legitimate the phrase and even take it seriously. Insofar as it is being taken seriously, does it indicate that there is some crisis in some conceptions of how democratic systems are kept in check by the fourth estate? Does the proliferation of that which might be false, blurred by powerful persons calling false that with which they do not agree, amount to an assault on rationality? A Nobel Prize was recently won by an economist whose behavioural economics research demonstrated that people do not make rational economic choices. This comes shortly after a year in which people in many parts of the world demonstrated that they also do not make rational political choices. When considered all together, these phenomena suggest that we might well be going through a crisis of rationality in human behavior, and a symptom of the disease is the repeated "fake news" castigation. If that is the case, in what ways, if any, can law, as a social institution, serve to slow, stop or reverse this assault on rationality as manifested through the "fake news" phenomenon?

Broadly stated, there are four different categories of what "fake news" has come to mean: intentional untruth (which will be referred to as FN1), unintentional untruth (FN2), truth that has no news value (FN3), and news that has no truth value (FN4). This last variation is not to say news is untrue, but rather, that it does not matter whether it is true. Fake news should be distinguished from satire, propaganda and commercial speech. Satire reveals its fake character to its audience. Commercial speech is not permitted to state untruths, nor to pretend to be news. On the other hand, FN1 "fake news" includes untruths that are intentionally produced as "click-bait" to encourage more views and, thus, advertising profit.[1] The first problem for news readers and listeners is to identify fake news as such.[2]

Despite the current emphasis, the concept of fake news is not a new phenomenon. Incidents of fake news have been found in the 6th century.[3] In fact, the reporting of news as truth only became a standard journalism practice at the beginning of the 20th century.[4] Even the term "fake news" existed before the US 2016 election, but Donald Trump's constant use of the term throughout his campaign to discredit mainstream news media organizations has made the term far more often seen and heard. In addition, there is substantial evidence that untruth intentionally sold as news (FN1) may have played a role in influencing voters' political views in the election of Trump.

The Distinction of Truth from Untruth Is Foundational to both FN1 and FN2

Rationality is in crisis when we either cannot distinguish truth from untruth or choose not to distinguish truth from untruth – the consequence of either one is that news reports that which is untrue. Rationality itself is only one way of being human, and other ways of being human have not only been present in other times and places, they have been more supported than rationality. Perhaps history will show that 2016 was a watershed year in which cycles of human thought turned away once again from rationality.

Historically, three axioms were used to establish rationality: identity, the excluded middle, and noncontradiction. Among several formulations that Aristotle provides for the meaning of "noncontradiction", the most apt for the law is "contradictory statements are not at the same time true."[5] We see this applied in the law, where truth is a defense to libel and slander, and if it can be proven that an untruth was intentional, a private or public wrong will attach.

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1 Damian *Tambini*, Media Policy Brief 20, Fake News: Public Policy Responses, The London School of Economics and Political Science, Department of Media and Communications, pp. 3–5. (http://eprints.lse.ac.uk/73015/1/LSE%20MPP%20Policy%20Brief%2020%20-%20Fake%20news_final.pdf).

2 Forum Privatheit: Policy Paper ueber „Fake News," ZD-Aktuell 2017, 05672.

3 http://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news/.

4 David *Lazer*, et al. "Combating Fake News: An Agenda for Research and Action, Conference Report", p. 8. (https://shorensteincenter.org/wp-content/uploads/2017/05/Combating-Fake-News-Agenda-for-Research-1.pdf, last accessed October 14, 2017).

5 *Aristotle*, Metaphysics, Book Gamma, 6 1011b14.

Even if a mistaken untruth can be proven, the negligence of the news source or private person could subject one to civil damages. Furthermore, to distinguish juvenile from adult abilities to testify in court, we even use the simple test of whether the witness understands the difference between telling the truth and telling a lie. These litmus paper distinctions allow only two possibilities in the controlled situation of legal testimony – truth and untruth. Thus, they do not help beyond the courtroom, such as when voters must choose among candidates for office. Moreover, informed, intelligent discussion is difficult if not impossible if everything is seen through only these two possible frames. The real harm is not that one candidate or opinion carries the day through truth or lies or halfway in between, but that we as beings capable of rationality have devalued rationality to a point where we do not use truth or untruth as a determining factor. Rationality brought light to the dark ages. Truth in legal testimony was no longer determined by duels or burning flesh, but rather by rational discourse. In the same paragraph in which Aristotle formulated the law of noncontradiction, as stated above, he made clear that "consequences follow from the denial of this belief"[6] in the principle of noncontradiction. Now, just a few centuries after the Enlightenment, we have begun to see the consequences of denouncing rationality.

Insofar as positive law is concerned with the notion of "fake", it is built upon the Aristotelian rational notion that if anything is accepted through some social or scientific method as true, its opposite cannot be true. Thus there is a private obligation not to express known untruths in writing or speaking, the consumer is legally protected against advertising that is intended to mislead him or her, and even criminal penalties are demanded against those who tell lies while under oath in a courtroom because it is an affront to the rational sense of public order. All of these sanctions are based largely on a societal norm supporting rationality that goes all the way back to the principle of non-contradiction. Shortly after Donald Trump became President, on NBC's US weekly news analysis show, "Meet the Press on Sunday," Trump's advisor, lawyer Kellyanne Conway, claimed that the White House press secretary, Sean Spicer, had not lied to reporters when he contradicted the US National Park Service's report of the crowd size at Donald Trump's inauguration, but claimed instead that Spicer had merely presented the media with "alternative facts."[7] As she uttered that statement, lawyer Kellyanne Conway was just inventing a fancy term for "lies" or "untruth" or "falsehood." But of greater interest is that the cultural permission for her to do so had begun in the frightening picture of "reality" painted by Karl Rove, when he boasted that the GW Bush administration created reality, as will be discussed with FN4 fake news below. FN1 misinformation can be for simple economic gain as well. There is the now infamous "Pizzagate" story of the two men from Skopje who invented an outrageous untrue story about Hillary Clinton as "clickbait", meaning it would get so many clicks that they could sell advertising. And so they did. And those clicks were not by readers who knew it was a game to make money – to those readers, it was news. And as a result, gunshots were fired into a US pizzeria, and local businesses and patrons of the pizzeria were harassed and threatened, including death threats.[8]

In such a state, what can it mean to say there is "fake news"? Facts are fragile things, whether knowable through scientific methods or through language or most often, through a mixture of both. Facts are not permanent, material or fixed, yet those are the values that we have invested in them and upon which we rest so that we have some semblance of societies in which we can practice law, communicate, work, rest and enjoy being alive without fear mongers and twitter blasts leaving us unable to talk about anything that can be called real, as though it is some sort of experience from *The Matrix*.

Some untruths are intentional (FN1), but others are unintentional (FN2). Studies show that even before social media, a lack of clarity in scientific citation form could lead to bad practices in medicine, for example, as when physicians relied upon a letter to the editor, cited as a scientific study in the *New England Journal of Medicine*,[9] or when a misquotation regarding the very practice of citation itself was picked up and replicated by print media far more often than the correct quotation was ever used.[10] These examples of FN2 fake news precede electronic and social media. Thus the issue for responsible reporting is not a new one brought about by the ease of electronic proliferation or the lack of vetting in social media.

Who can control the drifting from a standard of truth-based rationality to truthiness in the media? When we are concerned only with FN1 and FN2, private law can offer protections of individuals through actions for slander, libel, other speech-related torts and intellectual property violations. These traditional private legal actions do not address distorting the news with repetition of some truths far more than other truths, or to the exclusion of others, which is the FN3 problem. Public law might help, but has not yet done so. The Associated Press news agency has

6 *Aristotle*, Metaphysics, Book Gamma, 6 1011b14-15.

7 Jill *Abramson*, "‚Alternative facts' are just lies, whatever Kellyanne Conway claims," *The Guardian*, January 24, 2017, https://www.theguardian.com/commentisfree/2017/jan/23/kellyanne-conway-alternative-facts-lies.

8 „Washington gunman motivated by fake news 'Pizzagate' conspiracy," *The Guardian*, December 5, 2016, https://www.theguardian.com/us-news/2016/dec/05/gunman-detained-at-comet-pizza-restaurant-was-self-investigating-fake-news-reports, last accessed October 14, 2017.

9 Daniel *Engber*, Footnotes can be Deadly: A one-paragraph blurb helped cause the opioid crisis. That's just the start of science's citation woes, June 11, 217, http://www.slate.com/articles/health_and_science/science/2017/06/how_bad_footnotes_helped_cause_the_opioid_crisis.html, last accessed October 15, 2017.

10 Ole Byorn *Rekdal*, Academic Citation Practice: A Sinking Sheep? Libraries and the Academy portal – Volume 14, Number 4, October 2014.

taken upon itself the task of policing the news for things reported as news that are not true regardless of intent (that is, FN1 or FN2) and therefore, according to that interpretation, "not real news." Some examples from just one week in September of 2017 ranged from US national politics to consumer food protection. In politics, it had been reported that "Trump orders Puerto Rico travel ban for Congress after criticism of his hurricane response," but the Associated Press learned that Trump did not issue a travel ban on members of Congress after Hurricane Maria ravaged Puerto Rico, despite several viral headlines stemming from a *Washington Post* report that lawmakers were denied use of military aircraft to get there.[11]

And in consumer food protection, it had been reported that "If You Ever See Cracks in Your Watermelon When You Cut It, Throw It Out. It Can Make You Sick." The Associated Press learned that spiking temperatures while a watermelon is growing can cause cracks inside, but in the US, the National Watermelon Promotion Board insists they are harmless. Alarming stories had been shared based on a 2011 story of watermelons in China that were treated with a growth chemical that is not used elsewhere and which may cause the melons to split.[12]

The Fake News of Truth that Is Not Newsworthy (FN3)

As most often used, the word "fake" in the term "fake news" focuses on some sense of untruth. In a legal sense, "fake news" has been defined as the "publication of intentionally or knowingly false statements of facts"[13], a definition that would limit fake news to FN1 in my taxonomy. It is true – fake news is intentionally used by a variety of actors (news organizations, internet providers, governments and others) to affect the view of the public, to mislead readers and undercut trust in certain institutions and persons and in general to create confusion. It would however be oversimplification to imply that if something is true, it is news, and if something is false, it is not news. Any editor will remind us that not all truth is news. Moreover, the oversimplified use of the term also implies that if news is false, but reported as news anyway, then it is "fake news". That has been the focus of media scholars, regulators and media law, both before and since social media. This brings us to the FN3 variation on how the term "fake news" is used.

Technology providers have begun to take steps to control FN1, FN2 *and* FN3 fake news. Barack Obama, upon recognizing how intentional disinformation was accomplished through social media, went to the controllers of the media technology. In September 2017, the *Washington Post* reported that "Two months before Trump's inauguration, Obama made a personal appeal to [Facebook CEO Mark] Zuckerberg to take the threat of fake news and political disinformation seriously. Unless Facebook and the government did more to address the threat, Obama warned, it would only get worse in the next presidential race."[14] Zuckerberg eventually acknowledged that Facebook had been manipulated during the 2015-2016 political campaign cycle, and so the company would turn over to Congress more than 3,000 politically themed advertisements that were bought by suspected Russian operatives.

"There's been a systematic failure of responsibility" [15] on Facebook's part, said Zeynep Tufekci, an associate professor at the University of North Carolina at Chapel Hill who studies social media companies' impact on society and governments. "It's rooted in their overconfidence that they know best, their naivete about how the world works, their expensive effort to avoid oversight, and their business model of having very few employees so that no one is minding the store." [16] The *Washington Post* went on to say that "There has been a rising bipartisan clamor . . . for new regulation of a tech industry that . . . has largely had its way in Washington despite concerns raised by critics about its behavior."[17]

There is pressure in Congress for new law requiring communications media to disclose who buys political advertising and how much they spend on it. "There is no question that the idea that Silicon Valley is the darling of our markets and of our society – that sentiment is definitely turning," said Tim O'Reilly, an adviser to tech executives and chief executive of the influential Silicon Valley-based publisher O'Reilly Media. [18]

Using law to control the problem is made difficult in the US by Constitutional protection for legitimate political speech, however. The misinformation content posted on Facebook by Russian operatives during the 2015-2016 presidential election campaign was largely within the realm of Constitutionally-protected political speech. The biggest difference was simply that the accounts themselves were illegit-

11 Associated Press Fact Check: https://www.apnews.com/tag/APFactCheck.

12 Associated Press Fact Check: https://www.apnews.com/tag/APFactCheck.

13 David O. *Klein* and Joshua R. *Wueller* "Fake News: A Legal Perspective," Journal of Internet Law, Vol. 20 No. 10, April 2017.

14 Adam *Entous*, "Barack Obama tried to give Mark Zuckerberg a wake-up call over fake news on Facebook", The Washington Post online, Sep 25, 2017.

15 Adam *Entous,* "Barack Obama tried to give Mark Zuckerberg a wake-up call over fake news on Facebook", The Washington Post online, Sep 25, 2017.

16 Adam *Entous*, "Barack Obama tried to give Mark Zuckerberg a wake-up call over fake news on Facebook", The Washington Post online, Sep 25, 2017.

17 Adam *Entous*, "Barack Obama tried to give Mark Zuckerberg a wake-up call over fake news on Facebook", The Washington Post online, Sep 25, 2017.

18 Adam *Entous*, "Barack Obama tried to give Mark Zuckerberg a wake-up call over fake news on Facebook", The Washington Post online, Sep 25, 2017.

imate. A further legal challenge for fake news is in a way that one might analogize to multinational organizations avoiding legal control by splintering into many states. Lies can avoid legal control by being splintered among various social media, the source of which cannot be known and is unimportant to the reader who becomes the voter, consumer and agent of repetition.

Faced with the challenge of policing the lies perpetuated through electronic media, and especially social media, Facebook itself has not suggested that public or private law is the answer, but rather that technology is. Facebook has built specialized data-mining software that can detect patterns of behavior that might be used for distorting news, such as the repeated posting of the same content. This secret software tool has now been used by Facebook and others in the French election in May of 2017, where it helped disable 30,000 fake accounts, the company said. The software was also used in the recent German election. Another new tool shows news readers when articles have been disputed by third-party fact checkers.[19]

Reporting a false number of people on a lawn as an "alternative fact" is an FN1 untruth, but one might also legitimately ask "why tell these true facts and not others?" According to US Presidential news expert Bob Schieffer of CBS, we are currently in the midst of a communication revolution that has as profoundly changed our culture as the invention of the printing press.[20] Every journalism student learns that there is a distinction between that which should be reported as news and that which should not. The distinction may begin with truth, but it certainly does not end there. So even if we could stop untruth from being reported, we are still not out of danger. The judgment as to whether a truth is newsworthy is a function of social considerations like politics and the economics of selling a story.

When it comes to determining whether a truth is newsworthy, journalism students learn that there are criteria that they could consider, although many editors and news directors will tell us it is a gut feeling, or sixth sense. How the feeling gets into their gut is the problem. That gut feeling or sixth sense can be the basis, against which readers will test the news that is offered. So FN3 fake news alleges that even if what is being repeated or reported is true, it can be called "fake news" if it is not newsworthy. Newsworthiness, not just truth, are of concern when working with fake news. Under what norm and to whom should the story be of interest? In a polarized populist culture of extremes, that which is of interest to one side is unlikely to be of interest to the other, even if true. Fake news, as a trend, is one more indication that the post-modern society has shifted from rationality to emotion, from evidence to belief. Calling a story "news" that is not consistent with my prior beliefs is a challenge to my beliefs, but since the criterion for my beliefs is not truth, but consistent opinion, I need not call it false or a lie, but I can challenge whether it is really a story that should be told at all, despite being true.

Extensive literature on news values attempts to describe the criteria by which news organisations select material from all that is true and available to them. From empirical observation of past news events, communication scientists attempt to catalogue the values that define newsworthiness. Journalists still point back to the 1965 empirical research on news values conducted by Johan Galtung and Mari Ruge.[21] Tony Harcup and Deirdre O'Neill have twice updated the work of Galtung and Ruge, and with each new study, some of the news values change.[22] Harcup and O'Neill found that news stories must generally satisfy one or more of the following requirements if they are to be selected: (1) powerful individuals, organisations or institutions; (2) celebrity; (3) entertainment; (4) surprise; (5) negative overtones of conflict or tragedy; (6) positive overtones of rescues and cures; (7) significant magnitude; (8) relevance to the audience; (9) follow-up of previous news; or (10) furtherance of the news organisation's agenda. This last point should perhaps be the most examined when defending against FN3 or FN4 fake news aspersions. News providers must admit that stories that establish or maintain the news organisation's own agenda need to be defended in their selection from among other true stories (FN3). Upon doing so, it will then be necessary also to defend against someone in power suggesting that the news organization's admitted agenda is targeting him, her or it, and therefore the selective, targeted news should be regarded as FN4 fake news.

Recent studies show that readers trust news sites not because they have fact-checked them rationally, but because their peers trust them. The practice of consciously or unconsciously seeking out information that confirms one's already held views (known as "confirmation bias") adds to the newsworthiness of fake news.[23] But readers may also use their own rationality. In July, 2017 many US news organisations posted a news story regarding police officers in Florida having stopped a car with tinted windows when a random check of its license number produced no file. The car happened to be driven by the Florida state attorney

19 Adam *Entous*, "Barack Obama tried to give Mark Zuckerberg a wake-up call over fake news on Facebook," The Washington Post online, Sep 25, 2017.

20 Bob *Schieffer*, Overload: Finding the Truth in Today's Deluge of News (Rowman and Littlefield, 2017). Schieffer points out that the US has lost 126 newspapers in recent years and that most reporting now just comes electronically from the big cities, leaving many people's lives unreported upon and without any local news coverage whatsoever.

21 Johan *Galtung* and Mari *Ruge*, "The Structure of Foreign News: The Presentation of the Congo, Cuba and Cyprus Crises in Four Norwegian Newspapers." Journal of International Peace Research 2: 64–90 (1965).

22 Tony *Harcup* and Deirdre *O'Neill* (2016): What is news? (revisited), Journalism Studies (on line). DOI: 10.1080/1461670X.2016.1150193, accessed October 6, 2017.

23 David *Lazer*, et al. "Combating Fake News: An Agenda for Research and Action, Conference Report", p.6.

who is both black and female.[24] In response to the publication of the police stop, some responses questioned the news value of such a story. One commentator said "I'm as liberal as they come but this is a non-story... the stop was justified. She said so. She was polite. The cops were professional. And she is completely within her rights as a citizen (and within her duties as a state attorney) to follow up with the Dept. afterwards about the logic and methodology behind the stop. This reporter is trying to make something out of it ... (and there still could be) ... but there's no direct evidence to support any bias on the cops' part." Another response by a reader clearly demonstrates that the reader understands "fake news" in the FN3 sense, distinguishing between what is true and what is newsworthy, and at the same time, demonstrates how the presentation of news can be used as an opportunity to advocate social critique or imply facts not in evidence. The reader simply wrote: "If I understand this right, they could not see if she was black so this is not a race story, so where is the story? Fake news." His or her understanding of "fake news" was not that the facts were false, but that they were not newsworthy.

From Truth to Truthiness – News that Is Not Truthworthy (D.)

The suggestion that we might now have begun (again) to dis-feature the rationality-based sense of truth should not sound impossible, if we study European history. In history, we would see that the methods of establishing or maintaining notions of truth have always had a social component. In his book, *A Social History of Truth*, Steve Shapin makes clear from the historical record that as recently as the 17th century, truth did not solely depend on the quality of the proposition, but also upon the person making the proposition. Problems of credibility and trust were found in the practices of "gentlemanly culture." Shapin reports that if English gentlemen had an annual income of £280 or more, they could be presumed to be telling the truth.[25] Women, servants and other dependents, by comparison, were assumed not to tell the truth, just as they would have not been deemed to be truthful enough to be witnesses in ancient Greek legal proceedings. These events provide an historical foundation for FN4 pronouncements today.

In the FN4 sense of fake news, the truth-versus-untruth distinction upon which rationality is based, is irrelevant. In the recent political era, the decline of rationality's distinction between truth and untruth was already reported in the October 2004 *New York Times Magazine*, when Ron Suskind reported the following exchange between him and an "unnamed [GW Bush] Administration official":

> The aide said that guys like me were ´in what we call the reality-based community,´ which he defined as people who `believe that solutions emerge from your judicious study of discernible reality.´ I nodded and murmured something about enlightenment principles and empiricism. He cut me off. `That's not the way the world really works anymore´, he continued. `We're an empire now, and when we act, we create our own reality. And while you're studying that reality-judiciously, as you will – we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors … and you, all of you, will be left to just study what we do.´

It is now regarded as clear that the aide was Karl Rove, the Steve Bannon of the GW Bush Presidency. What was missing from Rove's cunning description was the tag that the "we" are all millionaires, not just persons schooled in a peculiar sense of rationality.[26]

For years, cultural theorists wanted to assure us that language did not fix meaning as tightly and neatly as the mechanics of symbolic logic might lead us to believe. And we became convinced. Since at least Immanuel Kant, philosophers and sociologists of scientific knowledge wanted to convince us that while the material world does what it does, we humans, in doing what we do, might only be seeing the natural world insofar as we can through our limited and human interpretations, which does not equal human practices that are as precise, fixed and mathematically sound as the material world itself. And they too, have convinced us. The result, it seems, is that rather than to have humanized natural science by adjusting our thinking to the real limits of language and science, we have instead become conditioned to accept political factions who can be "anti-science" and instead are "faith-based," acting on the "feeling" that something is truth, rather than acting on a rational method to prove or disprove its truth. This has become known in popular media as "truthiness".

The American Dialect Society named "truthiness" its sixteenth annual word of the year for 2005, explaining that "*truthiness* refers to the quality of preferring concepts or facts one wishes or believes to be true, rather than concepts or facts known to be true. As political satirist Stephen Colbert put it, "I don't trust books. They're all fact, no heart."[27] In 2006, the Merriam-Webster Dictionary selected "truthiness" as its Word of the Year, based on a reader poll. "We're at a point where what constitutes truth is a question on a lot of people's minds, and truth has become up for grabs", said Merriam-Webster president John Morse.[28] And in 2009, the *BBC Online* magazine asked its readers to nominate things to include on a poster to represent im-

24 Kalhan *Rosenblatt*,"Black Florida State Attorney Pulled Over in Traffic Stop, Prompting Criticism," https://www.nbcnews.com/news/nbcblk/black-florida-state-attorney-pulled-over-traffic-stop-prompting-criticism-n782481, last accessed October 15, 2017.

25 Steve *Shapin*, A Social History of Truth: Civility and Science in Seventeenth Century England (University of Chicago Press, 1994).

26 This was foreseeable. George Bernard Shaw predicted it with considerable accuracy about an English government that looks very much like the Trump government in his 1929 play, The Apple Cart.

27 "Truthiness Voted 2005 Word of the Year by American Dialect Society" (PDF). Retrieved June 4, 2006.

28 Adam *Gorlick*, "Colbert's 'truthiness' pronounced Word of the Year". AP/Houston Chronicle, December 8, 2006.

portant events in the first decade of the new century. A panel of five independent experts selected from the readers' submissions. The readers submitted the word "truthiness," the panel agreed, and "truthiness" appeared in the poster.[29] An important question to ask is "How is a core belief formed against which news can 'feel truthy'"?

And so something much bigger than the prejudice of populist political positioning is at stake in the practice of repeatedly casting the aspersion of "fake news." At issue is society's relationship to the establishment and maintenance of the ancient process of distinguishing fact from opinion and the value placed upon choosing to act based upon fact, once that distinction is made. While the phrase "fake news" was not invented by Trump,[30] it has been made commonplace due to his use. If we take that point as a starting point, it would seem that when he says "fake news", the audience is to understand that a lie has been told about him in the media, but in fact he means to assert that he has the power to disagree with the truth, beginning with the number of persons who were present at his inauguration ceremony. That is the FN4 sense of the term "fake news". With that characterization, we are not far from the same person(s) taking the next step of simply denying that the news is true facts at all. Thus, for example, the description of the natural world that science gives us can simply be dismissed, as when the Catholic church dismissed Galileo's heliocentric description of earth's motion, or when fossil fuel economic interests dismiss the science of describing climate.

It is of great concern that the "gut" or "sixth sense" of the journalist-editor that was formerly the gatekeeper of newsworthiness has changed to the gut of politicians, their minders and their minions, exercised through direct and social media. In other words, without editors using journalistic knowledge and experience, complete with flaws and biases, we are left with social media tweeters being their own gatekeepers, without journalistic knowledge and experience to control their flaws and biases. That problem worms its way backward to not only change the criteria of what is newsworthy, but back to whether it is even true. "Truthiness" does not mean true, but through this new gut feeling, it has replaced the criterion of truth and made it quite alright to celebrate making reality, as did Karl Rove, or presenting "alternative facts", as does Kellyanne Conway.

Conclusions: What Can the Law Do With Fake News?

The law can control FN1 and FN2 fake news through private law actions for libel and slander as well as through the protection of intellectual property. Criminal law may apply to FN1 and FN2 fake news. Public law may seek to control FN1 and FN2 fake news as well. But in general, law's control of fake news is limited to work within the rationality of the truth-untruth distinction. With people acting instead on truthiness (C.) and political or economic power (D.), law has yet to offer effective tools of control. Particularly challenging from a legal perspective is the balance of information as a social good and free speech as a constitutional right, as well as the question of identifying the actors in a media industry that is constantly undergoing change at the rate that its technology changes. [31]

Accountability is another difficult issue for law. Much fake news is not seen or heard directly from publishers, but through social media sites like Facebook.[32] Therefore, it is difficult for public law to distribute the burden of policing the internet's fake news among the different actors. [33] Consequently, self-policing of FN1 and FN2 fake news by the news media itself, such as the Associated Press' fact check, or technological fixes, such as those begun at Facebook, are needed where law has no tools. It has also been suggested that the law can shift the burden of checking the website to the operator, rather than finding the actual publishers.[34]

At a 2017 conference organized in the US by Harvard and Northeastern universities, scholars and practitioners from a variety of fields in the public and private sectors addressed what could be done to stop fake news, but largely limited their efforts to the FN1 sense of fake news. The conveners summarized the conference offerings as "There are some possible pathways for reducing fake news, including: (1) offering feedback to users that particular news may be fake (which seems to depress overall sharing from those individuals); (2) providing ideologically compati-

29 "A portrait of the decade". BBC. December 14, 2009. Retrieved December 17, 2009.

30 Although most recently he did in fact say that he did. See Sanya Jain, "Donald Trump Claims He Invented The Word 'Fake'. For Real" October 11, 2017, NDTV, accessed online October 13, 2017 at https://www.ndtv.com/offbeat/donald-trump-claims-he-invented-the-word-fake-for-real-1761410. "Donald Trump claims he came up with the word 'fake' during an interview. In an interview on Saturday, US President Donald Trump actually appears to be taking credit for inventing the word 'fake': "The media is really, the word, one of the greatest of all terms I've come up with, is 'fake'. I guess other people have used it perhaps over the years but I've never noticed it. And it's a shame," Trump said to American politician Mike Huckabee during an interview on the Trinity Broadcasting Network.

31 Damian *Tambini*, Media Policy Brief 20, Fake News: Public Policy Responses, The London School of Economics and Political Science, Department of Media and Communications, p.5.

32 https://www.cjr.org/analysis/fake-news-facebook-audience-drudge-breitbart-study.php.

33 David O. Klein and Joshua R. Wueller "Fake News: A Legal Perspective", Journal of Internet Law, Vol. 20 No. 10, April 2017.

34 Forum Privatheit: Policy Paper über „Fake News", ZD-Aktuell 2017, 05672.

ble sources that confirm that particular news is fake; (3) detecting information that is being promoted by bots and `cyborg` accounts and tuning algorithms to not respond to those manipulations; and (4) because a few sources may be the origin of most fake news, identifying those sources and reducing promotion (by the platforms) of information from those sources."[35]

The law might be effective, if it can get past politics and take action against the untruth of FN1 and FN2 fake news. But the law cannot dictate the particular truths that journalists and editors present as news from among the "deluge" of facts that Bob Schieffer of CBS describes. In such a system, the media would be contributing to a totalitarian state, rather than acting as the fourth estate. Further, the law is not equipped to resist economic or political power notions that "fake" is just an exercise of the will of those who have those powers. FN3 and FN4 fake news can be resisted, if at all, through an education not only in how FN1 and FN2 are proliferated, but in how FN2 and FN3 form our societies. As Aristotle warned, consequences do follow from a denial of the belief that contradictory statements are not at the same time true.

In addition to top-down legislation or technology policing by industry, we can resist all forms of fake news, FN1, FN2, FN3, and FN4 through education in rational thinking. Lisa Crate, a school librarian and media specialist writes about the difficulties of distinguishing fake news from real news and gives advice to teachers on how to help their students to spot fake news.[36] Legislators in California are advocating that there be formal higher level education in "spotting" fake news,[37] which one would have hoped was part of the critical thinking that so many educational administrators already talk about, but so few would seem to practice.

In the end, one might conclude that the plasticity of notions of truth over the time of intellectual history means truth and related ideas do and will change and we are simply witnessing one of those times. Maybe so, but if so, we had better become conscious of the fact and decide whether we want to do so. If not, the legal system, with its binary sense of true and false might not be the most effective place where we can maintain the rationality of truth.

35 David *Lazer*, et al., "Combating Fake News: An Agenda for Research and Action, Conference Report", p.1. (https://shorensteincenter.org/wp-content/uploads/2017/05/Combating-Fake-News-Agenda-for-Research-1.pdf).

36 "Fake News vs. Real News – How do we teach ourselves and our students to know the difference?" by Lisa *Crate*, NJEA Review.

37 Melanie *Mason,* "Fake News 101? Lawmakers Want California Schools to Teach Students How to Evaluate What They Read on the Web," L.A. Times (January. 11, 2017), http://bit.ly/fakenewslaw, last accessed October 15, 2017.