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## **Fake News, Alternative Facts, and Disinformation: The Importance of Teaching Media Literacy to Law Students**

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## **FAKE NEWS, ALTERNATIVE FACTS, AND DISINFORMATION: THE IMPORTANCE OF TEACHING MEDIA LITERACY TO LAW STUDENTS**

*Marin Dell\**

*Like legal education, media literacy education teaches critical thinking skills. Students with media literacy education are able to evaluate media messages and decide for themselves the truth of media. Media literacy education is critical at all levels, but it should be a required inclusion for every legal education program.*

*People choose the facts they want now.<sup>1</sup> – The Newsroom (HBO)*

*Facts are the center. Facts. We don't pretend that certain facts are in dispute to give the appearance of fairness to people who don't believe them.<sup>2</sup> – The Newsroom (HBO)*

### **I. INTRODUCTION**

Media literacy education can help all people fight against fake news, alternative facts, and the pervasive spread of disinformation in our society. Media literacy should be a required and integral part of all levels of our educational systems. Like legal education, media literacy education teaches critical thinking skills. Students with media

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<sup>1</sup> *The Newsroom: The 112<sup>th</sup> Congress* (HBO Television Broadcast Jul. 8, 2012).

<sup>2</sup> *The Newsroom: We Just Decided To* (HBO Television Broadcast Jun. 24, 2012).

literacy education will be able to evaluate media messages and decide for themselves the truth, falsity, and/or bias of media communications in their professional and personal life. Today, information about the world around us comes to us not only by words on a piece of paper but also, more and more, through the powerful images and sounds of our multimedia culture. “Media no longer just shape our culture—they ARE our culture.”<sup>3</sup>

Part II of this article sets out the reasons why law students should graduate with media literacy skills.<sup>4</sup> Part III discusses how various groups define media literacy and why a media literacy education program is important to citizens and society at large.<sup>5</sup> Part IV surveys the current state of media literacy education in non-legal educational settings.<sup>6</sup> It also reviews how media literacy has skimmed the surface of legal education, and looks at the American Bar Association (“ABA”) Chapter 3 requirements for legal education.<sup>7</sup> Part V then evaluates the reasons why media literacy and fake news are inexplicably intertwined with legal education requirements under ABA Standards 301 and 302.<sup>8</sup> Media literacy education is necessary under ABA Chapter 3’s program of education requirements.<sup>9</sup> Part V argues that those schools that claim to have “practice ready” law graduates are not doing a complete job educating their students without also teaching them media literacy and complete critical thinking skills.<sup>10</sup> Part VI concludes that law students must have exposure to media literacy education to be able to evaluate fake news and alternative facts, as well as parse out disinformation, in order to be effective attorneys at law.<sup>11</sup> Media literacy education is critical at all levels, but it is important under the ABA guidelines and should be a required inclusion for legal education programs.<sup>12</sup>

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<sup>3</sup> Elizabeth Thoman & Tessa Jolls, *Media Literacy: A National Priority for a Changing World*, CTR. FOR MEDIA LITERACY, <http://www.medialit.org/reading-room/media-literacy-national-priority-changing-world> (last visited Apr. 15, 2019) (alteration in original).

<sup>4</sup> See *infra* Part II.

<sup>5</sup> See *infra* Part III.

<sup>6</sup> See *infra* Part IV.

<sup>7</sup> See *infra* Part V.

<sup>8</sup> See *infra* Part V.

<sup>9</sup> See *infra* Part V.

<sup>10</sup> See *infra* Part V.

<sup>11</sup> See *infra* Part VI.

<sup>12</sup> See *infra* Part VI.

## II. WHY MEDIA LITERACY FOR LAW STUDENTS?

The terms fake news and alternative facts have become associated with politics, but the necessity to view this information presented in the media with a clear head and unbiased view has nothing to do with politics, religion, or any other single perspective.<sup>13</sup> The answer to fighting fake news, alternative facts, and disinformation is media literacy.<sup>14</sup> “Media literacy is critical to the health and well-being of America’s children, as well as their future participation in the civic and economic life of our democracy.”<sup>15</sup> Not only is media literacy a domestic issue, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) stated, “[e]mpowerment of people through information and media literacy is an important prerequisite for fostering equitable access to information and knowledge, and building inclusive knowledge societies.”<sup>16</sup> Lawyers are the stewards of our civic and economic and the administration of justice in our democratic society.<sup>17</sup> As officers of the court, lawyers must be educated in legal critical thinking and in media literacy.<sup>18</sup> This includes thinking critically about the ways the media communicates to clients and how that shapes our society.<sup>19</sup>

“Being literate in a media age requires critical thinking skills that empower us as we make decisions, whether in the classroom, the living room, the workplace, the boardroom, or the voting booth.”<sup>20</sup> Media literacy is inextricably intertwined with the idea of justice.<sup>21</sup> A lawyer’s ability to discern and evaluate when media and media messages that have been purposefully falsified or had the truth obscured in order to confuse and manipulate the viewer has never been

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<sup>13</sup> *What is Media Literacy?*, MEDIA LITERACY NOW, <https://medialiteracynow.org/what-is-media-literacy/> (last visited Apr. 15, 2019).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Media Literacy Defined*, NAT’L ASS’N FOR MEDIA LITERACY EDUC., <https://namle.net/publications/media-literacy-definitions/> (last visited Apr. 15, 2019).

<sup>20</sup> *Id.*

<sup>21</sup> *Introduction to Media Literacy*, MEDIA LITERACY PROJECT, <http://www.youthconnectioncoalition.org/content/wp-content/uploads/2014/07/Intro-to-Media-Literacy.pdf> (last visited Apr. 15, 2019).

more important to all people in our technologically advancing society.<sup>22</sup>

Critical thinking skills, acquired in media literacy education and required under ABA Standards 301 and 302, are critically important to lawyers whose life's work consists of dealing in truth, lies, facts, and the search for justice.<sup>23</sup> It is the obligation of legal education to make sure that new "practice ready" graduates leave law school not only ready to analogize law to facts, interview clients, and the myriad other things that legal education teaches, but also that they have critical thinking skills enhanced by media literacy education.<sup>24</sup>

A lawyer's ability to think critically is incomplete without the ability to see through media to evaluate the message, the facts, the lies, and the bias and skewed perceptions that the media use in everyday communication with ordinary citizens.<sup>25</sup> It is the obligation of lawyers to see through the disinformation campaigns and zealously advocate for their clients without being manipulated by or unaware of the "media monopoly" and its potentially negative and positive effect on the media consumer.<sup>26</sup> "Media literacy helps us understand how media create cultures, and how the 'media monopoly'—the handful of giant corporations that control most of our media—affects our politics and our society."<sup>27</sup>

It is not good enough for law schools to hope their graduates learned the medial literacy skills they need in their elementary, secondary or other post-secondary programs.<sup>28</sup> It is especially important to educate law students before they graduate because of the uneven and haphazard ways the media literacy education is adopted and implemented in elementary, secondary, and post-secondary education programs.<sup>29</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *What is Media Literacy?*, *supra* note 13; ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. ch. 3, § 302 (2018-2019), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf) [hereinafter ABA STANDARDS].

<sup>24</sup> Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149, 151 (2012).

<sup>25</sup> *See Introduction to Media Literacy*, *supra* note 21.

<sup>26</sup> *See id.*

<sup>27</sup> *Id.*

<sup>28</sup> W. James Potter, *The State of Media Literacy*, 54 J. BROADCASTING & ELECTRONIC MEDIA 675, 682-83 (2010).

<sup>29</sup> *Id.*

Law school is one of the last opportunities for media literacy education for many students and the only place for law schools to ensure that their new graduates get the practical media literacy skills they need.<sup>30</sup> This responsibility must not be abrogated and should be mandated in legal education under ABA Standards 301 and 302, which require that law students are taught critical thinking skills, in addition to the other myriad professional skills necessary to become a competent attorney.<sup>31</sup>

In our future—which could be as soon as tomorrow but perhaps up to a decade away—fake news, alternative facts, and disinformation programs, more technologically advanced than today, will inundate society, clients, and citizens around the world.<sup>32</sup> “Technology is making it increasingly easy to spread misinformation by manipulating video and audio.”<sup>33</sup> Discerning what is real, true, and/or authentic and what is not will become even more of a challenge without media literacy education and, in some cases, the access to sophisticated technology to evaluate fake or doctored media.<sup>34</sup>

Over the next decade, it may take experts to evaluate media for authenticity and truth because manipulation of media, audio, video, and photographs will become so sophisticated.<sup>35</sup> It is the job of every citizen to be media savvy, but lawyers need to hold themselves to an even higher standard than the general public.<sup>36</sup> Lawyers deal in facts and the application of those facts to the law.<sup>37</sup> Lawyers have an obligation to make sense of what is true and what is false for their clients and for society.<sup>38</sup> As officers of the court, lawyers need to protect the rule of law and the Constitution using unbiased and objective critical thinking.<sup>39</sup>

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<sup>30</sup> ABA STANDARDS, *supra* note 23.

<sup>31</sup> *Id.*

<sup>32</sup> Everette Dennis, *Out of Sight and Out of Mind: The Media Literacy Needs of Grown-Ups*, 48 AM. BEHAVIORAL SCI. 202, 204 (2004).

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

<sup>34</sup> *Id.*

<sup>35</sup> Gillian Edevane, *Jordan Peele Voices Obama PSA Against Fake Videos: ‘Ben Carson is in the Sunken Place’*, NEWSWEEK (Apr. 17, 2018), <http://www.newsweek.com/jordan-peeelimitates-obama-psa-fake-video-889924>; A.J. Katz, *Jordan Peele Channels President Obama in a Faux PSA About Fake News*, ADWEEK (Apr. 17, 2018), <https://www.adweek.com/tv-video/jordan-peeelimitates-obama-in-a-faux-psa-about-fake-news/>.

<sup>36</sup> *See* Edevane, *supra* note 35.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

### III. THE CURRENT STATE OF MEDIA LITERACY, FAKE NEWS, AND ALTERNATIVE FACTS

Media literacy as a concept has been researched and adopted by multiple academic disciplines.<sup>40</sup> This means that there are many different definitions of media literacy and the definitions diverge from each other depending on the direction and perspective of the scholar/author and his or her academic discipline.<sup>41</sup> It also means that there are numerous definitions of media literacy, and while these definitions are not the same, they are mostly in agreement with each other.<sup>42</sup> In Potter's *The State of Media Literacy*, he lists a table containing twenty-three different sample definitions of media literacy from many different disciplines.<sup>43</sup>

#### A. Defining Media Literacy

In reviewing the definitions of media literacy, it is easy to find commonalities in viewpoints.<sup>44</sup> The National Association for Media Literacy Education ("NAMLE") states that "media literacy is the ability to access, analyze, evaluate, create, and act using all forms of communication."<sup>45</sup> This definition of media literacy is very enticing because it covers the essential interaction necessary for those exposed to media messages to make their own informed decision as to what they think and believe about the media; namely its truth or falseness.<sup>46</sup>

NAMLE also says that "[m]edia literacy empowers people to be critical thinkers and makers, effective communicators and active citizens."<sup>47</sup> This is an important distinction to lawyers because critical thinking is one of the hallmarks of the legal profession and the emphasis on critical thinking and communication is a necessary quality for law students and effective lawyers.<sup>48</sup>

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<sup>40</sup> Potter, *supra* note 28.

<sup>41</sup> Renee Hobbs, *The State of Media Literacy: A Response to Potter*, 55 J. BROADCASTING & ELECTRONIC MEDIA 419, 420 (2011).

<sup>42</sup> See Potter, *supra* note 28.

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

<sup>44</sup> See, e.g., *Media Literacy Defined*, *supra* note 19.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

The group Media Literacy Now defines media literacy as “an umbrella term encompassing a variety of approaches that develop critical thinking skills around all types of media, build an understanding of how media messages shape our culture and society, give people tools to advocate for a changed media system.”<sup>49</sup> The Media Literacy Project defines media literacy as “the ability to access, analyze, evaluate, and create media.”<sup>50</sup> There are numerous other media literacy definitions that are constructed along the same definitional lines.<sup>51</sup>

Some of the major themes of these divergent media literacy definitions encompass concepts such as critical thinking skills, evaluation of media messages, and an understanding of message bias.<sup>52</sup> One of the most useful and expansive media literacy definitions is from the Center for Media Literacy (“Center”), which defines media literacy as “[a] framework for accessing, analyzing, evaluating and creating media. [It is t]he develop[ment] of critical thinking and media production skills needed to live fully in the 21st century media culture.”<sup>53</sup> The definition is expanded even further as the Center goes on to say that media literacy is “the ability to communicate competently in all media forms[, print and electronic,] as well as to access, understand, analyze, evaluate and participate with powerful images, words and sounds that make up our contemporary mass media culture.”<sup>54</sup> The Center’s media literacy definition is the recommended definition for legal education and curriculum development.<sup>55</sup>

### **B. What are Fake News and Alternative Facts?**

Fake news and alternative facts are similar, but not synonymous.<sup>56</sup> The differences in the definitions are important and show that fake news and alternative facts are used in slightly different ways by different people.<sup>57</sup> Regardless of the type of disinformation

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<sup>49</sup> See *What is Media Literacy?*, *supra* note 23.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See *About CML*, CTR. FOR MEDIA LITERACY, <http://www.medialit.org/about-cml> (last visited Apr. 15, 2019).

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See generally Part III.B.

<sup>57</sup> See generally Parts III.B.1, B.2.



used, fake news and alternative facts are damaging to society and media literacy skills are the only way to combat their spread.<sup>58</sup>

### 1. *Defining Fake News*

For many years, “fake news” was defined as a type of news story that was not professional or real.<sup>59</sup> These fake news stories were characterized by their untruthfulness, not by their publisher or the reader’s perspective on the story.<sup>60</sup> Since 2016, however, the term fake news has become synonymous with reader-perspective population who considers any negative treatment of the subject of the news article to be fake news.<sup>61</sup>

News is the business of the dissemination of facts about current events, and the means by which the public engages in the debates of the day.<sup>62</sup> News may be created and disseminated by literally anyone, but the most reputable news comes from journalists and the mainstream media (“MSM”).<sup>63</sup> Traditionally, fake news was thought of as “news-like stories that are not designed to inform or educate, but rather engineered to appeal to our preconceived narratives about how the world works while also trading on the trademarked names of news sources in order to both cloak themselves in legitimacy and to be easily shareable on social media.”<sup>64</sup> While fake news is “intentionally misleading articles, often published for profit or other gain,” too often it is mistaken for what it is not: “any news you don’t agree with.”<sup>65</sup>

Since the 2016 presidential election, the term fake news has constantly been in the press, not necessarily because the MSM is reporting untruthful news stories, but because many political figures are calling any negative press stories they don’t like fake news.<sup>66</sup> Our society is in a war between those who call stories they don’t like fake

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<sup>58</sup> See generally Parts III.B.1, B.2.

<sup>59</sup> Joshua Humphrey, *The Plague of Fake News and the Intersection with Trademark Law*, 8 CYBARIS AN. INTELL. PROP. L. REV. 126, 133 (2017).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 131.

<sup>65</sup> Kathy Dempsey, *What’s Behind Fake News and What You Can Do About It*, INFO. TODAY (May 2017), <http://www.infoday.com/it/may17/Dempsey—Whats-Behind-Fake-News-and-What-You-Can-Do-About-It.shtml>.

<sup>66</sup> *Id.*

news and the MSM, where news is no longer an objective thing but a weapon used with impunity to delegitimize the opposing side, and truth is getting lost in the fray.<sup>67</sup> Currently, any negative story can be dismissed as fake news and anyone with a camera and an internet connection can call themselves a news outlet.<sup>68</sup> More troubling, fake news is a money-making industry and shows no signs of slowing down.<sup>69</sup>

Confirmation bias, which complicates an individual's ability to evaluate what is a truthful news story and what is not, is "a tendency to search for or interpret information in a way that confirms one's preconceptions."<sup>70</sup> Confirmation bias means that people reading the news tend to behave in a way when reading news that results in their "ignoring, forgetting, or explaining away information that contradicts [their] existing beliefs."<sup>71</sup> Also, complicating matters is "source amnesia" when "people recall facts but cannot remember where they initially came from."<sup>72</sup> All these very human traits will tend to cause confusion about new stories and will exacerbate an already difficult situation filled with both honest mistakes and deliberate manipulation, depending on who the news media and publishers/writers are.<sup>73</sup>

Another unfortunate wrinkle are the purveyors of actual fake news articles who tend to lie with impunity and go on the attack when called out on it.<sup>74</sup> In the article *Fighting Fake*, Melissa Zimdars, a communications professor at Merrimack College, chronicled her decision to create a Google doc with lists of "fake news sources . . . to those that are sometimes reliable but use sensational and misleading headlines . . . also includ[ing] several tips for analyzing sources of information."<sup>75</sup> Her project, which started out for the use of her students, went viral online and was reported in news publications around the world.<sup>76</sup> But, just as she garnered praise for her information on separating fake news from reliable publications, she started

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Humphrey, *supra* note 59.

<sup>70</sup> *Id.* at 137.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at 138.

<sup>73</sup> *Id.*

<sup>74</sup> Melissa Zimdars, *Fighting Fake*, CHRONICLE HIGHER EDUC. (Jan. 15, 2017), <https://www.chronicle.com/article/Fighting-Fake/238870>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

receiving death and rape threats and needed campus security at her office.<sup>77</sup> Harassment online and fake news seem to go hand in hand in today's society.<sup>78</sup>

## 2. *Why does Fake News exist?*

Fake news has become ubiquitous in United States news cycles, and it exists because people make money through the advertising on fake news articles.<sup>79</sup> This isn't new, however.<sup>80</sup> According to Humphrey, sensational and fake news stories have been used to sell newspapers as far back as Jack the Ripper in the 19th century and a "hoax involving life on the moon enraptured readers of *The New York Sun* in 1835."<sup>81</sup> In the era of Thomas Jefferson, political parties had their own newspapers and it was up to the readers to decide for themselves what the truth was and what was false.<sup>82</sup> Our current news reports and the obligation of the reader to understand bias and falsity and evaluate accordingly have come full circle.<sup>83</sup>

The current proliferation of fake news online and on the air is motivated by money.<sup>84</sup> Any click, even if only for a moment, makes money; therefore, fake news creators are incentivized to create fake news articles.<sup>85</sup> It is the clicks and the website/video views that fuel the money for fake news websites, so the more outrageous and false the story, the more incentive there is for the author to disregard the facts or truth of the story.<sup>86</sup>

Eventually, people started creating fake news websites that, at first glance, look like credible news sources and/or mimic the names of credible news sources to tempt more people to go to the site and click on the stories.<sup>87</sup> Fake news websites mushroomed during the 2016 United States Presidential election and many of those websites

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See* Dempsey, *supra* note 65.

<sup>80</sup> *See id.*

<sup>81</sup> *See* Humphrey, *supra* note 59.

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See id.* at 135-36.

<sup>85</sup> *See* Dempsey, *supra* note 65.

<sup>86</sup> *Id.*

<sup>87</sup> Emma Jane Kirby, *The City Getting Rich from Fake News*, BBC NEWS (Dec. 5, 2016), <http://www.bbc.com/news/magazine-38168281>.

were created in a “small city in Macedonia.”<sup>88</sup> The phrase the “Macedonia teens” became synonymous with fake news websites and stories, a verbal shorthand for the most egregious examples of fake news.<sup>89</sup> In this Macedonian town, “teenagers [were] pumping out sensationalist stories to earn cash from advertising” and making more money than they could have dreamed of before solely on fake news websites.<sup>90</sup> “A Macedonian teen is claiming to have made at least \$60,000 producing fake news in the past six months, mostly by appealing to the supporters of Donald Trump.”<sup>91</sup> This teen is just one of hundreds in Macedonia who are making money in ad revenue through fake news websites.<sup>92</sup>

Even more disturbing, there is no incentive for anyone in Macedonia to stop the spread of fake news websites and stories.<sup>93</sup> The truth is that the city itself is getting rich from fake news.<sup>94</sup> The mayor, scolding a reporter, says, “There’s no dirty money in [Macedonia], . . . before adding curiously that he is rather proud of the entrepreneurs of his tiny little city, thousands of miles from the U.S., [who] have influenced the outcome of the American election.”<sup>95</sup> And as one of the teens noted, “[t]eenagers in our city don’t care how Americans vote, . . . [t]hey are only satisfied that they make money.”<sup>96</sup>

This “digital gold rush” in Macedonia is a problem for social media companies like Facebook.<sup>97</sup> The websites created there are pushing out plagiarized content, both real and fake, aimed at getting U.S. political readers to use their sites, not necessarily to influence elections or political views.<sup>98</sup> These fake news sites are not limited to the “Macedonian teens” with plenty of the same type of websites being

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<sup>88</sup> *Id.*

<sup>89</sup> See Zimdars, *supra* note 74.

<sup>90</sup> See Kirby, *supra* note 87.

<sup>91</sup> Hayley Miller, *Macedonian Teen Claims He Made \$60,000 Producing Fake News Mostly Targeted to Trump Supporters*, HUFFINGTON POST (Oct. 12, 2016), [https://www.huffingtonpost.com.au/entry/macedonian-teen-claims-trump-supporters-paid-him-60k-to-produce-fake-news-during-campaign\\_us\\_584ac403e4b0bd9c3dfc51b7](https://www.huffingtonpost.com.au/entry/macedonian-teen-claims-trump-supporters-paid-him-60k-to-produce-fake-news-during-campaign_us_584ac403e4b0bd9c3dfc51b7).

<sup>92</sup> *Id.*

<sup>93</sup> See Kirby, *supra* note 87.

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *See id.*

<sup>97</sup> Max Read, *Can Facebook Solve Its Macedonian Fake-News Problem?*, N.Y. MAG. (Nov. 4, 2016), <http://nymag.com/selectall/2016/11/can-facebook-solve-its-macedonian-fake-news-problem.html>.

<sup>98</sup> *Id.*

created right here in the United States.<sup>99</sup> All of these websites started trending in Facebook, because “Facebook is built to engage its users.”<sup>100</sup> The truth or falsity of the news didn’t factor into Facebook’s algorithm.<sup>101</sup>

This type of monetized and targeted behavior is not solely the province of those with nefarious motives.<sup>102</sup> Traditional news outlets have begun using sponsored content to help increase viewership.<sup>103</sup> “Sponsored content, also referred to as native advertising, paid content, advertorials, or infomercials,” have begun appearing everywhere on legitimate websites and news articles.<sup>104</sup> This content is supposed to have a bias, as it is advertising and meant to sway the consumer to a particular side or view.<sup>105</sup> Sponsored content, marked with an easy to miss disclaimer, looks like a news article but it is not; it is advertising.<sup>106</sup>

[C]ompanies often label native ads as “sponsored,” “sponsored content,” “brand publishing,” “brand publisher,” “promoted,” “paid for and posted by,” “sponsor generated content by,” or “presented by.” The media outlets also vary as to where the labeling is placed, with some placing it above the article, and others above the headline, in the byline with the advertiser’s name, to the immediate left of the headline, or at the bottom of the article with the advertiser’s name.<sup>107</sup>

The public is easily confused about what is real news and what is fake news on many Internet websites due to the blurred lines in vocabulary and format surrounding sponsored advertising.<sup>108</sup> The lines have become so skewed, that only those persons who have had

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> LARRY ADKINS, SKEWED: A CRITICAL THINKER’S GUIDE TO MEDIA BIAS 86-87 (2016).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 85.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 88.

<sup>108</sup> *Id.*

media literacy training, or are technologically savvy, can evaluate of news online correctly.<sup>109</sup>

The prevalence of social media has enabled news of all kinds, even when not real or not complete or false, to spread quickly and muddle true journalism.<sup>110</sup> Social media and Google make real news articles harder to find because blogs, fake news websites, and other “suspect” news sites are usually easier to find and easier to spread.<sup>111</sup> Moreover, “[w]e live in a sound-bite society.”<sup>112</sup> There is no time to delve into news for lengthy explanations, because “the nature of broadcast news is to focus on mostly providing information quickly, in short chunks.”<sup>113</sup>

Today’s society has a short attention span, which means many people are not hearing complete reporting and explanations from MSM news. Many Americans are only watching fake news programs or primarily entertainment programs as their only source for news.<sup>114</sup> “Programs like *The Daily Show*, along with Fox News, MSNBC, talk radio, myriad blogs and social networking site[s], have become significant sources of political information.”<sup>115</sup> These MSM, radio and other fringe media sites have become common for many people in the U.S., with viewer numbers usually organized by age.<sup>116</sup> *The Daily Show* and *The Colbert Report* were the media outlets for the younger generation and Fox News for the over 65 crowd.<sup>117</sup> “Political information no longer comes to us primarily from news broadcasts or newspapers, nor are the myriad sources through which it does flow clearly and consistently labeled.”<sup>118</sup>

Ironically, even though more people are turning to supposed fake or entertainment news outlets, the people who run those outlets resist scrutiny and having their work edited.<sup>119</sup> John Stewart famously scoffed at Tucker Carlson during an interview and professed that his show “followed puppets” on Comedy Central and was therefore not

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *See id.* at 257.

<sup>113</sup> *See id.* at 88

<sup>114</sup> THE STEWART/COLBERT EFFECT 184-85 (Amarnath Amarasingam ed., 2011).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

open to criticism of journalistic standards.<sup>120</sup> Stewart also went on *Bill Moyers' Journal* and said that they “had no obligation to follow the news cycle . . . because . . . we are not journalists.”<sup>121</sup> This statement is both true and disingenuous at the same time, given that many younger viewers said *The Daily Show* was their major source of news.<sup>122</sup>

### 3. *Alternative Facts and Disinformation*

The idea of “alternative facts” is a relatively new concept, first popularized after the 2017 inauguration of President Donald J. Trump.<sup>123</sup> “‘Alternative facts’ [is] a term that . . . became synonymous with a willingness to persevere with a particular belief either in complete ignorance of, or with a total disregard for, reality.”<sup>124</sup> This new world where facts are not facts depending on a person’s point of view has never before been so widespread among the members of a democratically elected government administration, but the problem is not really new. This world creates problems for lawyers, judges, and policymakers, in particular.<sup>125</sup>

In a world of fake news and alternative facts, it is social media that fuels the flames.<sup>126</sup> “Disinformation campaigns on social media are designed to create confusion and erode trust in democratic institutions.”<sup>127</sup> And there is no clear way to combat the spread of false statements and disinformation. Justice Brandeis believed that the way to correct ignorance or misperceptions was to respond with “more speech.”<sup>128</sup> Research shows, however, that Justice Brandeis’ cure does not actually work for “certain types of political misperceptions and may in some cases be counterproductive.”<sup>129</sup>

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<sup>120</sup> *Id.* at 183.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 184.

<sup>123</sup> S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137, 137 (2017).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Denise Clifton, *A Murder Plot, a Twitter Mob, and the Strange Unmasking of a Pro-Kremlin Troll*, MOTHER JONES (June 5, 2018), <https://www.motherjones.com/politics/2018/06/disinformation-russian-trolls-twitter-facebook-election-2018/>.

<sup>128</sup> See Strong, *supra* note 123.

<sup>129</sup> *Id.* at 138.

In our current society, the reluctance to believe “more speech” on a subject is likely moving away from political thought and with the rise of social media, like Facebook, Twitter, and YouTube, is affecting all areas of our lives.<sup>130</sup> “The [Twitter] platform is a dream for spreading disinformation: [t]he ability to share ideas very quickly, impassion people across national borders, with anonymity and while manufacturing momentum—these are integral features to how Twitter works.”<sup>131</sup> Social media is not something that can be ignored and will only become more ingrained into our national culture and identity as time goes on.<sup>132</sup>

The danger of ideas like alternative facts is that falsehoods and lies become normalized into a new reality where truth is cheapened and malleable.<sup>133</sup> What is being argued now, on news programs across the United States, is “that there are so many shades of gray that clear facts just don’t really exist.”<sup>134</sup> More than denigration of what is true and what is false, the idea of alternative facts becomes a “symptom of media distrust” and feeds into a cycle of disinformation and fake news.<sup>135</sup> This distrust cycles back to the practice of framing any negative press as fake news to limit or restrict the freedom of the press in contravention of the First Amendment, rather than the accepted historical practice of defining fake news stories or media hoaxes.<sup>136</sup>

### C. Importance of Fighting Fake News, Alternative Facts, and the Spread of Disinformation

It is critical that lawyers are prepared to evaluate and combat fake news, alternative facts, and disinformation campaigns.<sup>137</sup> Their professional competence and ability to effectively practice law is

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<sup>130</sup> See *id.*

<sup>131</sup> See Clifton, *supra* note 127 (internal quotation marks omitted).

<sup>132</sup> See *id.*

<sup>133</sup> 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/?noredirect=on&utm\\_term=.cab81d437929](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/?noredirect=on&utm_term=.cab81d437929).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Jon Swaine, *Donald Trump’s Defends ‘Alternative Facts’ after Widespread Protests*, GUARDIAN (Jan. 23, 2017), <https://www.theguardian.com/us-news/2017/jan/22/donald-trump-kellyanne-conway-inauguration-alternative-facts>.

<sup>137</sup> See Blake, *supra* note 133.



shaped by their ability to see through media manipulation and bias.<sup>138</sup> In addition to the everyday practice of law, lawyers and judges will be standing in the front lines of the war on the media and the First Amendment as officers of the court.<sup>139</sup> The media literate attorney is going to be critical to the defense of democracy and the Constitution.<sup>140</sup>

Alternative facts is a fairly new concept.<sup>141</sup> Attacks on democracy and truth and justice are not new.<sup>142</sup> Lawyers and judges must be ready, and being media literate is only one weapon in the war against disinformation and charges of fake news against the legitimate media.<sup>143</sup> Authority figures who spread fake news and disinformation to others are dangerous because of the tendency of people to model “conformity, or social proof, by imitating the behavior of other people.”<sup>144</sup> This encourages groupthink where “[m]embers of the in-group have a stronger feeling of group-safety compared with members of the out-group.”<sup>145</sup> This feeling of safety in group conformity makes social media a space that exacerbates disinformation and fake news spread by authority figures.<sup>146</sup> Facebook’s Deputy General Counsel weighed in on this saying, “[t]here are important economic and financial underpinning [fake news] that are just as critical at getting to the bottom of as the technological questions.”<sup>147</sup>

Alternative facts and fake news are the edge of an abyss, where society is watching the real-time amalgamation of “TV news morph[ing] into infotainment and reality television.”<sup>148</sup> News, especially cable news, has become the purview of “news personalities” rather than journalists.<sup>149</sup> News has become nothing more than

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<sup>138</sup> *See id.*

<sup>139</sup> *See id.*

<sup>140</sup> *See id.*

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> Jan-Willem H. Bullee et al., *The Persuasion and Security Awareness Experiment: Reducing the Success of Social Engineering Attacks*, 11 J. EXP. CRIMINOLOGY 97, 97 (2015), <https://link.springer.com/content/pdf/10.1007%2Fs11292-014-9222-7.pdf>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Ross Todd, *Facebook Lawyer Details ‘Fake News’ Fight*, RECORDER (July 20, 2017), <https://www.law.com/therecorder/almID/1202793548492/Facebook-Lawyer-Details-Fake-News-Fight/?slreturn=20180506182425>.

<sup>148</sup> Phillip N. Meyer, *Alternative Facts and the Law: Is Justice a Reality?*, ABA J. (June 2017), [http://www.abajournal.com/magazine/article/alternative\\_facts\\_law\\_justice\\_reality](http://www.abajournal.com/magazine/article/alternative_facts_law_justice_reality).

<sup>149</sup> *Id.*

“reporting what experts on both sides think about events as sufficient to tell the “truth” about events rather than undertaking more costly (and perhaps more off-putting and less entertaining) investigative reporting characteristic of print journalism.<sup>150</sup> In the end, “the media left it up to the audience to choose what to believe based on competing opinions, rather than on presentation of evidence.”<sup>151</sup> If we are not careful, soon we will have lost what it means to agree on facts, and that is something that lawyers and judges must never let happen because the consequences are too severe.<sup>152</sup> Even the Pope has weighed in on fake news and the dangers of “spreading . . . disinformation online or in the traditional media,” calling it a “grave sin.”<sup>153</sup>

To heighten the absurdity, or alert us to the grave danger of an alternative facts miasma, the Oxford dictionary chose “post-truth” as its 2016 Word of the Year.<sup>154</sup> It defined post-truth as “relating to denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.”<sup>155</sup> The objective and mission of everyone in the legal community is to fight back against a “post-truth” world before it overtakes our real world. It may be that we have reached a point of no return, and there is no going back.<sup>156</sup> Lawyers, however, must be educated on how to recognize and evaluate facts, media messages, and the implicit bias or objectivity of the media, remaining the arbiters of truth in a “post-truth” world.<sup>157</sup> Media literacy education is critical to this ability because it not an innate talent.<sup>158</sup> Media literacy is a learned skill, similar to learning to analogize facts to law.<sup>159</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Rosa Flores, *Pope Warns Against ‘Fake News’ and Likens it to ‘Crafty Serpent’ in Genesis*, CNN (Feb. 26, 2018), <https://www.cnn.com/2018/01/24/world/pope-condemns-fake-news/index.html>; Paulina Dedaj, *Pope Criticizes ‘Fake News’, Calls it a ‘Grave Sin’*, FOX NEWS (Dec. 18, 2017), <http://www.foxnews.com/world/2017/12/18/pope-criticizes-fake-news-calls-it-grave-sin.html>.

<sup>154</sup> Gleb Tsipursky, *Towards a Post-Lie Future*, HUMANIST (Feb. 21, 2017), <https://thehumanist.com/magazine/march-april-2017/features/towards-post-lies-future>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *See id.*

#### D. Things that Help, but Do Not Fix the Problem

The proliferation of fake news and alternative facts have “inaugurated the golden age of fact-checkers—news sites that expose public lies with well-crafted barrages of ‘real’ facts and data.”<sup>160</sup> There have always been some attempts to stay ahead of fake news in the media, but “[f]act-checking is particularly challenging in the current era of ‘fake news,’ ‘alternative facts,’ and gaslighting coming from the [U.S. government].”<sup>161</sup> In the past, fact-checking was done by librarians or staff in newsrooms.<sup>162</sup> Those who are fighting fake news are taking a new approach, however, creating multiple fact-checking Internet websites, such as FactCheck.org, *The Washington Post*’s The Fact Checker, and PolitiFact.<sup>163</sup> The ABA has created a “web-based fact-check service to help the public find dependable answers to swirling and sometimes confusing legal questions.”<sup>164</sup> The ABA’s service uses case law and statutes to combat fake legal news.<sup>165</sup>

As much as efforts to combat fake news are out there, though, there are still many setbacks in the technological giants that helped create the fake news proliferation.<sup>166</sup> “Nearly a year after Facebook and Google launched offensives against fake news, they’re still inadvertently promoting it—often at the worst possible times.”<sup>167</sup> In October 2017, the New York Times reported fact-checking websites contained fake news ads, such as Politifact and Snopes, as recently as the week before.<sup>168</sup> Only with sharp eyes and a complete understanding of the ways fake news creators and media companies

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<sup>160</sup> Mick O’Leary, *Fact-Checkers Resist Alternative Facts*, QUESTIA (Oct. 2017), <https://www.questia.com/magazine/1G1-507185452/fact-checkers-resist-alternative-facts>.

<sup>161</sup> Amrita Khalid, *The Best Political Fact-Checking Sites on the Internet*, DAILY DOT (Sept. 21, 2016), <https://www.dailydot.com/layer8/best-fact-checking-websites/>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> ABA Rolls Out New Fact Check Website to Help Separate Legal Fact From Fiction, ABA (Sept. 1, 2017), [https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba\\_rolls\\_out\\_newfa/](https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba_rolls_out_newfa/).

<sup>165</sup> Hilarie Bass, *ABA Legal Fact Check Sorts Fact from Fiction On Legal Issues*, ABA J. (Jan. 2018), [http://www.abajournal.com/magazine/article/aba\\_legal\\_fact\\_check](http://www.abajournal.com/magazine/article/aba_legal_fact_check).

<sup>166</sup> *Id.*

<sup>167</sup> Fake News Ads are Reportedly Popping Up On Fact-Checking Websites, FOX NEWS (Oct. 19, 2017), <http://www.foxnews.com/tech/2017/10/19/fake-news-ads-are-reportedly-popping-up-on-fact-checking-websites.html>.

<sup>168</sup> *Id.*

craft these misleading and false stories, can people be prepared to evaluate the media messages for themselves.<sup>169</sup>

#### IV. REVIEW OF MEDIA LITERACY AND “FAKE NEWS” IN NON-LEGAL AND LEGAL EDUCATION

Media literacy is the key to fighting the spread of disinformation, fake news, and alternative facts.<sup>170</sup> However, media literacy education is not prevalent in either non-legal education or legal education.<sup>171</sup> The lack of media literacy education in general means that law students do not graduate with the necessary skills to be a competent and practice ready lawyer.<sup>172</sup>

##### A. Non-Legal Education

In general, media literacy education is not currently widespread in our education system and what education there is has not prepared students of any age for the constant media exposure, manipulation, and material commoditization they are exposed to in their daily lives.<sup>173</sup> The twenty-first century is a media saturated, technologically dependent, and globally connected world.<sup>174</sup> However, most education in the United States has not kept up with advances in technology or educational research.<sup>175</sup>

The beginnings of federal educational support for media literacy education began in the 1970s, but dwindled in the early 1980s, and only recently became a significant part of a few educational curriculums.<sup>176</sup> Moreover, “scholars and educators have struggled to

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<sup>169</sup> *Id.*

<sup>170</sup> *See generally* Part IV.A.

<sup>171</sup> *See generally* Part IV.B.

<sup>172</sup> *See generally* Part IV.B.

<sup>173</sup> Seth Ashley, *Teaching Nuance: The Need for Media Literacy in the Digital Age*, BLUE REV. (Feb. 20, 2013), [https://scholarworks.boisestate.edu/cgi/viewcontent.cgi?article=1064&context=communication\\_facpubs](https://scholarworks.boisestate.edu/cgi/viewcontent.cgi?article=1064&context=communication_facpubs).

<sup>174</sup> *Id.*

<sup>175</sup> DOUGLAS KELLNER & JEFF SHARE, *CRITICAL MEDIA LITERACY, DEMOCRACY, AND THE RECONSTRUCTION OF EDUCATION* (2007), [https://pages.gseis.ucla.edu/faculty/kellner/essays/2007\\_Kellner-Share-Steinberg%20and%20Macedo\\_ch1.pdf](https://pages.gseis.ucla.edu/faculty/kellner/essays/2007_Kellner-Share-Steinberg%20and%20Macedo_ch1.pdf).

<sup>176</sup> Marjorie Heins & Christina Cho, *Media Literacy: An Alternative to Censorship*, NAT’L COALITION AGAINST CENSORSHIP (2003), <http://ncac.org/fepp-articles/media-literacy-an-alternative-to-censorship>.

define the field [of media literacy] and establish standards for what it means to be media literate.”<sup>177</sup>

For many years, educational institutions simply did not have formal programs to teach media literacy to students.<sup>178</sup> Even where some formal education standards and programs were created, adoption has been uneven and the educational standards do not always agree with each other.<sup>179</sup> There is ongoing debate about the appropriateness of a protectionist point of view, which some see as infantilizing students, versus a more empowered approach to teaching students about media.<sup>180</sup> A mix of many reasons and viewpoints are accepted by most current media literacy education programs.<sup>181</sup>

Media literacy education programs are either enthusiastically accepted or haphazardly implemented and/or ignored altogether at all school levels.<sup>182</sup> Another standardization issue of media literacy programs is the lack of definition and agreement among educators as to the scope and outcomes of a media literacy program.<sup>183</sup> Nevertheless, there are many quality programs available, such as the programs which use the principles for media literacy as set out by the NAMLE.<sup>184</sup>

The Core Principles of Media Literacy Education are:

1. Media Literacy Education requires active inquiry and critical thinking about the messages we receive and create.
2. Media Literacy Education expands the concept of literacy to include all forms of media (i.e., reading and writing).
3. Media Literacy Education builds and reinforces skills for learners of all ages. Like print literacy, those skills necessitate integrated, interactive, and repeated practice.

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<sup>177</sup> See Ashley, *supra* note 173.

<sup>178</sup> Bradford L. Yates, *Media Literacy and the Policy Making Process: A Framework for Understanding Influences on Potential Educational Policy Outputs*, INST. EDUC. SCI. (1998), <https://files.eric.ed.gov/fulltext/ED424602.pdf>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *The Core Principles of Media Literacy Education*, NAT’L ASS’N FOR MEDIA LITERACY (2007), <https://namle.net/publications/core-principles/>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

4. Media Literacy Education develops informed, reflective and engaged participants essential for a democratic society.
5. Media Literacy Education recognizes that media are a part of culture and function as agents of socialization.
6. Media Literacy Education affirms that people use their own skills, beliefs and experiences to construct their own meanings from media messages.<sup>185</sup>

These core principles form the basis for many current media literacy programs integrated in schools at all levels.<sup>186</sup> A benefit of teaching media literacy, beyond the ability to evaluate media messaging and bias, is that “bringing media culture into the learning environment—from kindergarten to graduate school—guarantees a high level of engagement by students.”<sup>187</sup> It is critical that the U.S. education system integrates media literacy programs into school programs to combat media manipulation and make children and adults media savvy consumers, as many other countries have already adopted.<sup>188</sup> “Individuals are often not aware that they are being educated and positioned by media culture, as its pedagogy is frequently invisible and is absorbed unconsciously.”<sup>189</sup>

It was even suggested that states should require schools to teach media literacy to combat fake news, evaluate bias, and heighten awareness of media literacy.<sup>190</sup> “A 2016 Stanford University study showed that middle school, high school, and college students frequently had difficulty judging the credibility of information that they found online and are frequently duped by fake news, biased sources, and sponsored content.”<sup>191</sup> This study showed that it is not just young children who cannot decipher the complicated and sophisticated systems those engaged in disinformation campaigns

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Thoman & Jolls, *supra* note 3.

<sup>188</sup> *Id.*

<sup>189</sup> See KELLNER & SHARE, *supra* note 173.

<sup>190</sup> Larry Atkins, *States Should Require Schools to Teach Media Literacy to Combat Fake News*, HUFFINGTON POST (July 13, 2017), [https://www.huffingtonpost.com/entry/states-should-require-schools-to-teach-media-literacy\\_us\\_59676573e4b07b5e1d96ed86](https://www.huffingtonpost.com/entry/states-should-require-schools-to-teach-media-literacy_us_59676573e4b07b5e1d96ed86).

<sup>191</sup> *Id.*

create, but even college students and many adults are taken in by fake news.<sup>192</sup> Media literacy education is needed now to ensure that “citizens are equipped to make the decisions and contributions to a global economy and global culture demand of them.”<sup>193</sup>

As a nation we do not properly educate our children about media literacy, resulting in incoming college students who cannot distinguish between authoritative sources and fake news during their freshman composition research.<sup>194</sup> The lack of media literacy training and inability to construct credible arguments are found among incoming freshman students even at the U.S.’s most prestigious universities.<sup>195</sup> Even at the university level, “[t]he age of social media—and of fake news—is such a new development that we have not yet come to terms with how best to educate students and citizens on how to successfully navigate it.”<sup>196</sup>

Comprehensive media literacy will help in the future, but at the moment we have a critical mass of students and adults who do not know how to discern real news from fake news.<sup>197</sup> They do not know how to utilize basic media literacy principles in their daily personal and professional lives, but they are learning.<sup>198</sup> When Melissa Zimdars’ viral Google doc of “False, Misleading, Clickbait-y, and/or Satirical ‘News’ Sources” garnered her Internet fame, and death threats, it also made the “list more interesting to [her] students. The disconnect between the defamatory articles and the person they knew proved why such websites belonged on [her] list in the first place.”<sup>199</sup>

It is time for media literacy education to be a required part of education to teach critical thinking skills and prepare citizens for the media intensive world we all inhabit.<sup>200</sup> Students are “technology-savvy yet information-illiterate” and without a comprehensive media literacy education program at some level of their schooling, they will

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<sup>192</sup> *Id.*

<sup>193</sup> Thoman & Jolls, *supra* note 3.

<sup>194</sup> Ellen Wayland-Smith, *Commentary: Where Do Students Learn About Fake News? In Freshman Comp*, CHRONICLE HIGHER EDUC. (Feb. 26, 2017), <https://www.chronicle.com/article/Commentary-Where-Do-Students/239266>.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> See Zimdars, *supra* note 74.

<sup>200</sup> Lauree Padgett, *Filtering Out Fake News: It All Starts With Media Literacy*, INFO. TODAY (Jan./Feb. 2017), <http://www.infoday.com/it/jan17/Padgett—Filtering-Out-Fake-News.shtml>.

exit into the world without those critical skills.<sup>201</sup> NAMLE's executive director, Michelle Ciulla Lipkin, advocates for media literacy education in elementary school and believes that states should "pass legislation requiring media literacy inclusion in their curriculum."<sup>202</sup> Accountability is a weapon against fake news, and everyone involved in creating media should be held up to scrutiny.<sup>203</sup> Lipkin says that education "is key and is our most powerful weapon against falsehoods."<sup>204</sup>

## B. Legal Education

Media literacy education is a critical skill for lawyers and judges because the legal profession uses media differently than other professions.<sup>205</sup> Currently, "[m]edia literacy occupies a very limited and marginal role in North American Law Schools and no Law School teaches its students the conventions of media language."<sup>206</sup> Media literacy is essential to effective legal advocacy because the correct interpretation of facts and reality, unclouded by media manipulation, is at the heart of legal practice.<sup>207</sup> "Ethical judgement is . . . critical to law practice."<sup>208</sup>

Legal education is focused on educating graduates to become lawyers who are "practice-ready and to help make them better prepared for lifelong learning, something that goes to the core of what it means to be a lawyer."<sup>209</sup> Lawyers need to be "expert learners," but without instruction in media literacy, they are missing a critical portion of the mandate that they graduate with critical thinking skills.<sup>210</sup> "For lawyers and law students, being an expert learner requires that they know what knowledge they have, what knowledge they lack, what they will need to learn, how to obtain that knowledge, how to apply that

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> JULIAN HERMIDA, THE NEED FOR TEACHING MEDIA LITERACY AT THE UNIVERSITY LEVEL: THE CASE OF LEGAL EDUCATION 3 (2006), <http://www.julianhermida.com/algoma/medialiteracy.pdf>.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Nelson P. Miller, *Meta-Ethical Competence as a Lawyer Skill: Variant Ethics Affecting Lawyer and Client Decision-Making*, 9 THOMAS M. COOLEY J. PRAC. & CLINICAL L. 91 (2007).

<sup>209</sup> Niedwiecki, *supra* note 24.

<sup>210</sup> *Id.* at 155.



knowledge, and how to know they are getting the right knowledge.”<sup>211</sup> Awareness is part of the equation for critical thinking and full “expert learning” is not possible when a law student or lawyer is unaware of the media effect of bias or falseness.<sup>212</sup>

It is imperative to optimal job performance that new law graduates are media literate, as well as lifelong learners.<sup>213</sup> “The ability to locate, understand, and use information and to solve problems is a necessary competency for most jobs.”<sup>214</sup> Some of the information literacy necessary for job success and for lawyers are: “Digital media literacy . . . [c]ritical thinking, problem solving, and analytical reasoning, and . . . [the] [a]bility to locate, organize, and assess the credibility of information.”<sup>215</sup> Employers noted that these qualities indicate a more successful employee and that it is “easier to develop these skills in students than in experienced workers.”<sup>216</sup> This is not to say that experienced lawyers would not benefit from extensive media literacy training.<sup>217</sup> It is, however, easier to expose law students to the principles of media literacy to make them “practice-ready” and to do that as a required part of their curriculum.<sup>218</sup>

Fake news affects the legal profession greatly because our purpose is to look for truth and justice, and the inability to see how media messages affect what are facts and what are lies distorts how lawyers and judges interpret the world.<sup>219</sup> What the truth of a matter is, resting on the evidence and facts, is a critical question for lawyers.<sup>220</sup> “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.”<sup>221</sup> Social media is the funhouse mirror and the legal system may be trapped by a reality where everything is subjective and fake news is shouted by anyone who does not like the outcome.<sup>222</sup>

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Sharon Weiner, *Information Literacy and the Workforce: A Review*, 34 EDUC. LIBR. 7, 8 (2011), <http://educationlibraries.mcgill.ca/article/view/306>.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 9.

<sup>216</sup> *Id.* at 10.

<sup>217</sup> *Id.*

<sup>218</sup> *See id.* at 8.

<sup>219</sup> *See id.*

<sup>220</sup> *See Meyer, supra* note 148.

<sup>221</sup> *See id.*

<sup>222</sup> *See id.*

Ultimately, Facebook may be on the right track as it tries to combat one cause of the spread of disinformation by “disrupting the economic incentives of fake news producers who seek to draw eyeballs to their sites to boost revenues through advertisements, subscriptions, or purchases.”<sup>223</sup> Certainly, not all cries of fake news and alternative facts have to do with money, but taking away that incentive will do more to expose the non-financial motivations of those who seek to spread disinformation in the news and online.<sup>224</sup>

Stanford’s study found that when “most high-school and college students are unable to distinguish real from fake information when evaluating online sources” it is not a small thing.<sup>225</sup> The study called the results “bleak” and “a threat to democracy.”<sup>226</sup> Legal education should take the results just as seriously and resolve to ensure that the graduates it sends to the world to be officers of the court and guardians of justice have the media literacy skills to practice law with an objective and practiced eye towards the media they consume and create.<sup>227</sup>

#### **V. LEGAL EDUCATION’S MANDATE UNDER ABA STANDARDS 301 AND 302 – GRADUATE A MEDIA LITERATE LAWYER**

The ABA mandates that every law school meet specific standards to ensure all the school’s graduates are competent lawyers.<sup>228</sup> Its standards include a mandate to make all graduates media literate.<sup>229</sup> However, despite that inclusion, it is clear that legal education and even non-legal education are woefully underpreparing their students to understand and sift through potential fake news or alternative facts.<sup>230</sup>

##### **A. Critical Thinking Under ABA Standards 301 and 302 and the Media Literacy Core**

The ABA Chapter 3 Program of Legal Education requires that:

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<sup>223</sup> See Todd, *supra* note 147.

<sup>224</sup> See *id.*

<sup>225</sup> See Wayland-Smith, *supra* note 192.

<sup>226</sup> See *id.*

<sup>227</sup> See *id.*

<sup>228</sup> See generally Part V.A.

<sup>229</sup> See generally Part V.A.

<sup>230</sup> See generally Part V.A.

# STANDARD 301. OBJECTIVES OF PROGRAM OF LEGAL EDUCATION

A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for *effective, ethical, and responsible participation* as members of the legal profession.

...

# STANDARD 302. LEARNING OUTCOMES

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following: . . .

(b) *Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;*

(c) *Exercise of proper professional and ethical responsibilities to clients and the legal system;* and

(d) *Other professional skills* needed for competent and ethical participation as a member of the legal profession.<sup>231</sup>

Critical thinking skills support all the highlighted skills above and are necessary to be a competent and ethical member of the legal profession.<sup>232</sup> The skills enumerated above include the ability to critically examine, evaluate, and create personal and professional media.<sup>233</sup> Media literacy competency must be included as one of the “other professional skills” necessary in law school education under ABA Standard 302(d).<sup>234</sup> Critical thinking skills are the nexus between media literacy education and ABA Chapter 3 law school education standards.<sup>235</sup>

Additionally, critical thinking is fundamental to media literacy education and that knowledge will enhance any student’s research, writing, and argumentation, especially that of a law student.<sup>236</sup> Media literacy skills are necessary for the most effective client advocacy.<sup>237</sup>

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<sup>231</sup> ABA STANDARDS, *supra* note 23, §§ 301, 302 (emphasis added).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *See* Yates, *supra* note 176.

<sup>237</sup> *See id.*

Media literacy skills are more critical than ever because “the media do not present their messages in a neutral and value-free way; they shape and distort reality.”<sup>238</sup> It is the job of an attorney, as advocate and counselor, to interpret and advise their clients and see beyond the media messaging.<sup>239</sup> “Media literacy promotes the critical thinking skills that enable people to make independent choices.”<sup>240</sup>

Incomplete critical thinking education in law school has led to law school graduates who do not have the ability to discern current misinformation in media.<sup>241</sup> These attorneys are not prepared for the advanced technological media manipulation and disinformation campaigns, affecting their ability to decide what is and is not the truth.<sup>242</sup> Essential lawyering skills, such as client advocacy, legal argumentation and analogizing, and effective legal research all suffer without the right media literacy education.<sup>243</sup>

### **B. “Practice Ready” Law School Graduate Means a Media Literate Law School Graduate**

The law school curriculum must support these necessary skills to graduate a law student into a “practice-ready” lawyer.<sup>244</sup> “Part of the issue is that we need to train lawyers to think like clients, not to think like lawyers.”<sup>245</sup> And while that means hard tech in some cases, it should also mean the evaluation of technology and media that clients use and have in their life. Law schools are not keeping up with this mandate from employers, however.<sup>246</sup> In fact, only about half of practicing lawyers believe that graduating law students have the skills necessary to practice law.<sup>247</sup> Law schools must prepare students by

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<sup>238</sup> *See id.*

<sup>239</sup> *See id.*

<sup>240</sup> ART SILVERBLATT, *MEDIA LITERACY: KEYS TO INTERPRETING MEDIA MESSAGES* 4 (Praeger eds., 3rd ed. 2007).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> Katherine Kruse, *Biting Off What They Can Chew: Strategies for Involving Law Students in the Problem-Solving Beyond Individual Client Representations*, 8 CLIN. L. REV. 405, 407 (2002).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

honing the critical thinking skills necessary for effective legal research, problem solving, and effective client interviews and representation.<sup>248</sup>

Law students need broad education in problem solving, one of the ABA standards, and part of effective client representation is the effective evaluation of information and fact gathering.<sup>249</sup> The six steps to lawyering as problem solver are the following: (1) problem-identification, (2) *gathering and evaluating information and raw materials*, (3) solution-generation, (4) solution-evaluation, (5) decision, and (6) action.<sup>250</sup> Media literacy skills are a necessary part of gathering and evaluating information and raw materials effectively and are the current missing part of legal education.<sup>251</sup>

## VI. LAW SCHOOL-BASED MEDIA LITERACY EDUCATION SOLUTIONS

There are many different models and structure of media literacy education that will serve to provide a base of knowledge for law students.<sup>252</sup> Curriculum structured to provide as much or as little as a law school wants to insert into its particular program of legal education is possible.<sup>253</sup> Media literacy education in law school can take the form of non-credit seminars or a for-credit class in the regular curriculum which counts towards graduation.<sup>254</sup> The following are some recommendations for law schools to adopt as they include media literacy in their programs.<sup>255</sup>

1. Train librarians in media literacy principles and have the law librarians use one class period in each 1L skills or intensive writing class to teach media literacy to the law students. This model can be combined with the law schools' already existing Scholarly Writing Requirement programs, clinics, or upper level advanced legal research classes.<sup>256</sup>

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<sup>248</sup> *See id.*

<sup>249</sup> *See id.*

<sup>250</sup> *See id.*

<sup>251</sup> *See id.*

<sup>252</sup> *See Yates, supra* note 176.

<sup>253</sup> *See id.*

<sup>254</sup> *See id.*

<sup>255</sup> *See id.*

<sup>256</sup> *See id.*

2. Craft multiple media literacy class modules tied to law topics and hold law faculty training in media literacy principles which can then be incorporated into substantive law classes.<sup>257</sup>
3. Create a semester-long class in Media Literacy for credit towards a student's law degree. This class may be an elective or required class for 1-3 credit hours. The Media Literacy class may be a stand-alone class or may be combined with pro bono, clinic, or other required law school training programs.<sup>258</sup>

Every law student must have exposure to media literacy education in law school as part of the law school's requirements under ABA Chapter 3.<sup>259</sup> How that training is integrated in law school education is up to the individual law school.<sup>260</sup> Student could see a media literacy class in their substantive class, students could take a 1-credit Media Literacy and the Law course, or students could take a combined training in media literacy and scholarly writing for their writing requirement.<sup>261</sup> Media literacy education must become a part of the legal education at every ABA accredited law school to comply with ABA Chapter 3 education standards.<sup>262</sup>

## VII. CONCLUSION

Current media literacy education in elementary, secondary, and post-secondary schools is unevenly adopted and inconsistent. Media literacy is a necessary skill to have to be an effective lawyer, judge and counselor. Law schools have a mandate to graduate law students who are effective, ethical, and responsible members of the legal profession. The "practice-ready" law school graduate is not completely educated if he or she lacks the essential critical thinking skills necessary to problem-solve and research as a media savvy student. Only when including media literacy education in their programs will law schools fully discharge their obligations to their students and the legal

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<sup>257</sup> *See id.*

<sup>258</sup> *See id.*

<sup>259</sup> *See id.*

<sup>260</sup> *See id.*

<sup>261</sup> *See id.*

<sup>262</sup> *See id.*

profession under ABA Chapter 3 and truly prepare their students to be members of the legal community.