

## **Focus Questions for Being Wrong: Adventures in the Margin of Error**

These focus questions are intended to aid you in the active reading of Kathryn Schulz's "Being Wrong: Adventures in the Margin of Error," one of the books selected by the faculty of the Syracuse University College of Law to help prepare you for your time studying law. This book was chosen by Professor Laura Lape.

The questions are written with the intention of helping you. You won't be tested on your answers and you can feel free to read the book without them should you choose. And there aren't any correct answers for these questions. It's more important to question the text and reflect on what the answers might be than to seek for a definitive "correct" answer.

The questions are designed to model the process of active reading, which is a skill with which you should already be familiar. Active reading is a crucial skill for doing well in law school, and the more adept you become at it before you come to school, the better you will do during your time here. If you would like to learn more about active reading, there will be content discussing the topic in more depth on the Legal Writer's Toolkit site.

You shouldn't assume that these questions indicate a point of view or that they're trying to steer you to answer them in a particular way. Rather, they're intended to provoke you to think critically about what you read and to help you form your own conclusions, based on the information the author gives you about the topics discussed in the book.

We hope you enjoy "Being Wrong," and we look forward to meeting you and working with you over the course of the next few years.

## WRONGOLOGY

1. How important do you think it is for a lawyer to have a highly attuned sense of when we are wrong? How many lawyers live their lives, as the author describes it, “unconsciously assuming we are very close to omniscient?” Do you see why this is both important and dangerous for lawyers?
2. As you prepare to embark on a difficult and complicated course of study, do you draw some comfort from the author’s assertion that “wrongness is a vital part of how we learn and change? Had you considered that idea before? As you read it now, do you agree or disagree with it?
3. The author describes an epistemological definition of “error” as believing something to be true when it is false, or believing something to be false when it is true. The author suggests that this definition is “bedeviled by a problem” that is so significant that she will not rely on the definition. Do you see what that problem might be? Were you comfortable with the definition of error she proposed until she told you it was flawed?
4. The author writes of “[t]he conundrum of whether truth exists.” Had you considered that there was such a conundrum? If “truth” doesn’t exist, what does the law’s traditional evidentiary oath, requiring the witness to tell the truth, the whole truth, and nothing but the truth, mean?
5. The author describes our difficulty in recalling times when we were wrong. Can you identify mistakes you’ve made in your life or times when you believed something and then later discovered you were wrong?

## TWO MODELS OF WRONGNESS

1. Have you ever made a mistake like the one the author describes at the beginning of this chapter as being made by Ross Gelbspan? How did you feel about it? Has it haunted you as apparently Ross Gelbspan’s mistake has haunted him?
2. The author writes of an “optimistic model of error.” Without looking for examples from the book, can you think of examples of what the author is writing about from your own experience? Can you think of mistakes you’ve made that have caused you to experience “[s]urprise, bafflement, fascination, excitement, hilarity, [or] delight?”

3. The author writes that “[t]he idea that error can be eradicated . . . contains within it a frighteningly reactionary impulse.” Had you considered this idea before? Do you agree with the author now? Or are you waiting for a more extended consideration of the consequences of eradicating error before committing yourself?

4. Had you thought of the scientific method as a “monument to the utility of error?” Does this definition make sense, especially in the context of this chapter? Does this change the way you think of error?

5. The author writes of the elation of experiencing an altered state brought on by sickness. Have you had a similar experience? Do you think the author’s position here is more a result of an idiosyncratic response to a fever than it is a considered view of the beneficial effects of altered states?

6. The author writes that “[b]eing right might be gratifying, but in the end it is static, a mere statement. Being wrong is hard and humbling, and sometimes even dangerous, but in the end it is a journey, and a story.” Is the author suggesting it is better to be wrong than right? If so, do you agree? If being wrong is a way of discovering what it means to be right, would it be better to be right in the first place and to avoid the journey to get there?

## OUR SENSES

1. The author describes some of the visual metaphors we use to describe being right and wrong. Although not part of the author’s purpose in this book, the use and nature of metaphor in our everyday communications can be fascinating to explore. As lawyers we should always be conscious of our metaphorical expressions and should be constantly aware of what metaphors we are using and why we are using them. Have you spent much time thinking about metaphors? About the metaphors you use? Will you spend more time in the future thinking about the metaphors you use, those others use, and analyzing why you and others use those metaphors and how effective they are at conveying meaning?

2. Before reading this chapter, had you spent time thinking about how our senses operate to provide information to form opinions about the world? Does spending time thinking about this make you more or less confident about the information our senses provide for us?

3. After having the illusion caused by the checkerboard example explained to you, do you still see the two squares as different shades, or can you now adjust what you see based on the explanation the author provides? Based on this and other illusions with which you are familiar, are you now less trusting of the rightness of what your senses tell you, or do you still implicitly trust sensory input?
4. The author describes an experiment to test the phenomenon of inattentional blindness? Have you experienced this experiment or one like it? Do you see why this phenomenon has profound implications for lawyers relying on eyewitness testimony at trial?
5. The author claims that illusions are universally loved. Do you love illusions? Do you enjoy watching magicians, or illusionists, at work?

### **OUR MINDS, PART ONE: KNOWING, NOT KNOWING, AND MAKING IT UP**

1. The author writes that “even if you happen to be a professional philosopher, it is very difficult to figure out what, if anything, you can claim to know.” Had you considered before reading this book that you might not be able to be certain about what you know? Do you find this realization to be disturbing? Exhilarating?
2. Have you experienced a situation where you had a specific, detailed memory of something which you later realized must be wrong, in at least one of the details you remember? Does this affect your ability to trust your memory? If you haven’t had this experience, do you believe that the author is exaggerating this phenomenon, or that it only applies to some people? Do you see why this phenomenon, like that of inattentional blindness, has profound implications for lawyers seeking testimony from witnesses at trial?
3. How do you think of your memory? Had you thought of it as one of the metaphors the author describes; as a photograph, or a movie, or a computer? Is it strange to think of memory as a product of many different processes, reassembled by different parts of the brain whenever necessary?
4. The author describes a 1977 experiment conducted by psychologists testing why people chose between what they believed were different varieties of pantyhose. Do you think manufacturers and stores took note of this research? Does the human skill in confabulation pose additional issues for lawyers to understand and be concerned about?

5. The author writes of the tendency of all of us to be mildly confabulatory. To emphasize her point, she describes some relatively benign examples of her own behavior: discussing the accuracy of string theory in physics and the origin of ethnic tension in the former Yugoslavia. In current times, can you think of perhaps less benign examples of confabulatory behavior, especially in regard to the coronavirus crisis?

## **OUR MINDS, PART TWO: BELIEF**

1. Have you experienced the failure of a belief? Was the experience as devastating for you as it apparently was for Allen Greenspan? Is it possible that the failure of beliefs such as the ones described by the author at the start of this chapter can only be experienced by older people, and that one spends the first part of adulthood establishing the beliefs that are challenged by later experience? If this is so, how do you think you will react when some of your established beliefs are called into question and perhaps fail?

2. The author describes the experience of meeting someone and realizing that she didn't look as the author expected. Have you had this experience? Have you thought about why you expected the person to look one way and why it is that you were surprised by how the person actually looked?

3. In this chapter, the author delves deeply into why, and how, we believe. Do you see why thinking about how and why we believe the things we believe is so important for lawyers? Do you think many people have spent as much time as you have spent reading this chapter in thinking about the validity and process of their belief systems?

4. The author writes about the way we think of people who disagree with us. Have you experienced any of the assumptions the author describes? Have you seen others respond to challenges to their beliefs from others in the way the author describes? In today's political climate, do you recognize the types of responses you are reading about? What are the implications of this chapter for laws and the people who make them?

## OUR MINDS, PART THREE: EVIDENCE

1. The author writes of the decision of Judge Stoughton to admit into evidence visitations by evil spirits during the Salem witch trials of 1692. It's easy to assume that such evidence would never be admitted today. Can you think of any circumstances in which evidence like this might be admitted into a contemporary court, for any reason?
2. The author poses several questions about evidence. How do you answer these questions? What assumptions do you make when answering these questions, if any? The law assumes, for example, that the statements of those who believe they are about to die are more trustworthy than those made by people who believe they will continue to live after making the statements, and therefore dying declarations - even though they would normally be excluded from evidence as hearsay - are permitted to be introduced at trial. What assumptions do you think support this decision? Are these assumptions correct? These assumptions might have been made some time ago, when society's beliefs were different. Should we persist in allowing what might be out-of-date assumptions to control our contemporary approach to admissible evidence?
3. The author writes of a situation in which a man assumed - incorrectly - that a woman wasn't a lawyer. The story happened in 1978. How likely is it that something like this could happen today? If you answered, "not likely," do you think your personal gender identification influenced your answer?
4. The author writes about the dangerous ability of inductive reasoning to generate stereotypes. Do you see why this is a particular problem for lawyers seeking to persuade a jury?
5. Do you recognize some of your own inductive biases? What, if anything, do you do to combat them?
6. This book was first published in 2010. If it had been published in 2020, how would the author have used the coronavirus crisis to illustrate her points about evidence and belief? As you reflect on the last two chapters, and as you read the rest of this book, consider that the points the author is making are not just theoretical, but rather have profound implications for law, public policy, and diplomacy.

## OUR SOCIETY

1. The author writes about the notion that the greater the number of people who believe a thing, the more likely it is to be true. Do you see why this idea can cause concerns for lawyers conducting jury trials?
2. We are all familiar with the concept of peer pressure. Can you think of examples when you have succumbed to peer pressure? Do you actively seek out groups of peers who share your views or do you try to avoid peer groups and try to reach your own conclusions about things?
3. Based on what the author says about communities, is it more or less effective for lawyers to appear as someone from the community to members of the communities they are addressing? Will lawyers speaking to the board of a large corporate client dress and sound the same when speaking to a jury made up of members of a rural community? What if the lawyer is representing the corporation before a rural jury?
4. The author writes of the Talmudic injunction that if there is a unanimous verdict of guilty in a death penalty case, then the defendant must go free. Do you prefer this approach over our justice system's insistence on unanimous verdicts? Earlier in the chapter, the author appeared to deride the concept of the exception proving the rule. By endorsing the Talmudic embrace of non-unanimity, does the author appear to be changing her position?

When I showed this question to Professor Lape she had this response:

“On page 128 Schulz states, “More generally, we all demonstrate it every time we insist that ‘the exception proves the rule.’ Think about the claim this adage is making: that a piece of acknowledged counterevidence weighs in favor of the hypothesis it appears to weigh against.” Schulz is here making a common error. She utterly misunderstands the adage, as do many people. The key is in the word “rule.” The adage deals with rules, not with statements of fact. With reference to statements of fact, the adage would make no sense at all. Finding a black swan undercuts, and does not support, the statement of fact that all swans are white. The adage does not deal with statements of fact at all. It deals with the existence of rules. If I say to my class, “On Mondays you may bring coffee to class,” that exception proves the existence of the rule that on other days no coffee may be brought to class. In legal reasoning we use this line of argumentation all the time. I . . . hate for the students to think the adage has any relation whatsoever to statements of fact.”

To illustrate her point further, Professor Lape points to a case, **Bolden v. Doe**, 358 P.3d, 1009, 1026 (Utah 2014):

For better or worse, our legal system treats attorneys as agents for their clients. And on that basis, we generally deem clients responsible for the decisions they make on advice of counsel.

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There is an exception to this rule: In criminal cases, defendants convicted upon objectively deficient advice at trial may be entitled to a new trial as a remedy on a constitutional claim for ineffective assistance of counsel. **See Strickland v. Washington**, 466 U.S. 668, 691-92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (to prevail on ineffective assistance of counsel claim defendant must show deficient performance by counsel that was objectively unreasonable and prejudicial). But the exception proves the rule. Except in these limited circumstances, a misstep on advice of counsel is still a misstep, and a client's recourse is simply an action for malpractice.

There is always a danger that when an author uses a well-known phrase - a cliché in this case - that the phrase might have acquired a meaning other than that which the words of the phrase might suggest. In that case, as here, the author's choice of the cliché introduces ambiguity into what should be plain and simple meaning. It's something to look out for in every text you read.

5. The author describes the 95% vote against women's suffrage in Switzerland. How different would the result have been if the vote had been conducted by secret ballot? Do you see why the mechanics of group decision making are important? Are there times when non-secret polling is appropriate, or should all polls be secret?

## THE ALLURE OF CERTAINTY

1. Are you someone who is comforted by certainty? Are you comfortable living with doubt? Which approach do you think is more helpful for a law student? For a lawyer? Are the answers to the last two questions necessarily the same, or might they be different?
2. Can you think of examples of leaders who have displayed what the author describes as King Lear's "unshakeable conviction" with similarly negative results? Is the author correct when she asserts that we find certainty desirable in leaders? What would happen if the President of the United States experienced Hamlet-like doubt? Would that be preferable to Lear-like certainty, or are both equally dangerous, albeit in different ways?



3. The author describes the 2004 election contest between John Kerry and George W. Bush. Do you prefer politicians who hold an unwavering set of convictions or politicians who change their minds? What if the politician whose stance you prefer (firm convictions or mind changing) represented a party different from yours? Would you vote for that candidate or would the political views of the candidate be more important to you?

4. Have you ever been an undecided voter? Do you share what the author suggests is a distaste for undecided votes? Given that in any election there are a substantial number of voters who identify themselves as undecided, can the condemnation of undecided voters be as widespread as the author suggests?

### **BEING WRONG**

1. Have you experienced the process the author describes - of no longer believing something you used to believe? Do you remember the process of changing your belief? If you were one of the people in the survey the author describes, do you think you would respond that your current beliefs are the ones you used to hold, as did the subjects of the study, or are you confident you could identify the change in your beliefs from the past to the present?

2. The author describes situations in which people stubbornly cling to their beliefs even when external evidence shows them to be wrong. Recently there was a case in which an off-duty policewoman shot and killed a man she thought was in her apartment. In fact, the man was in his own apartment and the police officer was mistaken about the apartment she was in. Was this a similar - albeit tragic - case to the ones the author describes in this chapter? If it was a tragic case of the officer behaving as the author says we are all likely to behave when confronted with the reality that our beliefs are wrong, how should the legal system handle such a case? What is the appropriate sentence for someone who makes a mistake like this? Should the defense have sought expert testimony on mistakes and error?

3. The author writes of the divide between younger and older people, and the tendency for younger people to point out the errors in other people's thinking but unwillingness to hear when they themselves might be wrong. This book was written before the "OK, boomer" phrase was coined, but might this phrase be an example of the thinking the author is writing about? It can also be identified as an expression of the belief that older people are often wrong, but delight in sharing their opinions with younger people anyway, an irony since baby boomers once believed exactly the same thing about their parents and grandparents. Do you share the views encapsulated by the "OK, boomer" phrase? Or do you believe that the issue is more nuanced than can be captured in any short phrase?

## HOW WRONG?

1. As you read this chapter about how we respond to being wrong, consider how the law should respond to error and how it actually responds. Having concluded that slavery was wrong, for example, should society have immediately removed all laws that were based on the incorrect belief that there are differences between races? Did society do that? Has that happened, even today? Why is this, if we were wrong about the central premise of discrimination?
2. Have you experienced the phenomenon the author describes here of being wrong but finding persuasive reasons to explain why you were wrong? Would you know you were rationalizing your mistake? Does reading this chapter cause you to consider whether your explanations for your error might have been unjustifiable rationalizations?
3. Do some of the claims made during the coronavirus crisis, and the rationalizations made after these claims, sound familiar when reading this chapter? Does the analysis the author is presenting here help us when trying to understand the claims and counterclaims made by those who claim expertise and those who disregard expertise on a variety of issues? Again, do you see how our approach to error can have profound, real-world, consequences?

## DENIAL AND ACCEPTANCE

1. This chapter gets us closer than ever to the law and to the significance of error in what we do. As you read it, consider if there any missteps or avoidable mistakes that were made during the investigation and prosecution of the case the author describes and how they could have been avoided. And if you are interested in trial work, consider what the author has to say about eyewitness testimony and how you might guard against or use the information about eyewitness reliability you learn in this chapter.
2. The author goes into the etymology of the word “witness” to begin the discussion of witness testimony and reliability. Is this an approach you have followed when you start your investigation into a concept? How often do you look up a word in the dictionary to discover its origins as well as its contemporary meaning? Is this a useful way of understanding what a word like “witness” means?

3. The author writes of the catastrophic health consequences of the South African President's denial that AIDS is caused by HIV. Can the same effect be seen in some responses to the coronavirus pandemic? As we consider public policy, is this ability to deny causal relationships, no matter how well-established by science, something we should be concerned about and should attempt to guard against?
4. As you read the description of the Jimmy Rae Bromgard case, consider how you would respond if you were the D.A. presented with the DNA evidence the author describes. Do you think you would be willing to concede that someone you spent time and energy prosecuting was innocent? What would be the personal and professional implications for you if your state's forensic scientist had testified as Montana's did? How would an acceptance of error influence the other convictions based on that scientist's testimony?
5. Are you surprised to learn that memory experts say that witnesses have one chance to identify someone, and that once they have selected someone - from a photo or lineup, for example - the image of the selected person becomes the image of the perpetrator in their mind? Does this change your confidence in the strength of witness testimony?
6. The author writes about the coda to the story of Penny Beerntsen and Steven Amery, and notes that her initial reaction was to leave the story out of her book. Was her first reaction correct, or was she correct to include the story? Does learning about the aftermath of the story change your response to what you had learned up to this point? Do you think the DNA evidence that freed Steven Amery was wrong? Does Penny Beerntsen bear any responsibility for the death of Teresa Halbach?

## **HEARTBREAK**

1. The author places an important point - one might almost say buries it - in a footnote: the idea that "[o]ur very morality is grounded in [the] paradox of identification." She uses the golden rule of doing unto others as you would have them do unto you, and writes that one way of subverting the goal of the rule is to deny the sameness of others. This is the strategy adopted by, as the author notes, the defenders of slavery, but is also the strategy adopted by the Nazis in the 1930s and '40s, and is arguably the strategy adopted by those who deny scientific evidence in order to argue that falsely accused convicts belong in jail ("they're bad people who are guilty of something."). Can you think of other examples of this way of thinking? Do you see how seductive an error this is?

## TRANSFORMATION

1. The author claims that error represents “a moment of alienation from ourselves.” If you had read that claim at the beginning of this book, how would you have responded to it? How do you respond to it now? How will reading this book change the way you think about or respond to errors you have made? The errors others have made?
2. Have you ever experienced buyer’s remorse? About what purchase? Voting for a political candidate? Ordering a meal? Buying a car? A life choice? How did you respond to the feeling once you experienced it?
3. The author writes of the transformative power of error. Had you thought of error this way? Do you agree with the author when she writes that “[o]ur errors can alter our beliefs, our relationships, ourselves?”

## THE PARADOX OF ERROR

1. While most of the discussion of error in this book has been personal or theoretical, the issue of medical error - or malpractice - is very practical. Lawyers must also deal with the implications of making errors in their field, and must carry expensive malpractice insurance policies to cover themselves and their clients in case of lawyer malpractice. While the consequences of lawyer malpractice are usually less dramatic than those associated with medical malpractice, they are often serious enough, both for the lawyer and for the client. Yet lawyers, like doctors, cannot be paralyzed by the fear of making a mistake. Do you feel comfortable about the possibility of making a mistake in practice? Are there things you can do to help make sure that you do not make a professional mistake?
2. The author notes that apologize-and-disclose policies have led to a reduction in medical malpractice lawsuits. Does this surprise you? Did you imagine that a doctor who apologizes for a mistake, and who explains what happened, would be inviting a lawsuit? Do you think the same reduction in lawsuits would apply in the legal malpractice area?
3. Again in this chapter the author relies on etymology, grammar, and rhetoric to explore the concepts she’s trying to explore. Had you considered the closeness of language and thought before? Are you persuaded by the author’s approach?

## **THE OPTIMISTIC META-INDUCTION FROM THE HISTORY OF EVERYTHING**

1. Had you considered the close relationship the author is describing between error and humor?
2. Having explored errors along with the author, do you agree with her when she says “[s]cientists, like poets, could fairly claim that “what we are engaged in . . . is error?” Did you expect to end up here when you started reading this book?