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## Twitter and the #So-CalledJudge

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# TWITTER AND THE #SO-CALLEDJUDGE

Elizabeth Thornburg\*

## ABSTRACT

*Two-hundred-eighty characters may be insufficient to deliver a treatise on the judiciary, but it is more than enough to deliver criticism of the third branch of government. Today, these tweeted critiques sometimes come not from the general public but from the President himself. Attacks such as these come at a challenging time for court systems. We live in a highly politicized, polarized society. This polarization is reflected in attitudes toward the courts, particularly the federal courts. Unfortunately, public doubts about the court system come at a time when public understanding of the structure of government, and especially the court system, is abysmally low.*

*All of this context raises a number of related questions. When the prolific executive tweeter calls out a federal judge, is President Trump just venting or has he tapped into a strong subset of American opinion on the judiciary? And, if so, does a “so-called judge” have a role in engaging, informing, perhaps even rebutting these opinions? Further, could 280 characters be an effective platform to use in fulfilling that role?*

*This article will address the specific issue of judges using Twitter to promote the interests of the courts as institutions. After section II’s brief description of the mechanics of Twitter, section III will discuss why and how judges communicate through Twitter.*

*Section IV will sound a note of caution based on two factors: 1) a web of judicial ethics rules that limit judicial speech (including Twitter); and 2) the nature of the Twitter experience and the way people use it, which can hinder attempts to effectively reach the desired audience.*

*The article will conclude by arguing that in this day and age, when much of America gets its news from social media and those platforms are being used to delegitimize the judiciary, the third branch can ill afford to disengage. Judicial tweeting, within the limits of the ethics rules, should be encouraged rather than shunned.*

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\* Richard R. Lee Professor of Law, SMU Dedman School of Law. Thanks to Denise Neary, Senior Judicial Education Attorney at the Federal Judicial Center, for getting me involved in this issue for the Second Circuit Judicial Conference, to U.S. District Judge William Smith for sharing his judicial Twitter experience, and to both for spurring my thinking about this subject. Thanks also to Donna Wolff, Associate Director of the Underwood Law Library, for her research support and to my excellent research assistant, Tammie Banko, for both research and suggestions. Finally, thanks to the Enoch Family Research Fund for a summer research grant that supported the creation of this article.

This article is dedicated to the late Professor Joseph McKnight who, although he had an aversion to computers and probably would have hated Twitter, loved the courts and had a passion for justice.

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## I. INTRODUCTION

ONE hundred forty characters may be insufficient to deliver a treatise on the judiciary, but it is more than enough to deliver criticism of the third branch of government.<sup>1</sup> Today, these tweeted critiques sometimes come not from the general public but from the President himself. Consider these Twitter posts (tweets) by Donald Trump from February of 2017. He wrote them in response to Federal District Judge James Robart's<sup>2</sup> decision to temporarily enjoin President Trump's first travel ban on immigrants from certain Muslim-majority countries.<sup>3</sup>

1. Twitter is a microblogging platform, and brevity is its essence. Until November 7, 2017, tweets could be no more than 140 characters long, but on that date, Twitter doubled the limit to 280 characters. The Twitter activity that is the subject of this article was done under the original limit (and many Twitter users swear they will stay faithful to 140), and so retrospective portions of the article retain the reference to 140 characters. Karissa Bell, *Twitter's 280-Character Tweets Are Here to Stay*, MASHABLE (Nov. 7, 2017), <http://mashable.com/2017/11/07/twitter-280-character-limit-expansion/#lpQFbA0hsgqs> [https://perma.cc/72UU-LCTK].

2. Ted Robbins, *Who Is Judge James L. Robart and Why Did He Block Trump's Immigration Order?*, NPR (Feb. 4, 2017, 3:08 PM), <http://www.npr.org/2017/02/04/513446463/who-is-judge-james-l-robart-and-why-did-he-block-trumps-immigration-order> [https://perma.cc/6D3S-SK7E].

3. Donald Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 7:12 AM & 2:44 PM) (Feb. 5, 2017, 2:39 PM), <https://twitter.com/realdonaldtrump/status/827867311054974976> [https://perma.cc/63DA-TFYM]. For a collection of the President's tweets about the court, see *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUSTICE (June 5, 2017), <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts> [https://perma.cc/67GV-LPU6].

**Donald J. Trump** ✓

@realDonaldTrump

Follow



The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!

7:12 AM - 4 Feb 2017

33,550 Retweets 159,373 Likes

**Donald J. Trump** ✓

@realDonaldTrump

Follow



Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!

**Donald J. Trump** ✓

@realDonaldTrump

Follow



What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into U.S.?

Attacks such as these come at a challenging time for court systems. We live in a highly politicized, polarized society.<sup>4</sup> This polarization is reflected in attitudes toward the courts, particularly the federal courts. For example, a 2015 Gallup Poll found that Americans' trust in the federal judicial system had fallen to a historical low, with only 53% of responders saying that "they have 'a great deal' or 'a fair amount' of trust in it."<sup>5</sup>

4. *Political Polarization in the American Public*, PEW RESEARCH CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public> [https://perma.cc/3REA-NTWT].

5. Jeffrey M. Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP (Sept. 18, 2015), <http://www.gallup.com/poll/185528/trust-judicial-branch-sinks-new->

Digging deeper, the pollsters attributed the decline to Republicans unhappy with the Supreme Court's controversial decisions that year supporting same-sex marriage and upholding the Affordable Care Act.<sup>6</sup> The judiciary's authority depends on its perceived legitimacy, and it is disturbing that public opinion divides along partisan political lines. Equally disturbing is the apparent tendency to elide agreement with decisions and trust in the institution that made them.

Support for state courts overall seems to have been less affected by political polarization. A 2016 survey of registered voters conducted for the National Center for State Courts found that 74% had confidence in their state court system.<sup>7</sup> In response to more specific questions, 71% agreed that the "courts in their state [were] committed to protecting individual and civil rights," 65% agreed that courts "serve as an appropriate check on the other branches of government," 71% agreed that the courts "treat[ed] people with dignity and respect," and 63% agreed that the courts "take[ ] the needs of people into account."<sup>8</sup>

Concerns about discrimination nevertheless lurk beneath the positive numbers. The survey looked at one issue that was "brought into focus" by the 2016 presidential campaign: opinions about "whether a judge's ethnicity influences fairness in the court system."<sup>9</sup> The findings:

In the abstract, we see that most voters do believe there is an influence, albeit a minor one. But when we move to more specific hypothetical examples, we see a clear . . . racial disparity, with non-white voters in particular suggesting that a minority defendant is less likely to receive equal justice from a white judge but few concerns in the opposite scenario for a white defendant with a minority judge.<sup>10</sup>

In a similar vein, a 2015 survey of young people reflected worries about the impact of race on the criminal justice system. A poll of 18- to 29-year-olds found that 49% of responders had "little to no confidence that the justice system [could] operate without bias."<sup>11</sup> In addition to the predictable racial divide in responses, there was a political one. Almost two-thirds of those self-identifying as Republicans were confident about the system's fairness, while self-identified Democrats were evenly split.<sup>12</sup> Again, trust in the court system shows the effects of partisan fault lines.

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low.aspx [Perma link unavailable]. Note that trust in the executive branch (45%) and legislative branch (32%) were even lower.

6. *Id.*

7. *Annual National Tracking Survey Analysis*, GBA STRATEGIES (Dec. 12, 2016), [http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC\\_2016\\_Survey\\_Analysis.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2016_Survey_Analysis.ashx) [https://perma.cc/4BCR-EDPF].

8. *Id.*

9. *Id.*

10. *Id.*

11. Cara Tabachnick, *Poll: Young Americans Have "Little Confidence" in Justice System*, CBS NEWS (Apr. 30, 2015, 6:00 AM), <http://www.cbsnews.com/news/poll-young-people-have-little-confidence-in-justice-system> [https://perma.cc/SY5D-7XYY]. Questions about the "justice system," which can be interpreted to ask about the police as well as the courts, tend to reflect a greater concern about racial disparity.

12. *Id.*

Unfortunately, public doubts about the court system come at a time when public understanding of the structure of government, and especially the court system, is abysmally low. A September 2016 study by the Annenberg Public Policy Center found that “[o]nly a quarter of Americans [could] name all three branches of government.”<sup>13</sup> Knowledge about the Supreme Court and the Constitution is especially spotty.<sup>14</sup> This is not new. A 1998 survey done on behalf of the American Bar Association had similar results. Further, public understanding of the function of courts was weak. “While about half knew the judicial branch interprets laws, just as many thought its function was to enforce laws.”<sup>15</sup>

All of this context raises a number of related questions. When the prolific executive tweeter calls out a federal judge, is President Trump just venting or has he tapped into a strong subset of American opinion on the judiciary? And, if so, does a “so-called judge” have a role in engaging, informing, and perhaps even rebutting these opinions? Further, could 280 characters be an effective platform to use in fulfilling that role?

This article will address the specific issue of judges using Twitter to promote the interests of the courts as institutions.<sup>16</sup> After Section II’s brief description of the mechanics of Twitter, Section III will discuss why and how judges communicate through Twitter. Section IV will sound a note of caution based on two factors: (1) a web of judicial ethics rules that limit judicial speech (including Twitter); and (2) the nature of the Twitter experience and the way people use it, which can hinder attempts to effectively reach the desired audience. The article will conclude by arguing that in this day and age, when much of America gets its news from social media and those platforms are being used to delegitimize the judiciary, the third branch can ill afford to disengage. Judicial tweeting, within the limits of the ethics rules, should be encouraged rather than shunned.

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13. *Americans’ Knowledge of the Branches of Government Is Declining*, ANNENBERG PUB. POL’Y CTR. (Sept. 13, 2016), <http://www.annenbergpublicpolicycenter.org/americans-knowledge-of-the-branches-of-government-is-declining> [https://perma.cc/B56C-SU8U]. Thirty-one percent could not name any branch at all.

14. Matthew Shaw, *Civil Illiteracy in America*, HARV. POL. REV. (May 25, 2017, 6:12 PM), <http://harvardpolitics.com/culture/civic-illiteracy-in-america> [https://perma.cc/L5KU-9ETZ].

15. AM. BAR ASS’N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 10 (1998), [https://www.americanbar.org/content/dam/aba/publishing/abanews/1269460858\\_20\\_1\\_1\\_7\\_upload\\_file.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/abanews/1269460858_20_1_1_7_upload_file.authcheckdam.pdf) [https://perma.cc/L7KY-S8GH].

16. The use by judges of social media in general and Twitter in particular raises additional issues that are beyond the scope of this article. For example, ethical rules requiring judges to act with “dignity” have been invoked as a limit on social media posts. *Judicial Discipline & Disability Comm’n v. Maggio*, 440 S.W.3d 333, 334 (Ark. 2014); Mass. Comm. on Judicial Ethics, Op. 2016-09 (2016), <http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-2016-09.html> [https://perma.cc/VX4E-6W6T]; Cal. Judges Ass’n Judicial Ethics Comm., Op. 66 (2010) (“While it may be acceptable for a college student to post photographs of himself or herself engaged in a drunken revelry, it is not appropriate for a judge to do so.”). And, as is true for all of us, the decision to maintain an online presence raises issues of security. *See generally* PRIVACY RIGHTS CLEARING-HOUSE, <https://www.privacyrights.org> [https://perma.cc/P7TA-YG54].

## II. TWITTER 101

Twitter is a social network that permits a user to create and share information. Twitter was launched in 2006, and by 2014 it already had 646 million registered users.<sup>17</sup> At the end of the first quarter of 2017, Twitter estimated that it had 328 million *active* users.<sup>18</sup> As of the writing of this article, more than 6,000 postings, called “tweets,”<sup>19</sup> are processed every second; 500 million tweets are posted per day; and around 200 billion are posted per year.<sup>20</sup> A tweet may contain no more than 280 (formerly 140) characters but can link to other information on the internet, including articles, images, and videos. About 40% of Twitter users do not post their own tweets, but do observe others’ tweets and use Twitter as a curator of news and information.<sup>21</sup>

Twitter users create a “handle” to identify themselves. The handle begins with an @ sign followed by letters and numbers chosen by the user. For example, my Twitter handle is @btSMU; Donald Trump’s Twitter handle is @realDonaldTrump.<sup>22</sup> Entities can also have Twitter accounts, which also have handles. Thus the journal in which this article is published is @SMULawReview, the Supreme Court of Texas is @SupremeCourt\_TX, and Starbucks Coffee is @Starbucks.

Because Twitter is meant to be a shared experience, there are a number of ways to interact with others. Users can communicate directly but publicly with each other by including handles in tweets; they can communicate privately by sending a “direct message” (DM for short). A user may repost another user’s tweet (retweeting), which can be done with or without adding a new comment by the retweeter. A Twitter user may also “like” other people’s tweets by clicking on a heart-shaped icon. In addition, Twitter users may publicly “reply” to other people’s tweets. In all of these cases, the targeted Twitter user will be informed of the interactions. Twitter users are also encouraged to “follow” other Twitter users, and on the user’s homepage there is a “news feed” that displays the tweets of the followed users.<sup>23</sup> Each homepage also displays, for anyone to see, lists of

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17. 2014 CCPIO NEW MEDIA SURVEY, CONFERENCE OF COURT PUB. INFO. OFFICERS 6 (Aug. 6, 2014), [http://ccpio.org/wp-content/uploads/2014/08/CCPIO-New-Media-survey-report\\_2014.pdf](http://ccpio.org/wp-content/uploads/2014/08/CCPIO-New-Media-survey-report_2014.pdf) [<https://perma.cc/2SRE-VYNJ>] [hereinafter CCPIO].

18. Daniel Sparks, *How Many Users Does Twitter Have?*, THE MOTLEY FOOL (Apr. 27, 2017, 11:06 AM), <https://www.fool.com/investing/2017/04/27/how-many-users-does-twitter-have.aspx> [Permalink unavailable].

19. The screenshots from President Trump’s accounts shown above are examples of what tweets look like.

20. *Twitter Usage Statistics*, INTERNET LIVE STATS, <http://www.internetlivestats.com/twitter-statistics> [<https://perma.cc/8Hdj-GCUH>].

21. CCPIO, *supra* note 17, at 6.

22. This is the account he had before becoming President, which he still uses prolifically. There is also an official Twitter account for the President of the United States, which was transferred from President Obama to President Trump. Its handle is @POTUS. (Just to make matters a tad more confusing, the @POTUS account sometimes retweets the @realDonaldTrump account’s tweets.)

23. The feed actually uses a complex algorithm designed to deliver the content the Twitter user most wants to see. This algorithm is discussed at greater length in Section IV.B, *infra*.

who that Twitter user follows and who follows him or her. Users may “block” or “mute” undesired followers.<sup>24</sup>

Although it is possible to make a Twitter account “private,” most Twitter users hope that their posts will be widely read. One way to attract notice from people who do not follow the user is by the use of hashtags. Adding a # sign before a word (or words smashed together) helps people who are searching for comments on that topic to find the tweet.<sup>25</sup> For example, some lawyers who specialize in appellate practice include the hashtag #AppellateTwitter to help attract like-minded Twitter users.<sup>26</sup> References to the U.S. Supreme Court often include the hashtag #SCOTUS. Another popular legal hashtag is #A2J (Access to Justice). Some hashtags are quite political, for example: #Resist for Trump opponents and #MAGA (short for “Make America Great Again”) for Trump supporters. Since the February 2017 tweets criticizing the judge in the travel ban case, #SoCalledJudge has been used often by Twitter users of all political persuasions.

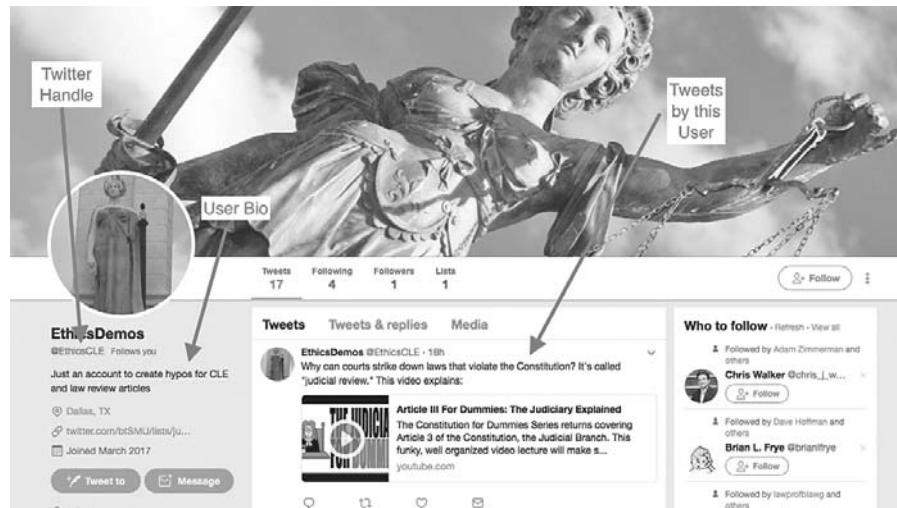
For those who do not use Twitter and might be helped by a visual image, below is a what a Twitter user sees when looking at another user’s homepage.

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24. *Blocking Accounts on Twitter*, TWITTER HELP CTR., <https://support.twitter.com/articles/117063> [<https://perma.cc/P8PA-UGA3>]. Note, however, that a government account’s blocking of another Twitter account based on the content of its tweets may raise constitutional concerns. See Daniel Funke, *Knight Institute Sues President Trump over Twitter Blocking*, POYNTER (July 11, 2017), <http://www.poynter.org/2017/knight-institute-sues-president-trump-over-twitter-blocking/466322> [<https://perma.cc/BDY3-GYH9>]. For a general discussion of constitutional issues raised by government social media forums, see Ross Rinehart, Note, “Friending” and “Following” the Government: How the Public Forum and Government Speech Doctrines Discourage the Government’s Social Media Presence, 22 S. CAL. INTERDISC. L.J. 781, 782 (2013).

25. *What Are Hashtags and How to Use Them*, DIG. MKTG. PRO, <https://www.digitalmarketingpro.net/what-are-hashtags-and-how-to-use-them-312> [<https://perma.cc/VRK5-HVC8>].

26. Christina DiPinto, *The Marketing Appeal of #AppellateTwitter*, MUSE COMM., <http://www.musecommunicationsllc.com/marketing-appellatetwitter> [<https://perma.cc/R9BS-UA8M>].



### III. WHY AND HOW JUDGES TWEET

In a general sense, judges use Twitter for the same reason everyone else does: to share news and information (personal, professional, political, commercial) and to be part of online communities discussing that information. Information gathering is a big part of typical Twitter usage. An American Press Institute survey in 2015 found that “81% [of Twitter users] keep up with the news at least daily” (71% use it several times a day).<sup>27</sup> But they are not merely consumers of information. Thirty one percent say they use Twitter “to tell others what I am doing and thinking about,” 24% “to ‘keep in touch with people I know,’” 19% “[t]o share news” and “[t]o network,” and 18% “[t]o follow trending topics.”<sup>28</sup> Beyond news, there are lots of ways to use Twitter, depending on one’s interests.<sup>29</sup>

If a court or a judge wants to reach out to the public, social media makes sense. “[T]he judiciary is finally joining the public it serves where the public has chosen to congregate.”<sup>30</sup> Accordingly, courts and judges are using social media far more than in the past. One national survey found that social media use by the judiciary increased from 40% in 2010

27. Tom Rosenstiel et al., *How People Use Twitter in General*, AM. PRESS INST. (Sept. 1, 2015, 10:30 AM), <http://www.americanpressinstitute.org/publications/reports/survey-research/how-people-use-twitter-in-general/> [https://perma.cc/83C5-RHUI].

28. *Id.*

29. See, e.g., Daniel Nations, *Why Twitter? Ways for Beginners to Get Started*, LIFEWIRE (Apr. 28, 2017), <https://www.lifewire.com/ways-for-beginners-to-use-twitter-3486595> [https://perma.cc/C4XK-GHEW] (suggesting microblogging, quick answers, finding a job, keeping up with the news, arranging lunch with friends, venting, keeping up with a favorite team, finding out what people really think about the latest movie, and becoming involved with politics).

30. John G. Browning, *The Judge as Digital Citizen: Pros, Cons, and Ethical Limitations on Judicial Use of New Media*, 8 FAULKNER L. REV. 131, 131 (2016).

to 86% in 2013.<sup>31</sup> More than 42% of public information officers agreed in 2014 that using social media is necessary for courts to connect to the public.<sup>32</sup> As one court information officer noted, because traditional media covers the judicial branch far less often than they used to,

[t]here is an emerging recognition among courts that in order to fulfill the requirement that courts are transparent and understandable to the public in the new media age we are in, courts will have to play an active role in facilitating access to information and perform many of the same functions that traditionally have been performed by the now dwindling traditional media.<sup>33</sup>

A recent Pew study determined that 21% of all adult Americans are on Twitter, and their demographics are a further indication of the utility of Twitter for public outreach.<sup>34</sup> Thirty-six percent of young adults (ages 18–29) use Twitter, and “29% of internet users with college degrees use Twitter.”<sup>35</sup> Thirty percent of urban internet users use Twitter, while only 21% of suburban and 15% of rural users are on Twitter.<sup>36</sup> There does not, however, seem to be a strong ethnic or racial divide in Twitter use. Pew’s study found that about 25% of Latino internet users, 27% of black internet users, and 21% of non-Hispanic white internet users are on Twitter.<sup>37</sup> Employing social media platforms allows courts and judges to reach a different audience than if they used print and television news sources alone and helps them reach a younger, more educated, and demographically diverse population.<sup>38</sup>

Twitter in particular has a lot to offer to courts. “The most popular social media tool for courts, Twitter use has quickly spread and, in many instances, become a mainstay for communicating critical, time-sensitive

31. *Id.* at 131 (citing CCPIO, *supra* note 17).

32. CCPIO, *supra* note 17, at 4, 8; *see also* Michael S. Sommermeyer, *All-a-Twitter: Harnessing New Media for Judicial Outreach and Communication*, NAT’L CTR. FOR ST. CTS. (2011), <http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/social-media/2-5-harnessing-new-media-for-judicial-outreach.aspx> [<https://perma.cc/XY5N-4XEZ>].

33. Christopher J. Davey, *The Future of Online Legal Journalism: The Courts Speak Only Through Their Opinions?*, 8 I/S: A J.L. & POL’Y FOR INFO. SOC’Y 575, 600 (2013).

34. Shannon Greenwood, Andrew Perrin & Maeve Duggan, *Social Media Update 2016*, PEW RES. CTR. (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016/> [<https://perma.cc/NQ97-W6YA>].

35. *Id.*

36. Maeve Duggan, *The Demographics of Social Media Users*, PEW RES. CTR. (Aug. 19, 2015), <http://www.pewinternet.org/2015/08/19/the-demographics-of-social-media-users>. [<https://perma.cc/7QLH-WGPN>].

37. Jens Manuel Krogstad, *Social Media Preferences Vary by Race and Ethnicity*, PEW RES. CTR. (Feb. 3, 2015), <http://www.pewresearch.org/fact-tank/2015/02/03/social-media-preferences-vary-by-race-and-ethnicity/> [<https://perma.cc/5SD2-N4QJ>] (also reporting that Hispanic and black internet users are more likely than white internet users to use Instagram, while Pinterest is more popular with white users). A slightly later Pew survey put Hispanic and black Twitter use at 28% and white use at 20%. Duggan, *supra* note 36.

38. Media Insight Project, *How Millennials Get News: Inside the Habits of America’s First Digital Generation*, AM. PRESS INST. (March 16, 2015, 12:01 AM), <https://www.americanpressinstitute.org/publications/reports/survey-research/millennials-news> [<https://perma.cc/4MF4-NZW9>].

information to the public and the media.”<sup>39</sup> It can also be used for more interactive outreach. In April of 2017, for example, the Provincial Court of British Columbia held its second annual Twitter Town Hall, using the hashtag #AskChiefJudge to allow members of the public to ask questions.<sup>40</sup> Georgia’s courts have done the same using #AskGAJudges.<sup>41</sup>

The social media context is new, but judicial ethics codes have long encouraged judges to help educate their communities about the role of the courts. The ABA Model Code of Judicial Conduct allows judges to participate in activities “concern[ed with] the law, the legal system, or the administration of justice,”<sup>42</sup> and the code governing federal judges encourages them to “speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.”<sup>43</sup> The federal commentary explains why:

Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge’s time permits and impartiality is not compromised, the judge is encouraged to do so.<sup>44</sup>

Not every judge will choose to use Twitter or other social media for this purpose, but judges’ unique experience and vantage point on the law-in-action makes them a tremendous resource to the community in understanding both the law and the role of courts.<sup>45</sup>

Many judges got started using Twitter for a very pragmatic reason: they have to run for election, and social media, including Twitter, is an essential campaign tool. As Texas Supreme Court Justice Don Willett (@JusticeWillett) noted:

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39. CCPIO, *supra* note 17, at 11.

40. *Have You Got a Question for the Chief Judge?*, PROVINCIAL CT. B.C. (Mar. 28, 2017), <http://provincialcourt.bc.ca/enews/enews-28-03-2017> [<https://perma.cc/AL22-VCN3>] (noting success of the 2016 Twitter Town Hall).

41. #AskGAJudges #LawDay Edition, STORIFY, <https://storify.com/ashleystollar/ask-gajudges-lawday-edition> [<https://perma.cc/JLA5-NDU8>]. An earlier occurrence was announced by the Judicial Council of Georgia, Administrative Office of the Courts, <http://georgiacourts.gov/content/askgajudges> [<https://perma.cc/G6MV-U2G2>] (announcing Sept. 15, 2016 Twitter Town Hall).

42. MODEL CODE OF JUDICIAL CONDUCT Canon 3.1 (AM. BAR ASS’N 2011).

43. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)(1) (2014).

44. *Id.*, cmt. on Canon 4. *See also* MODEL CODE OF JUDICIAL CONDUCT r. 1.2 cmt. 6 (AM. BAR ASS’N 2011) (recommending that judges “should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice”).

45. This article does not mean to suggest that other entities, such as bar associations, law schools, and court public information offices do not also have a role to play. They do. *See, e.g., Protecting Our Judiciary: What Judges Do and Why It Matters*, AM. BAR ASS’N, [https://www.americanbar.org/groups/committees/american\\_judicial\\_system/projects.html](https://www.americanbar.org/groups/committees/american_judicial_system/projects.html) [<https://perma.cc/H6PF-EJXA>].

Judges are elected in 39 states, and Americans increasingly consume information online. If you're a Texas Supreme Court Justice hopscotching across 254 counties, trying to tattoo your name onto the noggins of millions of voters, you must find creative ways to raise visibility and build awareness. Twitter, Facebook, etc. are low-cost but high-yield ways to leverage the support of key influencers and opinion leaders. Bottom line: It's political malpractice not to engage people smartly via social media.<sup>46</sup>

Tweeting, then, provides judges with a higher profile, allows outreach to voters, helps make judges (and thus courts) seem more accessible, and (if desired) allows judges to announce their positions on legal issues.<sup>47</sup> Here are two examples of election-related communications: a straightforward campaign tweet and a retweet of a very partisan political tweet, both by a candidate for an intermediate appellate court in Texas.<sup>48</sup>



**Justice Schenck**

@Schenck\_Texas

Follow



In my race, I ask for your vote as the only candidate with relevant appellate experience & credentials for the bench. #Election2016



**Justice Schenck** @Schenck\_Texas

Now you're the judge: Please decide on the merits. #KeepSchenck  
#CourtofAppeals #Texas #Election2016 #ElectionDay

46. Don Willett, *The Tweeter Laureate of Texas Discusses Judges' Use of Social Media*, WASH. TIMES (July 22, 2015), <http://www.washingtontimes.com/news/2015/jul/22/celebrate-liberty-month-the-tweeter-laureate-of-te/> [<https://perma.cc/N36Y-RN6Y>].

47. As to the latter, judicial ethics rules create limits that will be discussed in Section IV.A, *infra*.

48. Justice David Schenck (@Schenck\_Texas), TWITTER (Nov. 7, 2016, 1:49 PM), [https://twitter.com/Schenck\\_Texas/status/795714901767553024](https://twitter.com/Schenck_Texas/status/795714901767553024) [<https://perma.cc/95BU-REKH>]; retweet of Phillip Huffines (@PhillipHuffines), TWITTER (Nov. 1, 2017, 5:34 PM), <https://twitter.com/PhillipHuffines/status/793582000728739840> [<https://perma.cc/88TL-PL8L>].



**Phillip Huffines**  
@PhillipHuffines

Vote Early, Vote #Republican all the way down the ballot!  
#KeepTexasRed #earlyvoting @DallasGOP



11/1/16, 5:34 PM

Campaign tweets alone garner little attention because they tend to be pretty boring. Judges therefore engage in additional Twitter activity to connect them with voters. That additional type of tweeting also engages the Twitter audience as citizens. Many of the most successful judicial tweeters<sup>49</sup> spend considerable time humanizing themselves. They may tweet pictures of their children or pets; they may support their alma mater's teams; they may comment on the latest episode of *Game of Thrones*; or they may put their sense of humor on display. While done largely as a campaign tool, making judges more accessibly human may also help alleviate a sense that courts are too formal, out of touch, or otherwise off-putting.<sup>50</sup>

49. As of November, 2017, Texas Supreme Court Justice Don Willett has 105,000 followers. In contrast, Justice Schenck of the Dallas Court of Appeals had 171. See Justice Don Willett (@JusticeWillett), TWITTER, <https://twitter.com/JusticeWillett/followers> [https://perma.cc/6ZWS-2DL8] (last visited Nov. 17, 2017); Justice David Schenck (@Schenck\_Texas), TWITTER, [https://twitter.com/Schenck\\_Texas/followers](https://twitter.com/Schenck_Texas/followers) [https://perma.cc/EJF2-J2WK] (last visited Nov. 17, 2017). To put this in perspective, Justin Bieber had almost 103 million followers. See Justin Bieber (@justinbieber), TWITTER, <https://twitter.com/justinbieber/followers> [https://perma.cc/254Q-AEQ9] (last visited Nov. 17, 2017).

50. For example, the first National Center for State Courts public opinion survey in 1999 found that "one-third of African-American respondents feel 'Courts are "out-of-

Some judges use not only their tweets but also their Twitter profiles (again, where allowed by their jurisdictions) to provide information about their party affiliation, values, and judicial philosophy. While some (including Justice Willett) strive to keep their Twitter presence nonpartisan, others take a side. These range from the brief and party-oriented (Justice Ada Brown: “I’m a Republican appellate court judge in Texas”)<sup>51</sup> to more full-bodied self-descriptions such as “I believe in a loving God, the U.S. Constitution, the rule of law, American exceptionalism, and traditional Texas values” (Justice Jeff Brown)<sup>52</sup> or “Loves God, his wife, his family, America, Texas, and the Texas A&M Aggies” (Justice Scott Field).<sup>53</sup>

Even justices who aim for an apolitical Twitter presence sometimes can’t resist edgy humor. For example, while Justice Willett is a conservative Republican, elected in a state in which candidates for judicial office run with party affiliations, he posted the tweet below during the 2016 Republican presidential primary season.<sup>54</sup>

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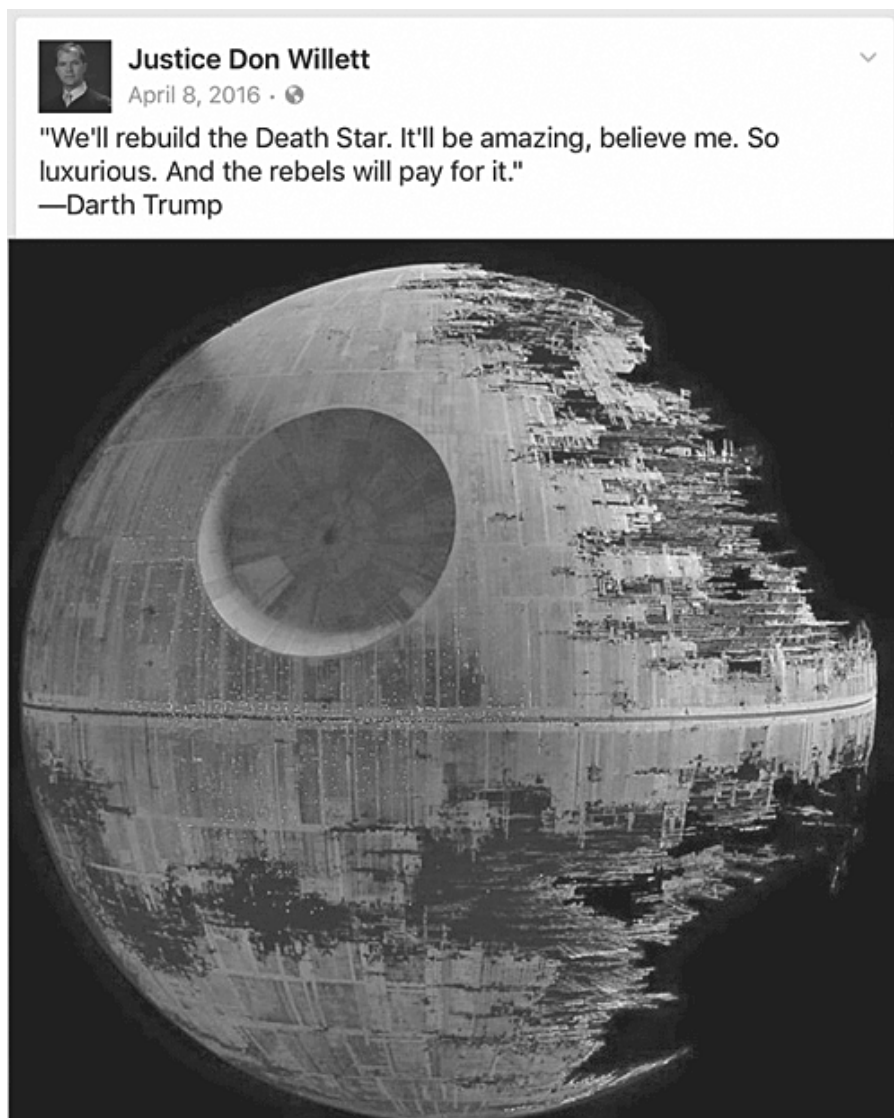
touch” with what’s going on in their communities’ compared to 21% of Hispanics and less than 15% of White/Non-Hispanics.” David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, CT. REV., Fall 1999, at 24, 26, <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctcomm/id/97> [Perma link unavailable]. Cf. HAZEL GENN & ALAN PATERSON, *PATHS TO JUSTICE SCOTLAND: WHAT PEOPLE IN SCOTLAND DO AND THINK ABOUT GOING TO LAW* 233–34 (2001) (finding that 70% of respondents “agreed or strongly agreed” that “most judges [are] out of touch with ordinary peoples’ lives”).

51. Justice Ada Brown (@JusticeAdaBrown), TWITTER, <https://twitter.com/JusticeAdaBrown> [<https://perma.cc/Q8UC-6XB4>] (last visited July 30, 2017).

52. Justice Jeff Brown (@judgejeffbrown), TWITTER, <https://twitter.com/judgejeffbrown> [<https://perma.cc/9CEV-7YMF>] (last visited July 30, 2017).

53. Judge Scott Field (@ScottKingField), TWITTER, <https://twitter.com/ScottKingField> [<https://perma.cc/NC2Q-6K9H>] (last visited July 30, 2017).

54. Justice Don Willett (@JusticeWillett), TWITTER (Apr. 8, 2016, 10:32 PM), <https://twitter.com/justicewillett/status/718280241752510465> [<https://perma.cc/BG9U-YDQT>]. This was not Justice Willett’s only Twitter dig at Donald Trump. See Bobby Blanchard, 9 *Times Texas Supreme Court Justice Don Willett Dissed Donald Trump on Twitter*, DALL. MORNING NEWS (May 18, 2016), <https://www.dallasnews.com/news/politics/2016/05/18/9-times-texas-supreme-court-justice-don-willett-threw-shade-at-donald-trump-on-twitter> [<https://perma.cc/V33C-JTV3>].



Humor, moreover, can be a tricky thing. Since this article was first written, Justice Willett has been nominated by President Trump to a seat on the Fifth Circuit Court of Appeals. At his Senate confirmation hearing, the content of his tweets were fair game.<sup>55</sup> While it may be safe to make fun of New Yorkers who put peas in guacamole, two tweets in particular that were perhaps intended to be jokes, but which were disrespectful of

55. Emma Platoff, *Don Willett Defends Controversial Tweets As Jokes at Confirmation Hearing Before U.S. Senate*, TEX. TRIB. (Nov. 15, 2017), <https://www.texastribune.org/2017/11/15/don-willett-defends-controversial-tweets-jokes-confirmation-hearing-us/> [https://perma.cc/FD8G-HNK8].

LGBTQ citizens, provoked pointed questions.<sup>56</sup> Tweeting that reaches out to voters may be less well received when the audience shifts, and what judges say on Twitter is as relevant as what they say to live audiences.

Judges often use Twitter to educate readers about issues pertaining to the workings of the courts. Note that in the tweets below, both Chief Judge Dillard<sup>57</sup> and Judge Smith<sup>58</sup> include links that would take the reader to longer stories about the subject of the tweet.



**Chief Judge Dillard** @JudgeDillard · Jun 22

"The Roberts Court Hasn't Reargued Many Cases. That Could Change"  
at.law.com/DFE382?cmp=sha... via @lawdotcom



**The Roberts Court Hasn't Reargued Many Cases. That Could Change**

The possibility that the U.S. Supreme Court will rehear a set of cases—including several immigration disputes—looms over the justices...

law.com

56. Justice Don Willett (@JusticeWillett), TWITTER (July 1, 2015 8:42 PM), <https://twitter.com/justicewillett/status/616421779410694145> [<https://perma.cc/5G9X-XCUU>] ("7.1.2015— New York votes for peas in guacamole. 7.2.1776—New York abstains from voting for US independence" with photo of face captioned "I'VE MADE A HUGE MISTAKE."); *id.* (Feb. 14, 2014 5:48 PM), <https://twitter.com/JusticeWillett/status/434474201638920192> [<https://perma.cc/777G-TP48>] (replying to Fox news story about a transgender high school girl with "Go away, A-Rod. @FoxNews: California's transgender law allows male high schooler to make girls' softball team"); *id.* (April 29, 2015 8:43 PM), <https://twitter.com/JusticeWillett/status/593591597641531392> [<https://perma.cc/23NF-QM3V>] ("I could support recognizing a constitutional right to marry bacon.").

57. Chief Judge Dillard (@JudgeDillard), TWITTER (June 22, 2017, 3:45 PM), <https://twitter.com/JudgeDillard/status/877990887812243457> [<https://perma.cc/N4KK-Y2TS>].

58. Judge William Smith (@judgewesmith), TWITTER (Aug. 8, 2016, 8:39 AM), <https://twitter.com/judgewesmith/status/762644326098866176> [<https://perma.cc/7WXL-KMDA>].



**William Smith**  
@judgewesmith



## NYTimes: Jury Trials Vanish, and Justice Is Served Behind Closed Doors



Trial by Jury, a Hallowed American Right, Is Vanishing  
nytimes.com

8/8/16, 8:39 AM

Courts and judges also use Twitter to keep the public informed about the ongoing activities of their courts. The release of a noteworthy opinion is often announced with a tweet. Using the news media as an intermediary, judges also increase transparency and public outreach by creating virtual relationships with local news providers by following their Twitter accounts and allowing the reporters to live-tweet from the courtroom. U.S. District Judge William Smith of the District of Rhode Island, for example, follows the Providence Journal, Rhode Island television stations, and others.<sup>59</sup>

Other judicial tweets are aimed more specifically at members of the legal profession. Some tweets highlight continuing education opportunities and other courthouse events. Judges may use tweets to provide guidance to practitioners. For example, Georgia's Chief Judge Stephen Dillard of the Georgia Court of Appeals (@JudgeDillard) hopes that his Twitter account promotes excellence in appellate practice, encourages lawyers and law students to practice professionalism and civility, and generally helps him act as a virtual mentor to students and young lawyers.<sup>60</sup> His involvement with the lawyers and law students who use the #AppellateTwitter hashtag<sup>61</sup> has included extensive advice about brief writing and other practice tips.

59. Judge William Smith (@judgewesmith), TWITTER, <https://twitter.com/judgewesmith/following> [https://perma.cc/94WE-88FB] (last visited July 10, 2017).

60. Stephen Louis A. Dillard, *#Engage: It's Time for Judges to Tweet, Like, & Share*, 101 JUDICATURE 10, 13 (2017).

61. Scott R. Larson, *What You Need to Know About #AppellateTwitter*, ABA SEC. LITIG. (May 30, 2017), <https://www.americanbar.org/publications/litigation-committees/appellate-practice/articles/2017/spring2017-what-you-need-to-know-about-appellatetwitter.html> [https://perma.cc/DD5K-7NL4].

President Trump's tweets have incited a new form of judicial tweeting: responding to the executive branch's attacks on the judicial branch. The three tweets noted in the Introduction are not an isolated event. During the campaign,<sup>62</sup> Trump attacked the judge presiding over the Trump University litigation ("I have a judge in the Trump University civil case, Gonzalo Curiel (San Diego), who is very unfair. An Obama pick. Totally biased-hates Trump") and later went on to complain that the Indiana-born judge was biased because he is "Mexican."<sup>63</sup> As President, he has gone after judges who have ruled against him and has questioned the legitimacy of judicial review. In April of 2017, for example, he criticized the judges who stayed the "sanctuary cities" order.<sup>64</sup> In June of 2017, after courts again ruled against the revised travel ban, frustration with the courts was again the focus of presidential tweets to his more than 30 million followers. ("We need the courts to give us back our rights." "The courts are very slow and political!")<sup>65</sup>

The Twittersphere is, of course, full of both support for and pushback against tweets like this. But what about judges?<sup>66</sup> May they weigh in? Using Twitter as a medium has the potential advantage of reaching the same audience that was exposed to the President's tweets about the courts. Tweets can be composed fairly quickly because they are short (remember the 140/280-character limit), but they can also link to a longer, more in-depth discussion that the judge him or herself does not have to write. Tweets can be posted immediately, without the kind of delay that would accompany the writing and marketing of an opinion piece in a traditional newspaper. And, in an ideal world, tweets and their replies could be a civil and interactive discussion in which people with different views communicate.

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62. Even before the campaign, Donald Trump had a history of accusing judges presiding over his litigation of being biased against him and seeking their recusal. See Michael Barbaro & Megan Twohey, *A Biased Judge? Donald Trump Has Claimed It Before*, N.Y. TIMES (June 6, 2016), <https://www.nytimes.com/2016/06/07/us/politics/donald-trump-judge-history.html> [permalink unavailable].

63. Donald J. Trump (@realDonaldTrump), TWITTER (May 30, 2016, 4:45 PM), <https://twitter.com/realdonaldtrump/status/737399475509985280> [<https://perma.cc/X3A7-JTGU>]; Sean Sullivan & Jenna Johnson, *Trump Calls American-Born Judge 'a Mexican,' Points out 'My African American' at a Rally*, WASH. POST (June 3, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/06/03/trump-calls-american-born-judge-a-mexican-points-out-my-african-american-at-a-rally/?utm\\_term=.4eda07409be6](https://www.washingtonpost.com/news/post-politics/wp/2016/06/03/trump-calls-american-born-judge-a-mexican-points-out-my-african-american-at-a-rally/?utm_term=.4eda07409be6) [<https://perma.cc/TUH8-HDBE>].

64. Nina Totenberg, *Trump's Tweets on Court Blocking 'Sanctuary City' Order: 5 Facts to Know*, NPR (Apr. 26, 2017, 6:23 PM), <http://www.npr.org/2017/04/26/525742143/trumps-tweets-on-court-blocking-sanctuary-city-order-5-facts-to-know> [<https://perma.cc/W9YD-KPQY>].

65. Donald J. Trump (@realDonaldTrump), TWITTER (June 3, 2017, 6:17 PM), <https://twitter.com/realdonaldtrump/status/871143765473406976> [<https://perma.cc/2FS2-Z8FR>]; *Id.* (June 5, 2017, 5:44 AM), <https://twitter.com/realdonaldtrump/status/871679061847879682> [<https://perma.cc/256S-9LKV>].

66. For a list of self-identified judges with Twitter accounts, see Beth Thornburg (@btSMU), TWITTER, <https://twitter.com/btSMU/lists/judges> [<https://perma.cc/H6S4-ABT3>] (last visited Nov. 17, 2017).

To explore the possibilities of judicial twitter, as well as its constraints, consider four example tweets. First, after President Trump posted the tweets that begin this article, U.S. District Judge William Smith responded with several tweets, all pointing to the need for respect for the judicial branch and the rule of law (but none dealing with the merits of the decision about the travel ban). This one is representative.<sup>67</sup>



**William Smith** @judgewesmith · Feb 6

More on why respect for courts, the judiciary and rule of law matters.  
via @nytimes



**Trump Clashes Early With Courts, Portending Years of Legal Battles**

The president's attacks on a judge over an order blocking his immigration ban received condemnation in both parties but a defense from his vice p...

nytimes.com

Second, U.S. District Judge Mark Bennett (Northern District of Iowa) tweeted about his opposition to mandatory minimum sentencing in federal criminal cases.<sup>68</sup>

67. Judge William Smith (@judgewesmith), TWITTER (Feb. 6, 2017, 5:30 AM), <https://twitter.com/judgewesmith/status/828566600185954304> [<https://perma.cc/A3AQ-XW6C>].

68. Judge Mark W. Bennett (@MarkWBennett1), TWITTER (May 25, 2017, 1:39 PM), <https://twitter.com/MarkWBennett1/status/867812376325758980> [<https://perma.cc/H6V6-FN7K>]. The NPR interview he refers to is here: *A Federal Judge Says Mandatory Minimum Sentences Often Don't Fit the Crime*, NPR (June 1, 2017, 5:04 AM), <http://www.npr.org/2017/06/01/531004316/a-federal-judge-says-mandatory-minimum-sentences-often-dont-fit-the-crime> [<https://perma.cc/4QLU-VQAL>]. Judge Smith also tweeted his support for Judge Bennett's interview, and he, too, has tweeted his opposition to mandatory minimum sentences. See Judge William Smith (@judgewesmith), TWITTER (June 5, 2017, 10:10 AM), <https://twitter.com/judgewesmith/status/871745935235313664> [<https://perma.cc/ZC6P-ZDWV>]; *Id.* (June 5, 2017, 10:08 AM), <https://twitter.com/judgewesmith/status/871745599317606400> [<https://perma.cc/U7LM-5ZRT>] (disagreeing that "naïve" federal judges need to be "reigned in" by mandatory minimums).

**Mark W. Bennett**

@MarkWBennett1

Following

Interview with NPR this morning about my opposition to mandatory minimums. Same for CNN last week. Wish more of my colleagues did same.

1:39 PM - 25 May 2017

Third, Justice Willett obliquely highlighted his judicial philosophy.<sup>69</sup>

**Justice Don Willett** ✓

@JusticeWillett

Following

When it comes to legislating from the bench —I literally can't even.

10:00 PM - 9 Sep 2014

Fourth, Judge Dillard tweeted a link to this Wall Street Journal article about the Supreme Court's approach to having only eight Justices.<sup>70</sup>

69. Justice Don Willett (@JusticeWillett), TWITTER (Sept. 9, 2014, 10:00 PM), <https://twitter.com/justicewillett/status/509536749731979264> [<https://perma.cc/A7TL-CR7T>].

70. Chief Judge Dillard (@JudgeDillard), TWITTER (June 3, 2016, 11:58 AM), <https://twitter.com/JudgeDillard/status/738776858980814849> [<https://perma.cc/XH85-T9KB>].



**Chief Judge Dillard** ✓  
@JudgeDillard

Following



"At last, A Supreme Court that does Less"  
[wsj.com/articles/the-s...](https://www.wsj.com/articles/the-s...)

Narrow and shallow rulings reflect one virtue above all: humility. Minimalist judges know that there is a lot that they don't know. Life is full of surprises, and a far-reaching ruling might turn out to be a big fat blunder. Equally important, minimalist rulings have the advantage of keeping things open for debate, above all by We the People. On

All four tweets deal with the role of judges; all touch on lively issues of the day. Two are by federal judges and two by state judges. The next section of this article considers the propriety and efficacy of these and other tweets about the court system in light of judicial ethics rules and the nature of Twitter.

#### IV. GETTING YOUR TWEETS IN A ROW

##### A. JUDICIAL ETHICS RULES

Courts are a branch of government and, hence, are a part of the political system.<sup>71</sup> Yet, the traditional view of the judicial branch locates it above the political fray. One commentator describes this approach:

[F]or reasons of both judicial function and public faith in the courts, judges are required by virtue of their profession to withdraw from the turbulent world of majoritarian politics and live their public lives as a class apart. Two broad themes, one legal and one psychological, seemingly underlie this view. The legal theme, frequently announced as a public article of faith by judges and politicians alike, is that the task of judging involves a faithful and learned adherence to the Law (with a capital "L"), without reference to the personal views of the

71. For a thorough and fascinating comparative analysis of judicial use of social media in Australia, see Marilyn Krawitz, *Can Australian Judges Keep Their "Friends" Close and Their Ethical Obligations Closer? An Analysis of the Issues Regarding Australian Judges' Use of Social Media*, 23 J. JUD. ADMIN. 14, 15 (2013).

judge. Due process, which requires “an impartial and disinterested tribunal,” implicitly demands this fidelity. The psychological theme, rarely articulated but fervently believed by many members of the judiciary, is that, if public faith in the courts is to be maintained, the public must view the judges as a priestly caste.<sup>72</sup>

This reflexive aversion to being perceived as “political” or as making decisions that reflect their own personal views underlies both general and specific provisions of codes of judicial conduct.<sup>73</sup> The rules constrain the behavior of judges both in the conduct of their official duties and in their extrajudicial activities. While there are few rules that specifically address social media use, the rules governing judicial speech apply to digital media just as they would to a speech to the local chamber of commerce. Broadly speaking, there are three types of limits on judicial speech that would come into play should a judge choose to tweet about the courts: (1) limits on commenting on pending or impending cases; (2) prohibitions of *ex parte* communications; and (3) admonitions to avoid activities that would reflect adversely on the judge’s impartiality, integrity, or independence. This section will address each in turn.

### 1. *Comments on Pending and Impending Cases*

One way to increase public understanding of the workings of courts would be to tweet about cases and trials currently pending in the court system. However, because this creates a strong danger of raising questions about the judge’s actual or apparent impartiality, the ethics rules permit only limited public comment, even about cases in other courts. Rule 2.10(A) of the ABA Model Code of Judicial Conduct provides: “A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”<sup>74</sup> Nevertheless, Rule 2.10(D) says judges “may make public statements in the course of official duties, [and] may explain court procedures.”<sup>75</sup> Rule 2.10(E)<sup>76</sup> gives permission to “respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter.”<sup>77</sup> The federal code’s prohibition is

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72. Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 14–15 (2004) (footnote omitted).

73. Each state has its own code, and there is a separate code for federal judges. Actual judges should always consult the rules, interpretations, and case law from their own jurisdiction to try to ascertain the limits of acceptable behavior. For the most part, this article will use the ABA’s Model Code of Judicial Conduct (on which most state systems are based) and the federal Code of Conduct for United States Judges as examples.

74. MODEL CODE OF JUDICIAL CONDUCT r. 2.10 (AM. BAR ASS’N 2011).

75. *Id.*

76. Not every state has adopted this provision. See *Comparison of ABA Model Judicial Code and State Variations*, AM. BAR ASS’N (Aug. 31, 2016), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2\\_10.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_10.authcheckdam.pdf) [<https://perma.cc/AU63-AFYF>].

77. MODEL CODE OF JUDICIAL CONDUCT r. 2.10 (AM. BAR ASS’N 2011). The Rules define a “pending matter” as one that “has commenced. A matter continues to be pending through any appellate process until final disposition.” MODEL CODE OF JUDICIAL CONDUCT, Terminology (AM. BAR ASS’N 2011). An “impending matter” is not one that might

similar:

A judge should not make public comment on the merits of a matter pending or impending in any court. . . . The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.<sup>78</sup>

Many situations in which judges have found themselves in ethics trouble involve comments, digital or otherwise, on pending cases. Some examples:

- While presiding over a drunken driving trial, a Travis County, Texas judge posted a comment on a friend's Facebook wall: "I've had the worst cold but instead of staying home I'm being tortured by an attorney in a trial."<sup>79</sup>
- An Ennis, Texas municipal judge posted on Facebook about the arrest of former Heisman Trophy winner Johnny Manziel, whose case would be heard in the judge's court, saying that Manziel "was speeding on the 287 bypass yesterday. . . . Time to grow up/slow down young 'un."<sup>80</sup>
- A Minnesota judge, presiding over a sex trafficking case, posted on Facebook: "Some things I guess will never change. I just love doing the stress of jury trials. In a Felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate. We will see what the 12 citizens in the jury box do."<sup>81</sup>

In fact, there are so many cases involving comments on pending litigation that the Center for Judicial Ethics of the National Center for State Courts has compiled an eight-page document describing them.<sup>82</sup>

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conceivably be filed someday, but one that is "imminent or expected to occur in the near future." MODEL CODE OF JUDICIAL CONDUCT, Terminology (AM. BAR ASS'N 2011).

78. CODE OF CONDUCT FOR U.S. JUDGES Canon 3A(6) (2014). The comments note that "[i]f the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality." *Id.*

79. Ryan Autullo, *Austin Lawyers Want More Details About Judge's Critical Facebook Post*, STATESMAN, <http://www.statesman.com/news/crime-law/austin-lawyers-want-more-details-about-judge-critical-facebook-post/Ir0Qf2ufOhMZjus2Sz0AwL/> [https://perma.cc/9VG7-YV7Z] (last updated July 11, 2017, 3:01 PM).

80. Chris Huston, *Over-Exuberant Judge Posts About Johnny Manziel's Ticket on Facebook*, CBSSPORTS.COM (Jan. 17, 2013), <http://www.cbssports.com/college-football/news/over-exuberant-judge-posts-about-johnny-manziels-ticket-on-facebook/> [Perma link unavailable].

81. News Release, Minn. Bd. on Judicial Standards, Public Reprimand Issued to Senior Judge Edward W. Bearse (Nov. 20, 2015), <http://www.bjs.state.mn.us/file/public-discipline/1517-news-release-and-reprimand.pdf> [https://perma.cc/4F8M-DYWU].

82. NSCS Ctr. for Judicial Ethics, *Supplement to "Social Media and Judicial Ethics: Part I"*, 39 JUD. CONDUCT REP. (2017), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/PublicCommentsonPendingCasesonSocialMedia.ashx> [https://perma.cc/L2WJ-JRCC]. See also Cynthia Gray, *Commenting on Pending Cases* (Am. Judicature Soc'y 2001), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/CommentingonPendingCases.ashx> [https://perma.cc/L9EE-8PCG].

One case grapples directly with the fine line between helpful public information and inappropriate evaluative comments on a pending case by the presiding judge. Texas's Special Court of Review in *In re Slaughter*<sup>83</sup> reversed sanctions that had been imposed by the State Commission on Judicial Conduct but nevertheless cautioned the judge about the ethical pitfalls of public comments. Judge Michelle Slaughter used her Facebook page to provide information about her court. Some of her postings dealt with ongoing trials, and ethics charges ensued. One charge against her challenged the post "We have a big criminal trial starting Monday!" and another that described an exhibit being assembled in the courtroom (calling it a "box," when that characterization was hotly contested).<sup>84</sup> In a child pornography case, she commented that those cases are difficult "for jurors (and the judge and anyone else) to sit through because of the evidence they have to see."<sup>85</sup> The post concluded by thanking the jurors for their service but was worded as "[b]less the jury for their service and especially bless the poor child victims."<sup>86</sup> In a third case, she described the defendant as "very challenging."<sup>87</sup> While the Special Court of Review absolved Judge Slaughter of code violations,<sup>88</sup> it stated: "[W]e find troublesome that these comments go beyond mere factual statements of events occurring in the courtroom and add the judge's subjective interpretation of these events at or near the time of their occurrence."<sup>89</sup> Judges who would like to use Twitter to keep the public informed about current developments in pending cases should keep in mind this very fine line.

Taken together, these authorities establish that a judge who would like to tweet comments on a case pending or impending in any court may do so, but must take care. Remember first that the rule is only addressed to comments that "affect the outcome" or "impair the fairness" (ABA/state) of a matter or to comments "on the merits" (federal). Consider this tweet, from a state court judge in Kansas, commenting on a Second Circuit decision about the statute of limitations in an immigration matter.<sup>90</sup> Is there any reason to think that it would affect the outcome or impair the fairness of the federal litigation?

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83. *In re Slaughter*, 480 S.W.3d 842, 855 (Tex. Spec. Ct. Rev. 2015).

84. *Id.* at 850, 855.

85. *Id.* at 851.

86. *Id.* at 847–48.

87. *Id.* at 848.

88. Note that the Texas version of the pending cases rule merely provides, "A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case." TEX. CODE OF JUDICIAL CONDUCT Canon 3(B)(10), <http://www.law.uh.edu/libraries/ethics/Judicial/judiccanons/canon3.html> [<https://perma.cc/6CT8-ZLYV>]. Judges in states with a more typical "pending cases" rule should not count on getting the same result as in *Slaughter*.

89. *Slaughter*, 480 S.W.3d at 851.

90. Judge Steve Leben (@Judge\_Leben), TWITTER (Aug. 2, 2017, 9:01 AM), [https://twitter.com/Judge\\_Leben/status/892747282684284928](https://twitter.com/Judge_Leben/status/892747282684284928) [<https://perma.cc/3AJV-5DB3>]. The Second Circuit case that is the topic of the tweet is *Watson v. United States*, 865 F.3d 123, 143 (2d Cir. 2017) (Katzmann, J., concurring in part, dissenting in part), and Judge Leben's tweet links to the opinion itself.



**Steve Leben**  
@Judge\_Leben

Following



Disturbing. Note that Chief Judge Katzmann would've applied equitable tolling & upheld the claim. Opinion: [goo.gl/HihbNZ](https://goo.gl/HihbNZ).

**Hadas Gold** ● @Hadas\_Gold

Whoa this story- US citizen almost deported - then can't be awarded damages cuz statute of limitations expired - while he was in custody [twitter.com/npr/status/892...](https://twitter.com/npr/status/892...)

The greatest danger comes in commenting on cases pending in the judge's own court. The safest course is clearly to stick, as far as possible, to descriptions that do not characterize the thing being described or that fall into the category of informing the public about court procedures. If a judge wants to link to news coverage of the event being discussed, and wants to be extraordinarily beyond reproach, one state ethics committee has suggested that links be confined to official reports and not to media coverage that might "contain commentary or reaction favoring one point of view."<sup>91</sup>

What about coming to the defense of oneself or another judge who has been the subject of a critical tweet? A tweet that discusses the importance of an independent judiciary or the role of judicial review need not address "the merits" of the case or impact its fairness or outcome. A judge exercising social media self-defense, however, should carefully examine a federal case suggesting that the mere fact that a judge chooses to speak with reporters to correct mistakes in a news story may be interpreted as a lack of impartiality.<sup>92</sup> It is safer, perhaps, for one judge to defend another

91. Mass. Comm. on Judicial Ethics, Op. 2016-09 (2016), <http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-2016-09.html> [https://perma.cc/VX4E-6W6T]. But see *United States v. Sierra Pac. Indus. Inc.*, 862 F.3d 1157, 1175 (9th Cir. 2017) (rejecting the argument that a link to news story with inaccurate headline was a comment on pending litigation or sufficiently prejudicial to create appearance of bias). A still-developing line of cases about the implication of linking in the context of defamation may also provide some guidance on this complex issue. See generally Cindy Gierhart, *Rethinking Hyperlinking: Linking to Source Material Can Help Journalists in Defamation Lawsuits*, 38 NEWS MEDIA & LAW, Spring 2014, at 9, <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2014/rethinking-hyperlinking> [https://perma.cc/ZX32-5YD3].

92. See *In re Bos.'s Children First*, 244 F.3d 164, 171 (1st Cir. 2001) (finding recusal required but noting that the three other First Circuit judges consulted in connection with a motion for rehearing en banc would not have found recusal required); see also *White v. Nat'l Football League*, No. 4-92-906, 2008 WL 1827423, at \*2-6 (D. Minn. Apr. 22, 2008) (rejecting argument for disqualification). The lessons to be drawn from these cases are somewhat limited because the decisions are very fact-specific. See generally RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES §16.10 (2d ed. 2007 & Supp. 2016).

than for the judge under attack to exercise digital self-defense. State judges (in states that have adopted it) can invoke ABA Model Rule 2.10(E),<sup>93</sup> in which the judge is permitted to respond to “allegations in the media or elsewhere concerning the judge’s conduct in a matter.”<sup>94</sup>

In light of all this, what about the four exemplar tweets that precede this section? Some might argue that Judge Smith’s tweet commented improperly on a pending case, but I think that would be incorrect. It responded to President Trump’s “so-called judge” series of tweets, which in turn responded to pending litigation over the travel ban. But Judge Smith’s tweet is not about the merits—it is about President Trump’s tweets about judges.<sup>95</sup> Although the article it linked to is largely critical of President Trump, it, too, focuses on the role of the courts and President Trump’s tweeting rather than the constitutionality of the executive order. Judge Bennett’s tweet refers to his position on sentencing in criminal cases, and there are scores of pending prosecutions, but the tweet could hardly be read as commenting on any particular case. Nor should a generic comment about the law be so construed. In considering whether statements about the law indicate improper bias, cases hold that “a judge’s expression of a viewpoint on a legal issue, in and of itself, is generally not deemed to provide a legitimate basis for disqualification.”<sup>96</sup> And, like it or not, federal judges are bound by the mandatory sentencing minimums, so Judge Bennett has no choice but to follow the law he disagrees with.<sup>97</sup> The state court judges’ tweets are not about pending cases (the Wall Street Journal opinion piece<sup>98</sup> quoted by Judge Dillard does not cite specific cases), nor would their comments affect the outcome or fairness of a pending case.

## 2. *Ex Parte Communications*

Independent judicial research on the internet, including social media,

93. The federal ethics code does not include the explicit provision about a right to reply.

94. See generally Laurence Pulgram, *When Attacks on Judges Go Beyond the Pale*, LITIG., Fall 2016, at 1, 1 (noting judges’ options and suggesting that the organized bar also needs to defend judges against attacks).

95. Contrast Judge Smith’s post with that of Texas Court of Criminal Appeals Justice Elsa Alcala Spjut, addressing the travel ban itself: “NO! I do not feel safer now that the USA has essentially accused ALL people of one religion a dangerous threat. #executive-orders #muslimban.” She later deleted this tweet. See Judge Elsa Alcala Spjut (@TexasElsa), TWITTER (Jan. 28, 2017, 12:20 PM), <https://twitter.com/TexasElsa/status/825408251198132226> [<https://perma.cc/46P8-H9ZX>].

96. FLAMM, *supra* note 92, §10.9, at 278 (footnote omitted).

97. Social media posts showing the public judges in the act of applying laws, even those with which they disagree, would be a powerful lesson about the rule of law and the function of judges. See Judge Steve Leben (@Judge\_Leben), TWITTER (July 27, 2017, 9:43 AM), [https://twitter.com/Judge\\_Leben/status/890583344827813888](https://twitter.com/Judge_Leben/status/890583344827813888) [<https://perma.cc/32CP-FP4F>] (“Those of us on here [Twitter] want to explain the judicial role and be reasonably accessible. . . . [R]ecently #AppellateTwitter folks have rightly noted that judges they clerked for decide cases on the law, not whim or party. Hopefully others can learn what you already know about us in part through this social-media exposure.”).

98. Cass R. Sunstein, *At Last, a Supreme Court That Does Less*, WALL ST. J., June 3, 2016, at C3.

can clearly run afoul of the prohibition on ex parte communications.<sup>99</sup> But what about posting on Twitter? While there are some pitfalls here for a judge wishing to use Twitter to promote civic understanding of the courts, problems should be rare. ABA Model Rule 2.9(A) provides that “[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter.”<sup>100</sup> It is important to realize that this rule applies only to pending and impending matters and not to communications generally. It is designed to assure fairness and transparency in the adjudication of cases.

Facebook, perhaps because it is structured to encourage users to become each other’s “friends,” has spawned a number of problems arising out of ex parte communications. One of the earliest ethics opinions to deal with social media involved a judge who exchanged messages on his Facebook wall about a pending custody dispute. (“[I have] ‘two good parents to choose from.’” “I have a wise Judge.”)<sup>101</sup> The judge was reprimanded for this “conduct prejudicial to the administration of justice.”<sup>102</sup>

Twitter, on the other hand, doesn’t have friends. But it does encourage its users to follow others.<sup>103</sup> And it allows anyone to interact with a tweet, including judges’ tweets, in a way that could be characterized as a communication. This could be done through a retweet, like this one by lawyers talking about their pet peeves (the smaller one in the box is the original tweet).<sup>104</sup>

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99. Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIGATION 131, 137 (2008).

100. MODEL CODE OF JUDICIAL CONDUCT r. 2.9(A) (AM. BAR ASS’N 2011). *See also* CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(4) (2014) (“[A] judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers.”). Both rules have numerous listed exceptions.

101. Public Reprimand: B. Carlton Terry Jr., Inquiry No. 08-234, at 1–2 (N.C. Jud. Standards Comm’n Apr. 1, 2009), <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf> [<https://perma.cc/A8G6-GHGY>].

102. *Id.* at 4. State judicial ethics commissions have spent numerous hours considering the implications of Facebook “friendship,” and different states have adopted different approaches to this digitally-constructed relationship. *See generally* John G. Browning, *Why Can’t We Be Friends? Judges’ Use of Social Media*, 68 U. MIAMI L. REV. 487 (2014).

103. Unlike friend requests on Facebook, in which access is granted only if the request is accepted, anyone can follow a Twitter account without the advance permission of the account’s owner.

104. Jenny Barber Valois (@Inspiredlawyer), TWITTER (July 12, 2017, 11:49 AM), <https://twitter.com/Inspiredlawyer/status/885179378119921664> [<https://perma.cc/C7YE-47E3>].

**Jenny Barber Valois**

@Inspiredlawyer

Following



YES! I've never understood why lawyers do this when the date isn't in dispute.

**Rebecca Blunden** @newt1989

#legalwriting pet peeve: "on or about" date when you know the ACTUAL date. We all know the fire was on March 3. Why waffle?

Or users can interact by writing a reply (as in this exchange on the arcane but controversial topic of the serial—or “Oxford”—comma). Notice that the replies contain the handle of the original tweeter (in this case, the original tweet by Justice Willett is on top).<sup>105</sup>

**Justice Don Willett** ✓

@JusticeWillett

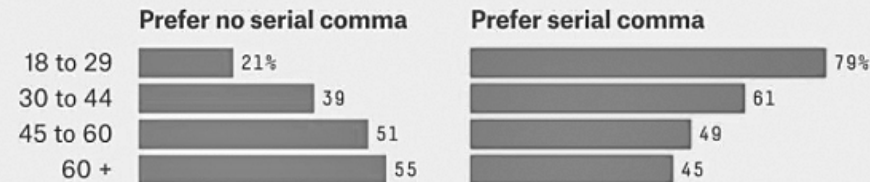
Following



♪♪ I believe the children are our future ♪♪

### Younger Respondents Favor the Oxford Comma

Comma preference by age



FIVETHIRTYEIGHT

SOURCE: SURVEYMONKEY AUDIENCE

Exchanges like these are calculated to call themselves to the attention of the author of the original tweet. If the parties to the tweet chain were involved in a pending case, would the ex parte prohibition come into play? In one recent Ninth Circuit case, the appellant took the position that Twitter interactions involving the judge and lawyers for appellee that took place while the case was pending constituted ex parte communications.<sup>106</sup> As one legal blogger put it,

105. Justice Don Willett (@JusticeWillett), TWITTER (Jan. 12, 2017, 8:47 PM), <https://twitter.com/JusticeWillett/status/819737674798006272> [<https://perma.cc/YQ3Y-DCH8>].

106. See *United States v. Sierra Pac. Indus. Inc.*, 862 F.3d 1157, 1174 (9th Cir. 2017).

You follow a judge on Twitter. . . . He tweets about life on the bench. You tweet about cats and the occasional courtroom victory. The judge even retweets you on occasion. If this tweeting takes place while you have a case pending before said judge, have you both engaged in *ex parte* communication . . . ?<sup>107</sup>

The Ninth Circuit concluded that when tweets are public, available for all parties to see, and not directed at anyone in particular, they are not *ex parte* communications:

[N]one of the challenged tweets were specifically directed from the U.S. Attorney to the judge, nor have the Defendants alleged that there were any personally directed tweets. Thus, the public tweets did not constitute communication from the U.S. Attorney to the judge. Rather, the relevant tweets from the U.S. Attorney's account constituted news items released to the general public, intended for wide distribution to an anonymous public audience. Under the circumstances, the social media activity alleged to have occurred in this case did not constitute prohibited *ex parte* communication.<sup>108</sup>

Nevertheless, there is an additional context in which *ex parte* communications issues might arise. Judges on Twitter need to take care that tweets directed at them by others are not *ex parte* communications about pending cases. One would hope that the attorneys in the case know that they should avoid such communications.<sup>109</sup> But on Twitter, contacts could come from parties or the general public. Just as is true of unsolicited letters and phone calls that a judge may receive about a case, these tweets should be disregarded but are unlikely to disqualify the judge.<sup>110</sup> Judges should be particularly wary of DMs (direct messages), which are private rather than public conversations. While Twitter does not allow users to block all DMs, it is possible to limit them only to people one follows and to block them from specific users. Should a judge receive an unwanted *ex parte* communication "bearing upon the substance of a matter" via Twitter, the judge must disclose the communication to the parties and provide them with the opportunity to respond, to the extent it would be required of any other *ex parte* communication.<sup>111</sup>

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107. Casey C. Sullivan, *Is Following a Judge on Twitter Ex Parte Communication?*, FINDLAW: STRATEGIST (Nov. 24, 2015, 10:16 AM), <http://blogs.findlaw.com/strategist/2015/11/is-following-a-judge-on-twitter-ex-parte-communication.html> [https://perma.cc/P47H-AEEU] (discussing "Moonlight Fire" case). For reasons having to do with appearance of bias, as opposed to *ex parte* communications, judges would be safer if they do not follow lawyers or law firms, especially those that have a case pending before the judge.

108. *Sierra Pac. Indus. Inc.*, 862 F.3d at 1175.

109. There are, of course, exceptions. See Samson Habte, *Lawyer Disbarred for Social Media Campaign to 'Influence and Intimidate' Judicial Officials*, ABA BNA LAW. MANUAL ON PROF. CONDUCT (July 16, 2015), <https://www.bna.com/lawyer-disbarred-social-n17179933600> [https://perma.cc/U4L2-6CPL] (reporting that "[a] lawyer who used social media and blogs to launch a 'viral campaign to influence and intimidate' judges who presided over a friend's sensitive child custody dispute was disbarred . . . by a divided Louisiana Supreme Court").

110. See FLAMM, *supra* note 92, §14.5.5.

111. MODEL CODE OF JUDICIAL CONDUCT r. 2.9(B) (AM. BAR ASS'N 2011). ("If a judge inadvertently receives an unauthorized *ex parte* communication bearing upon the

### 3. Keeping Up Appearances

It is the rules mandating an appearance of judicial propriety that bring us to the crux of ethical worries about judicial involvement with social media: a concern that certain kinds of public statements will either reveal actual bias or give a reasonable person the impression that the judge might be biased. The rules also tap directly into the tension between the traditional view of the judiciary as a caste apart and the desire of some judges (and voters) to allow the expression of opinions about legal and policy issues.<sup>112</sup>

Some of the relevant rules deal with judges as candidates for office and limit campaign speech. Rules also apply to the activities of sitting judges and prohibit involvement in “political activity” and controversial issues generally. All ultimately justify the limits based on the need to maintain the public’s belief in the impartiality and independence of the judicial branch.<sup>113</sup> The limits on speech have limits of their own. Some are subject to challenge based on the First Amendment since they are content-based limits on speech.<sup>114</sup> All are subject to code provisions encouraging judges to speak about the law, the legal system, and the administration of justice.<sup>115</sup>

This section will begin by discussing prohibitions based on politics, then discuss the more general limits on addressing controversial issues, and conclude by exploring whether the First Amendment rights of judges who wish to speak would constrain the broadest interpretations of the ethics code limits.

#### a. State Court Limits on Political Speech

The regulation of judicial campaigns varies widely from state to state, often in ways that parallel the states’ systems of judicial selection.<sup>116</sup> For example, since Texas elects judges in partisan elections, it has very few

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substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.”); CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(4) (2014) (“If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested.”). For an example of a judge handling this appropriately in the context of Facebook, see *Youkers v. State*, 400 S.W.3d 200, 204–05 (Tex. App.—Dallas 2013, pet. ref’d).

112. As Judge Blue notes, it is *expressing* opinions rather than *having* opinions that is regulated. Blue, *supra* note 72, at 22 (“Our real choice is between judges who have opinions that have been publicly stated and judges who have opinions that have not been publicly stated.”).

113. See, e.g., MODEL CODE OF JUDICIAL CONDUCT r. 4.1 cmt. 1 (AM. BAR ASS’N 2011).

114. The First Amendment issues will be discussed in Section IV.A.4, *infra*.

115. See *supra* text accompanying notes 42–43.

116. See *Comparison of ABA Model Judicial Code and State Variations*, Rule 4.1, AM. BAR ASS’N (Sept. 1, 2016), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/4\\_1.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/4_1.authcheckdam.pdf) [<https://perma.cc/E3RX-F2AW>].

politics-related limits on campaign speech.<sup>117</sup> Judicial candidates may indicate support for a political party, attend political events, and express views on political matters. Nevertheless, even in Texas a judge or judicial candidate may not

- make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;
- knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent;<sup>118</sup> or
- public[ly] comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case.<sup>119</sup>

Other states (and the ABA Model Code) have vaguer versions of the first prohibition, often referred to as the "commit" clause. They outlaw pledges, promises, or commitments that are "inconsistent with the impartial performance of the adjudicative duties of judicial office."<sup>120</sup> Their prohibition on misrepresentation may also be broader (not limited to other candidates and including "misleading" statements). States that appoint judges or hold nonpartisan or retention elections are more likely to prohibit participation in explicitly partisan politics. Requests that candidates reveal in advance their positions on certain controversial legal issues (such as abortion) in response to advocacy group questionnaires are often the noninternet locus of controversy here, and current rules do not prohibit judges and judicial candidates from responding to those questionnaires.<sup>121</sup>

In addition to the regulation of campaign speech, some states have prohibitions on political activity, with enumerated exceptions, and they interpret political quite broadly, beyond partisan electoral concerns. While not directly related to social media, ethics committees have prohibited judges from participating in certain activities deemed to be political, particularly if they relate to issues that would be deemed controversial. For example, New York's ethics advisory committee ruled that (1) judges may not, as individuals, sign a MoveOn.org petition opposing the ap-

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117. TEX. CODE OF JUDICIAL CONDUCT Canon 5. *Cf.* MODEL CODE OF JUDICIAL CONDUCT r. 4.1 (AM. BAR ASS'N 2011).

118. TEX. CODE OF JUDICIAL CONDUCT Canon 5(1)(i)-(ii).

119. TEX. CODE OF JUDICIAL CONDUCT Canon 3(B)(10).

120. Commit clauses are often the subject of First Amendment attacks, and some courts have invalidated particular versions of them on their face or as applied. *See* CTR. FOR JUDICIAL ETHICS, *Case-law Following* Republican Party of Minnesota v. White, 536 U.S. 765 (2002), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/CaselawAfterWhite.ashx> [perma.cc/PC7K-66K4] (updated Nov. 2016); MODEL CODE OF JUDICIAL CONDUCT r. 4.1 (AM. BAR ASS'N 2011).

121. MODEL CODE OF JUDICIAL CONDUCT r. 4.1 (AM. BAR ASS'N 2011)

pointment of Stephen Bannon to the National Security Council; (2) judges may not participate in local grassroots rallies against the Trump travel ban; and (3) judges should not participate in the March for Science if it is “a platform for political protest against the perceived preference among some individuals and groups which ignore or discredit the scientific consensus in favor of what others perceive to be ‘junk’ science.”<sup>122</sup> Massachusetts prohibited judges from participating in the national Women’s March, commenting:

We understand that you wish to participate in the Women’s March to stand up against misogyny, racism, and other biases and bigotries that threaten the rule of law. The public and the media are, however, likely to focus on the timing of the event and the organizers’ announced desire to “send a message” to the new President on his first day in office. We believe that a reasonable person would perceive the Women’s March as a political protest, and the Code therefore prohibits your participation.<sup>123</sup>

The Connecticut Committee on Judicial Ethics opined that judges may not take leadership roles in the American Civil Liberties Union or Southern Poverty Law Center (but may join and may donate to those organizations) and may have no affiliation at all with the National Organization for Women (NOW). It explained the distinction like this:

The Frequently Asked Questions section of NOW’s website states that it is not affiliated with any political party and that all candidates for office are eligible for NOW’s endorsement. However, NOW’s website and its affiliated political action committee . . . appear to be one-sided in their support of one of the major political parties and its candidates, and NOW’s president has been outspoken about the results of the 2016 presidential election.<sup>124</sup>

One can imagine that these states would also find judges tweeting support for any of these organizations, or retweeting their posts, to be unacceptable.

On the other hand, the Massachusetts committee does allow judges to participate in “outreach activities, including speaking engagements, intended to assure or reassure the Commonwealth’s residents and visitors that Massachusetts judges are committed to providing every person a fair hearing before independent and impartial judges dedicated to upholding the rule of law” and they may also “respond to comments made by public officials or others that appear to reflect misconceptions about the role of

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122. N.Y. Advisory Comm. on Judicial Ethics, Op. 17-38 (2017), <http://www.nycourts.gov/ip/judicialethics/opinions/17-38.htm> [<https://perma.cc/3MHP-QW4M>].

123. Mass. Comm. on Judicial Ethics, Op. No. 2016-10 (2016), <http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-2016-10.html> [<https://perma.cc/9R98-LP3K>].

124. Conn. Comm. on Jud. Ethics, Informal Op. 2016-16 (2016), <https://www.jud.ct.gov/Committees/ethics/sum/2016-16.pdf> [<https://perma.cc/P23R-86B2>]. Given developments since December of 2016, it might be that the Connecticut committee would now also prohibit any involvement with ACLU and SPLC.

an independent judiciary or manifest disrespect for the rule of law.”<sup>125</sup> The committee cautioned that such activities should “avoid the implication [that] the judge is influenced by, or appears to be influenced by, partisan or political interests” in doing so.<sup>126</sup> An earlier Massachusetts opinion directly addressing Twitter had, on the one hand, approved of judges using Twitter for informational and educational purposes but, on the other, warned against implicitly or explicitly conveying the judge’s opinion on “political matters.”<sup>127</sup>

For state court judges, would these rules limit tweets about the court system, the independence of the judiciary, or the President’s tweets attacking judges? Tweets on those subjects should easily be able to avoid making commitments that violate the ethics rules or knowingly or recklessly making false statements. Certainly neither of the two exemplar state-judge tweets would fall within these prohibitions. Tweets such as those by Justice Willett and Judge Dillard, which could be considered statements of their judicial philosophies, were allowed even under the old prohibition on “announcing” a judge’s position on legal issues.<sup>128</sup> However, judges in states whose ethics committees have broadly construed their prohibitions on political activities may need to tread carefully. Tweets designed to educate the public about the law, the legal system, and the administration of justice are proper, but those that could be seen as supporting or opposing particular politicians or political parties (even when they are making more general points) may be interpreted as improper political activity.<sup>129</sup>

#### b. Federal Court Limits on Political Speech

Federal judges do not run for office, but the Code of Conduct for United States Judges contains a section regulating the political activity of federal judges. Canon 5 provides as follows:

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125. Mass. Comm. on Judicial Ethics, Op. No. 2017-01 (2017), <http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-2017-01.html> [https://perma.cc/CQ7Q-52DS].

126. *Id.*

127. Mass. Comm. on Judicial Ethics, Op. No. 2016-09 (2016), <http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-2016-09.html> [https://perma.cc/VX4E-6W6T].

128. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002). As Justice Scalia noted,

[C]onstruing the clause to allow “general” discussions of case law and judicial philosophy turns out to be of little help in an election campaign. At oral argument, respondents gave, as an example of this exception, that a candidate is free to assert that he is a “strict constructionist.” But that, like most other philosophical generalities, has little meaningful content for the electorate unless it is exemplified by application to a particular issue of construction likely to come before a court—for example, whether a particular statute runs afoul of any provision of the Constitution.

*Id.* at 773 (internal citation omitted).

129. The opinions about political activity overlap considerably with those urging judges to avoid activities that might cause the public to question the judiciary’s impartiality or independence. That broader concern will be addressed in Section IV.A.3.c, *infra*.

(A) *General Prohibitions*. A judge should not: (1) act as a leader or hold any office in a political organization; (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate. . . .

(C) *Other Political Activity*. A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4 [those dealing with the law, the legal system, and the administration of justice].<sup>130</sup>

“[P]olitical organization” is defined as “a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.”<sup>131</sup> “[P]olitical activity” is not defined.

The federal Judicial Conference’s Committee on Codes of Conduct provides advisory opinions to help guide judges in the application of the ethics rules. It has issued an opinion about the use of social media by federal judges and their staff members that touches on the politics issue. While generally it talks about partisan and electoral politics, the opinion retains the ambiguous reference to political activity in its concerns. The political activity to be avoided

includes but is not limited to posting materials in support of or endorsing a candidate or issue, “liking” or becoming a “fan” of a political candidate or movement, circulating an online invitation for a partisan political event (regardless of whether the judge/employee plans to attend him/herself), and posting pictures on a social networking profile that affiliates the employee or judge with a political party or partisan political candidate.<sup>132</sup>

All of those examples seem to contemplate partisan politics, except for the vague references to supporting an “issue” or becoming a “fan” of a “movement.”

An earlier ethics opinion, although it does not deal specifically with social media, discusses the scope of the permission granted to judges to participate in extrajudicial activities related to law.<sup>133</sup> The opinion views the scope of that permission fairly narrowly. “[N]ot every activity that involves the law or the legal system is considered a permissible activity. Law is, after all, a tool by which many social, charitable and civic organizations seek to advance a variety of policy objectives.”<sup>134</sup> Activities are acceptably legal when they draw on the judge’s judicial experience as a

130. CODE OF CONDUCT FOR U.S. JUDGES Canon 5(A), (C) (2014).

131. *Id.*

132. Comm. on Codes of Conduct Advisory Opinions, Op. 112 at 225, <http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf> [https://perma.cc/KXH4-QEFC].

133. Comm. on Codes of Conduct Advisory Opinions, Op. 93 at 151, <http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf> [https://perma.cc/KXH4-QEFC].

134. *Id.* at 151–52.

qualification and when the law or legal system itself, as opposed to some specific constituency, will be the beneficiary of the activities. Ultimately, the propriety of the judge's involvement depends on "how closely related the substance of the activity is to the core mission of the court of delivering unbiased, effective justice to all."<sup>135</sup> When it comes to the intersection of prohibited political activities and permissible activities to improve the law or legal system, the committee states that "because of the ethical risks associated with any politically-oriented activity, we construe permissible Canon 4 activities in this context narrowly, restricted to those activities that are most directly related to the law and legal process."<sup>136</sup>

An earlier controversy, involving a blog rather than Twitter, raised this issue. When he was running for the Republican nomination for President, Senator Ted Cruz stated that he would support a constitutional amendment subjecting U.S. Supreme Court Justices to periodic retention elections, revoking their lifetime tenure. U.S. District Judge Richard Kopf blogged in response that Cruz was a "right-wing ideologue" whose "extreme proposal" and attack on lifetime tenure made him "demonstrably unfit to become President."<sup>137</sup> As Professor Orin Kerr noted at the time, while Judge Kopf was free to comment on the merits of Cruz's proposal, this blog post violates Canon 5 by publicly opposing a candidate for public office.<sup>138</sup> Judge Kopf initially defended his post as expressing his views on legal subjects, but he ultimately conceded that parts of the post went too far.<sup>139</sup>

Judge Kopf's change of heart came after reading a Second Circuit opinion involving widely reported remarks that Judge Guido Calabresi made at the annual convention of the American Constitution Society in 2005. Ruling on charges filed against Judge Calabresi, the Judicial Council of the Second Circuit rejected an argument that merely speaking at the "left-leaning" group's meeting violated Canon 5, citing a judge's ability to write and speak about the law, even to groups with an identifiable legal or political bias.<sup>140</sup> However, it also had little trouble concluding that Judge Calabresi's unscripted remarks following a panel discussion on the upcoming election were prohibited political activity.<sup>141</sup> Judge Calabresi was raising the "deeper structural issue" of *re*-election after an election

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135. *Id.* at 153.

136. *Id.* at 155.

137. Richard G. Kopf, *Senator Ted Cruz Is Not Fit to Be President*, HERCULES & UMPIRE (July 6, 2015), <https://herculesandtheumpire.com/2015/07/06/senator-ted-cruz-is-not-fit-to-be-president/> [<https://perma.cc/Y6JP-27S6>].

138. Orin Kerr, *Blogging Judge Calls Political Candidate "Unfit" for Office*, WASH. POST: VOLOKH CONSPIRACY (July 7, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/07/blogging-judge-calls-political-candidate-unfit-for-office> [[perma.cc/NLY9-4QD3](https://perma.cc/NLY9-4QD3)].

139. Richard G. Kopf, *Professor Orin Kerr Is Correct on Canon 5, and for That I Apologize*, HERCULES & UMPIRE (July 8, 2015), <https://herculesandtheumpire.com/2015/07/09/professor-orin-kerr-is-correct-on-canon-5-and-for-that-i-apologize> [[perma.cc/38QW-3M6F](https://perma.cc/38QW-3M6F)].

140. *In re Charges of Judicial Misconduct*, 404 F. 3d 688, 693 (2nd Cir. 2005).

141. *Id.* at 695–96.

that was arguably illegitimate (referring to *Bush v. Gore*) and compared that rise to power to those of Mussolini and Hitler.<sup>142</sup> He went on to say

I'm not suggesting for a moment that Bush is Hitler. . . . When somebody has come in in that way they sometimes have tried not to exercise much power. In this case, like Mussolini, he has exercised extraordinary power. . . . It seems to me that one of the things that is at stake is the assertion by the democracy that when that has happened it is important to put that person out, regardless of policies, regardless of anything else, as a statement that the democracy reasserts its power over somebody who has come in and then has used the office to . . . build himself up. . . . That's got nothing to do with the politics of it. It's got to do with the structural reassertion of democracy.<sup>143</sup>

To the extent these remarks could reasonably be understood as opposing a political candidate, they violated then-Canon 7(A)(2) (now 5(A)(2)).<sup>144</sup> As to the comparisons to Hitler and Mussolini, however, the Council was unconvinced that a violation had occurred. "Although the comparison remarks were inflammatory to a reasonable person of ordinary sensibilities, it is not clear that they constituted judicial misconduct."<sup>145</sup> Although the complainant had alleged that the remarks violated Canon 1's admonition to behave so as to maintain the "integrity and independence of the judiciary," the Council noted that it is unclear "when out-of-court remarks that may be intemperate or disrespectful transcend the merely distasteful or the inadvisable and amount to misconduct."<sup>146</sup> Claims that Judge Calabresi's remarks disclosed his general political bias, or that it violated judicial ethics to express disagreement with *Bush v. Gore*, were dismissed.<sup>147</sup>

The tweets of Judges Bennett and Smith would be evaluated in light of precedents like these.<sup>148</sup> They do not support or oppose the election of any candidate. Would the federal standards prohibit the tweets of Judges Bennett and Smith on mandatory minimum sentencing because that issue is political? Sentencing and incarceration rates are certainly a much-de-

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142. *Id.* at 691.

143. *Id.*

144. *Id.* at 695–96.

145. *Id.* at 697–98.

146. *Id.* at 698.

147. *Id.* at 698–99 ("To the extent that any of the complaints are based on the belief that a judge must be politically neutral or hold no strong political beliefs, they are without merit. To the extent that any of the complaints are based on the belief that the Judge's alleged bias renders him unable to sit as a judge in a case involving the President or any particular issue, they are (at least) premature as any such claim would await an actual instance.").

148. *Cf.* Bd. of Comm'rs on Grievances and Discipline, Op. 2002-3, 2002 WL 600747 at \*1 (2002), <http://www.ohioadvop.org/wp-content/uploads/2017/04/Op-02-003.pdf> [perma.cc/PPF6-CPU9] (judge may comment publicly on "a proposed state constitutional amendment regarding drug treatment in lieu of incarceration, to explain the proposed amendment, to compare it to current law, and to describe its potential impact on the constitution, the law, and the operation of the courts").

bated issue, but opinions do not split neatly along political party lines.<sup>149</sup> Their statements draw on their experience as judges imposing sentences under the law, and it is certainly arguable that getting sentencing “right” is a core part of delivering effective, unbiased justice.<sup>150</sup> This conclusion does not turn on the position the judges take; tweets taking the opposite position, supporting mandatory minimum sentencing, would also be proper. Judge Bennett has also tweeted about his activities that educate judges and others about the phenomenon of implicit bias and its impact on the litigation process.<sup>151</sup> That, too, has no clear political party connection and is intended to improve the operation of the courts.<sup>152</sup>

Judge Smith’s tweets supporting judicial independence are similarly grounded in judicial expertise and focused on the health of the legal system. Does their timing, or the sources linked to, somehow make them unacceptably political? Consider the contents and timing of both his tweets and those of President Trump.

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149. See, e.g., German Lopez, *Jeff Sessions: Mandatory Minimum Sentences Protected Us from Violent Crime. Research: Nope*, Vox (July 11, 2017, 6:28 PM), <https://www.vox.com/policy-and-politics/2017/7/11/15955570/jeff-sessions-mandatory-minimums-crime> [perma.cc/S7A8-B2HX]; Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016, 9:51 PM), <https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice#.T8HJ6Gtrf> [perma.cc/U5J8-C56K].

150. Cf. W. Va. Jud. Investigation Comm’n, Op. 2017-03 (2017), <http://www.courtswv.gov/legal-community/advisory-opinions.htm#Extrajudicial> [perma.cc/XG3H-PPX3] (concluding that judge who “presides over domestic violence cases” may write master’s thesis “on . . . community response to domestic violence” as long as he does not “express any opinions on what” he would do “with any specific set of facts or” on any pending or impending issues); N.Y. Advisory Comm. on Jud. Ethics, Op. 2016-135, 2016 WL 7973867 at \*1–2 (2016), <http://www.nycourts.gov/ip/judicialethics/opinions/16-135.htm> [perma.cc/W9KS-4FQS] (judge may “publicly advocate for [a] change[ ] in the Penal Law” that would create “a new standard in a particular class of criminal cases”).

151. Mark W. Bennett (@MarkWBennett1), TWITTER (Nov. 15, 2016, 5:14 PM), <https://twitter.com/MarkWBennett1/status/798665387349053440> [perma.cc/FLR8-CQKU].

152. Cf. U.S. Judicial Conference Comm. on Codes of Conduct, Op. 93, *supra* note 133, at 152 (approving of membership in “an organization to eliminate gender bias in the judiciary”). On the other hand, Judge Bennett’s tweet reacting to President Trump’s claim that he had been wiretapped by President Obama may cross the line: “Maybe Obama bypassed DOJ got a device at Radio Shack, wore a wig and snuck into Trump Tower. You heard this here first.” Mark W. Bennett (@MarkWBennett1), TWITTER (Mar. 20, 2017, 10:51 AM), <https://twitter.com/MarkWBennett1/status/843852568824438785> [https://perma.cc/3BWS-ZWZQ].

Trump Tweet <sup>153</sup>	Smith Tweet <sup>154</sup>	Smith Link
2/4/17: "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!" [perma.cc/65CJ-HW9U]	2/4/17: "personal attacks on judges have no place in a system based the rule of law" [perma.cc/M96W-GRN8]	NY Times, "Appeals Court Rejects Request to Immediately Restore Travel Ban" <sup>155</sup>
2/4/17: "What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into U.S.?" [perma.cc/ETJ9-A8Q4]	2/4/17: Retweets Neal Katyal, "This really smart piece explains why Pres.Trump's 'so-called judge' comment was diffit from criticism of decisions." [perma.cc/WP3Y-9SY9]	Washington Post, "The Deadly Serious Accusation of Being a 'So-Called Judge'" <sup>156</sup>
2/4/17: "Because the ban was lifted by a judge, many very bad and dangerous people may be pouring into our country. A terrible decision" [perma.cc/SM4Q-MU6X]	2/4/17: Links to story in The Economist. [perma.cc/KB9Y-2VCL]	Economist, "Donald Trump Rages Against the Judge Who Halted His Travel Ban" <sup>157</sup>
2/5/17 "Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!" [perma.cc/88DW-ZAAB]	2/5/17 "More on why respect for the judicial branch and rule of law matters" [perma.cc/R2LS-85HF]	Washington Post, "Constitutional Crisis? What Happens if Trump Decides to Ignore a Judge's Ruling" <sup>158</sup>
	2/6/17 "More on why respect for courts, the judiciary and rule of law matters." [perma.cc/TCL4-SAPQ]	NY Times, "Trump Clashes Early with Courts, Portending Years of Legal Battles" <sup>159</sup>

The contents of Judge Smith's tweets focus entirely on the problem with attacks on judges, the role of the judicial branch, and the importance of the rule of law. On their face, they appear neither inflammatory nor

153. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017 through Feb. 5, 2017), <https://twitter.com/realdonaldtrump/>.

154. William Smith (@judgewesmith), TWITTER (Feb. 4, 2017), <https://twitter.com/judgewesmith>.

155. Mark Landler, *Appeals Court Rejects Request to Immediately Restore Travel Ban*, N. Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/politics/visa-ban-trump-judge-james-robart.html> [Perma link unavailable].

156. Will Baude, *The Deadly Serious Accusation of Being a "So-Called Judge,"* WASH. POST: VOLOKH CONSPIRACY (Feb. 4, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/04/the-deadly-serious-accusation-of-being-a-so-called-judge> [perma.cc/X8MT-6LQD].

157. S.M., *Trump and the Law: Donald Trump Rages Against the Judge Who Halted His Travel Ban*, ECONOMIST (Feb. 5, 2017), <https://www.economist.com/blogs/democracyinamerica/2017/02/trump-and-law> [perma.cc/2SUD-DVSA].

158. Aaron Blake, *Constitutional Crisis? What Happens if Trump Decides to Ignore a Judge's Ruling*, WASH. POST (Feb. 5, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/05/constitutional-crisis-what-happens-if-trump-decides-to-ignore-a-judge> [perma.cc/NK28-XRVM].

159. Peter Baker, *Trump Clashes Early with Courts, Portending Years of Legal Battles*, N. Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/05/us/politics/donald-trump-mike-pence-travel-ban-judge.html> [Perma link unavailable].

partisan.<sup>160</sup> The articles he links to have the same focus, although they also discuss the underlying travel ban litigation. The sources of those articles are mainstream media, albeit ones that President Trump has also attacked and believes to be biased against him. (In fact, the tweet that immediately followed “so-called judge” was about the *New York Times* and “fake news.”)<sup>161</sup> To the extent the articles address the merits of the travel ban litigation, they are more like the portions of Judge Kopf’s blog about Senator Cruz’s proposal that dealt with the proposal itself, which both Judge Kopf and Professor Kerr rightly believe to be outside the political activities ban.<sup>162</sup>

If a personal attack on a judge, or repudiation of judicial review, or critique of nationwide injunctions, came from a nongovernmental source, a response to it would not be a political act.<sup>163</sup> Does the fact that the attack came from the head of the executive branch of government, at a time when the country is politically polarized, convert the response into a political issue and hence make it off limits for judges? Does the immediacy of the response give the tweets a whiff of political opposition to President Trump personally?<sup>164</sup> If ethics committees take this position, they will be conflating the legal issue itself with the person raising the issue, and they will have allowed the President to create a political controversy in a way that silences opposition by those uniquely qualified to explain the judicial role that his tweets dismiss.<sup>165</sup> That doesn’t mean

160. Judge Smith was appointed to the federal bench by President George W. Bush in 2002.

161. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 7:39 AM), <https://twitter.com/realDonaldTrump/status/827874208021639168> [perma.cc/2FCP-T7TF].

162. Judges have expressed the same sentiments in a dissenting opinion in an actual travel ban case, but this is less controversial than tweeting because judicial opinions are a traditional way for judges to articulate their thoughts. See Fred Barbash, *Appeals Court Judges Rebuke Trump for “Personal Attacks” on Judiciary, “Intimidation”*, WASH. POST (Mar. 16, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/16/appeals-court-judges-rebuke-trump-for-personal-attacks-on-judiciary-intimidation> [perma.cc/NRW6-5BQA] (“The personal attacks on the distinguished district judge and our colleagues were out of bounds of civic and persuasive discourse—particularly when they came from the parties.”).

163. Politics aside, whether this tweet would be seen by some ethics committees as addressing such a controversial issue that it would endanger the public confidence in the impartiality of the courts will be addressed in the next section.

164. Cf. Conn. Comm. on Jud. Ethics, Informal Op. 2016-16, 2016 WL 8467644 at \*5 (2016), <https://www.jud.ct.gov/Committees/ethics/sum/2016-16.pdf> [perma.cc/E63A-TJL8] (NOW membership prohibited); Mass. Comm. on Jud. Ethics, Op. 2016-10, 2016 WL7342827 at \*1 (2016), <http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-2016-10.html> [perma.cc/62V9-364Q] (Women’s March participation prohibited). If that is the case, would identical tweets at a different moment in time be permissible comments on the legal system?

165. Blue, *supra* note 72, at 33 (“Judges have no monopoly on wisdom, but they nevertheless have something to say. What they have to say is not the product of innate wisdom or high constitutional position, at least not necessarily. It is the product of judicial experience. The experience of listening to the stories and problems of persons representing the entire spectrum of humanity and resolving those problems (or at least attempting to do so) in principled ways is not a common experience in our society. When the extrajudicial speech of judges is limited to anodyne topics of judicial administration, our political discourse loses the benefit of this experience and perspective.”).

that committees won't do so because they fear that judicial entanglement in anything that *looks* like political wrangling will endanger the public's belief that judges are different from other politicians. But they should think hard before prohibiting a measured defense of judicial independence in the name of judicial independence.

c. Impartiality, Integrity, Independence

Ethics rulemakers justify the specific prohibitions on political activity as a way to protect the special role of the judiciary by avoiding the appearance of bias and lack of independence from partisan political actors. Even for matters that are removed from partisan politics, some jurisdictions' interpretations of general ethics rules can limit judicial speech on social and policy issues based on a belief that disclosing those opinions might undermine public confidence in the judiciary. New York, for example, has a long string of ethics opinions disallowing judicial participation in matters that are "so controversial that it is incompatible with judicial office."<sup>166</sup>

The governing ethics rules are expressed in general terms.<sup>167</sup> Concerns about impartiality (and the appearance of impartiality) are contained in a couple of places. The ABA Model Rules and the Code of Conduct for United States Judges are quite similar:

*ABA Rule 1.2*: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."<sup>168</sup>

*U.S. Code Canon 2(A)*: "A judge should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."<sup>169</sup>

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*ABA Rule 2.11(A)*: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

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166. See, e.g., N.Y. Advisory Comm. On Jud. Ethics, Op. 16-135, 2016 WL 7973867 at \*1 (2016), <http://www.nycourts.gov/ip/judicialethics/opinions/16-135.htm> [https://perma.cc/3BAB-Q573].

167. In *Republican Party of Minnesota v. White*, Justice Scalia commented that the supporters of the ethics rules were "rather vague . . . about what they mean by 'impartiality.'" 536 U.S. 765, 775 (2002).

168. MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS'N 2011). In the Terminology section, "impartiality" is defined to mean "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." MODEL CODE OF JUDICIAL CONDUCT Terminology (AM. BAR ASS'N 2011). The term "impropriety" is defined to include "conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality." *Id.* "Integrity" means "probity, fairness, honesty, uprightness, and soundness of character." *Id.* And "independence" means "a judge's freedom from influence or controls other than those established by law." *Id.*

169. CODE OF CONDUCT FOR U.S. JUDGES Canon 2A (2014).

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer . . . (5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."<sup>170</sup>

*U.S. Code Canon 3(C)(1)*: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge has a personal bias or prejudice concerning a party."<sup>171</sup>

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*ABA Rule 3.1*: "A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not: . . . (B) participate in activities that will lead to frequent disqualification of the judge; (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."<sup>172</sup>

*U.S. Code Canon 4*: "A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and non-legal subjects. However, a judge should not participate in extrajudicial activities that . . . reflect adversely on the judge's impartiality, [or] lead to frequent disqualification . . . ." <sup>173</sup>

For purposes of a judge considering whether to use Twitter to discuss the courts and respond to attacks on their independence, the gist of these rules comes down to whether those tweets would give the public a reason to believe that the judge is not impartial—the consequence of which could be disciplinary charges or disqualification. Tweets about what courts do, the function of judicial review, the need for an independent judiciary, and even the problem with ad hominem attacks on judges seem unlikely to demonstrate personal bias or prejudice concerning a party (or, in state court, a party's lawyer). Nor do they seem likely to commit a judge to rule in a particular way in a particular case.

Although the provisions regarding discipline and disqualification are not identical, cases determining whether or not judicial actions require disqualification can shed light on the "appearance of impropriety" issue. This is true for two reasons: First, the test in both cases asks whether the judge's impartiality might reasonably be questioned. Second, the ethics rules limiting judges' extrajudicial activities require them to avoid activities that would lead to frequent disqualification. The leading treatise on

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170. MODEL CODE OF JUD. CONDUCT r. 2.11(A) (AM. BAR ASS'N 2011).

171. CODE OF CONDUCT FOR U.S. JUDGES Canon 3(C)(1) (2014). *See also* 28 U.S.C. § 455 (2001) (disqualification of justice, judge, or magistrate judge).

172. MODEL CODE OF JUD. CONDUCT r. 3.1 (AM. BAR ASS'N 2011).

173. CODE OF CONDUCT FOR U.S. JUDGES Canon 4 (2014).

judicial disqualification addresses whether views about law or policy subject the judge to recusal. It states:

Generally speaking, judicial bias will not be presumed merely because a judge has . . . developed views about matters of law or public policy. This is so even when such views are strongly held by the judge. . . . Therefore, there exists a strong presumption against disqualifying a judge solely on the basis of her views about public policy, or even the policy underlying the specific law she is bound to apply in a particular case. A judge is also not subject to mandatory disqualification because of her general views about the applicable law.<sup>174</sup>

As Justice Scalia explained in the context of campaign speech rules, “[a] judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason.”<sup>175</sup> Judges are expected to have preconceptions about the law by the time they reach the points in their careers where they are qualified for the bench. “And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the ‘appearance’ of that type of impartiality can hardly be a compelling state interest . . . .”<sup>176</sup>

Expressing views about the law can require disqualification, however, when the judge’s statements show that the judge’s mind is closed on an issue and give the impression that the judge has a category-based bias. For example, a federal magistrate judge spoke at the South Carolina Trial Lawyers Association Auto Torts Seminar in a way that was consistently hostile to defense counsel. He said at one point that “[e]very defense lawyer objects to the net worth coming in [on the issue of punitive damages] and all of that. Then after that verdict you can get up there and call them the son-of-a-bitches that they really are.”<sup>177</sup> He also described “three pro-plaintiff judicial decisions” by noting that “the lawyers that represent these habitual defendants, they met these three decisions with about the same degree of joy and enthusiasm as the fatted calf did when it found out the prodigal son was coming home. That indicates that that’s some pretty good decisions.”<sup>178</sup> Under these circumstances, the Fourth Circuit held that the “remarks . . . reflect[ed] a predisposition against . . . product liability defendants” that required his recusal.<sup>179</sup> It is hard to imagine a tweet about courts and their functioning creating this kind of appearance of bias.

174. FLAMM, *supra* note 92, § 10.7 at 271–72 (footnotes omitted).

175. Republican Party of Minnesota v. White, 536 U.S. 765, 777–78 (2002).

176. *Id.* at 777.

177. Hathcock v. Navistar Int’l Transp. Corp., 53 F.3d 36, 39 (4th Cir. 1995).

178. *Id.*

179. *Id.* at 41. See also *In re Chan*, 2009 WL 4929370 at \*2 (N.Y. Comm’n on Jud. Conduct 2009), <http://www.cjc.ny.gov/Determinations/C/Chan.Margaret.2009.11.17.DET.pdf> [perma.cc/B66S-C9A7] (citing campaign literature advertising a lecture in which Chan “will show you how to stick up for your rights, beat your landlord, . . . and win in court!”).

Ethics opinions interpreting the rules intended to ensure the appearance of impartiality and independence occasionally reflect a concern that by merely addressing controversial issues judicial speech can undermine confidence in the judiciary. These fears are reflected in general discussions of social media. For example, the Utah Ethics Advisory Committee responded to a question about whether judges could “post comments and content on legal topics, particularly when such comments may be alongside a post that would be inappropriate if made by a judge” with this warning: “[I]f the public might associate the judge with a particular comment in a way that would undermine the judge’s impartiality, such as a judge specifically taking a position adopting a poster’s comments on a legally or politically controversial topic, then such a post would be inappropriate.”<sup>180</sup> The Massachusetts Committee on Judicial Ethics also cautioned against writing on “controversial or contested issues,” although it did limit that to issues “that may come before the courts.”<sup>181</sup> In discussing a judge’s tweets “intended to reveal the existence of racism and implicit bias in the courts,” the Committee advised caution, stating that judges “must avoid posts that individually or as a pattern would lead a reasonable person to conclude [they] have a predisposition or bias that calls . . . impartiality into question.”<sup>182</sup> A federal advisory opinion also warns against using social media to discuss issues that are “politically sensitive and currently active,” but the prohibition is limited to issues that might present themselves to the court.<sup>183</sup> Confining the prohibition to issues that might come before the court may not be much of a limit. As Judge Posner noted long ago in *Buckley v. Illinois Judicial Inquiry Board*, “There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”<sup>184</sup>

What policy underlies this fear of controversy, even for speech that is unrelated to pending cases and that does not indicate a systematic bias? (Remember that the concern here is not *having* a bias; these rules are about *revealing* a bias by articulating it.) Perhaps the ethics officials worry that “[i]f judges are given the freedom of expression enjoyed by other citizens, some judges will inevitably say things that are controversial, foolish, or even horrifying.”<sup>185</sup> If so, it is an overstated worry:

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180. Utah Ethics Adv. Comm., Informal Op. 12-01 2012 WL 11916794 at \*8 (Aug. 31, 2012) [https://www.utcourts.gov/resources/ethadv/ethics\\_opinions/2012/12-1.pdf](https://www.utcourts.gov/resources/ethadv/ethics_opinions/2012/12-1.pdf) [https://perma.cc/3Q7A-84EB].

181. Mass. Comm. on Judicial Ethics, Op. 2016-09, *supra* note 16, at \*2.

182. *Id.* One hopes that the committee did not mean to suggest that the tweeting judge needed to keep an open mind to racism and bias. Expressions of actual bias, in social media or otherwise, are of course enormously problematic. See, e.g., *In re Judicial Misconduct*, 751 F.3d 611 (U.S. Jud. Conf. Comm. on Jud. Conduct and Disability 2014) (complaint against Judge Richard Cebull); CTR. FOR JUD. ETHICS OF THE NAT’L CTR. FOR STATE COURTS, *Cases in Which Judges Were Disciplined for Biased Social Media Posts* (2017), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/BiasedSocialMediaPosts.ashx> [perma.cc/D42E-YP4B].

183. Comm. on Codes of Conduct Advisory Opinions, Op. 112, *supra* note 132, at 223.

184. 997 F.2d 224, 229 (1993).

185. Blue, *supra* note 72, at 59–60 (footnote omitted).

But an unspoken concern that the predictably ill-chosen remarks of a few judges will compromise the integrity and independence of the judiciary is almost certainly unfounded. The institutions of our democratic government have proven, over the years, to be surprisingly resilient. Experience teaches that constitutional officers in other branches of government can utter quite horrifying remarks and effectively disgrace themselves without disgracing their institutions. In addition, if truth be told, under current law, judges periodically manage to say altogether horrifying things while speaking in their judicial capacities and, just as is the case with their executive and legislative counterparts, embarrass themselves without damaging their institutions.<sup>186</sup>

Perhaps the fear is that taking public positions on controversial *issues* will, like partisan political activity, feed public criticism of controversial *decisions* and thereby encourage both citizens and politicians to regard adherence to judicial decisions as optional. It is important to note, though, that despite existing prohibitions, many members of the public already believe that judges' decisions are influenced by their own beliefs and political pressure. The annual survey of public perception done for the National Center for State Courts got the following results in 2014 and 2015<sup>187</sup>:

Statement	% Agree	
	2014	2015
Judges in (STATE) courts make decisions based on an objective review of facts and the law	48	48
Judges in (STATE) courts make decisions based more on their own beliefs and political pressure.	46	47

In addition, “a full 61 percent say that the term ‘political’ describes the courts in their state, compared to just 34 percent who feel it does not.”<sup>188</sup> These beliefs are fed partly by attacks on the courts from the right<sup>189</sup> and the left.<sup>190</sup>

186. *Id.*

187. 2015 Report Summary, GBA STRATEGIES 2 (Nov. 17, 2015), [http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC\\_2015\\_Survey%20Analysis.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx) [perma.cc/DLL3-FZ33].

188. *Id.*

189. See, e.g., Bruce Shapiro, *The Real Danger in Trump's Attack on Judges*, NATION (Feb. 16, 2017), <https://www.thenation.com/article/the-real-danger-in-trumps-attacks-on-judges> [perma.cc/KC3T-MF8U] (“Ever since *Brown v. Board of Education*, no idea has been more important to the American right than the libel of judicial overreach; no claim a more effective, resentment-stoking stand-in for racial animus, corporate greed, abusive law-and-order policies, or retreat from sexual liberation and abortion rights.”).

190. See, e.g., ALL. FOR JUSTICE, THE ROBERTS COURT AND JUDICIAL OVERREACH 4 (2013), <https://www.afj.org/wp-content/uploads/2013/09/the-roberts-court-and-judicial-overreach.pdf> [perma.cc/5J3Q-8KCC] (“It has been well-documented that the Roberts Court consistently pursues an agenda that favors powerful corporate interests and the wealthy at the expense of everyday Americans. What is less well-known is that in order to

To some extent, the public's opinion that some judicial decisions are affected by the judges' beliefs is correct and so rules based on a desire to suppress information about judicial attitudes are rules that protect a fiction. Many judicial decisions are discretionary, and even law and fact decisions on issues such as pleadings and summary judgment turn on the judge's assessment of the credibility of inferences, based on the judge's own "experience and common sense."<sup>191</sup> In the federal courts, data show a correlation between the political party of the President who appointed judges and their rulings.<sup>192</sup> A set of hypotheticals administered to federal judges at a 2015 conference showed their sentencing decisions were influenced more by the traits of the defendant than the law.<sup>193</sup> And another recent study examines the politicization of judicial selection, concluding that political actors tend to rely on ideology in choosing judges so the appointment of judges, especially at the highest level, may be even more politicized than the election of judges.<sup>194</sup> It is hard to imagine that they would bother to do this if they did not expect the judges' ideology to have some impact on their decisions.

One can question, then, whether hiding judicial views is needed to maintain a fictional belief that politics and policy views play no role in judicial decisions. Given existing public suspicions, a more nuanced explanation of the ways in which judging *is* (and is not) affected by a judge's legal views might serve the reputation of the courts more than a ban on a discussion of those views. Nevertheless, judges deciding to use Twitter to share information about the courts must do so with the knowledge that certain issues might be deemed out of bounds simply because they are too "controversial."

Turning back to our four exemplar tweets, do they give any reason to doubt the tweeter's integrity, impartiality, or independence—or that of

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reach these preferred outcomes, a bloc of five conservative justices has proven strikingly willing to engage in judicial activism by overreaching and twisting the law.").

191. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

192. Adam Liptak, "Politicians in Robes"? Not Exactly, But . . . , N.Y. TIMES (Nov. 26, 2012), <http://www.nytimes.com/2012/11/27/us/judges-rulings-follow-partisan-lines.html> [Perma link unavailable] (citing LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE* (2013)). For studies considering other types of links between judges' characteristics and judicial decisions, see, for example, Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007).

193. See Robert M. Sapolsky, *When Justice Isn't So Blind*, WALL ST. J. (Aug. 9, 2017), <https://www.wsj.com/articles/when-justice-isnt-so-blind-1502298303> [Perma link unavailable] (describing study detailed in Holger Spamann & Lars Klöhn, *Justice Is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255 (2016)).

194. Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Politicize the Judiciary* (HKS Faculty Research Working Paper Series, RWP15-001, 2015), <https://ssrn.com/abstract=2577378> [perma.cc/M255-YLKK] ("We show that the higher the court, the more conservative and more polarized it becomes, in contrast with the broader population of attorneys, who tend to be liberal.").

courts in general? In a sane world, no. It's not that they don't send signals; but those signals are well within the bounds of accepted judicial opinion about the law and the courts. Justice Willett is permitted to declare his opposition to "legislating from the bench," although that phrase is code for "judicial activism," which is the topic of fervent policy debate.<sup>195</sup> Judge Dillard is permitted to tweet a link to an article arguing that the U.S. Supreme Court should make decisions on the narrowest possible grounds available, a position that cuts across political lines but is also controversial.<sup>196</sup> Judges Bennett and Smith are on solid ground tweeting about federal sentencing laws; both ethics opinions and recusal cases have allowed judges to express opinions on similar criminal law issues.<sup>197</sup>

Judge Smith's tweet emphasizing the very views in issue—the importance of respect for the courts, the judicial branch, and the rule of law—gives no reason to believe that he does not enforce those values in his court. Not only is his tweet expressing only a general legal principle, it is one that the courts themselves hold dear.<sup>198</sup> Nor should we assume that Judge Smith will be held responsible for every sentence in every article he links to, or that certain mainstream media sources are disallowed because they are *per se* controversial. As the Ninth Circuit recently noted in *United States v. Sierra Pacific Industries*, a judge's tweeted link to a news story, even one with an inaccurate headline related to the merits of a pending case, was not sufficiently prejudicial to create appearance of bias.<sup>199</sup> It comes down to this, then: were Judge Smith's February 2017

195. Catherine Cook, *Legislating from the Bench*, HARV. POL. REV. (March 3, 2009), <http://harvardpolitics.com/online/legislating-from-the-bench> [perma.cc/K7BL-ME9Y]. Not "legislating from the bench" is a repeated theme in Justice Willett's tweets. See the results of this Twitter search: <https://twitter.com/search?l=en&q=%22legislate%20from%20the%20bench%22%20from%3Ajusticewillett&src=typd&lang=en> [perma.cc/HDS6-9MKD].

196. See, e.g., Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347 (2010) (arguing that Minimalism actually allows judges to apply their subjective values).

197. N.Y. Advisory Comm. on Jud. Ethics, Op. 2016-135, *supra* note 150, at 2; *United States v. Pitera*, 5 F.3d 624, 626–27 (2d Cir. 1993) (holding that a judge who gave a lecture to government agents and prosecutors, including advice on how to "increase the prospects for conviction in narcotics cases," was not required to recuse herself from narcotics prosecution).

198. He is also not the only judge who, directly or through a retweet, expressed that opinion at that time. Texas appellate judge Charles Kreger, a Republican like Smith, retweeted a tweet on February 4 that quoted Alexander Hamilton: "The complete independence of the courts of justice is peculiarly essential in a limited constitution." Charles Kreger (@kregerjudge), retweeting Julie Silverbrook (@JMSilverbrook), TWITTER (Feb. 4, 2017, 10:31 AM), <https://twitter.com/JMSilverbrook/status/827917482623119360> [perma.cc/WR87-JF4E]. (So did Texas Supreme Court Justice Jeff Brown (@judgejeffbrown)). On February 5, Kreger also tweeted a pretty meme that read, "No free government can survive that is not based on the supremacy of the law. Where law ends tyranny begins. Law alone can give us freedom." Charles Kreger (@kregerjudge), TWITTER (Feb. 5, 2017, 2:38 PM), <https://twitter.com/kregerjudge/status/828342156741967872> [perma.cc/J72U-9XJG].

199. *United States v. Sierra Pac. Indus. Inc.*, 862 F.3d 1157, 1172–75 (9th Cir. 2017). Since the Twitter issue was not raised in the court below, the Ninth Circuit reviewed the issues under a plain error standard and it was not taken as proven that the twitter account in question belonged to the trial judge. *Id.* Nevertheless, the court noted that even if the

tweets problematic because the surrounding circumstances make them too controversial? Unless publicly disagreeing with President Trump is inherently off limits, even when the tweets relate to the President's statements rather than his elective status, Judge Smith's tweets did not violate the Code. It is not improperly controversial to oppose attacks on individual judges or to defend judicial review.

Much of what judges would want to express on Twitter about the courts and the legal system would bother no one, so long as they stay away from ex parte communications, evaluative comments on their own pending cases, and positions that portend group biases that might lead to frequent disqualification. But in this polarized world, complaints can be expected to arise when a tweet bothers someone, and disciplinary complaints may well be filed. The next section considers whether free speech values could or must lead ethics authorities to allow judges to tweet even on controversial topics.<sup>200</sup>

#### 4. *Can They Do That? Ethics Rules and the First Amendment*

Most of the ethics rules discussed above place content-based limits on what judges may say, on Twitter or otherwise. They therefore raise constitutional free speech concerns, although the contours of the law are murky at best. It is fairly clear, though, that the limits on comments on a judge's own pending cases and on ex parte communications would survive a First Amendment challenge, based both on the interests of the state in the integrity of the court system and the due process rights of the litigants.

Especially where the ethics limitations on speech are based only on a vaguely defined desire for propriety, judges' First Amendment rights will sometimes prevent states from broadly interpreting and enforcing prohibitions on judicial speech. The Supreme Court, in *Republican Party of Minnesota v. White*,<sup>201</sup> struck down an ethics rule (typical of many states at the time) that "prohibited candidates for judicial office from announcing their [positions] on disputed legal or political issues."<sup>202</sup> The candidates' right to communicate their views to the electorate is a very protected type of speech, and the majority rejected the state's argument that Minnesota's "announce" rule was narrowly tailored to support a compelling interest in protecting judicial impartiality and independence. The Court's skepticism about issue-based impartiality as a compelling in-

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content of linked articles is attributed to the judge tweeting those links, the content of the three tweets and articles were insufficient to create an appearance of impropriety requiring recusal. *Id.*

200. Context matters, too. In the context of disciplinary proceedings, decision makers may already lean somewhat in the direction of giving judges the benefit of the doubt while cautioning that everyone needs to be more careful with social media. When drafting general advisory opinions or giving prospective advice, on the other hand, ethics committees are more apt to advise against anything that might be interpreted as political or controversial. In ruling on disqualification motions, as noted above, general statements about the law that do not disclose a pattern of bias are unlikely to require recusal.

201. 536 U.S. 765 (2002).

202. *Id.* at 765.

terest is an indication that speech limitations that are grounded only on the desire that judges appear to have no positions on issues may be vulnerable to First Amendment challenges, even outside the election context.<sup>203</sup> Courts in general, however, continue to be very protective of their institutional reputational interests. “The judicial system depends on its reputation for impartiality; it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife.”<sup>204</sup>

Lower court cases following *White* are mixed, but some strike down other ethics rules that limit what can be said.<sup>205</sup> After *White*, many jurisdictions have narrowed their political activity prohibitions in order to avoid First Amendment challenges. Those narrowly drafted rules prohibiting judges from making “pledges or promises” and “committing” to certain positions that will come before their courts often survive First Amendment challenges, while broader prohibitions fail.<sup>206</sup> Even the approvals come with caveats. For example, the New York Court of Appeals, while reprimanding a judicial candidate for pro-prosecution campaign statements, noted that the prohibition cannot be a blanket ban: “[A] judicial candidate may promise future conduct provided such conduct is not inconsistent with the faithful and impartial performance of judicial duties . . . [and] most statements identifying a point of view will not implicate the ‘pledges or promises’ prohibition.”<sup>207</sup> Rather, “[t]he rule precludes only those statements of intention that single out a party or class of litigants for special treatment, be it favorable or unfavorable, or convey that the candidate will behave in a manner inconsistent with the faithful and impartial performance of judicial duties if elected.”<sup>208</sup>

Other types of campaign-related ethics rules have also been challenged as violating the free speech rights of candidates for judicial office. Rules prohibiting false campaign statements have been upheld, while those prohibiting misleading statements have been rejected because they un-

203. Cf. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (invalidating application of Nevada’s attorney ethics rule governing pretrial publicity absent a likelihood of prejudicing the proceeding).

204. *Bauer v. Shepard*, 620 F.3d 704, 712 (7th Cir. 2010). See also *Wolfson v. Concannon*, 750 F.3d 1145 (9th Cir. 2014).

205. CTR. FOR JUDICIAL ETHICS, *Case-law Following Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/CaselawAfterWhite.ashx> [perma.cc/PC7K-66K4] (updated Nov. 2016).

206. *Id.* The current ABA Model Code, Rule 4.1(A)(13), provides that judges shall not “in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(13) (AM. BAR ASS’N 2011).

207. *In re Watson*, 794 N.E.2d 1, 6–7 (N.Y. 2003).

208. *Id.* at 7. See also *In re McGrath*, 2010 WL 597261 at \*1–4 (N.Y. Comm’n on Jud. Conduct Feb. 5, 2010), <http://www.cjc.ny.gov/Determinations/M/McGrath.Patrick.2010.02.05.DET.pdf> [perma.cc/D55G-5LNN] (agreed to admonishment for, in addition to other misconduct, campaign letter that indicated the judge would give special consideration to pistol permit applicants).

duly chill speech.<sup>209</sup> Rules prohibiting various forms of participation in partisan politics are also generally upheld,<sup>210</sup> although federal circuits have rejected rules prohibiting judicial candidates from identifying themselves as members of a political party.<sup>211</sup>

The situation of a sitting judge who wants to use Twitter to communicate views on law and policy might constitutionally differ from a judicial candidate. *White* and its progeny use strict scrutiny, but outside the election context, some courts apply the more forgiving standard of *Pickering v. Board of Education*,<sup>212</sup> which treats the ethics rule restrictions as a political activity prohibition on a government employee.<sup>213</sup> The resulting analysis attempts to balance the rights of the employee (in this case, the judge) to comment on matters of public concern against the interest of the government, as an employer, in the effectiveness of the public services it performs. Seen through this lens, the ‘no political activity’ and ‘no controversy’ limits restrict “the rights of a limited (albeit high-ranking) class of government employees and is intended to protect the integrity of that class.”<sup>214</sup> On the other hand, it may be that the judges on courts and ethics committees will find the distinction between what judges do and what other government employees do to be sufficiently substantial and important that *Pickering* is inapt.<sup>215</sup>

One pre-*White* case from the state of Washington said it was applying strict scrutiny but took a balancing approach (although without citing *Pickering*) in the context of a disciplinary proceeding.<sup>216</sup> Its results show

209. See, e.g., *Winter v. Wolnitzek*, 834 F.3d 681, 694 (6th Cir. 2016); *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002).

210. See *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1659 (2015) (upholding personal solicitation clause based on “[s]tate’s interest in preserving public confidence in the integrity” and impartiality of judiciary, which the majority held was greater than its interest in preventing the appearance of corruption in legislative and executive branch elections).

211. See, e.g., *Carey v. Wolnitzek*, 614 F.3d 189, 203–04 (6th Cir. 2010).

212. 391 U.S. 563 (1968). See also *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding the Hatch Act and similar state laws that limit the ability of government employees to engage in politics).

213. See *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010) (applying *Pickering* in upholding ethics rule prohibiting partisan activities); *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010) (applying *Pickering* in considering ethics rules limiting statements of party affiliation, endorsement of partisan candidates, and personal solicitation of campaign funds). For an argument that a modified *Pickering* standard should govern, see Lynne H. Rambo, *When Should the First Amendment Protect Judges from Their Unethical Speech*, OHIO ST. L.J. (forthcoming 2018), SSRN paper available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3027761](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3027761) [<https://perma.cc/33QS-CRRF>].

214. Blue, *supra* note 72, at 11.

215. See, e.g., *Wolfson v. Concannon*, 750 F.3d 1145, 1154 (9th Cir. 2014) (rejecting Seventh Circuit’s *Pickering* analysis); *Carey*, 614 F.3d at 200 (applying strict scrutiny to party membership and solicitation rules).

216. *In re Sanders*, 955 P.2d 369, 372 (Wash. 1998) (en banc). The court was highly influenced by Judge Posner’s analysis in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993). Judge Posner blogs but does not tweet (although there is a parody account for Judge Posner called @Posner\_Thoughts). See Posner Thoughts (@Posner\_Thoughts), TWITTER (Sept. 18, 2017, 2:13 PM) [https://twitter.com/Posner\\_Thoughts](https://twitter.com/Posner_Thoughts) [<https://perma.cc/GU27-DLDA>]. Judge Posner retired from the federal bench effective September 2, 2017, and a self-published book explaining his reasons has raised ethics issues of its own.

that even under a balancing test, a judge's free speech rights may be limited only when the appearance of propriety is genuinely threatened. As the court in *In re Sanders* noted,

Judges do not forfeit the right to freedom of speech when they assume office. They do agree, however, that the right must be balanced against the public's legitimate expectations of judicial impartiality. But the constitutional concern weighs more heavily in that balance, requiring clear and convincing evidence of speech or conduct that casts doubt on a judge's integrity, independence, or impartiality in order to justify placing a restriction on that right.<sup>217</sup>

Here are the underlying facts: on the same day on which he was sworn in as a Justice of the Washington Supreme Court, Sanders attended a rally called "March for Life," sponsored by a coalition of groups opposed to a woman's right to choose to have an abortion. His own remarks were brief:

I want to give all of you my best wishes in this celebration of human life. Nothing is, nor should be, more fundamental in our legal system than the preservation and protection of innocent human life. . . . I owe my election to many of the people who are here today and I'm here to say thank you very much and good luck. Our mutual pursuit of justice requires a lifetime of dedication and courage. Keep up the good work.<sup>218</sup>

Justice Sanders left immediately after speaking, but other "speakers [at the event] urged those in attendance to work to" elect an anti-abortion governor and legislators and for the passage of anti-abortion legislation.<sup>219</sup> The Washington court treated Canon 1's admonition to act so that the integrity and independence of the judiciary will be preserved as an articulation of the state's interest but refused to apply it as an independent basis for disciplinary action. The court also refused to decide the case merely by defining what counts as political, instead adding a free speech component to its analysis. While the court found the state's interest in an impartial judiciary to be compelling, it warned that "[t]o permit the governmental interest in an impartial judiciary to prevent a judge from speaking on any issue that has proponents on both sides or that might come before the bench essentially gags the judge."<sup>220</sup> Under the specific facts of this challenge to the disciplinary charges, the court con-

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See Jonathan H. Adler, *Richard Posner's 'Bats— Crazy' New Book*, WASH. POST (The Volokh Conspiracy) (Sep. 21, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/21/richard-posners-bats-crazy-new-book/?utm\\_term=.06c6c4124490](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/21/richard-posners-bats-crazy-new-book/?utm_term=.06c6c4124490) [https://perma.cc/UR6D-JG4K].

217. *Sanders*, 955 P.2d at 370.

218. *Id.* at 371. *White, Sanders*, and other recent cases challenging ethics-based limitations on political activities also serve as valuable reminders that the issue of judicial speech is of interest across the political spectrum. While the current controversy involves pushback against the tweets of a Republican President, many of the early challenges to limits on judicial speech came from socially conservative judicial candidates who wanted to announce their positions on issues like abortion and school prayer to conservative voters.

219. *Id.* at 371.

220. *Id.* at 375.

cluded that Justice Sanders' remarks did not indicate that he would lack impartiality or jeopardize public confidence in the judiciary.<sup>221</sup>

What implications do First Amendment cases have for judges wishing to use Twitter to discuss legal issues without running afoul of ethics rules prohibiting political activity of any kind and rules limiting controversial speech in the interest of maintaining the public's view of the judiciary as impartial and politically independent? The free speech cases may mean that some of the most expansive interpretations of ethics rules limiting speech go too far. Rather, prohibitions on involvement with political or controversial issues may only be enforceable when a reasonable observer would conclude that the judge is supporting a political party, would be biased against a category of litigants, or would refuse to apply the law. Statements about legal issues that have policy implications may need to be permitted or risk running afoul of the judge's First Amendment rights. If this is correct, free speech values could well mean that judges need to be allowed to tweet about the importance of judicial review and the rule of law, even immediately after the President tweets his criticism.

The problem, however, is that the answer is not clear and so the free speech argument loses much of its protective power. When the outcome of a First Amendment defense is a close call, judges may choose to self-censor. No one wants the embarrassment, publicity, or expense of defending against a charge that she has violated the judicial ethics rules and so only a judge with a strong motivation to be the one to share the message will take the risk.<sup>222</sup>

For the risk-averse, there is nevertheless quite a bit of tweeting in support of the judicial branch that would raise no ethical eyebrows, and even more that is proper and protected despite addressing disputed social issues. Further, there are judges who, aware of the ethics rules but seeing value in reaching out to lawyers and the public through social media, really want to use that platform to explain and defend the courts, even in contexts that are controversial. Is Twitter likely to help them fulfill their educational and advocacy goals?

#### B. TWITTER'S INHERENT CHALLENGES

A judge choosing Twitter as a platform begins with the same problem that all active Twitter users have: getting noticed. One measure of how much impact a Twitter account has is its number of followers. In terms of news, major media outlets have enormous followings. For example, the main New York Times account has 39.7 million followers; CNN has 37.9 million; Fox News has 16.1 million; the Wall Street Journal has 14.9 million; MSNBC has 1.89 million; and Breitbart News has 838,000.<sup>223</sup> Indi-

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221. *Id.* at 375–77.

222. Blue, *supra* note 72, at 7, 12.

223. Follower numbers are from the home page of each Twitter account as of October 8, 2017. For politicians who have both official and “personal” Twitter accounts, this reports the number for the account with the larger number of followers. The New York Times

vidual reporters have their own accounts. Among those who cover primarily legal affairs, SCOTUS Blog has 292,000 followers; Above the Law has 142,000; Jeffrey Toobin has 134,000; NPR's Nina Totenberg has 81,400; the New York Times' Adam Liptak has 49,100; and the National Review's Andrew McCarthy has 49,100.<sup>224</sup>

Politicians, of course, work hard to create a large Twitter following. President Trump's @realDonaldTrump account has 40.2 million followers.<sup>225</sup> Hillary Clinton has 18.8 million followers; Speaker of the House Paul Ryan (@SpeakerRyan) has 2.93 million; Senator Kamala Harris (@KamalaHarris) has 853,000; Senator Ben Sasse's has 198,000; New York Governor Andrew Cuomo has 483,000; Texas Governor Greg Abbott (@GregAbbot\_TX) has 191,000.<sup>226</sup> Certain types of tweet content can increase impact. Researchers have determined that tweets that combine moral outrage and psychological passion are far more likely to go viral.<sup>227</sup> Some of the most successful tweeting politicians do a masterful job of using this medium.

Judges, however, have far lower numbers. Consider the four judges whose tweets have provided hypotheticals for this article. The most successful judicial tweeter in the country is Justice Willett (@JusticeWillett),

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(@nytimes), TWITTER (Oct. 8, 2017), <https://twitter.com/nytimes> [perma.cc/QV5G-CACP]; CNN (@CNN), TWITTER (Oct. 8, 2017), <https://twitter.com/CNN> [perma.cc/GF55-NVQ7]; Fox News (@FoxNews), TWITTER (Oct. 8, 2017), <https://twitter.com/foxnews> [perma.cc/H2Y5-B2HF]; Wall Street Journal (@WSJ), TWITTER (Oct. 8, 2017), <https://twitter.com/wsj> [perma.cc/J27E-EAVH]; MSNBC (@MSNBC), TWITTER (Oct. 8, 2017), <https://twitter.com/msnbc> [perma.cc/8DCB-94UF]; Breitbart News (@BreitbartNews), TWITTER (Oct. 8, 2017), <https://twitter.com/breitbartnews> [perma.cc/GCG8-5ARP].

224. SCOTUSblog (@SCOTUSblog), TWITTER (Oct. 8, 2017), <https://twitter.com/scotusblog> [perma.cc/G9JY-FLYK]; Above the Law (@atlblog), TWITTER (Oct. 8, 2017), <https://twitter.com/atlbog> [perma.cc/PTH7-GETD]; Jeffrey Toobin (@JeffreyToobin), TWITTER (Oct. 8, 2017), <https://twitter.com/jeffreytoobin> [perma.cc/94BR-QJXC]; Nina Totenberg (@NinaTotenberg), TWITTER (Oct. 8, 2017), <https://twitter.com/ninatotenberg> [perma.cc/ST6W-GH69]; Adam Liptak (@adamliptak), TWITTER (Oct. 8, 2017), <https://twitter.com/adamliptak> [perma.cc/9A9X-JAVC]; Andrew C. McCarthy (@AndrewCMcCarthy), TWITTER (Oct. 8, 2017), <https://twitter.com/andrewcmccarthy> [perma.cc/E2JN-VV8B].

225. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 8, 2017), <https://twitter.com/realDonaldTrump> [perma.cc/A58M-RLWP].

226. Hillary Clinton (@HillaryClinton), TWITTER (Oct. 8, 2017), <https://twitter.com/hillaryclinton> [perma.cc/GCZ9-ZBGL]; Paul Ryan (@SpeakerRyan), TWITTER (Oct. 8, 2017), <https://twitter.com/speakerryan> [perma.cc/SB6S-53FV]; Kamala Harris (@KamalaHarris), TWITTER (Oct. 8, 2017), <https://twitter.com/kamalaharris> [perma.cc/9RW4-ZWQD]; Ben Sasse (@BenSasse), TWITTER (Oct. 8, 2017), <https://twitter.com/bensasse> [perma.cc/6FYP-G73E]; Andrew Cuomo (@NYGovCuomo), TWITTER (Oct. 8, 2017), <https://twitter.com/NYGovCuomo> [perma.cc/M5VH-UPYY]; Greg Abbott (@GregAbbott\_TX), TWITTER (Oct. 8, 2017), [https://twitter.com/GregAbbott\\_TX](https://twitter.com/GregAbbott_TX) [perma.cc/J22Y-SN3Y].

227. Jay Van Bavel, *Twitter's Passion Politics*, N.Y. TIMES (July 8, 2017), <https://www.nytimes.com/2017/07/08/opinion/sunday/twitters-passion-politics.html?emc=eta1> [Perma link unavailable] (distinguishing nonmoral emotions and nonemotional moral content, neither of which spreads as well on Twitter as tweets that combine both morality and outrage). This piece reports on their study of half a million public tweets. *See also* William J. Brady et al., *Emotion Shapes the Diffusion of Moralized Content in Social Networks*, 114 PROC. NAT'L ACAD. SCI. 7313 (2017), <http://www.pnas.org/content/114/28/7313.abstract> [perma.cc/JY3N-66NM].

and he has more than 103,000 followers.<sup>228</sup> Judge Dillard (@JudgeDillard) has 10,700.<sup>229</sup> Judge Smith (@judgewesmith) has 513 followers; Judge Bennett (@MarkWBennett) has 312.<sup>230</sup> Even the lower numbers of the two federal judges mark them as among the more successful users of Twitter. Although it is hard to get definitive data (and numbers change over time), Twitter marketing firm *beevo* did a study of thirty-six million Twitter users in 2012. It concluded that a majority of Twitter users have fewer than fifty followers, and that six out of one hundred Twitter users have no followers at all.<sup>231</sup>

Counting followers is not the only, or best, measure of Twitter influence. Some followers are bought and paid for and don't really interact with the material posted. (Some, referred to as "bots," are not even humans.)<sup>232</sup> Conversely, tweets are often viewed by people beyond one's followers through chains of connections (and retweets, replies, and likes) and hashtags (or subject searches) and Twitter's news feed algorithm. There are also measures that Twitter users can take to increase their Twitter footprint. Innumerable articles advise things like tweeting often (but not too often), providing helpful and interesting information, having a distinctive voice, scheduling tweets at the best times, using popular hashtags, including images and links, following other people (so they'll follow you back), interacting with other Twitter users, using other contacts to find Twitter connections, and promoting the Twitter account.<sup>233</sup> A judge wanting to use Twitter as part of her public outreach can ethically adopt these methods, and Twitter's internal analytics can help the judge see which tweets are having the greatest impact so she can adapt her tech-

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228. Justice Don Willett (@JusticeWillett), TWITTER (Oct. 8, 2017), <https://twitter.com/JusticeWillett> [perma.cc/Z554-Q4WC].

229. Chief Judge Dillard (@JudgeDillard), TWITTER (Oct. 8, 2017), <https://twitter.com/JudgeDillard> [perma.cc/P89K-3B8W].

230. William Smith (@judgewesmith), TWITTER (Oct. 8, 2017), <https://twitter.com/judgewesmith> [https://perma.cc/MHJ9-74VL]; Mark W. Bennett (@MarkWBennett1), TWITTER (Oct. 8, 2017), <https://twitter.com/markwbennett1> [perma.cc/62C7-TJLS].

231. BEEVO, AN EXHAUSTIVE STUDY OF TWITTER USERS ACROSS THE WORLD (Oct. 10, 2012), <http://www.beevo.com/twitter-statistics> [https://perma.cc/97HA-JVQR].

232. Sarah Kessler, *How Twitter Bots Fool You into Thinking They Are Real People*, FAST COMPANY (June 10, 2014), <https://www.fastcompany.com/3031500/how-twitter-bots-fool-you-into-thinking-they-are-real-people> [perma.cc/M44D-678X]. Experts disagree about how many of President Trump's followers on Twitter are actually bots (and he is certainly not the only Twitter user with bot followers). For one estimate, see Adam Edelman, *The Billionaire GOP Patron Behind Trump's Social Media Bot Army*, DAILY NEWS, <http://www.nydailynews.com/news/politics/billionaire-gop-patron-behind-trump-social-media-bot-army-article-1.3236933> [Perma link unavailable] (last updated June 10, 2017, 1:14 PM). See also Tim Hwang & Samuel Woolley, *The Most Important Lesson from the Dust-up over Trump's Fake Twitter Followers*, SLATE (June 2, 2017, 11:29AM), [http://www.slate.com/articles/technology/future\\_tense/2017/06/the\\_lesson\\_of\\_the\\_dust\\_up\\_over\\_trump\\_s\\_fake\\_twitter\\_followers.html](http://www.slate.com/articles/technology/future_tense/2017/06/the_lesson_of_the_dust_up_over_trump_s_fake_twitter_followers.html) [perma.cc/946L-M2P9].

233. See, e.g., Dorie Clark & Daniel Vahab, *How to Dramatically Increase Your Twitter Following*, FORBES (Sept. 24, 2013, 10:10 AM), <https://www.forbes.com/sites/dorieclark/2013/09/24/how-to-dramatically-increase-your-twitter-following> [perma.cc/D7ZE-NXW7]; Sarah Dawley, *How to Attract and Engage More Twitter Followers*, HOOTSUITE (Nov. 1, 2016), <https://blog.hootsuite.com/how-to-get-twitter-followers/#Posting> [perma.cc/7DFV-2PE6].

nique accordingly.<sup>234</sup> In addition, a substantial Twitter account could strive to be selected for the ABA Web 100, which now includes awards for social media that would provide a significant boost in visibility among those in the legal profession.<sup>235</sup>

Even prolific judicial tweeters may not get much visible reaction to their tweets. Consider the four exemplars from this article. Justice Willett's "legislating from the bench" tweet got two retweets and seven likes.<sup>236</sup> Judge Dillard's minimalism tweet got three retweets and eight likes.<sup>237</sup> Judge Smith's combined "rule of law" tweets (excluding his retweet of Neal Katyal, which has its own reaction counter) got twenty-three retweets and twenty-two likes.<sup>238</sup> In contrast, President Trump's February 4 "so-called judge" tweet achieved 33,243 retweets and 157,517 likes.<sup>239</sup> Judge Bennett's tweet about mandatory minimum sentencing got one reply, six retweets, and nine likes.<sup>240</sup> Many more people may have read the tweets or clicked through to read the stories to which the tweets link and so these numbers are not a full measure of readership, but without efforts to promote a judge's Twitter account, it will be difficult to have a large impact through occasional tweeting.

Getting noticed is only half the battle. Especially when it comes to using Twitter to communicate positions on disputed issues of legal policy, a judge using Twitter will encounter challenges posed by the polarization of the Twitter experience. In its earliest days, Twitter functioned more like text messaging—a way to exchange personal messages and status updates

234. *Tweet Activity Dashboard*, TWITTER HELP CTR., (Oct. 8, 2017) <https://support.twitter.com/articles/20171990> [perma.cc/VSX9-2YUU].

235. Andy Lefkowitz, *Help the ABA Journal Select the Web 100*, ABA JOURNAL (July 1, 2017, 12:10 AM), [http://www.abajournal.com/news/article/help\\_the\\_aba\\_journal\\_select\\_the\\_web\\_100](http://www.abajournal.com/news/article/help_the_aba_journal_select_the_web_100) [perma.cc/G4L3-DAQE] (soliciting nominations).

236. Justice Don Willett (@JusticeWillett), TWITTER (Sept. 9, 2014, 8:00 PM), <https://twitter.com/JusticeWillett/status/509536749731979264> [perma.cc/VXP6-S5AK]. Some of his other tweets on this same topic got a stronger reaction. Combined, the tweets that come up from a Twitter Advanced Search of his account for "legislate from the bench" resulted in 61 Replies, 462 retweets, and 1161 likes. Twitter Advanced Search for account @JusticeWillett and the phrase "legislate from the bench", TWITTER, <https://twitter.com/search-advanced> (Enter "@JusticeWillett" into "from these accounts." Enter the phrase "legislate from the bench" in "this exact phrase," then click "search." This search was done on Sept. 19, 2017, 2:00 PM).

237. Chief Judge Dillard (@JudgeDillard), TWITTER (June 3, 2016, 11:58 AM), <https://twitter.com/JudgeDillard/status/738776858980814849> [perma.cc/ZQV4-9E4L].

238. William Smith (@judgewesmith), TWITTER (Feb. 4, 2017, 3:40 PM), <https://twitter.com/judgewesmith/status/827995215084412929> [perma.cc/Z2RD-M9MK]; William Smith (@judgewesmith), TWITTER (Feb. 5, 2017, 9:38 AM), <https://twitter.com/judgewesmith/status/828266561148444672> [perma.cc/9MC2-C8TJ]; William Smith (@judgewesmith), TWITTER (Feb. 6, 2017, 5:30 AM), <https://twitter.com/judgewesmith/status/828566600185954304> [perma.cc/52FV-MG8K].

239. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 7:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976> (retweet and like count accessed Oct. 8, 2017) [perma.cc/T9UZ-PCVT].

240. Mark W. Bennett (@MarkWBennett1), TWITTER (May 25, 2017, 1:39 PM), <https://twitter.com/MarkWBennett1/status/867812376325758980> [perma.cc/U66S-KS9L].

among friends.<sup>241</sup> Within a short time, however, it evolved into something more akin to a news aggregator. The company now sees the function of the Twitter user's news feed as "helping users to stay informed with what's going on in the world."<sup>242</sup> It is, in other words, a "real-time, personalized news service."<sup>243</sup>

Twitter users consciously customize their experience by deciding who to follow. Until early 2016, a Twitter user's news feed displayed the posts of the followed accounts chronologically, with the most recent at the top.<sup>244</sup> Because the user chose who to follow, there was always some tendency to choose sources that agreed with the user's general outlook, but studies showed that viewpoint diversity nevertheless crept in, and the internet was not the main force driving political polarization.<sup>245</sup>

The new Twitter "algorithmic timeline" introduced in 2016 (and constantly evolving) may change that. In order to increase engagement, the algorithm is designed to feed the user more of what she wants to see. The top of the news feed will not be chronological, but will rank what the user sees based on variables like a tweet's overall engagement (how many people retweet, click, or like it), how recently it was published, how often that user engages with the tweet's author, how much time that user spends reading tweets by that author (even if the user doesn't click on it),<sup>246</sup> and whether it has the kind of attachment the user tends to engage with most often.<sup>247</sup> In addition to the ranked timeline, the "In Case You Missed It" feature displays slightly older tweets, again according to the algorithm's ranking scores. That may well make Twitter users happy, but as Slate's senior technology editor points out, "you can't see more of some kinds of tweets without seeing less of others."<sup>248</sup>

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241. Amanda MacArthur, *The Real History of Twitter, in Brief*, LIFEWIRE, <https://www.lifewire.com/history-of-twitter-3288854> [perma.cc/TGC3-JTJD] (last updated Apr. 26, 2017).

242. Will Oremus, *Twitter's New Order*, SLATE (Mar. 5, 2017, 8:00 PM), [http://www.slate.com/articles/technology/cover\\_story/2017/03/twitter\\_s\\_timeline\\_algorithm\\_and\\_its\\_effect\\_on\\_us\\_explained.html](http://www.slate.com/articles/technology/cover_story/2017/03/twitter_s_timeline_algorithm_and_its_effect_on_us_explained.html) [perma.cc/Q2VZ-2NZZ].

243. *Id.*

244. *Id.*

245. Pablo Barberá, *How Social Media Reduces Mass Political Polarization. Evidence from Germany, Spain, and the U.S.*, (Paper Prepared for the Am. Political Sci. Ass'n Conference, 2015), [http://pablobarbera.com/static/barbera\\_polarization\\_APSA.pdf](http://pablobarbera.com/static/barbera_polarization_APSA.pdf) [perma.cc/NS3K-MMP5] (arguing that social media use increases incidental exposure to political messages shared by peers of heterogeneous views); Chris Weller, *Facebook and Twitter Don't Polarize People's Political Views, New Study Finds*, BUS. INSIDER (Apr. 19, 2017, 1:16 PM), <http://www.businessinsider.com/social-media-political-bubbles-2017-4> [perma.cc/3H7M-Z2V2] (arguing that the internet is not the primary driver of political polarization); Sarita Yardi & Danah Boyd, *Dynamic Debates: An Analysis of Group Polarization over Time on Twitter*, 30 BULL. SCI., TECH. & SOC'Y 316 (2010) (using response to the murder of a doctor who performed abortions to measure reactions over time); Matthew Gentzkow & Jesse M. Shapiro, *Ideological Segregation Online and Offline*, 126 Q.J. ECONOMICS 1799 (2011).

246. Damon Beres, *Yeah, Twitter's Watching You Even When You're Not Tweeting*, MASHABLE (March 6, 2017), <http://mashable.com/2017/03/06/twitter-algorithms-targeting/> [https://perma.cc/ER96-B75Z].

247. Oremus, *supra* note 235, at 85.

248. *Id.*

It is what users do not see that increases the problem of Twitter polarization and makes it more difficult for Twitter users to reach out to people who don't already agree with them.

[A]s Twitter gets better at showing users the tweets that most resonate with them, the risk is that it's also getting better at reinforcing their biases and abetting their construction of alternate realities—not a marketplace of ideas, but a battlefield pocked with foxholes. . . . The same service that gave Trump's critics a platform to counter his rhetoric with facts also gave his supporters the power to drown them out in a cacophony of abuse and invective.<sup>249</sup>

The operation of the new algorithm has been particularly helpful to popular Twitter users like President Trump. “[I]t’s a safe bet that Trump’s tweets regularly topped his followers’ ranked timelines, ensuring that the missives reached a much wider audience than they would have under the old system.”<sup>250</sup> Those with something to gain from the political impact of Twitter have learned how to use the algorithm to their advantage.<sup>251</sup>

Perhaps the power of numbers could actually increase the impact of a judge responding to an anti-court tweet. The judges discussed in this article did not share their views through replying to someone else’s tweet, but that could be done if desired. An item in a Twitter user’s news feed, if clicked on, will display both the tweet itself and replies to the tweet, and even for those tweets that get thousands of replies, Twitter users who have clicked on the tweet itself might read at least the first few replies. It turns out that Twitter also has an algorithm for which replies are displayed first, and a competition has developed to try to get replies to the top. Want a prime spot to get a reply critiquing a tweet noticed? Tweet that reply instantly and understand how the algorithm works.<sup>252</sup> It is possible, but it seems unlikely that a judge would have the time or would feel comfortable with that kind of encounter, and such direct interaction might increase the danger that an ethics committee would find the tweet comes too close to partisan politics to fall into the safe comments on the legal system category.

Even if judges can get people to read their tweets, it may be difficult to influence Twitter users who already hold firm views on an issue. Confirmation bias not only influences what Twitter content people interact with, but also affects whether they are persuaded by efforts to debunk false

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249. *Id.*

250. *Id.*

251. See Alex Hern, *Facebook and Twitter Are Being Used to Manipulate Public Opinion — Report*, GUARDIAN (June 19, 2017, 1:57 PM), <https://www.theguardian.com/technology/2017/jun/19/social-media-proganda-manipulating-public-opinion-bots-accounts-facebook-twitter> [perma.cc/8NKR-PHVL] (reporting on studies from Oxford University’s Internet Institute).

252. Adrienne LaFrance, *The First Reply to a Trump Tweet is Prime Media Space*, ATLANTIC (Dec. 16, 2016), <https://www.theatlantic.com/technology/archive/2016/12/weird-media-ecosystem/510911> [https://perma.cc/QFP8-BCU9] (noting, for example, prominently displayed replies by both human journalists like Nicholas Kristof and Trump-supportive bots advertising products like a mug to hold “hot liberal tears”).

information.<sup>253</sup> Researchers have found that people continued to believe untrue statements even when direct replies pointed to reliable sources for corrected information.<sup>254</sup> This mirrors the situation outside of Twitter. Even for information as comparatively bland as support for an independent Supreme Court, people's reactions were influenced significantly by their political alignment with what they believed to be the source of a suggested reform.<sup>255</sup> The researchers found that

individuals are less likely to support court-curbing measures when informed that elites from the opposite party have proposed them than when such measures are endorsed by either a neutral source or members of their own party. . . . [And] individuals are more likely to say the justices should be influenced by demonstrators when the side they favor is the one doing the demonstrating.<sup>256</sup>

More direct interactions with those who hold views different from those espoused by a judge also come with a higher risk of online abuse, at least if a judge's tweet were to hit a nerve.<sup>257</sup> Sometimes the judge himself is not the target of Twitter-reply sniping, and it is relatively mild. For example, Justice Willett's mostly nonpartisan Twitter feed has garnered him a multipartisan group of followers. On July 13, 2017, he tweeted a photo of President Reagan and this text: "Only one President since World War II left office when his term expired & was succeeded by someone of the same party."<sup>258</sup> Responses ranged from "Named my only son Reagan . . . nuff said"<sup>259</sup> to "Your pick also holds the record for most staff & administration officials indicted for crimes committed while serving his administration."<sup>260</sup> But there is little or no name-calling among the responses and no attack on Justice Willett.

Commercial Twitter accounts, which for their own reasons have occasionally taken on President Trump, have been met with a string of replies that is far less polite. When sneaker manufacturer Reebok tweeted a

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253. Alessandro Bessi et al., *Social Determinants of Content Selection in the Age of (Mis)Information*, 2014 SOCINFO 259 (2014).

254. *Id.*

255. See Tom S. Clark & Jonathan P. Kastellec, *Source Cues and Public Support for the Supreme Court*, 43 AM. POL. RES. 504 (2015).

256. *Id.*

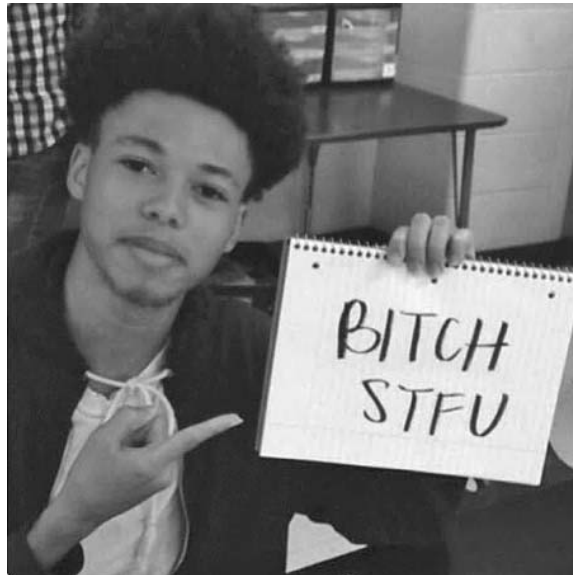
257. For general discussions of "trolling" generally and its impact on internet discourse, see Lee Rainie et al., *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RES. CTR. (Mar. 29, 2017), <http://www.pewinternet.org/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online> [perma.cc/WG5U-YTKB]; Pam Ramsden, *Internet's Cloak of Invisibility: How Trolls are Made*, CONVERSATION (Feb. 27, 2017, 9:31 AM), <https://theconversation.com/internets-cloak-of-invisibility-how-trolls-are-made-73220> [perma.cc/8U4D-2Z7N].

258. Justice Don Willett (@JusticeWillett), TWITTER (July 13, 2017, 8:42 PM), <https://twitter.com/JusticeWillett/status/885675865484427265> [perma.cc/NH4P-29TN].

259. The Conservative Post (@TheConservative), comment to @Justice Willett, TWITTER (Jul. 30, 2017, 8:56 PM), <https://twitter.com/TheConservative/status/885679311809896451> [perma.cc/ZV7Y-BKT4].

260. Todd Wolf (@toddnwolf), comment to @JusticeWillett, TWITTER (Jul. 14, 2017, 8:45 AM), <https://twitter.com/toddnwolf/status/885857770901319680> [perma.cc/NY72-RPX3].

chart<sup>261</sup> satirizing President Trump's statement to the wife of the President of France, "You're in good shape," responders both supported and attacked Reebok, but no reasoned discussion ensued.<sup>262</sup> In my own Twitter feed, a thread started as a legal expert's technical explanation that James Comey's indirect release of his memos was likely not criminal, followed by a reply from a female law dean suggesting that Comey would not have admitted doing so if it did break the law, which in turn was followed by a tweet from a Trump supporter suggesting that Comey is "as crooked as Hillary."<sup>263</sup> At that point, another Twitter user responded with this:



For those who discuss the more controversial issues of the day, Twitter is not for the faint of heart.<sup>264</sup>

261. "When Is It Appropriate to Say 'You're in Such Good Shape . . . Beautiful,'" Reebok (@Reebok), TWITTER (July 14, 2017, 3:31 PM), <https://twitter.com/Reebok/status/885959875393712128> [perma.cc/83AF-LQ74] (including prompts such as "Are you in an elevator with a woman? No" and "Did you just find a forgotten action figure from your youth, unscathed after decades, in your parents' basement? Yes.").

262. *Id.*

263. See Steve Vladeck (@steve\_vladeck), TWITTER (June 8, 2017, 12:51 PM), [https://twitter.com/steve\\_vladeck/status/872873709501112321](https://twitter.com/steve_vladeck/status/872873709501112321) [perma.cc/S93L-6CTT]; Jackie Gardina (@JackieGardina), comment to @steve\_vladeck, TWITTER (June 8, 2017, 1:08 PM), <https://twitter.com/JackieGardina/status/872878053105442816> [perma.cc/V4WX-74L8]; Stacy Gardner (@StacySgardner54), comment to @Jackie Gardina, TWITTER (June 8, 2017, 3:11 PM), <https://twitter.com/StacySgardner54/status/872908931017920513> [perma.cc/BMU6-4EAR].

264. MsKissMyAss (@ThiCC\_BraZiLiaN), TWITTER (June 8, 2017, 3:57 PM), [https://twitter.com/ThiCC\\_BraZiLiaN/status/872920508974723073](https://twitter.com/ThiCC_BraZiLiaN/status/872920508974723073) [perma.cc/X2ZM-87G4]. See also Jenna Johnson, *This Is What Happens When Donald Trump Attacks a Private Citizen on Twitter*, WASH. POST (Dec. 8, 2016), [https://www.washingtonpost.com/politics/this-is-what-happens-when-donald-trump-attacks-a-private-citizen-on-twitter/2016/12/08/a1380ece-bd62-11e6-91ee-1addfe36cbe\\_story.html?nid&utm\\_term=.829259eab8cb](https://www.washingtonpost.com/politics/this-is-what-happens-when-donald-trump-attacks-a-private-citizen-on-twitter/2016/12/08/a1380ece-bd62-11e6-91ee-1addfe36cbe_story.html?nid&utm_term=.829259eab8cb) [perma.cc/

The challenge of developing a following, the existence of Twitter trolls, and the difficulty of piercing the echo chamber of committed partisans are not reasons for judges not to use Twitter. Those forces, however, must inform the techniques a judge would use to get noticed and to try to reach open-minded users who will attend to useful information if appealingly presented. They will test the boundaries of the ways in which views and content can be shared without risking the political activity label. And they reinforce the Twitter reality that a judge who wants a strong impact can't just shoot off the occasional tweet when the mood strikes. It takes a sustained, prolific effort (such as Justice Willett's more than 25,000 tweets since 2009) to be noticed. When weighing the pros and cons of Twitter as an expressive medium, that's a reality to be kept in mind.

## V. CONCLUSION

What's a judge to do? Courts as institutions are under attack, and the three presidential tweets that began this article are not the only battleground. While it has gained far less attention, state court legislation has also been seeking to limit courts' power and manipulate judicial selection. Perhaps most troubling are the bills, introduced in at least seven states in 2017, "that would allow state legislatures to override or refuse to enforce court decisions."<sup>265</sup> Distrust of judges is at the root of this type of law. As one Florida legislator explained, he sought legislative override provisions in order to "curtail the tendency of activist judges to manipulate the law to suit their political views and agendas."<sup>266</sup>

Responding to anti-court rhetoric requires a multi-pronged approach, beginning with far better civics education in our school systems.<sup>267</sup> A fundamental understanding of and commitment to separation of powers, and the courts' role in supporting the rule of law, would be helpful indeed. For adults, ongoing efforts to enhance their understanding of the operation of the courts as well as to respond to specific, unjustified criticisms is also necessary. Judges have traditionally participated in the former but abstained from the latter, believing that personally participating in the

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G78U-KTEV] (narrating the story of an 18-year-old who questioned Trump at a political forum in New Hampshire).

265. Alicia Bannon & Nathaniel Sobel, *Assault on the Courts: A Legislative Round-up*, BRENNAN CTR. FOR JUST. (May 8, 2017), <https://www.brennancenter.org/analysis/assaults-courts-legislative-round> [https://perma.cc/Z88L-9MPX] (reporting that "at least 41 bills in 15 states have targeted state courts").

266. *Striking at Balance of Powers, Florida Lawmaker Files Measures to Nullify Court Decisions*, FLAGLERLIVE.COM (Dec. 28, 2016), <https://flaglerlive.com/103153/nullification-gonzalez/> [perma.cc/JNE8-7VSG].

267. See, e.g., Valerie Strauss, *We Talk a Lot About Civic Education. Here's How to Get Kids Really Engaged in It*, WASH. POST (Nov. 5, 2016), <https://www.washingtonpost.com/news/answer-sheet/wp/2016/11/05/we-talk-a-lot-about-civic-education-heres-how-to-get-kids-really-engaged-in-it> [perma.cc/XY9N-EAKN]. Alternatively, other civics initiatives focus on at least teaching students facts about the structure of government. CIVICS EDUC. INITIATIVE, <http://civicseducationinitiative.org> [perma.cc/KJA4-XMYD] (last visited July 31, 2017).

disputes does more harm than good. But in today's fractious world, can judges really afford to ignore the ongoing assault?

Now that most people get news constantly, and get it online,<sup>268</sup> the Law Day lecture and ninth-grade courthouse visit are like shoveling against the tide with a teaspoon. As California's Ethics Advisory Committee noted, today's "community exists and increasingly interacts in the realm of cyberspace."<sup>269</sup> Advocacy by surrogates such as bar associations is helpful, but for judges who want to do so, communication with the public through social media can make a valuable contribution to a strategy aimed at increased appreciation for the legitimacy of court decision-making. Twitter is a particularly useful tool for such outreach. For some purposes, groups of judges might even want to coordinate public educational efforts or judicial response.

Ethics rules are the biggest obstacle to increased judicial use of social media. In addition to the rules themselves, distrust of a new environment has led ethics committees to preface much of their advice with dire warnings. Connecticut suggests that it is "fraught with peril," Idaho recommends "restraint and caution," and Missouri describes social media use as a source of "unnecessary danger."<sup>270</sup> As with all judicial speech, there are important concerns based on the parties' due process rights—it is improper to disrupt the fairness of pending cases, unfair to engage in ex parte communications about cases, and wrong to preside over a case where the judge's bias against a party or group makes a fair decision appear unlikely. But it is time to let go of generic fear of electronic media and embrace the positive potential of new platforms for communication. Certainly, some judges have done stupid things, particularly on Facebook, but the same is true of more traditional public speaking. Judges should be encouraged to engage rather than warned off social media.

Discouraging any tweet that deals with legal topics that are part of the current debate, just because some might disagree with them, would greatly impoverish the judiciary's ability to contribute to civic education and the improvement of the legal system. To date, much of the discussion of judges and social media focuses on the behavior of judges who have misused social media (often in the "what was she thinking?!" category).

268. Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016> [perma.cc/6B68-W8BN] (62% of U.S. adults get news on social media, and 18% do so often).

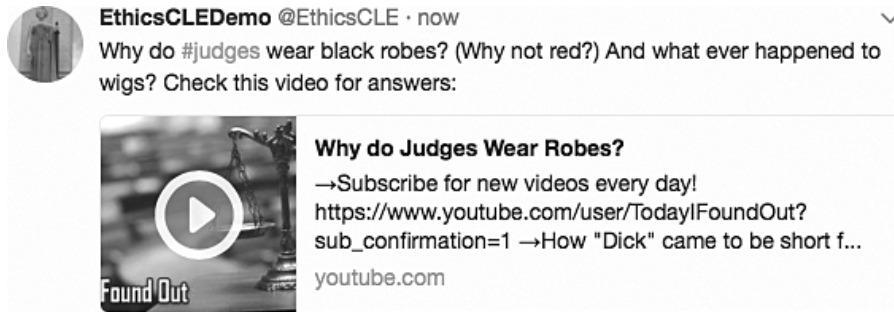
269. Cal. Judges' Ass'n Jud. Ethics Comm., Op. 66 (2010), <http://www.caljudges.org/docs/Ethics%20Opinions/Op%2066%20Final.pdf> [perma.cc/8L37-LPZE].

270. Conn. Comm. on Jud. Ethics, Informal Op. 2013-6, 2013 WL 1556755 at \*2 (2013), <http://jud.ct.gov/Committees/ethics/sum/2013-06.htm> [perma.cc/QM3C-XV3E]; IDAHO CODE OF JUDICIAL CONDUCT r. 3.1 cmt. 5 (IDAHO JUD. COUNCIL 2017), [https://isc.idaho.gov/orders/Idaho\\_Code\\_of\\_Judicial\\_Conduct\\_7.1.16.pdf](https://isc.idaho.gov/orders/Idaho_Code_of_Judicial_Conduct_7.1.16.pdf) [perma.cc/7FQL-EQB2]; Mo. Comm'n on Ret., Removal & Discipline, Op. 186 (2015), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/MOAdvisoryOpinionReSocialMedia.ashx> [perma.cc/KG8C-HFVS].

Consider instead some examples of what might be proper.<sup>271</sup> Some could be aimed at the general public, seeking to increase their understanding of the courts. Others could be aimed at members of the legal profession. Tweets aimed at either audience could go beyond mere description to celebrate certain facets of the court system, to criticize the system, or to urge that changes be made. Some tweets would touch on topics that could be considered controversial but still pose no threat to judicial integrity or independence, and the fact that a judge has raised the issues may lend credibility to the discussion, call attention to the perceived problem, and help spark meaningful conversation both on Twitter and off.

#### A. DESCRIPTION AND EDUCATION

Tweets like the ones below inform the community about facets of the court system and even try to interest people in legal careers.<sup>272 273 274 275</sup>



271. Genuine tweets from actual judges include their handles. Tweets from the “EthicsCLEDemo” or “EthicsDemo” account are fictional and were created for this article.

272. Linking to Today I Found Out, *Why Do Judges Wear Robes*, YOUTUBE (May 12, 2016), <https://www.youtube.com/watch?v=gtyvOM4hIck> [perma.cc/R6CQ-X5DE].

273. Linking to RadioLab Presents: *More Perfect*, *Kittens Kick the Giggly Blue Robot All Summer*, WNYC (June 30, 2016), <http://www.wnyc.org/story/giggly-blue-robot/> [perma.cc/GZM3-ZAFB].

274. Linking to Keith Hughes, *Article III for Dummies: The Judiciary Explained*, YOUTUBE (Oct. 17, 2013), [https://www.youtube.com/watch?v=UG0ZaAVF\\_i4](https://www.youtube.com/watch?v=UG0ZaAVF_i4) [perma.cc/L4CY-GPWT].

275. Linking to the UC Hastings Law School, *This is Why We Work for Justice*, YOUTUBE (June 26, 2017), <https://www.youtube.com/watch?v=18fsuOrgBtE> [perma.cc/6V9P-N39B].

**EthicsCLEDemo**

@EthicsCLE

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Awesome #SCOTUS history on this podcast:  
Kittens Kick the Giggly Blue Robot All  
Summer (Wait, what?)

**Radiolab Presents: More Perfect | WNYC**

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This video explains:

**Article III For Dummies: The Judiciary Explained**

The Constitution for Dummies Series returns covering Article 3 of the Constitution, the Judicial Branch. This funky, well organized video lecture will make s...

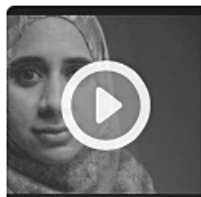
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[youtube.com](http://youtube.com)

## B. PRAISE FOR THE SYSTEM OR PROPOSALS FOR CHANGE

As noted when discussing the example tweets of Judges Bennett and Smith, judges can comment on mandatory minimum sentencing in criminal cases or on the effect of implicit bias in the courts. And there are so many additional options.

Judges could promote bail reform initiatives:<sup>276</sup>



**Brandon Birmingham**

@JudgeBirmingham

Following



I am very proud to work with all of my judicial colleagues on this issue, we are all going to bat! Together we are making the system better!

**Courtney Hopping** @CourtShopping

Bipartisan bill could get rid of money bail system [fox4news.com/news/270091247....](https://www.fox4news.com/news/270091247...)

Thanks @JudgeBirmingham for going to bat on needed #bailreform

9:46 AM - 26 Jul 2017

They could call attention to legal needs of low-income households (and self-represented litigants):<sup>277</sup>

276. Brandon Birmingham (@JudgeBirmingham), TWITTER (July 26, 2017, 9:46 AM), <https://twitter.com/JudgeBirmingham/status/890221882267521024> [<https://perma.cc/J7N3-ENQV>].

277. Justice Bridget Mary McCormack (@BridgetMaryMc) retweeting Legal Services Corp. (@LSCtweets), TWITTER (July 26, 2017 3:43 PM), <https://twitter.com/LSCtweets/status/890311722464051205> [[perma.cc/CQ59-SQN7](https://perma.cc/CQ59-SQN7)].

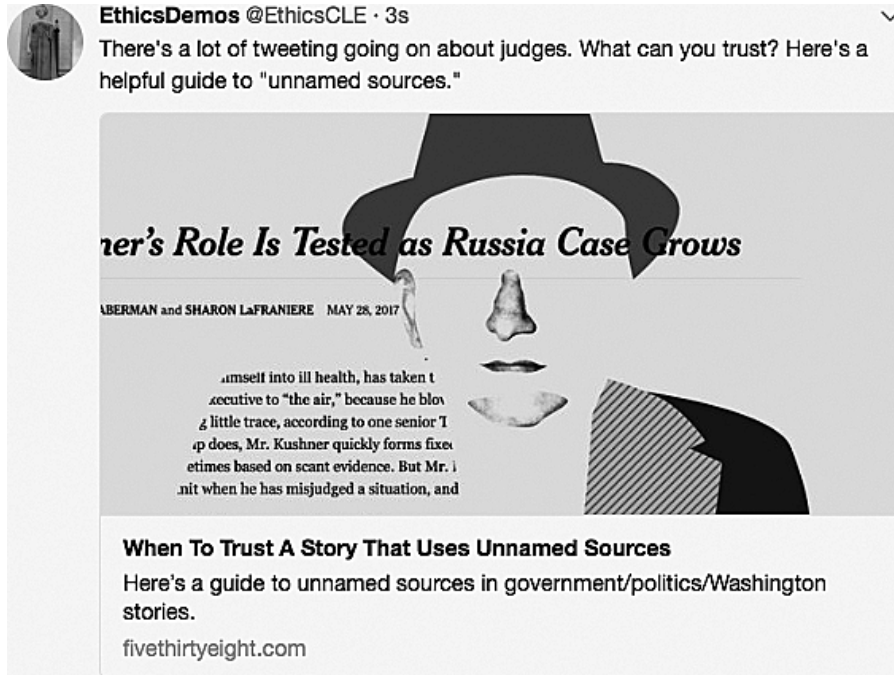
Justice McCormack Retweeted

LSC **Legal Services Corp.** @LSCtweets · Jul 26  
LSC's recent #justicegap study shows how often low-income families confront civil legal problems: [lsc.gov/justicegap2017](http://lsc.gov/justicegap2017)

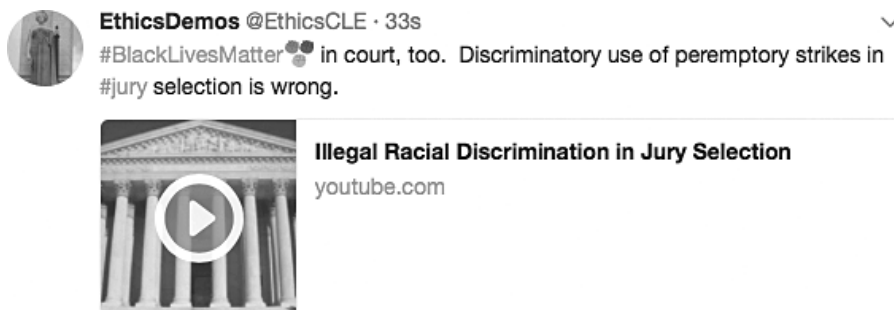


Tweets could also provide the tools to help the public evaluate social media (and mainstream media) coverage of courts and judges:<sup>278</sup>

278. Linking to Perry Bacon, Jr., *When to Trust a Story That Uses Unnamed Sources*, FIVETHIRTYEIGHT (July 18, 2017, 6:00 AM), <https://fivethirtyeight.com/features/when-to-trust-a-story-that-uses-unnamed-sources/amp/> [perma.cc/T3MV-Z3JK].



Judges could express concern about discriminatory use of peremptory strikes.<sup>279</sup>



279. Linking to Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection*, YOUTUBE (June 1, 2010), <https://www.youtube.com/watch?v=UFH2IitQzps> [perma.cc/45CM-D26N]. Some ethics committees might be concerned that the #BlackLivesMatter hashtag included in this tweet would make it too controversial or that the tweet indicates an antistrike bias that might impact *Batson* rulings. *Batson v. Kentucky*, 476 U.S. 79 (1986). Some judges might therefore prefer to link to the Federalist Society video taking on the same issue. The Federalist Society, *Jury Selection & Batson v. Kentucky*, YOUTUBE (Nov. 4, 2015), <https://www.youtube.com/watch?v=PDKbPQln65g> [perma.cc/7HLF-J9YJ]. In either case, note that this tweet does not accuse any particular litigant or type of litigant of discriminatory use of peremptory challenges. Cf. Matthew Glowicki, *Judge Kicked off Cases over Online Comments*, COURIER-JOURNAL, <http://www.courier-journal.com/story/news/local/2015/11/18/prosecutor-wants-judge-off-cases-over-racial-stand/75957606> [perma.cc/7G2P-GNS7] (last updated Nov. 19, 2015, 9:32 AM) (discussed in Browning, *supra* note 30, at 137–43).

The possibilities are almost endless and allow judges to highlight legal issues that are important to them. While these examples link to content created by others, judges could also take the time to create (and link to) longer content outside of Twitter to provide further information.

Twitter is no panacea. As a medium, it has its own problems of data-driven echo chamber effects, and developing a sufficient following to make a difference requires consistent effort. But judges have a unique perspective based on their experience in judging, and as such they can contribute to the conversation in a way that bar associations cannot. As demonstrated above, the types of tweets that could enlighten the public and encourage discussion of reform proposals can be done without breaching ethics prohibitions. Even direct responses to tweets demeaning other judges, so long as those responses are about the judicial role rather than the merits of any underlying litigation, should not be found to be political activity or to run afoul of the prohibition on discussing controversial disputed issues. So tweet on, judges. While few will be named “Tweeter Laureate,”<sup>280</sup> the power of 280 characters is in your hands.

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280. Chris McNary, *Meet the State Supreme Court Justice Who's Also Texas' "Tweeter Laureate"*, DALL. MORNING NEWS (June 5, 2015), <https://www.dallasnews.com/news/local-politics/2015/06/05/meet-the-state-supreme-court-justice-who-s-also-texas-tweeter-laureate> [perma.cc/EXC2-YGGQ] (Justice Willett compares being the most avid judicial tweeter in America to being the “tallest Munchkin in Oz”).