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Reflections on the Influence of Social Media on Judging

Peter D. Lauwers*

Reflections on the Influence of Social Media on Judging

This essay examines the influence of social media on judging. While the ethical implications of judges' engagement in social media have received some scholarly attention, the actual influence of social media on judging has not.¹ But it is possible to make some useful observations that might at once seem obvious and disquieting.

This essay is divided into four parts. Part 1 describes the normative judicial disposition. Part 2 examines the psychology of judging. Part 3 asks what could go wrong with the judicial use of social media. Part 4 describes a stance judges might take towards social media.

I. THE JUDICIAL DISPOSITION

The task of a judge is, in any particular case, to do the right thing for the right reason in the right way at the right time and in the right words. But God, and the devil, are in the details.

We judges arrive on the scene of every case carrying with us the baggage of our lives to that moment, including the influence of our culture, all of which “molds the orientation of [our] intelligence”² so that what “emerge[s] in consciousness [is] already patterned, and the pattern is already charged emotionally.”³ Judges must discern what we must step back from, and what we must hold on to in hearing cases and dispensing justice. Discernment amidst distraction. This is not a small challenge.⁴

* Justice of the Court of Appeal for Ontario. This essay is based on a talk given at the 2019 Conference of the Canadian Institute for the Administration of Justice on the Impact of Artificial Intelligence and Social Media on Legal Institutions. Eric Freeman, a clerk of the Court of Appeal for Ontario, with whom I had the good fortune to work closely, very ably assisted in the preparation of this essay.

¹ For a discussion of some of the ethical considerations, see Lorne Sossin & Meredith Bacal, “Judicial Ethics in a Digital Age” (2013) 46:3 U.B.C. L. Rev. 629.

² Bernard JF Lonergan, *Insight: A Study of Human Understanding*, Frederick E Crowe & Robert M Doran, eds (Toronto: University of Toronto Press, 1992) at 243.

³ *Ibid* at 212; see also Robert M Doran, S.J., “Empirical Consciousness in *Insight*: Is Our Conception Too Narrow?” in John J Liptay & David S Liptay, eds, *The Importance of Insight: Essays in Honour of Michael Verin* (Toronto: University of Toronto Press, 2007) 49 at 60.

⁴ See, e.g., Canadian Judicial Council, *Ethical Principles for Judges* (1 January 2004), online: https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_judicialcon-

The root expectation is that judges will be and will be seen to be impartial, objective, and independent. Consider Amartya Sen's idea of "open impartiality," which he borrows from Adam Smith:

Smith invoked the reflective device of the impartial spectator to go beyond reasoning that may — perhaps imperceptibly — be constrained by local conventions of thought, and to examine deliberately, as a procedure, what the accepted conventions would look like from the perspective of a "spectator" at a distance. Smith's justification of such a procedure of open impartiality is spelt out thus:

We can survey our own sentiments and motives, we can never form any judgment concerning them; unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us. But we can do this in no other way than by endeavouring to review them with the eyes of other people, or as other people are likely to view them.⁵

The judge's ability to stand back and take that impartial, objective, and independent view has always been essential. But today we face something quite new in the culture: the advent of social media.

II. THE PSYCHOLOGY OF JUDGING

Is true deliberation even possible? The short answer is "Yes, but. . ." We know something about how our minds and brains work, and about the cognitive illusions or biases that afflict us.

Psychologists now posit two basic cognitive structures.⁶ The first is known as System 1. It is intuitive, relatively automatic, and responds quickly. By contrast, System 2 involves deliberative thought. If a problem is too complex for System 1, System 2 takes over. But System 2 is energy-intensive, and people try to minimize its use. Psychologist Daniel Kahneman asserts that System 2 is lazy.⁷ While it can do cognitively complex tasks, it seeks shortcuts wherever possible.

Some contrasts between the two systems are set out in the following table:⁸

duct_Principles_en.pdf See specifically the commentary on Diligence for a discussion on some of the adjudicative duties of judges.

⁵ Amartya Sen, *The Idea of Justice* (Cambridge: The Belknap Press of Harvard University Press, 2009) at 125.

⁶ For a fuller exposition see Peter D Lauwers, "What Could go Wrong with Charter Values?" (2019) 91 S.C.L.R. 1 at 30-39.

⁷ Daniel Kahneman, *Thinking, Fast and Slow* (Toronto: Anchor Canada, 2011). The two-system model has been challenged, but not in a manner that undermines the operation of intuition as outlined in this paper: see Hugo Mercier & Dan Sperber, *The Enigma of Reason: A New Theory of Human Understanding* (London: Penguin, 2017). See also Linda L Berger, "A Revised View of the Judicial Hunch" (2013) 10 Legal Comm & Rhetoric: JALWD 1.

⁸ Adapted from Kahneman, *ibid.*

System 1	System 2
Intuition	Reasoning
Instinctive	Deliberative
Inferential	Argumentative
Unconscious	Conscious
Automatic	Controlled
Gullible and biased to believe	Capable of doubting and disbelieving
Fast	Slow, lazy
Emotional	Conceptual
Inarticulate	Loquacious

Humans possess a finite amount of cognitive capacity; working memory and attention span are limited.⁹ This means that “mental processes can be overloaded by a surplus of distractions being present at a given time.”¹⁰ Moreover, distractions that engage “mental processes can reduce available cognitive capacity over time, much like driving a vehicle depletes its available fuel reserves.”¹¹

In an influential article entitled “Blinking on the Bench: How Judges Decide Cases,” the authors assert that “judges generally make intuitive decisions but sometimes override their intuition with deliberation.”¹² They note the “importance of deliberation in constraining the inevitable, but often undesirable, influence of intuition.”¹³ In short, “judges should use deliberation to check their intuition,”¹⁴ because “deliberative decision making is more likely than intuitive decision making to lead to just outcomes.”¹⁵ This conviction is deeply rooted in our system of justice.¹⁶

The prescription that emerges from the psychology is this: judges must suspend judgment and use deliberative thought to assess the validity of their intuitive understanding. That is, judges must expand reliance on System 2 as a check on System 1.

⁹ John M Newman, “Antitrust in Digital Markets” (2019) 72:5 Vand. L. Rev. 1497 at 1505.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Chris Guthrie, Jeffrey J Rachlinski & Andrew J Wistrich, “Blinking on the Bench: How Judges Decide Cases” (2007) 93 Cornell L. Rev. 1 at 3.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid* at 6.

¹⁶ For example, the common law rules of evidence often structure and condition what inferences a trier of fact is permitted to draw from specific evidence.

What About Biases?

Psychologists have also discovered that judges are prey to numerous other cognitive illusions, or biases in human thinking. In an article entitled, “Inside the Judicial Mind” the authors observe: “Judges make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment.”¹⁷ It is beyond the scope of this talk to exhaustively explore the range of cognitive illusions to which judges are prey. I will pick out only a few.

The Framing Effect

The framing effect is a cognitive bias in which the decision-maker is influenced by how a choice is framed. Choices can often be framed in more than one way, highlighting either the positive or negative aspects of a particular option. Although two outcomes might be otherwise comparable, a decision-maker could be influenced by how a particular choice is framed.¹⁸ Framing is a method advocates use to attract positive judicial attention. Advocates aim to frame the question for determination in a way that aligns their preferred outcome with what they believe to be the natural sympathies of the court — hoping that the judge will be enticed to favour their position.¹⁹

The Halo Effect

First impressions matter. The halo effect is a cognitive bias in which one’s overall impression of a person influences one’s evaluation of that person’s specific traits or actions. This is the modern version of the old rhetorical device of ethos. As Kahneman notes, “[t]he halo effect helps keep explanatory narratives simple and coherent by exaggerating the consistency of evaluations: good people do only good things and bad people are all bad.”²⁰

The halo effect can impact a judge’s approach to a case. Although the rules of evidence—such as the strict rules relating to character evidence—have developed in a way to help counteract this cognitive bias, judges must remain vigilant. For example, if a factum is poorly written, a judge may be less inclined to give a meritorious argument the weight it deserves. In a 2006 interview, Justice Antonin Scalia noted: “[i]f you see someone who has written a sloppy brief, I’m

¹⁷ Chris Guthrie, Jeffrey J Rachlinski & Andrew J Wistrich, “Inside the Judicial Mind” (2001) 86 Cornell L. Rev. 777 at 783.

¹⁸ Kahneman, *supra* note 7; see also Amos Tversky & Daniel Kahneman, “The Framing of Decisions and the Psychology of Choice” (1981) 211:30 Science 433.

¹⁹ See e.g. Pedro Bordalo, Nicola Gennaioli & Andrei Shleifer, “Salience Theory of Judicial Decisions” (2015) 44: 1 J. Leg. Stud. 7; Chris Guthrie, Jeffrey J Rachlinski & Andrew J Wistrich, “Judging by Heuristic - Cognitive Illusions in Judicial Decision Making” (2002) 86:1 Judicature 44 at 46-47.

²⁰ Kahneman, *supra* note 7 at 199-200.

inclined to think that person is a sloppy thinker. It is rare that a person thinks clearly, precisely, carefully, and does not write that way. And contrariwise, it's rare that someone who is careful and precise in his thought is sloppy in his writing."²¹ Similarly, lawyers have reputations, and judges must be careful not to allow a lawyer's prior reputation—good or bad—to colour their analysis of the arguments.

The Affect Bias: The Effect of Emotions

Another cognitive illusion is known as the affect heuristic. This harkens back to the ancient rhetorical device of pathos. The emotional responses of System 1 overwhelm the deliberative responses of System 2, which then functions as an apologist for our emotional responses.

Advocates often appeal to emotions and judges must routinely make allowance for their own emotional reactions. It would obviously be wrong, for example, for a decision-maker's subjective feelings about a party, an advocate, or an expert, to influence the outcome of a case. Empathy, feeling compassion, is natural, but giving unbridled effect to it is a matter of deliberate choice.

The evidence is that “judges—like most adults—do not easily convert their emotional reactions into orderly, rational responses.”²² When emotions take over, they distort deliberative reasoning, which can be transformed into “motivated cognition” or “motivated reasoning.”²³ When that happens, instead of an impartial assessment of the evidence and arguments, the decision-maker looks for evidence and arguments that support the desired outcome in a way that is not impartial. Research shows “[t]he reach of emotions is also difficult to detect and hard to control” so that, “even with effort, powerful emotional content can easily influence what otherwise appear to be rational judgments.”²⁴

The Confirmation Bias

One of the “most robust and ineradicable” biases is the confirmation bias, says social psychologist Jonathan Haidt. This is “the finding that when we evaluate a proposition, we don't look for evidence on both sides and then weigh

²¹ Bryan A Garner, “First Impressions Endure, Even in Brief Writing” (1 May 2015) A.B.A. J., online: http://www.abajournal.com/magazine/article/first_impressions_endure_even_in_brief_writing > .

²² Andrew J Wistrich, Jeffrey J Rachlinski & Chris Guthrie, “Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?” (2014-2015) 93 Tex L Rev 855 at 863.

²³ *Ibid* at 869-870; Hugo Mercier & Dan Sperber, “Why Do Humans Reason? Arguments for an Argumentative Theory” (2011) 34 Behav & Brain Sci 57 at 66.

²⁴ Wistrich et al, *ibid* at 863. The research giving rise to these findings involved highly contentious issues calculated to engage emotions, including illegal immigration, medical marijuana, strip searches, credit card debt, narcotics searches, and environmental pollution.

up which side is more likely to be true.” He explains: “Rather, we start with an initial hunch and then we set out to see if we can find any evidence to confirm it. If we find any evidence at all, we have confirmed the proposition, and we stop thinking.”²⁵

Although our adversarial system of justice and the rules of evidence have developed to counteract this cognitive bias, judges and others in the legal profession must remain vigilant. Evidence on all sides must be fairly scrutinized and weighed.

Counteracting Bias

In a recent article I argued that the rule of law evolved in order to constrain the exercise of discretionary power by decision-makers like judges and tribunal members in view of their basic human weaknesses and the lure of power. The rule manifests in a set of institutional features including the adversarial system, the rules of evidence, procedural codes, the legal context of disputes, and the obligation of judges and tribunals to give adequate reasons. My view is that we would be foolish to diminish, disrespect or abandon the restraining function of the rule of law, which is attuned to the psychology of decision-makers and rooted in human nature.²⁶

In particular, the adversarial system is designed to counteract judicial biases, especially the confirmation bias, by providing a framework for the presentation of disconfirming evidence and argument. Jonathan Haidt and his co-author assert that: “thinking is social.” The implication is that “[a] lone individuals, each of us is not terribly smart, for we are all prone to cognitive distortions and the confirmation bias, but if you put people into the right sorts of groups and networks, where ideas can be shared, criticized, and improved, something better and truer can emerge.”²⁷

The adversarial system embeds disputes in just such a disconfirming network in order to provoke deliberation.

However, at its worst, social media may undermine true deliberation, and exploit the inherent cognitive illusions to which we are all susceptible.

III. WHY WORRY ABOUT SOCIAL MEDIA?

There has been virtually no research done on the influence of social media on judging, but it is not hard to imagine various crunch points, considering the

²⁵ Jonathan Haidt, “Moral Psychology and the Law: How Intuitions Drive Reasoning, Judgment, and the Search for Evidence” (2013) 64 *Alta L Rev* 867 at 873.

²⁶ Lauwers, *supra* note 6 at 61.

²⁷ Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure* (New York: Penguin Press, 2018) at 271.

contest between intuition and deliberation, and the existence of cognitive illusions or biases.

First, and perhaps most obviously, social media has the potential to distract and monopolize a person's limited available mental resources. Numerous psychological studies have examined the distracting nature of social media, and the evidence indicates that social media can be cognitively debilitating.²⁸ That is, distraction can impair or interrupt the deliberative processes of System 2. Also, social media can be highly addictive and the legal community is not immune to their seductive lure.²⁹ Besides their potentially distracting and mentally draining effects, social media can have more subtle impacts.

Social media fit into the judicial world both pervasively and specifically. Judges are not disembodied creatures sitting off in some remote place in the universe, but are embodied creatures located in time and place. Our culture is the formative matrix in which we live and move and have our being. It generated us and sustains us, inhibits us, nurtures us, and, in some sense, absorbs us. The culture also stands against us, like Oliver Wendell Holmes's proverbial "brooding omnipresence in the sky."³⁰ It has a life of its own. Social media are deeply embedded in that culture.

Social media look to stimulate several primal human urges such as curiosity, sociability, and the passion for narrative and for justice, among others. These urges all have an addicting affective or emotional salience.

In her recent book, provocatively entitled *Social Media and Morality: Losing Our Self Control*, Lisa S. Nelson observes, "[w]hether in the form of images or misrepresentations or the vilest of what our imagination might otherwise resist, social networking technologies deliver us a reality to which we react." She adds that "social networking technologies interweave subjects and objects in the interpretation or constitution of reality and, in doing so, mediate human perceptions" of the real.³¹

To the same effect are prescient comments by Canadian philosopher George Grant. His view was that technology is not neutral in its impact on human

²⁸ See, e.g., Eyal Ophir, Clifford Nass & Anthony D Wagner, "Cognitive Control in Media Multitaskers" (2009) 106:37 *Proceedings of the National Academy of Sciences* 15583; Larry D Rosen, L Mark Carrier & Nancy A Cheever, "Facebook and Texting Made Me Do It: Media-induced Task Switching while Studying" (2013) 29:3 *Computers in Human Behaviour* 948; Larry Rosen & Alexandra Samuel, "Conquering Digital Distraction" *Harvard Business Review* (June 2015), online: <https://hbr.org/2015/06/conquering-digital-distraction> > .

²⁹ Terry Davidson, "Social Media Distraction 'Widespread' in the Legal Profession, Say Expert" *The Lawyer's Daily* (18 September 2019), online: <https://www.thelawyersdaily.ca/articles/15313/social-media-distraction-widespread-in-legal-profession-says-expert> > .

³⁰ Holmes J. dissenting in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) at 222.

³¹ Lisa S Nelson, *Social Media and Morality: Losing Our Self Control* (Cambridge: Cambridge University Press, 2018) at 86. See Brett Frischmann and Evan Sellinger, *Re-Engineering Humanity* (Cambridge: Cambridge University Press 2018).

thinking and behaviour. The medium, to paraphrase Marshall McLuhan, does carry a message quite apart from the words communicated by the medium. We are gradually discerning what that message is, said Grant. Because “computers can only exist in societies in which there are large corporate institutions,” they “are not neutral instruments, but instruments which exclude certain forms of community and permit others.”³² The values embodied in this manipulatable technology exert pressure on us to conform. Technology can function as an instrument of colonization by which its mores gain supremacy, unless we are careful.

In our current cultural dispensation, we are taken to be autonomous individuals whose lives are entirely governed, or should be, by our free choices. At least that is the dominant mythos in our liberal democratic society. The motif of “losing our self-control” is hardly consonant with that vision.

So it is paradoxical that just when the cultural wind of radical autonomy is blowing strong — that human nature is entirely malleable and the function of personal choice, big data is busy assessing our personal data and creating algorithms designed to manipulate our emotions, our thinking, our beliefs, our behaviour, our political affiliations, and to get us to buy stuff. These algorithms are designed to exert seriously formative influences on us individually and collectively. The evidence suggests that they are effective.

Sean Parker, the first president of Facebook, said this in a 2017 interview:

The thought process that went into building these applications, Facebook being the first of them. . . was all about: “How do we consume as much of your time and conscious attention as possible?” . . . and that means that we need to sort of give you a little dopamine hit every once in a while, because someone liked or commented on a photo or a post or whatever. And that’s going to get you to contribute more content, and that’s going to get you. . . more likes and comments. . . it’s a social — validation feedback loop. . . exactly the kind of thing that a hacker like myself would come up with, because you’re exploiting a vulnerability in human psychology.³³

Let me sharpen things a bit more. Researchers have shown that it is possible to accurately predict a person’s personality type based on their interactions on social media.³⁴ Combine that with all the data trails you leave in your Google searches, Twitter feeds, YouTube views, e-reading, sites visited, Amazon buys, stores visited, places in stores visited, purchases made and so on. The internet is a relentless and unforgetting surveillance machine.

³² George Grant, *Technology & Justice* (Concord: House of Anansi Press Ltd., 1986) at 26.

³³ Taken from Lukianoff & Haidt, *supra* note 27 at 147.

³⁴ See Danny Azucar, Davide Marengo & Michele Settanni, “Predicting the Big 5 Personality Traits From Digital Footprints On Social Media: A Meta-Analysis” (2018) 124 *Personality & Individual Differences* 150.

Zeynep Tufekci wrote a meditation on the impact of digital technology on politics entitled “Engineering the Public: Big Data, Surveillance and Computational Politics.”³⁵ But it has broader implications. Professor Tufekci describes the algorithms used to discern an individual’s personality traits. One technique is known as modeling:

Crucially, this type of modeling allows access to psychological characteristics that were beyond the reach of traditional databases, as invasive as those might have been considered. Personality traits such as “openness” or “introversion” or “neuroticism” are traditionally measured by surveys, which have been developed and validated by psychologists and used on a large number of people for decades. [Researchers have demonstrated] that models based on Facebook likes were as good as scientific scales. In other words, without asking a single question, researchers were able to model psychological traits as accurately as a psychologist administering a standardized, validated instrument.³⁶

Our involvement in social media renders us transparent. And transparency makes us manipulatable if we are not self-aware, and perhaps even if we are.

In a forthcoming article, Jeffrey L. Fisher and Allison Orr Larsen argue that advocacy before the United States Supreme Court has changed in the digital era. They argue that the advent of blogs, Twitter, podcasts and various other forms of social media has led to the rise of “virtual briefing” in which online advocacy—either written or oral—is “targeted at particular cases pending at the Supreme Court and outside of the normal briefing process.”³⁷ The authors note how arguments are developed and then re-calibrated in real time using online mediums:

[Arguments] are fleshed out and explored in blog posts; the advocates are invited to elaborate on popular podcasts (sometimes even just days before or after their oral argument); and the Justices’ musings at argument are analyzed and re-analyzed publicly and by a wide variety of players at the very same time the law clerks are writing bench memos and the Justices are making their decisions.³⁸

The authors assert that an examination of the court’s decisions, oral arguments, and the Twitter patterns of law clerks shows that “there *are* reasons to suspect that the Justices—and their law clerks—are listening, and it is that connection to

³⁵ Zeynep Tufekci, “Engineering the Public: Big Data, Surveillance and Computational Politics” (2014) 19:7 *First Monday J*, online: <https://firstmonday.org/article/view/4901/4097> > .

³⁶ *Ibid.*

³⁷ Jeffrey L Fisher & Allison Orr Larsen, “Virtual Briefing at the Supreme Court” (2019) *Williams & Mary Law School Research Paper No. 09-397* at 8.

³⁸ *Ibid* at 4.

the Court that makes virtual briefing worthy of careful consideration.”³⁹ There is no reason to expect the situation in Canada to be different.

Even though our involvement in social media might render us transparent to others, ironically, we are not transparent to ourselves. The Delphic oracle’s ancient admonition was: “Know thyself”. You can only become transparent to yourself if you know yourself. What are the inclinations, dispositions, and personality traits that you need to monitor and lean against in the interests of maintaining impartiality, objectivity and independence? We do not want to become the tools of our tools. What are your buttons and strings? Do you know? Do judges know?

We need to go deeper. Consider what psychologists have identified as the “big five” basic personality traits,⁴⁰ and where each of us happens to be on the associated spectrums. The canonical traits are openness, conscientiousness, extroversion, agreeableness, and neuroticism.

Each of the big five domains has two aspects. The conscientiousness trait comprises industriousness and orderliness, as opposed to carelessness. People high in this trait value hard work, rules, order, reliability and duty. Judges probably rank high in conscientiousness, because it is difficult to have had a successful law career unless one is conscientious. This suggests that one is inclined to do one’s duty despite one’s other inclinations. A good start for a judge.

Openness to experience comprises openness and intellect. People who score high in openness are creative. The opposite is cautious. People who score high in the intellectual aspect enjoy abstract thinking and aesthetics.

The extroversion trait comprises sociability and assertiveness. The opposite is reservedness. The agreeableness trait comprises compassion and politeness. The opposite is detachment or disagreeableness.

Neuroticism comprises anxiety or volatility, and withdrawal. People high in neuroticism are shy and are sensitive to pain, threats and fear. The correlate is emotional stability.

The big five personality traits can give us meaningful insight into our own psychology. Judges’ personal traits could affect their judicial dispositions and behaviours, including what they might be inclined say in open court, or in reasons for decision, or do in choosing outcomes.

A judge might be inclined to fear negative feedback, on the one hand, or to hope for positive feedback, on the other hand. How approval-seeking is the judge?

Fear of negative feedback could inhibit clear and candid expression; this could be prudent, but, if it deprives the judge of courage, it can be counterproductive.

³⁹ *Ibid* at 24.

⁴⁰ See Colin G DeYoung, Lena C Quilty & Jordan B Peterson, “Between Facets and Domains: 10 Aspects of the Big Five” (2007) 93: 5 *J Personality & Social Psychology* 880.

On the other side is the hope of positive feedback. This is playing to a notional audience for approval, seeking to be what Chief Justice Lamer disdainfully called “the popular judge.”⁴¹ Such notoriety can add to a judge’s influence and may assist in achieving future ambitions. But both attitudes are plainly biases.

Social media trigger emotional and intuitive, rather than deliberative responses, by design. As sources of both abundant information and endless distraction, social media may overload a judge’s finite cognitive capacity, resulting in further reliance on System 1. As valuable as intuition is, deliberation is necessary as a counter balance. That was the key point established by the research on judicial bias. As high performing individuals, judges are quite likely to overestimate their personal capacity to resist seduction. But they must do so in order to maintain impartiality, objectivity and independence.

IV. WHAT STANCE SHOULD JUDGES TAKE REGARDING SOCIAL MEDIA?

I use the word “stance” in preference to the word “stand.” The posture of stance is meant to evoke the idea that we are called upon to test everything and embrace the good. This is the stance of confident and principled openness. Taking a stand, by contrast, is assuming a defensive posture, which rarely works. Judges can take that cultural energy, move with it, but bend it to judicial purposes.

In *The Nature of the Judicial Process*, Benjamin Cardozo wrote:

I do not doubt the grandeur of the conception which lifts [judges] into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. Nonetheless . . . they do not stand aloof on these chill and distance heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.⁴²

The advent of social media is a great tide that is surging through modern society. As human beings immersed in a culture of a particular time and place, judges should not needlessly detach themselves from the common practices of life in modern society. Such detachment may unnecessarily isolate them from the public that they serve.

⁴¹ Antonio Lamer, “The Role of the Judge in the 20th Century” in Yves-Marie Morissette, Wade MacLauchlan & Monique Ouellette, eds, *Open Justice*, Les Éditions Thémis (Montreal: Canadian Institute for the Administration of Justice, 1994) at 14; see his testimony in the *Proceedings of the Standing Senate Committee on Human Rights*, 37th Parl., 1st Sess. (15 April 15 2002) at 23: “I fear the popular judge and I fear even more the judge that wants to be popular.”

⁴² Benjamin J Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 168.

Despite the prevalence in social media of vapid distractions, it cannot be denied that much social, economic, political and community interaction occurs in this virtual space. Today's public square includes the diverse array of platforms and mediums where discussion and debate occur. A technologically illiterate judiciary, or one ignorant of the dominant cultural touchstones of modern society, is ill-suited to truly grapple with the pressing legal challenges in the modern world.

I have explored some of the dangers inherent in the use of social media by judges, but there are benefits that cannot and should not be unduly discounted. Given the degree to which social media have become an essential feature of the cultural zeitgeist, a judge who has no engagement with any form of social media could risk becoming overly detached from the public the judge is serving.

In his speech entitled, "Must a Judge be a Monk — Revisited," Justice John Sopinka lamented the pressure some judges feel to adopt a "monastic lifestyle" and to "[withdraw] completely from society."⁴³ In his view, complete isolation and detachment poses a risk to the image of the judiciary: "No longer can we expect the public to respect decisions from a process that is shrouded in mystery and made by people who have withdrawn from society."⁴⁴

Chief Justice McLachlin spoke to the same effect in a speech entitled "The Relationship Between the Courts and the Media":

One thing seems to me to be clear. In facing the reality of the modern communications revolution, it is crucial that we understand the technology and how it is being used — something lawyers and judges, often castigated as Luddites, may not find easy. And having understood the new technology and its uses, we must do what we are doing today — discuss, reflect, and share experiences and best practices.⁴⁵

Isolationism and disengagement are not viable options, as these jurists admonish. Impartiality remains a fundamental judicial commitment, but judges must not adopt a monastic lifestyle divorced entirely from the reality of the modern communications revolution.

Judges want to inoculate themselves against the loss of impartiality, objectivity, and independence that deep immersion in the social media culture might well threaten, on the one hand. But they want ready access to the enormous cognitive resources, the communicative capacities, and the intelligence about what is culturally salient that social media provide, on the other hand. Can judges do both? I have some suggestions.

Judges could consciously design an ethical framework for their personal use of social media. Consider some desiderata.

⁴³ John Sopinka, "Must a Judge Be a Monk—Revisited" (1996) 45 UNB LJ 167 at 167.

⁴⁴ *Ibid* at 167.

⁴⁵ Beverley McLachlin, "The Relationship between the Courts and the Media" (Remarks delivered at Carleton University, 31 January 2012), online: <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2012-01-31-eng.aspx> >

First, be reflective. For judges to be appropriately reflective, they need to be familiar with the biases they confront in social media and in the culture, the biases they have personally, and the psychological and dispositional factors that work subconsciously to frame their habits of mind. This means that they need to be familiar with what the culture is exhibiting, particularly in the area of the current and ever-changing vagaries of political correctness. It means knowing what judicial biases exist, but, more than that, knowing more about their own personality and its biases. Luckily none of this information is hard to get from the internet, ironically.

Second, since judges are transparent, why not make a virtue of it? I caution against the strategy of judges adopting a pseudonym in order to carry on pre-judicial activities. Whatever is hidden will come to light in a medium that never forgets and never forgives.⁴⁶

Third, while a judge might have been a member of one identifiable group or another in pre-judicial life, tribalism and group-think are far from impartiality and do not suit judges. Judges should be pluralistic in their engagement with the resources of social media. By that I mean, be heterodox. Be open to a wide variety of views including uncongenial ones.

The limiting feature is not to engage in hot debate, as opposed to, say, the relatively cooler precincts of a blog. Here we begin to shade into ethical principles for the participation of judges in public life, which is beyond my remit.

Fourth, judges should consider cultivating habits that adapt the traditional cardinal virtues to participation in social media. Prudence—be careful but not paralyzingly cautious. Temperance—be restrained, monitor and moderate the tone and force of expression, and be humble. Fortitude—be patient, tolerant and thick-skinned. Justice—do the right thing without self-regard and follow the golden rule. We can also adapt a form of the theological virtues. Faith—human nature has its better angels. Hope—they will prevail and this too will pass. Charity—be kind and will the good of the other as other.

The hazards and risks I have pointed out might tempt judges to quit social media and get off the grid, notionally at least. Judges should not do that because it could hamper their effectiveness as judges, although it might be wise to trim some pre-judicial participation, especially in hot social media for which going viral is a special delight.

The countervailing duty has more weight, and that is to be informed about the culture in which judges are making judgments. Social media provide participants with enormous cognitive and communicative resources that judges would be unwise to forgo.

Now some, perhaps hopeful, closing thoughts. The first is to recall that everything is transitional. If we are now in the exuberant phase of the use of

⁴⁶ See, e.g., Mihir Zaveri, “Mitt Romney Admits to Having a Secret Twitter Account, ‘Pierre Delecto’” *The New York Times* (21 October 2019), online: <https://www.nytimes.com/2019/10/21/us/mitt-romney-pierre-delecto.html?auth=login-google> > .

social media to enforce social mores or malevolencies, it is quite predictable that this phase will pass. We are still feeling our way.

Second, personal self-control is the primary basis of civility and order in any social setting. People are learning to resist the black hole of social media and its disinhibiting effects. There is an increasing disgust reaction to mobbing, bullying, shaming, and the lives ruined by overreaction to a tweet or comment buried in a larger piece, taken out of context. That kind of social cruelty, one hopes, will soon receive the social disapproval it so richly deserves.

Third, media companies are starting to assume some responsibility for self-regulation, if only to forestall state regulation. There are real problems with social media and its self-regulation, so some public regulation cannot be far behind.⁴⁷ Governments are paying attention to privacy and to the idea of a right to be forgotten. There are growing demands for trust-busting.⁴⁸ But I would not be too optimistic about the effectiveness of public regulation. At best government can police the frontiers and the especially recalcitrant individuals who are the agents of chaos, but civil order ultimately rests on personal self-restraint.

Lastly, perhaps we should maintain a little perspective and heed the timeless advice of Douglas Adams in *The Hitchhiker's Guide to the Galaxy*: "Don't Panic!"

⁴⁷ See, e.g., the call for an expert commission to regulate algorithms in the United Kingdom: Nick Hilborne, "Supreme Court Judge Calls for Independent Algorithm Regulator" *Legal Futures* (19 November 2019), online: <https://www.legalfutures.co.uk/latest-news/supreme-court-judge-calls-for-independent-algorithm-regulator> > .

⁴⁸ Newman, *supra* note 9.