

**THE INTERNET MADE ME DO IT: RECONCILING SOCIAL  
MEDIA AND PROFESSIONAL NORMS FOR LAWYERS,  
JUDGES, AND LAW PROFESSORS**

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FULL CITATION:

Agnieszka McPeak, *The Internet Made Me Do It: Reconciling Social Media and Professional Norms for Lawyers, Judges, and Law Professors*, 55 IDAHO L. REV. 205 (2019).

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# THE INTERNET MADE ME DO IT: RECONCILING SOCIAL MEDIA AND PROFESSIONAL NORMS FOR LAWYERS, JUDGES, AND LAW PROFESSORS

AGNIESZKA MCPeak\*

## ABSTRACT

*Social media platforms operate under their own social order. Design decisions and policies set by platforms steer user behavior. Additionally, members of online communities set informal expectations that form a unique set of norms. These social media norms—like oversharing, disinhibition, and anonymity—become common online, even though similar conduct might be shunned in the real world.*

*For lawyers, judges, and law professors, a different set of norms apply to both their online and offline conduct. Legal ethics rules, codes of judicial conduct, workplace policies, and general professionalism expectations dictate behavior for legal professionals. Collectively, these professional norms set a higher bar—one that fundamentally clashes with ever-evolving social media norms. This conflict between social media and professional norms must be reconciled in order for lawyers, judges, and law professors to avoid online missteps.*

*This essay examines the clash between the norms of social media conduct with the constraints of professional norms. By doing so, it hopes to help lawyers, judges, and law professors reconcile their real-world roles with their online behavior and offers some guidance for maintaining professionalism across the board.*

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## INTRODUCTION

Advice to legal professionals looking to use social media is full of cautionary tales and overly simplified tips for avoiding misconduct in the virtual world.<sup>1</sup> But the problem of unprofessional conduct online does not arise merely from a lack of appreciating the risks and hearing about the fallout. It is more fundamentally a disconnect between the norms of online conduct and the real-world standards of professionalism.

Social media platforms encourage oversharing and disinhibition. Their very design steers users to communicate in ways that deviate from real-world behavior. The community of users on a social media platform create their own social norms that steer the behavior of others in the online group. At the same time, legal professionals are held to a higher standard, often steeped in tradition. Lawyers, judges, and law professors are bound by ethics rules, workplace policies, or, more broadly, uncodified professional norms. Unfortunately, social media norms and professional norms often clash with each other, resulting in two competing sets of expectations and influences.

As social media becomes an indispensable part of our personal and professional lives, simple checklists of do's and don'ts will not suffice to guide proper online conduct. Instead, lawyers and judges must constantly balance their ethical and professional duties when interacting with others online, and law professors in particular must reconcile their roles as experts, mentors, public commenters, and private citizens in virtual spaces. To complicate things, the ever-changing contours of online behavior and professionalism expectations will remain difficult to gauge.

This essay recognizes that, while tips for avoiding trouble are helpful, the real question is *why* missteps happen. Thus, it looks at the causes of online missteps and

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1. See, e.g., Agnieszka McPeak, *Ten Tips for Maintaining Professionalism Online*, YOUNG LAWYER 1 (2012), reprinted in YOUR ABA, Oct. 2012 (as *Prevent These Professional Pitfalls of Social Media*). These tips included (1) Real world rules still apply, (2) In a shorts-and-sneakers world, keep it business casual, (3) Beware the bubble, (4) Use careful privacy settings, but don't count on them, (4) Boss-bashing is bad, (5) Credibility counts, (7) Mind your manners, (8) Politics can backfire, (9) Avoid the overshare, and (10) Your online reputation is your reputation. *Id.*

not merely the rules for avoiding them. It also explores the ways norms of online behavior are at odds with professional duties for lawyers, judges, and law professors. By examining these causes, this essay strives to help legal professionals better understand the reasons why maintaining professionalism online is challenging at times. Additionally, it concludes with some guidance for setting personalized strategies to avoid falling prey to social media's siren song of disinhibition, oversharing, and irreverence.

## I. DEFINING SOCIAL MEDIA NORMS

Social norms in general are informal rules for members of a group that exist despite never being written in a formal rule or law.<sup>2</sup> They can be self-perpetuating and enforceable through informal mechanisms like guilt, shame, or ostracization from the group.<sup>3</sup> They may exist to help maintain civility, and sometimes they interplay with the law or develop out of legal standards.<sup>4</sup> While social norms help create social order, they also leave enforcement to the whim of the social group.<sup>5</sup> As a result, social norms may change or morph with time, perhaps with unequal enforcement or sanctions.<sup>6</sup> Social norms are particularly important as we examine the development of the internet and social media.

### A. How Social Media Norms Develop

The internet has developed relatively regulation-free and social media, in particular, relies heavily on two sets of influences. The first I call "top-down policies" which are industry standards employed by largely self-regulated technology companies who design social media platforms. The second I call "bottom-up norms" which refer to user norms created by the members of the community who use the platform.

First, as to top-down policies, platforms are largely unregulated and are insulated from many forms of liability.<sup>7</sup> They therefore enjoy considerable freedom to set their own rules and procedures. When the internet was still in its infancy, Sec-

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2. See Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1035 (2016) (citing Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 365 (1997)).

3. See *id.*

4. *Id.* at 1035–36 (citing, inter alia, Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996)) (explaining that a non-legal norm, like giving up a seat for an elderly passenger on a bus, arises out of an unwritten code of civility while other norms develop in response to laws, like norms against racist conduct).

5. *Id.* at 1040 (citing James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1060–68 (1998)).

6. Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI. KENT L. REV. 1257, 1267 (1998) (criticizing the trend of deferring to private ordering, such as usage and norms of the internet, instead of relying on laws and regulation).

7. See generally 47 U.S.C. § 230(c)(2) (2018).

tion 230 of the Communication Decency Act expressly carved out liability exceptions for online intermediaries hosting third-party content.<sup>8</sup> Passed in 1996, Section 230 expressly sought to promote a free and open internet, uninhibited by government interference.<sup>9</sup> The effect of Section 230 is that online intermediaries are allowed to moderate third-party content without fear of being treated like a publisher or speaker of that content.<sup>10</sup> It is Section 230 that allows Facebook to delete graphic or offensive content at its discretion. In theory, Section 230 allows platforms to do their best to make the internet a safe and happy place, without facing liability if they fail to delete a defamatory post or refuse to comply with a takedown request.<sup>11</sup>

While initially contemplating “good faith” deletion of offensive material, Section 230 has been applied to insulate “bad faith” actors who shield themselves from liability for the illegal conduct facilitated or encouraged by the platform.<sup>12</sup> For example, courts have allowed a gossip website to openly host defamatory and abusive statements about private persons without tort liability.<sup>13</sup> Courts have also insulated websites like Backpage.com from state criminal liability, even though the website facilitates sex trafficking and other illegal activity.<sup>14</sup>

Section 230 has been important in shaping the modern internet, and it leaves regulation largely to the platforms themselves. Thus, social media platforms have developed express codes of conduct to articulate their expectations for user behavior.<sup>15</sup> Platforms then use their discretion to moderate content and remove anything they perceive as violative of the platform’s conduct code. For example, Facebook

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8. *See id.*

9. *See id.* § 230(a)–(b).

10. *Id.* § 230(c)(1).

11. *See, e.g.,* Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

12. *See id.*

13. *See, e.g.,* Jones v. Dirty World Entm’t Recordings, LLC, 755 F.3d 398, 415–17 (6th Cir. 2014).

14. *See, e.g.,* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016). Although the website has been shielded from civil liability, its operators have faced criminal charges. Paul Demko, *The Sex-Trafficking Case Testing the Limits of the First Amendment*, POLITICO (July 29, 2018), <https://www.politico.com/magazine/story/2018/07/29/first-amendment-limits-backpage-escort-ads-219034>. In 2018, new legislation was passed to limit Section 230 immunity for online platforms that promote or facilitate sex trafficking. *See* Stop Enabling Sex Traffickers Act and Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

15. *See, e.g.,* *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/> (last visited Mar. 25, 2019) [hereinafter FACEBOOK, *Community Standards*].

has a set of Community Standards that is twenty-seven pages long.<sup>16</sup> The Community Standards are meant to make Facebook a safe environment for self-expression, and state that they are rooted in principles of safety,<sup>17</sup> voice,<sup>18</sup> and equity.<sup>19</sup>

Notably, the top-down policies for each platform, as often expressed through their codes of conduct, may vary considerably. Facebook has a policy about nudity and will remove some images of bare breasts.<sup>20</sup> By contrast, Snapchat's policy on sexually explicit content is less specific, "prohibit[ing] accounts that promote or distribute pornographic content."<sup>21</sup> By not banning nudity more broadly, Snapchat seems to accept the reality that users may very well be using the platform to share explicit content.<sup>22</sup> And other platforms, like the now-defunct Pinsex, were created to expressly allow users to upload home-made pornography and other sexually explicit and graphic content.<sup>23</sup>

Top-down policies and their enforcement interplay with laws, regulations, and the demands of the platform's users.<sup>24</sup> But because platforms self-govern, they often do so without accountability or transparency.<sup>25</sup> And top-down policies exist to further the business interest of the platform, and not necessarily the privacy, safety,

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16. *See id.*; *see also* Issie Lapoowsky & Steven Levy, *Here's What Facebook Won't Let You Post*, WIRED (Apr. 24, 2018, 5:00 AM), <https://www.wired.com/story/heres-what-facebook-wont-let-you-post/> (describing the 27-page long Community Standards made public in early 2018).

17. *Introduction, Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/> (last visited Mar. 25, 2019) ("People need to feel safe in order to build community. We are committed to removing content that encourages real-world harm, including (but not limited to) physical, financial, and emotional injury.").

18. *Id.* ("Our mission is all about embracing diverse views. We err on the side of allowing content, even when some find it objectionable, unless removing that content can prevent a specific harm. Moreover, at times we will allow content that might otherwise violate our standards if we feel that it is newsworthy, significant, or important to the public interest. We do this only after weighing the public interest value of the content against the risk of real-world harm.").

19. *Id.* ("Our community is global and diverse. Our policies may seem broad, but that is because we apply them consistently and fairly to a community that transcends regions, cultures, and languages. As a result, our Community Standards can sometimes appear less nuanced than we would like, leading to an outcome that is at odds with their underlying purpose. For that reason, in some cases, and when we are provided with additional context, we make a decision based on the spirit, rather than the letter, of the policy.").

20. *Adult Nudity and Sexual Activity, Community Standards*, FACEBOOK, [https://www.facebook.com/communitystandards/adult\\_nudity\\_sexual\\_activity](https://www.facebook.com/communitystandards/adult_nudity_sexual_activity) (last visited Mar. 25, 2019) [hereinafter FACEBOOK, *Adult Nudity and Sexual Activity*].

21. *Community Guidelines*, SNAPCHAT SUPPORT, <https://support.snapchat.com/en-US/a/guidelines> (last visited Mar. 25, 2019).

22. *Our Privacy Principles*, SNAP INC., <https://www.snap.com/en-US/privacy/privacy-center/> (last visited Mar. 25, 2019) (Snapchat touts deletion as its default, but notes "[i]t's important to keep in mind that other Snapchatters can always take a screenshot, or save things using a third-party app. At the end of the day, it's best to only share the need-to-know stuff with the people you really trust — just like you would in real life!").

23. Anthony Ha, *Pin-Digital, The NSF Startup Behind (Ahem) PinSex and PinGay, Raises \$800K*, TECHCRUNCH, <https://techcrunch.com/2013/09/26/pin-digital-funding/> (last visited Mar. 25, 2019).

24. *See* Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, S.M.U.L. REV. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3247372](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247372).

25. *Id.* at 60.

or well-being of users.<sup>26</sup> For most social media platforms, their profit models rely on getting users to engage with the platform as often as possible and to disclose personal information that can be used for targeted advertising.<sup>27</sup> Thus, the platform's decisions as to policies are meant to maximize user engagement.<sup>28</sup> Facebook's policy banning nudity is probably motivated by the fear that such content is offensive to users and will drive them away, which is bad for business.<sup>29</sup>

Second, as to bottom-up norms, users of a specific platform tend to develop expectations among their community. These expectations can vary depending on which platform is being used and can change over time. For example, a Facebook Group<sup>30</sup> may expect users to keep discussions and content within the Group.<sup>31</sup> If a user copies content and shares it outside of the Group, that user may be kicked out of the group and criticized for the conduct.<sup>32</sup> On Twitter, racist or offensive statements may be retweeted and criticized broadly to expressly call out the actor, sometimes including de-anonymizing the user or posting their real-world home address.<sup>33</sup>

Additionally, bottom-up norms are influenced heavily by top-down policies. This occurs because platform codes of conduct and design decisions nudge or steer user behavior.<sup>34</sup> Codes of conduct lay out the expectations of users and set the tone for interactions on the platform.<sup>35</sup> Similarly, "nudging" refers to the platform encouraging users to act in a certain way through the very design of the product.<sup>36</sup> In other words, features that are built into the platform influence how users engage with the platform. Default settings are one example of nudging.<sup>37</sup> Social media platforms typically require affirmative steps by the user to change default settings for

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26. See Andrew Keen, *The 'Attention Economy' Created by Silicon Valley is Bankrupting Us*, TECHCRUNCH, <https://techcrunch.com/2017/07/30/the-attention-economy-created-by-silicon-valley-is-bankrupting-us/> (last visited Mar. 25, 2019).

27. *Id.* Some refer to social media as the attention economy, as keeping a user's frequent attention is critical for profitability.

28. See Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, J. OF INFO. TECH. 30, 75–89 (2015) (noting that the modern digital economy relies heavily on behavior prediction and modification, which requires extracting, commodifying, and controlling users).

29. See FACEBOOK, *Community Standards*, *supra* note 15 ("The goal of our Community Standards is to encourage expression and create a safe environment. We base our policies on input from our community and from experts in fields such as technology and public safety."); FACEBOOK, *Adult Nudity and Sexual Activity*, *supra* note 20 ("We restrict the display of nudity or sexual activity because some people in our community may be sensitive to this type of content.").

30. See *Help Center, Groups*, FACEBOOK, [https://www.facebook.com/help/1629740080681586?helpref=hc\\_global\\_nav](https://www.facebook.com/help/1629740080681586?helpref=hc_global_nav) (last visited Mar. 25, 2019) (defining Facebook "Groups").

31. See *Membership and Rules, Writing Great Group Rules*, FACEBOOK CMTY., <https://www.facebook.com/community/education/membership-and-rules/writing-great-group-rules/> (last visited Mar. 24, 2019) (suggesting that group rules should include respecting everyone's privacy, including a statement that "[w]hat's shared in the group should stay in the group.").

32. *Id.*

33. See discussion *infra* Section B.2, for a complete discussion of doxing.

34. See Woodrow Hartzog & Frederic Stutzman, *Obscurity by Design*, 88 WASH. L. REV. 385, 385–418 (2013).

35. See *Community Standards*, FACEBOOK, *supra* note 15.

36. Hartzog & Stutzman, *supra* note 34, at 411.

37. *Id.* at 412.

things like the size of the audience for private social media posts.<sup>38</sup> These default settings serve as an implicit endorsement for those settings, and nudge users to use the platform in this default way.<sup>39</sup> Feedback and notices to users are another example of nudging.<sup>40</sup> If a user posts a video on Facebook, the platform will show the names of who liked or commented on a video and the total number of views.<sup>41</sup> This feedback may subtly encourage the user to share more videos because others like it.

But Facebook does not display the names of those that viewed a video without liking or commenting on it, perhaps because users will have a negative emotional reaction and therefore bad user experience.<sup>42</sup> And bad user experiences may mean users decrease or quit their usage of the platform.

Just as top-down policies influence bottom-up norms, the reverse is also true. Users may develop norms of conduct that deviate from the platform's code of conduct or that are not easily supported by the platform's existing features. Demand among users may then drive the platform to alter its policies or design. For example, when Facebook began enforcing its no-nudity policy by removing images of breastfeeding, users demanded a change to the policy.<sup>43</sup> As a result, Facebook modified its policy to allow images of bare breasts of nursing mothers.<sup>44</sup> As another example, Facebook's policy of requiring real names for user accounts faced criticism from users because of its impact on the transgender community.<sup>45</sup> Pressure from users led to a modification to that policy so that "real names" is defined as "the name you use in real life."<sup>46</sup> Design elements may also be changed by the platform due to user demand. When Snapchat's expiration date and auto-deletion of posts gained popularity, Facebook added its Stories feature, which also auto-deletes, to compete.<sup>47</sup>

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38. *Id.* (While users can change default settings, "status quo bias" and inertia often result in no modification of default settings for many users).

39. *Id.*

40. *Id.*

41. *Id.* at 398–400.

42. See Ingrid Lunden, *Facebook Groups Let You See Exactly Who Has Viewed Your Photos, Too*, TECHCRUNCH (2013), <https://techcrunch.com/2012/08/11/facebook-groups-let-you-see-exactly-who-has-viewed-your-photos-too/>.

43. Samuel Gibbs, *Nudity and Facebook's Censors have a Long History*, GUARDIAN (Sept. 9, 2016), <https://www.theguardian.com/technology/2016/sep/09/facebook-history-censoring-nudity-automated-human-means>.

44. FACEBOOK, *Community Standards*, *supra* note 15 (Facebook's Community Standards now prohibit images of "[u]ncovered female nipples except in the context of breastfeeding, birth giving and after-birth moments, health-related situations (for example, post-mastectomy, breast cancer awareness or gender confirmation surgery) or an act of protest"); see also Simon Adler, *Post No Evil*, RADIOLAB (Aug. 17, 2018), <https://www.wnycstudios.org/story/post-no-evil> (detailing the evolution of Facebook's policy on nudity).

45. Amanda Holpuch, *Facebook Adjusts Controversial 'Real Name' Policy in Wake of Criticism*, GUARDIAN (Dec. 15, 2015), <https://www.theguardian.com/us-news/2015/dec/15/facebook-change-controversial-real-name-policy>.

46. Alex Hern, *Facebook Relaxes 'Real Name' Policy in Face of Protest*, GUARDIAN (Nov. 2, 2015), <https://www.theguardian.com/technology/2015/nov/02/facebook-real-name-policy-protest>.

47. Sameepa Shetty, *'Stories' Becomes Key Battleground for Facebook vs. Snapchat Rivalry*, CNBC (Apr. 29, 2017), <https://www.cnbc.com/2017/04/28/stories-become-key-battleground-for-facebook-vs-snapchat-rivalry.html>.

For both top-down policies and bottom-up norms, enforcement does not rely heavily on formal laws and regulations. Instead, no formal legal recourse may exist among users.<sup>48</sup> For top-down policies, Facebook may temporarily or permanently expel users.<sup>49</sup> For bottom-up norms, enforcement may happen through informal, user-driven means.<sup>50</sup> These informal enforcement mechanisms may involve shaming or expelling non-conforming users from the community altogether.<sup>51</sup>

By recognizing that these policies and norms exist and interplay with each other, the next question is: what is “normal” behavior on a social media platform? Norms may vary based on the specific community or platform at issue, but some common practices and expectations have emerged across social media platforms.

## B. Examples of Social Media Norms

Individual behavior online tends to take on a character of its own, separate and apart from what a similar real-world interaction may look like. Psychologists have studied the internet’s impact on human behavior, and have highlighted in particular the effect that disinhibition has on the quantity of what we share.<sup>52</sup> Further, the use of aliases and reliance on anonymity are somewhat accepted practices online and form part of developing social media norms.<sup>53</sup> But anonymity also changes the nature of what we share and how we interact with others online.<sup>54</sup>

### i. Disinhibition and Oversharing

One of the most obvious observations about social media is that we share more personal information with a broader audience than ever before. Online, people may self-disclose more often or more intensely.<sup>55</sup> Every user has the ability to disclose and disseminate any information they desire, and it is through sharing that users interact and build social networks online.

In the last decade, the internet has evolved into an interactive space with easy-to-create, user-generated content. Social media platforms in particular have blurred the boundaries between the private and the public, between the celebrity and ordinary, and between the real and the imaginary. The user no longer merely consumes online content but has become a participant in creating it.<sup>56</sup> The result is that everyone has a platform to broadcast personal information to potentially large audiences.

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48. 47 U.S.C. § 230(c)(1)–(2) (2018) (because Section 230 insulates online intermediaries for liability for the conduct of third parties, plaintiffs must seek out the identities of often anonymous and elusive online actors).

49. See FACEBOOK, *Community Standards*, *supra* note 15.

50. See Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1044–45 (2016).

51. See *id.* at 1051–59.

52. John Suler, *The Online Disinhibition Effect*, 7 CYBER PSYCHOL. & BEHAV. 321 (2004), <http://www.samblackman.org/Articles/Suler.pdf>.

53. See generally Molly Talbert, *The Power of Pseudonyms in an Online Community*, HIGHER LOGIC (Oct 18, 2016, 8:00 AM), <https://blog.higherlogic.com/the-power-of-pseudonyms-in-an-online-community>.

54. *Id.*

55. Suler, *supra* note 52.

56. SHENJA VAN DER GRAAF, *YOU AND OUR SPACE 2* (MIT, 2010), <https://ssrn.com/abstract=1712346>.

As we engage with others in online spaces, the environment itself affects the character and nature of human behavior. Online personas may morph into their own unrealistic or dissociated reality.<sup>57</sup> Sometimes this happens through creating distinct online personas, such as in a fantasy game:

Consciously or unconsciously, people may feel that the imaginary characters they “created” exist in a different space, that one’s online persona along with the online others live in an make-believe dimension, separate and apart from the demands and responsibilities of the real world. They split or dissociate online fiction from offline fact.”<sup>58</sup>

But even outside of the game context, online social communities also blur the lines between reality and fantasy.<sup>59</sup>

Personality types and other individual differences may dictate how much online behavior deviates from offline conduct.<sup>60</sup> For some, they perceive their online identities as more authentic and “true,” free from real-world constraints.<sup>61</sup> But people are multi-faceted, and the context in which self-expression occurs may influence the nature and scope of that expression.<sup>62</sup> No single version of self is the one-and-only “true” self, but the nature and scope of disclosure may be strongly influenced by the unique online environment in which it occurs.<sup>63</sup>

Online engagement also requires building networks and capturing user attention. In the context of celebrities, visual images of wealth and glamour reach large audiences and potentially influence others.<sup>64</sup> Even for non-celebrities, social media necessarily involves sharing information with others. For some, the broader the network, the more impactful communications can become. But achieving a broader online circle often requires attention-worthy posts. And the quest for more followers may drive extreme behavior online.

The motivation for gaining more and more followers can be a desire for attention, but it can also result in profit. YouTube videos can generate advertising revenue for posters. In 2018, the top-grossing YouTube star was a seven-year-old toy reviewer who earned \$22 million that year.<sup>65</sup> Instagram celebrities can make a lot

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57. See Suler, *supra* note 52.

58. *Id.* at 323.

59. *See id.*

60. *Id.* at 324.

61. *Id.* at 325.

62. *See id.*

63. See Suler, *supra* note 52, at 325.

64. See Meghan M. Gallagher, *John Berger, Paris Hilton, and the Rich Kids of Instagram: The Social and Economic Inequality of Images Sharing and Production of Power Through Self-Promotion*, SCRIPPS SENIOR THESES, Paper 545 (2015), <https://pdfs.semanticscholar.org/7ccb/7c0594d593c876e9dba05013b20677e59b33.pdf>.

65. Natalie Robehmed & Madeline Berg, *Highest-Paid YouTube Stars 2018: Markiplier, Jake Paul, PewDiePie and More*, FORBES (Dec. 3, 2018, 5:40 AM), <https://www.forbes.com/sites/natalierobehmed/2018/12/03/highest-paid-youtube-stars-2018-markiplier-jake-paul-pewdiepie-and-more/#472c4da5909a>.

of money through organic advertising and product placement.<sup>66</sup> Social media influencers exist in their own sphere, as if famous for merely being famous, a phenomenon that is driven at least in part by economic motives.<sup>67</sup>

Taken together, these forces push users to share more details more often, which function as norms that may not be consistent with what is acceptable in real-world interactions with others.

## ii. Anonymity

Another common norm in online behavior is the use of pseudonyms or otherwise maintaining a semblance of anonymity. Anonymity may be a powerful tool for allowing traditionally marginalized groups to engage more openly in online activity.<sup>68</sup> At the same time, anonymity may foster abuse.<sup>69</sup> Mob-like behavior can develop among anonymous groups targeting others online.<sup>70</sup> And those pushing the limits of online conduct often steadfastly cling to broad free speech rationales to excuse abusive conduct.<sup>71</sup> At the same time, platforms often dictate whether anonymity is permitted and thus may nudge users to adopt pseudonyms or, on the other end of the spectrum, deter users from posting anonymously. For example, as noted above, Facebook requires names used in real life.<sup>72</sup> By contrast, Whisper is an anonymous app in which users are meant to remain anonymous.<sup>73</sup>

Anonymity in online spaces may create a disinhibition effect. A user's identity may not easily be ascertainable due to the choice of username or other identifier that is visible to others, creating less inhibition in the user and more willingness to disclose information. Even if one's identity is ascertainable with some effort, the user still may experience some disassociation from the real world because communications are happening in a virtual space only.<sup>74</sup>

Indeed, the mere fact that communications are not face-to-face may affect human behavior because users may be disinhibited by virtue of the fact that they cannot see or hear others.<sup>75</sup> Referred to as invisibility, the ability to be "a physically ambiguous figure, revealing no body language or facial expression" may result in

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66. Oliver Budzinski & Sophia Gaenssle, *The Economics of Social Media Stars: An Empirical Investigation of Stardom, Popularity, and Success on YouTube*, 24 ILMENAU U. OF TECH., INST. OF ECON. 1, (2018), [https://www.tu-ilmenau.de/fileadmin/media/wpo/Diskussionspapier\\_Nr\\_112.pdf](https://www.tu-ilmenau.de/fileadmin/media/wpo/Diskussionspapier_Nr_112.pdf).

67. See THE AMERICAN MEME (Netflix documentary 2018), <https://www.netflix.com/title/81003741>. See also Naomi Fry, "The American Meme," *A New Netflix Documentary, Records the Angst of Social-Media Influencers*, NEW YORKER (Dec. 7, 2018), <https://www.newyorker.com/culture/culture-desk/the-american-meme-a-new-netflix-documentary-records-the-angst-of-social-media-influencers> (describing how Paris Hilton has created success as a social media influencer marketing her own products).

68. See Diane Rowland, *Griping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet*, 110 PENN. ST. L. REV. 519, 520 (2006).

69. *Id.* (Although studies differ about the effect of anonymity on human behavior, it may lead to less social awareness and a greater tendency towards abuse. Nonetheless, behavior regulation through social norms may still apply even in anonymous groups of internet users.)

70. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U.L. REV. 61, 65 (2009).

71. See *id.* at 66.

72. See *What Names Are Allowed on Facebook?*, FACEBOOK (Feb. 13, 2019), <https://www.facebook.com/help/112146705538576>.

73. See generally WHISPER, <http://whisper.sh> (last visited Mar. 24, 2019).

74. Suler, *supra* note 52, at 322.

75. *Id.*

revealing more without feeling inhibited.<sup>76</sup> When a user cannot see others' facial expressions or behavioral cues, they may feel at liberty to say and disclose more freely online as a result.<sup>77</sup>

Online identities also promote disinhibition because they obscure a person's real-world status and authority.<sup>78</sup> In real-world interactions, authority and power may inhibit all parties from truly expressing their thoughts and feelings due to the fear of disapproval, punishment, or reputational effect.<sup>79</sup> By contrast, the internet is decentralized and developed as a forum where all participants should have an equal voice. Professionals and authority figures may feel like they can lower their standards of conduct because their status and authority (and the accompanying higher expectations for behavior) are not relevant or implicated.<sup>80</sup>

Some platforms seem to embrace the disinhibition effects of anonymity. Whisper, the anonymous social networking app, defines itself as "the largest online community where people share real thoughts and feelings, without identities."<sup>81</sup> Anonymity is at the crux of Whisper's intentional design, as the platform touts anonymity as a path to being happy and authentic: "[w]e are leading a global movement that believes happiness starts when you get to be your real self."<sup>82</sup> Its community guidelines are substantially shorter than Facebook's and consist of only three rules: "don't be mean," which prohibits bullying, impersonation, or sharing others' personal information; "don't be gross," which prohibits "gory or pornographic" pictures; and "don't use Whisper to break the law," which condemns a broad panoply of illegal conduct from copyright violations to drugs, child pornography, and threats of violence.<sup>83</sup>

Although anonymity is a social media norm, so too is the enforcement mechanism of unmasking or doxing. Unmasking refers to publicly revealing the identity of an anonymous internet user.<sup>84</sup> Similarly, doxing means revealing documents or other personal information about an online user.<sup>85</sup>

Seen as a form of online vigilantism, unmasking and doxing may be used when an online user engages in behavior that deviates from social norms in an effort to shame or punish the user. The result is that users may, on the one hand, disassociate their online personas from their real-world selves while, on the other hand, face the very real threat of unmasking or doxing by other users.

In sum, we are constantly being influenced by top-down policies and bottom-up norms for particular platforms. Behavioral interventions and community norms steer users to say and do things that might otherwise be unacceptable in other con-

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76. *See id.*

77. *Id.*

78. *Id.*

79. Suler, *supra* note 52, at 324.

80. *See id.*

81. *Community Guidelines*, WHISPER (Feb. 13, 2019), <http://whisper.sh/guidelines>.

82. *Id.*

83. *Id.*

84. danah boyd, *Truth, Lies, and 'Doxing': The Real Moral of the Gawker/Reddit Story*, WIRED (Oct. 29, 2012, 6:30 AM), <https://www.wired.com/2012/10/truth-lies-doxing-internet-vigilanteism/>.

85. *Id.*

texts. Additionally, we are more likely to overshare and overstep the bounds of professionalism online due to actual or perceived anonymity (whether through use of aliases, obscurity, invisibility, or minimized status and authority). Taken together, these influences may very well lead lawyers, judges, and law professors to function only within the norms of online behavior in virtual spaces, despite the overarching professional norms and standards that apply in the real world.

## II. DEFINING PROFESSIONAL NORMS

While the internet is rapidly developing its own set of norms, the legal profession remains rooted in tradition. Notions of ethics and professionalism permeate. In particular, lawyers are held to laws and regulations that dictate the bounds of their conduct and provide for numerous, sometimes parallel remedies for missteps. Beyond enacted law, lawyers are also held to the norms of professionalism. For judges, the expectations as to both ethics rules and professional norms may be even higher. Law professors also face unique challenges online by virtue of their position within academic institutions, although their professional norms are less clearly defined.

### A. Lawyer Ethics and Professionalism

Lawyers are regulated by a body of law often referred to as the Law Governing Lawyers.<sup>86</sup> It draws on various sources of substantive law such as tort, agency, criminal law,<sup>87</sup> and procedural or evidence rules.<sup>88</sup> In addition to substantive law, the legal profession is expressly regulated in each state by ethics rules. Most of these rules mirror the *Model Rules of Professional Conduct* as promulgated by the American Bar Association.<sup>89</sup>

Collectively, these laws create a floor below which lawyer conduct may not fall. And depending on the source of law, numerous remedies may be available. Breaches of substantive law can result in criminal punishment, money damages, or injunctive relief.<sup>90</sup> Procedural rule violations can result in sanctions or other penalty.<sup>91</sup> Violation of ethics rules can lead to discipline, usually in the form of reprimand, suspension, or disbarment.<sup>92</sup>

While the Law Governing Lawyers contains express rules for lawyer conduct, lawyers are also expected to achieve a higher level of civility through the norms of professionalism. While not codified, professionalism functions like a social norm within the legal field. In some jurisdictions, professional norms are captured in express creeds or standards.<sup>93</sup> Professionalism, at its core, contemplates common courtesy and civility regardless of adversarial posture or position. Additionally, how

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86. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, intro. note (AM. LAW INST. 2000).

87. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1(b) (2000).

88. See *id.*

89. MODEL RULES OF PROF'L CONDUCT r. 1.0-8.5 (AM. BAR ASS'N 2012).

90. *Id.*

91. *Id.*

92. *Id.*

93. See Cheryl B. Preston, *Lawyers' Abuse of Technology*, 103 Cornell L.J. 881, 886 (2018).

one behaves towards others in the course of one's work fundamentally creates reputation. But protecting and maintaining reputation online is particularly challenging.<sup>94</sup> A lack of privacy and control over information online means that oversharing can have lasting and negative effects on a lawyer's professional reputation.<sup>95</sup> Disinhibition through anonymity can also negatively impact lawyers.

### B. Judicial Ethics

Judges are held to an even higher standard than lawyers because judicial behavior heavily affects the independence and impartiality of our system of justice.<sup>96</sup> As public officials, judges play a crucial role in creating trust and confidence in the legal system.<sup>97</sup> Thus, judges are governed by rules that are meant to promote confidence in the judiciary: "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>98</sup>

Relatedly, judges must avoid abuse of the prestige of judicial office and must avoid acting in ways to advance their own personal and economic interests instead.<sup>99</sup> And judges cannot disclose nonpublic information acquired through their role as judge.<sup>100</sup> Thus, because of their unique position and influence, judges must act with impartiality and fairness<sup>101</sup> and must avoid bias, prejudice, and harassment.<sup>102</sup> These standards thus create narrow confines within which judges must operate.

### C. Law Professors

The professional norms that apply to law professors are not as clearly defined as those for lawyers and judges. Granted, law professors may be practicing lawyers or judges, in which case some or all of the rules applicable to lawyers and judges also apply to them.<sup>103</sup> But more generally, law professors face unique and undefined challenges in their online conduct by virtue of their professional roles.

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94. Roberta B. Studwell, *The Notion and Practice of Reputation and Professional Identity in Social Networking: From K-12 through Law School*, KAN. J.L. PUB. POL'Y 231 (2016).

95. *See id.* at 241.

96. MODEL CODE OF JUDICIAL CONDUCT Preamble § 1 (AM. BAR ASS'N 2011).

97. *Id.*

98. MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS'N 2011).

99. *Id.* r. 1.3.

100. *Id.* r. 3.5.

101. *See id.* r. 2.2.

102. *See id.* r. 2.3.

103. Law professors who are not actively practicing law face greater flexibility to discuss real cases and issues without fearing that they will breach confidentiality or other duties to clients, although law professors must be mindful of confidentiality or other legal duties that pertain to information about students. *Compare* MODEL RULE OF PROF'L CONDUCT r. 1.6 (Am. Bar Ass'n 2016) (confidentiality duties that lawyers owe to clients), *and* Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (confidentiality duties owed by educators).

Law professors wear many hats and need to reconcile myriad roles. As teachers and mentors, they may be expected to model professional conduct and maintain respect and decorum in and out of the classroom.<sup>104</sup> As scholars, law professors are seen as legal experts and, as a result, their social media comments about the law may carry special weight in the eyes of others.<sup>105</sup> Law professors also serve their universities and law schools, so their online activity reflects on their institution and may be part of promoting the school.

Generally, law professors (particularly those with tenure) enjoy some protections under the principles of academic freedom.<sup>106</sup> Thus, potentially controversial statements may be afforded some protection, assuming they relate to an academic purpose.<sup>107</sup> Academic freedom focuses on allowing professors to seek truth and express unpopular opinions, albeit in an accessible, interactive, and civil way.<sup>108</sup> But social media encourages uncivil discourse and distortion of ideas, often breeding conflict.<sup>109</sup>

The policies surrounding academic freedom may be changing as universities grapple with public outcry from students, donors, and others dissatisfied with public comments made by faculty members. Indeed, some university speech policies seem to focus on protecting students and donors over the free-speech rights and academic freedom of faculty.<sup>110</sup> As employees of universities, law professors need to comply with an institutional policy surrounding decorum and public statements or otherwise conform with their employer's expectations and standards.<sup>111</sup>

Unfortunately, some university standards seek to actively restrict faculty social media use. The Kansas Board of Regents, for example, added a broad and restrictive policy that allows universities to go after faculty members who use social media "improperly," including by using it in a way that is "contrary to the best interests of the university."<sup>112</sup> Consequences can include discipline or even termination.<sup>113</sup> By contrast, the American Association of University Professors has empha-

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104. See Carissa Byrne Hessick, *Towards a Series of Academic Norms for #LawProf Twitter*, 101 MARQ. L. REV. 903, 916 (2018) (noting that unprofessional law professor conduct on Twitter reflects poorly on not only the image of that professor but of law professors as a whole).

105. See *id.* at 906 (discussing academic freedom in the context of institutions being free from government interference).

106. See Erica Goldberg & Kelly Sarabyn, *Measuring a "Degree of Deference" Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217 (2011).

107. See *id.* at 234. Even professors with tenure are vulnerable to attacks and negative career consequences from controversial tweets. Oliver Bateman, *The Young Academic's Twitter Conundrum*, ATLANTIC (May 10, 2017), <https://www.theatlantic.com/education/archive/2017/05/the-young-academics-twitter-conundrum/525924/>.

108. Maria Helen Murphy, *The Views Expressed Represent Mine Alone: Academic Freedom and Social Media*, 11 SCRIPTED 211, 222 (2011), <https://script-ed.org/article/the-views-expressed-represent-mine-alone-academic-freedom-and-social-media/>.

109. *Id.* at 218–21.

110. Bateman, *supra* note 107.

111. See *id.*

112. Murphy, *supra* note 108, at 219.

113. *Id.*; see also Peggy Lowe, *In Kansas, Professors Must Now Watch What They Tweet*, NPR (May 14, 2014, 7:12 PM), <https://www.npr.org/2014/05/14/312524014/in-kansas-professors-must-now-watch-what-they-tweet>.

sized that social media, like other communications by professors, should be afforded the same level of protections under academic freedom as traditional forms of media.<sup>114</sup>

Overall, little guidance exists as to the bounds of acceptable behavior by law professors outside of the classroom. As a result of the lack of distinct norms expressly governing law professor conduct online, several scholars have proposed them.<sup>115</sup> For example, Professor Carissa Byrne Hessick suggests that law professors on Twitter should: (1) assume their tweets on legal issues carry special gravitas by virtue of their status of a law professor, regardless of stated areas of expertise and (2) strive to promote reasoned debate, just as they do in the classroom.<sup>116</sup> Others urge law professors to shun Twitter altogether.<sup>117</sup> While refraining from social media entirely is not necessary, the lack of clear professional norms for law professors – coupled with the serious repercussions for online missteps in particular – makes reconciliation of professional norms with social media norms even harder.

### III. WHEN SOCIAL MEDIA NORMS AND PROFESSIONAL NORMS CLASH

While hard to define with precision, norms exist for both social media communities and for categories of legal professionals. Those norms rarely align. Instead, a legal professional operating in a norm-conforming way on a social media platform may be violating a professional norm at the same time. This tension helps explain why social media is challenging and full of pitfalls for lawyers, judges, and law professors.

#### A. Anonymity and Professionalism

Anonymity creates a false sense of freedom and may influence the content and civility of posts. For lawyers, judges, and law professors, anonymity seems tempting, as it could allow for free expression without the audience knowing the name or profession of the poster. But anonymity does not reduce the need to comply with professional norms. Thus, even anonymous conduct by a lawyer, judge, or law professor runs the risk of violating rules and norms of the profession. The very fact that posts are made anonymously increases the temptation to deviate from professional norms.<sup>118</sup> Indeed, in some instances anonymity is used intentionally to engage in objectionable conduct, perhaps because the poster falsely believes ano-

114. Murphy, *supra* note 108, at 221.

115. See Erica Goldberg, *What Makes a (Legal) Academic?*, IN A CROWDED THEATER (Dec. 17, 2017), <https://inacrowdedtheater.com/2017/12/17/what-makes-a-legal-academic/#more-2922> (noting that professors should promote some sort of “better” norms for their activity on Twitter); Hessick, *supra* note 104, at 216–23; Murphy, *supra* note 108, at 221–26 (proposing policies that expressly define and protect academic freedom for social media usage).

116. Hessick, *supra* note 104, at 217.

117. See, e.g., Eric Posner, *Twenty Theses About Twitter*, ERICPOSNER.COM (July 3, 2017), [ericposner.com/twenty-theses-about-twitter/](http://ericposner.com/twenty-theses-about-twitter/).

118. See *supra* notes 68–85, and accompanying text.

nymity is enough to disassociate their professional identities with online personas.<sup>119</sup> While anonymity increases obscurity,<sup>120</sup> it does not excuse poor conduct. And unethical conduct under a pseudonym may still result in bar discipline or other consequences.<sup>121</sup>

Rather than catalogue the myriad examples of lawyers and judges facing consequences for their anonymous conduct online, this section will instead focus on two highly publicized examples: the disbarment of Salvador Perricone, a US Attorney in Louisiana, and the removal of Arkansas Judge Michael Maggio. Both of these stories illustrate the pitfalls of over-reliance on anonymity.

#### i. Salvador Perricone Disbarment

For nearly five years, Salvador Perricone, an Assistant United States Attorney in New Orleans, commented anonymously on local news stories on *The Times-Picayune* newspaper's website.<sup>122</sup> He used at least five aliases and commented over 2,600 times.<sup>123</sup> Notably, he even commented on cases that his office was handling, including his own pending cases.<sup>124</sup>

In a news story about a federal corruption case, the "River Branch" case regarding improper contracts by Jefferson Parish officials, Perricone commented about witnesses, facts, and his personal opinions relating to the case.<sup>125</sup> First, Perricone commented to a news story about the indictment of a state official, stating that he read the indictment and that the official is "GUILTY!!!"<sup>126</sup> Second, he insulted Fred Heebe, the owner of the River Birch landfill that was awarded a questionable \$160 million contract in Jefferson Parish.<sup>127</sup> Specifically, Perricone posted that "Heebe comes from a long line of corruptors" and that his "goose is cooked."<sup>128</sup> Third, in another news story regarding the indictment of Dominick Fazio, River Birch's Chief Financial Officer, Perricone stated "[w]ell, Mr. Fazio, I hope you have room in your scrap book for your conviction and mug shot...."<sup>129</sup> Although other attorneys in Perricone's office were primarily involved in the River Branch case, Perricone personally handled a motion to disqualify Mr. Fazio's counsel.<sup>130</sup> But Perricone even commented on the very motion he handled, expressly insulting Fazio's attorney ("[t]he guy is a clown and Fazio is going down") and approving of the court's ultimate decision to grant his motion ("[i]t's the right decision. . . Judges don't take this action lightly").<sup>131</sup>

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119. *See id.*

120. *See Hartzog & Stutzman, supra* note 34, at 387–88.

121. *See generally* MODEL RULES OF PROF'L CONDUCT r.7.1 (AM. BAR ASS'N Aug. 17, 2018); *id.* r.8.4.

122. *In re Perricone*, 2018-B-1233, 2018 WL 6382168, at \*1 (La. Dec. 5, 2018) (per curiam).

123. *Id.* at \*2.

124. *Id.* at \*8.

125. *Id.* at \*2.

126. *Id.*

127. *Id.*

128. *Perricone*, 2018 WL 6382168, at \*2.

129. *Id.*

130. *Id.* at \*1.

131. *Id.* at \*2.

Significantly, Perricone's penchant for online anonymous comments led to a mistrial in another case, the high-profile Danziger Bridge trial.<sup>132</sup> Following Hurricane Katrina, police officers shot six unarmed civilians crossing the Danziger Bridge in New Orleans, killing two of them.<sup>133</sup> All of the defendants were found guilty after a jury trial and were sentenced to six to sixty-five years in prison.<sup>134</sup> Before and during the trial, Perricone posted several comments on the *Times-Picayune* website about the guilt of the officers, commending the work of his own office.<sup>135</sup> During jury deliberations, Perricone posted "I don't think the jury will leave the dead and wounded on the bridge."<sup>136</sup>

Perricone's online comments were reported to the district judge in the Danziger Bridge case. After an investigation, the judge granted a motion for a new trial due to "grotesque prosecutorial misconduct" and its effect on defendants' due process rights.<sup>137</sup> Although Perricone was not personally involved in the Danziger Bridge case, his comments nonetheless constituted misconduct in the case.<sup>138</sup> According to the judge, the fact that Perricone's comments were anonymous made "it all the more egregious."<sup>139</sup> Before a new trial was held, a plea deal was entered into that resulted in a much lower sentence for the officers, ranging from three to twelve years.<sup>140</sup>

In his disciplinary proceedings, Perricone was found to have committed numerous ethics violations, including placing his own interests above that of his client's,<sup>141</sup> making extrajudicial statements about the guilt of a defendant and materially prejudicing litigation,<sup>142</sup> and engaging in conduct that is prejudicial to the administration of justice.<sup>143</sup> In his defense, Perricone stated that "he made the anonymous online comments to relieve stress, not for the purpose of influencing the outcome of a defendant's trial."<sup>144</sup> Perricone emphasized that he never identified himself as an Assistant US Attorney and did not intend to influence the trial or prejudice any legal proceedings.<sup>145</sup> The court rejected Perricone's arguments and emphasized that Perricone is a public official "in an important position of public trust" who caused actual harm in the Danziger Bridge case.<sup>146</sup>

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132. *See id.*

133. Campbell Robertson, *New Orleans Police Officers Plead Guilty in Shooting of Civilians*, N.Y. TIMES (Apr. 20, 2016), <https://www.nytimes.com/2016/04/21/us/hurricane-katrina-new-orleans-danziger-bridge-shootings.html>.

134. *Id.*

135. *In re Perricone*, 2018-1233 (La. 12/5/18), *reh'g denied* (Jan. 30, 2019), at \*6.

136. *Id.* at \*7.

137. *United States v. Bowen*, 969 F. Supp. 2d 546, 551 (E.D. La. 2013).

138. *See id.*

139. *Id.* at 626.

140. *Perricone*, 2018 WL 6382168, at \*3.

141. *See id.* at \*5; MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2).

142. *See Perricone*, 2018 WL 6382168, at \*6; MODEL RULES OF PROF'L CONDUCT r. 3.6.

143. *See Perricone*, 2018 WL 6382168, at \*6; MODEL RULES OF PROF'L CONDUCT r. 8.4(a), (d).

144. *See Perricone*, 2018 WL 6382168, at \*9.

145. *Id.* at \*9. Perricone's therapist testified that the postings were a result of his post-traumatic stress disorder arising out of Perricone's time as a police officer and FBI agent. *Id.* at \*10.

146. *Perricone*, 2018 WL 6382168, at \*18.

The court also highlighted the need for maintaining the standards and traditions of the legal profession even though we live in the age of social media.<sup>147</sup> In particular, the court noted “[o]ur decision today must send a strong message to respondent and to all members of the bar that a lawyer’s ethical obligations are not diminished by the mask of anonymity provided by the Internet.”<sup>148</sup> Perricone thus was disbarred.<sup>149</sup>

## ii. Removal of Judge Maggio

In 2014, Judge Michael Maggio was removed from the bench, largely due to anonymous comments he made online under the alias “geauxjudge.”<sup>150</sup> Judge Maggio used this alias on Tiger Droppings, a Louisiana State University (LSU) fan message board.<sup>151</sup> His identity was deduced by a political blogger, who pieced together biographical hints from years’ worth of posts under the “geauxjudge” alias.<sup>152</sup> Although “geauxjudge” opined about LSU football and other innocuous matters, he also disclosed confidential information about actress Charlize Theron’s adoption proceedings.<sup>153</sup> Other posts discussed confidential proceedings and made racist, sexist, or homophobic statements.<sup>154</sup> For example, Judge Maggio commented about a divorce proceeding:

This case is still pending. I send them to mediation . . . . No need to drag the kids into court if can be avoided. I will say I get tired of hearing how the husband works all the time (uhh no kidding how you think the bill gets paid); that he had an affair (Ummm . . . the wife quits or shuts down sex to nothing, becomes unattractive, and non-supportive and then is shocked when he steps out) what did she think was going to happen . . . . Food and Frickin go a long way to helping a man overlook a lot of BS.<sup>155</sup>

Relating to another case, Judge Maggio commented:

Ok I have a case this afternoon involving ‘backpage.com.’ Seems this may be an issue in a divorce/custody case. I never had any idea about this site. So I just asked a LEO cyber investigator . . . well this could be interesting.

147. *Id.* at \*18 (citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1058 (1991)).

148. *Id.*

149. *Id.* at \*19.

150. *Judicial Discipline & Disability Comm’n v. Maggio*, 440 S.W.3d 333, 334 (2014).

151. *Id.* at 334.

152. *See id.* Political blogger Matt Campbell is credited with outing Judge Maggio as “geauxjudge.” *See* Matt Campbell, *Who Have Wronged You, Mr. Maggio? Hog Nation Turns Its Angry Eyes To You*, (Woo Woo Wooooo), BLUE HOG REP. (Mar. 3, 2014), <https://www.bluehogreport.com/2014/03/03/who-have-you-wronged-mr-maggio-hog-nation-turns-its-angry-eyes-to-you-woo-woo-wooooo/>.

153. Steve Barnes, *Arkansas Judge Dismissed for Disclosing Details About Theron Adoption*, REUTERS (Sept. 11, 2014, 3:01 PM), <https://www.reuters.com/article/us-usa-arkansas-theron-idUSKBN0H62IQ20140911>.

154. NAT’L CTR. FOR STATE COURTS, *CASES IN WHICH JUDGES WERE DISCIPLINED FOR PUBLICLY COMMENTING ON PENDING CASES ON SOCIAL MEDIA* 7 (2017) <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/PublicCommentsonPendingCasesonSocialMedia.ashx>.

155. *Id.*

Especially since a lot of subpoenas have been issued. Hey, here I thought it was going to be a slow week.<sup>156</sup>

Ultimately, Judge Maggio's inappropriate comments led to his removal from the bench. He is currently serving a ten-year prison sentence for bribery and corruption (apparently unrelated to his "geauxjudge" online persona).<sup>157</sup>

As illustrated in the Perricone and Maggio examples, intentional use of anonymity to hide blatantly improper conduct is ill-advised. In fact, it should go without saying that anonymity does not remedy bad conduct.<sup>158</sup> Additionally, anyone using the internet should assume that unmasking or doxing is possible. De-anonymization can be accomplished through various means, from biographical clues<sup>159</sup> to technical details linking accounts to their real users.<sup>160</sup> Little expectation of privacy or recourse exists when unmasking occurs. For example, Judge Shirley Strickland Saffold of Ohio was linked to the username "lawmiss" by two newspapers.<sup>161</sup> The "lawmiss" username made objectionable posts online, including one apparently blaming Arabs for slavery<sup>162</sup> and expressing homophobic views.<sup>163</sup> After the "lawmiss" scandal

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156. *Id.* at 7–8.

157. Benjamin Hardy & Max Brantley, *Mike Maggio Pleads Guilty to Federal Bribery Charge*, ARK. TIMES (Jan. 9, 2015), <https://www.arktimes.com/ArkansasBlog/archives/2015/01/09/mike-maggio-pleads-guilty-to-federal-bribery-charge>; Max Brantley, *Mike Maggio Begins 10-year Sentence on Federal Bribery Conviction*, ARK. TIMES (July 19, 2017), <https://www.arktimes.com/ArkansasBlog/archives/2017/07/19/mike-maggio-begins-10-year-sentence-for-federal-bribery-conviction>.

158. In one famous example, in 2011 Congressman Anthony Weiner accidentally tweeted a lewd picture of himself that was meant to be sent directly to a woman with whom he was privately messaging on Twitter. *Anthony Weiner Scandal: A Timeline*, CNN (Aug. 30, 2016), <https://www.cnn.com/2016/08/30/politics/weiner-scandal-timeline/index.html>. His initial reaction was to lie and claim he was hacked, but ultimately Wiener had to face the political fallout of his inappropriate online conduct by resigning from Congress. *Id.* In 2013, the gossip website theDirty.com revealed that Wiener was still "sexting" with young women, but this time using the pseudonym "Carlos Danger." Philip Bump, *Anthony 'Carlos Danger' Weiner Not Dropping Out After Admitting to More Sexting*, ATLANTIC (July 23, 2013), <https://www.theatlantic.com/politics/archive/2013/07/new-allegations-anthony-weiners-sexting-didnt-end-when-he-claims/312970/>. Following the revelation, Wiener resigned from the New York City mayoral race in disgrace. *Anthony Weiner Scandal: A Timeline*, CNN (Aug. 30, 2016). He later was sentenced to 21 months in federal prison because some of his obscene communications were with a fifteen-year-old girl. Sonia Moghe & Kate Sullivan, *Anthony Weiner to be Released from Prison Early*, CNN (Oct. 9, 2018), <https://www.cnn.com/2018/10/09/politics/anthony-weiner-early-prison-release/index.html>.

159. See Campbell, *supra* note 152 (Political blogger Matt Campbell is credited with outing Judge Maggio as "Geauxjudge").

160. For example, a journalist for the Plain Dealer newspaper in Cleveland looked up the email address linked to the pseudonym "lawmiss" and discovered the AOL e-mail belonged to Judge Shirley Strickland Saffold, an Ohio state-court judge. Kashmir Hill, *Ohio judge sues Cleveland Plain Dealer for \$50 Million After Being Outed as an Anonymous Commenter*, FORBES (Apr. 8, 2010), <https://www.forbes.com/sites/kashmirhill/2010/04/08/ohio-judge-sues-cleveland-plain-dealer-for-50-million-after-being-outed-as-an-anonymous-commenter/#2f99382f1275>.

161. Gabriel Baird, *Web Name Linked to Judge Shirley Strickland Saffold Has Comments on Other Sites: Some Target Arabs, Asians, Others*, CLEVELAND.COM (May 9, 2010), [http://blog.cleveland.com/metro/2010/05/lawmiss\\_comments\\_found\\_on\\_othe.html](http://blog.cleveland.com/metro/2010/05/lawmiss_comments_found_on_othe.html).

162. *Id.*

163. See *id.* For example, the "lawmiss" username commented on an article about Ellen DeGeneres with the following: "She's s dyke, and that's all she's competent at. She's no dancer. Nest think you'll know the gays will take over." Vince Grzegorek, *Judge Shirley Saffold Allegedly Left Racist Comments*

gained national attention, Judge Saffold brought a \$50 million lawsuit for invasion of privacy, false light, and other claims.<sup>164</sup> Her ability to recover for such claims was questionable, and she subsequently dropped the lawsuit after settlement.<sup>165</sup> The very real threat that anonymity will be defeated further illustrates why anonymity, while common online, should not be used to mask poor conduct by lawyers, judges, and law professors.

### B. Controversial Content and the Professor's Role

Professors have faced negative workplace consequences, or at least harsh criticism, for their tweets. The most common examples involve politically charged content from both ends of the political spectrum. Notably, the most controversial political content can be characterized as uncivil, deemed flippant in tone, or seen as condoning violence.

A University of Tampa sociology professor was fired for tweeting that Texas somehow deserved the devastation of Hurricane Harvey because of the state's right-leaning politics.<sup>166</sup> The tweet led to a successful social media campaign to fire the professor.<sup>167</sup> At the University of Illinois, a professor's offer of a tenured position was blocked after the professor tweeted about the bombardment of the Gaza strip.<sup>168</sup> The university noted that the tweets were seen as anti-Semitic and indicative of the professor's lack of civility, which may intimidate students with differing viewpoints.<sup>169</sup> A sociology professor at University of Mississippi faced criticism from the chancellor of the university and from the state's governor for urging harassment of conservative politicians in public.<sup>170</sup> His statements were seen as encouraging acts of aggression.<sup>171</sup> A Fresno State English professor was placed on leave for a disrespectful tweet about the death of former first lady Barbara Bush.<sup>172</sup> A

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at AOL, *Other Sites*, CLEVELAND SCENE (May 10, 2010) (errors in the original), <https://www.clevelandscene.com/scene-and-heard/archives/2010/05/10/judge-shirley-saffold-left-racist-comments-at-aol-other-sites>.

164. See Dan Bobkoff, *Judge Takes Paper to Court Over Online Comments*, NPR (Apr. 10, 2010), <https://www.npr.org/templates/story/story.php?storyId=125816869>; see also Hill, *supra* note 160.

165. Debra Cassens Weiss, *Judge Settles \$50M Suit Against Website for Linking 'Lawmiss' Comments to Her E-Mail*, ABA J. (Jan. 3, 2011), [http://www.abajournal.com/news/article/judge\\_settles\\_50m\\_suit\\_against\\_website\\_for\\_linking\\_lawmiss\\_comments\\_to\\_her/](http://www.abajournal.com/news/article/judge_settles_50m_suit_against_website_for_linking_lawmiss_comments_to_her/).

166. Claire McNeill, *UT Fires Teacher Whose Tweet Blamed Harvey on Texas GOP Vote*, TAMPA BAY TIMES (Aug. 31, 2017), <https://www.tampabay.com/news/education/college/ut-condemns-teacher-whose-tweet-blames-harvey-on-texas-gop-vote/2335504>.

167. *Id.*

168. See Robert Mackey, *Professor's Angry Tweets on Gaza Cost Him a Job*, N.Y. TIMES (Sept. 12, 2014), <https://www.nytimes.com/2014/09/13/world/middleeast/professors-angry-tweets-on-gaza-cost-him-a-job.html>.

169. *Id.*

170. Jessica Chasmar, *Professor Calls for Harassing Republicans at Restaurants, Sticking 'Fingers in Their Salads'*, WASH. TIMES (Oct. 17, 2018), <https://www.washingtontimes.com/news/2018/oct/17/professor-calls-harassing-republicans-restaurants/>. The professor tweeted: "[p]ut your whole damn fingers in their salads," and "[t]ake their apps and distribute them to the other diners. Bring boxes and take their food home with you on the way out. They don't deserve your civility." *Id.*

171. *Id.*

172. Javier Panzar, *Cal State Fresno Professor Under Fire for Tweets Attacking Barbara Bush*, L.A. TIMES (Apr. 19, 2018), <https://www.latimes.com/local/lanow/la-me-ln-fresno-state-barbara-bush->

Georgetown professor was criticized for tweeting in the wake of Justice Kavanaugh's confirmation hearings that "entitled white men" should die "miserable deaths while feminists laugh."<sup>173</sup> And a Boston University newly-hired sociology professor was criticized for her tweets that were critical of white-owned businesses and of white male college students.<sup>174</sup> At Drexel University, an associate professor of politics and global studies quit after several controversial tweets, including a statement that "all I want for Christmas is white genocide."<sup>175</sup> University of Chicago law professor Todd Henderson faced backlash after tweeting about Justice Sotomayor: "I'm old enough to remember when a second-class intellect like Sotomayor got onto the Court because her Latinaness gave us insight into her soul."<sup>176</sup> And a New York University liberal studies professor left his position after tweeting anonymously as "Deplorable NYU Prof" using the twitter handle @antipcnypuf, making statements criticizing safe spaces, trigger warnings, and topics like campus directives on bias responses or guidelines on appropriate Halloween costumes.<sup>177</sup>

The degree of negative attention professors get for controversial, politically-charged tweets has been called a culture war of sorts, fueled by online speech and harassment.<sup>178</sup> Even if controversial statements were not made on social media, dissenters have mobilized on social media to pressure and harass the professor, sometimes even doxing them to reveal their personal information.<sup>179</sup> A Portland

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20180419-story.html. The professor tweeted: "I'm happy the witch is dead. can't wait for the rest of her family to fall to their demise the way 1.5 million iraqis have. byyyyyyyyyyy." *Id.*

173. Katherine Mangan, *Georgetown Professor's Profane Tweet Elicits Tepid Response from University*, CHRONICLE OF HIGHER EDUC. (Oct. 2, 2018), <https://www.chronicle.com/article/Georgetown-Professor-s/244708>. The professor's Twitter account had been suspended. Jason Murdock, *Twitter Suspends University Professor Who Said Kavanaugh Supporters 'Deserve Miserable Deaths,'* NEWSWEEK (Oct. 2, 2018), <https://www.newsweek.com/twitter-suspends-georgetown-professor-kavanaugh-supporters-deserve-miserable-1148829>.

174. Scott Jaschik, *Regret Over Tweets on Race*, INSIDE HIGHER EDUC. (May 13, 2015), [https://www.insidehighered.com/news/2015/05/13/professor-center-debate-over-her-tweet-white-male-students-expresses-regret?utm\\_source=slate&utm\\_medium=referral&utm\\_term=partner](https://www.insidehighered.com/news/2015/05/13/professor-center-debate-over-her-tweet-white-male-students-expresses-regret?utm_source=slate&utm_medium=referral&utm_term=partner); Katia Hetter, *Online Fury Over Boston University Professor's Tweets on Race*, CNN (May 13, 2015), <https://www.cnn.com/2015/05/13/living/feat-boston-university-saida-grundy-race-tweets/index.html>.

175. Scott Jaschik, *Controversial Professor Quits*, INSIDE HIGHER EDUC. (Jan. 2, 2018), <https://www.insidehighered.com/news/2018/01/02/controversial-drexel-professor-resigns>. The professor resigned, citing fear for his safety as a reason. *Id.* The same professor also sparked controversy when he tweeted "that he wanted to 'vomit' after seeing someone give up a first-class seat to a uniformed soldier." Colleen Flaherty, *Looking into Tweets*, INSIDER HIGHER EDUC. (Apr. 18, 2017), <https://www.insidehighered.com/news/2017/04/18/documents-show-drexel-investigating-professors-tweets-its-unclear-whether-faculty>.

176. Benjamin Fearnow, *Conservative Law Professor Says 'Latinaness' Got Supreme Court Justice Sotomayor Appointed Before Deleting Twitter*, NEWSWEEK (Aug. 9, 2018), <https://www.newsweek.com/sonia-sotomayor-chicago-law-school-latinaness-professor-m-todd-henderson-1066705>.

177. Colleen Flaherty, *'Deplorable' NYU Prof on Leave*, INSIDE HIGHER EDUC. (Nov. 1, 2016), <https://www.insidehighered.com/news/2016/11/01/nyu-professor-who-used-anonymous-twitter-account-criticize-university-trigger>; see also Melkorka Licea, *Professor Who Tweeted Against PC Culture is out at NYU*, N.Y. POST (Oct. 30, 2016), <https://nypost.com/2016/10/30/nyu-professor-who-opposed-pc-culture-gets-booted-from-classroom/>.

178. Anya Kamenetz, *Professors Are Targets in Online Culture Wars; Some Fight Back*, NPR (Apr. 4, 2018), <https://www.npr.org/sections/ed/2018/04/04/590928008/professor-harassment>.

179. See *id.*

State political science professor was forced to withdraw his essay entitled “The Case for Colonialism” following backlash.<sup>180</sup> In some instances, conservative speakers have been met with sometimes-violent opposition on college campuses.<sup>181</sup> As one opinion piece in the New York Times notes, academics and others with controversial views feel as if they are members of an “intellectual dark web” in which they can only share unpopular perspectives in the shadows of the mainstream internet.<sup>182</sup>

While most of the examples of problematic tweets by professors involve questionable tone or a lack of civility, there is no doubt a risk with sharing controversial political statements from both ends of the political spectrum. While clear academic norms for professors do not exist, professors generally are expected to act with civility, inclusiveness, and professionalism. Politically charged tweets may deviate from these professional norms and may lead to criticism or fierce backlash both online and in the real world.

### C. Other Attempts to Separate the Personal from the Professional

One solution to the challenges of social media professionalism is to maintain separate accounts for personal and professional tweets. But for many legal professionals, one’s career identity may be difficult to separate from one’s personal life.<sup>183</sup> Additionally, divorcing real-world and online personas can be messy and fraught with error. And even seemingly innocuous attempts to separate real-world and online personas still create the risk of disinhibited behavior and unprofessionalism.<sup>184</sup>

For example, some professionals prefer to treat social media as only a personal tool. But even personal accounts must conform with professional norms.<sup>185</sup> One purpose of professional norms is to present to the public a dignified image of the profession, whether it be lawyers, judges, or law professors.<sup>186</sup> Inappropriate content on a personal account still leaves a bad impression on members of the public who have access to the personal account contents.<sup>187</sup> Further, a user’s social media networks inevitably begin to blend professional and personal contacts, so that it becomes impossible to isolate one’s personal life from the professional one.<sup>188</sup>

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180. Nigel Jaquiss, *On Columbus Day, the Washington Post Details Blowback from PSU Professor’s Controversial Essay Defending Colonialism*, WILLAMETTE WEEK (Oct. 9, 2017), <https://www.wweek.com/news/2017/10/09/on-columbus-day-the-washington-post-details-blowback-from-psu-professors-controversial-essay-defending-colonialism/>.

181. Kamenetz, *supra* note 178.

182. Bari Weiss, Opinion, *Meet the Renegades of the Intellectual Dark Web*, N.Y. TIMES, May 8, 2018.

183. See, e.g., *supra* Section III.A.ii.

184. See Suler, *supra* note 52.

185. See W. VA. LAWYER DISCIPLINARY BD., *Social Media and Attorneys* (Sept. 22, 2015); see also Murphy, *supra* note 108 (noting how claiming tweets are merely personal does not solve problem of missteps on Twitter by academics).

186. See generally Hessick, *supra* note 104.

187. *Id.*

188. See, e.g., Kerry Gallagher, *The Myth of Separate Personal and Professional Social Media Accounts*, CONNECT SAFELY BLOG (May 10, 2017) (noting how separate accounts may be helpful but that boundary-crossing is inevitable), <https://www.connectsafely.org/the-myth-of-separate-personal-and-professional-social-media-accounts>.

Another approach some professionals use is to maintain a personal account and a separate, parallel account that functions as the professional one.<sup>189</sup> For those that use parallel accounts, keeping the content separate, as intended, is important.<sup>190</sup> While posting something patently unprofessional is not advisable on social media at all, it can be especially problematic if accounts are inadvertently mixed up.<sup>191</sup> The best approach is to maintain professionalism across the board.

#### IV. TIPS FOR MAINTAINING PROFESSIONALISM ONLINE

The purpose of this essay is not to dissuade social media usage. To the contrary, social media is an important part of modern social behavior. It provides a centralized place for staying in touch with real-life contacts, for making new virtual contacts, for learning about current affairs and breaking news, for scheduling events, and for communicating with people. Facebook, for example, is so entrenched in all aspects of our lives (both virtual and real-world) that abandoning it altogether is difficult or seen as unusual.<sup>192</sup>

Professionally, social media may be equally indispensable. Lawyers can stay current on legal developments using Twitter, research litigants and witnesses on Facebook,<sup>193</sup> or promote their business on LinkedIn.<sup>194</sup> Judges can interact directly with their constituents, educate the public about the judiciary, build relationships

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189. See Melanie Pinola, *Managing Your Personal and Professional Online Profiles*, LIFEWIRE (May 15, 2018), <https://www.lifewire.com/social-networking-strategies-for-personal-and-professional-use-2378017>.

190. *Id.*

191. For example, the marketing contractor for Chrysler accidentally tweeted from the company's official account an unflattering statement meant to come from his personal account: "I find it ironic that Detroit is known as the #motorcity and yet no one here knows how to (expletive) drive." *Man Fired over Obscene Chrysler Tweet is Sorry*, NBCNEWS.COM (Mar. 17, 2011), <http://www.nbcnews.com/id/42132041/ns/business-autos/t/man-fired-over-obscene-chrysler-tweet-sorry/#.XDZSfC2ZOMI>. As another example, in 2012, a KitchenAid employee accidentally tweeted an offensive political rant about former President Obama's grandmother from the official account instead of her personal one. Tiffany Hsu, *KitchenAid Apologizes Over Tweet About Obama's Grandmother*, L.A. TIMES (Oct. 4, 2012), <https://www.latimes.com/business/la-fi-mo-kitchenaid-tweet-obama-grandmother-20121004-htmllstory.html>.

192. See generally Abby Ohlheiser, *You Want to Quit Facebook, But Will You Really Click the Button? These Folks Tried.*, WASH. POST (Mar. 21, 2018), [https://www.washingtonpost.com/news/the-intersect/wp/2018/03/21/its-easy-to-hate-facebook-its-much-tougher-to-quit/?utm\\_term=.1aa86a7458af](https://www.washingtonpost.com/news/the-intersect/wp/2018/03/21/its-easy-to-hate-facebook-its-much-tougher-to-quit/?utm_term=.1aa86a7458af); Kashmir Hill, *Beware, Tech Abandoners. People Without Facebook Accounts Are 'Suspicious.'*, FORBES (Aug. 6, 2012), <https://www.forbes.com/sites/kashmirhill/%202012/08/06/beware-tech-abandoners-people-without-facebook-accounts-are-suspicious/>; Geoff Burns, *Millennial Survives Month Without Social Media*, TOLEDOBLADE.COM (Dec. 1, 2017), <https://www.toledoblade.com/Geoff-Burns/2017/12/01/Millennial-survives-month-without-social-media.html>.

193. See Agnieszka McPeak, *Social Media Snooping and its Ethical Bounds*, 46 ARIZ. ST. L.J. 845 (2014).

194. See Chris Riley, *The Lawyer's Guide to Using LinkedIn as a Marketing Tool*, LEXOLOGY (May 17, 2017), <https://www.lexology.com/blog/2017/05/lawyers-guide-using-linkedin-marketing-tool>.

with the legal community, mentor aspiring lawyers, model professionalism and civility, and remain abreast of how modern technology is used by ordinary people.<sup>195</sup> Law professors can share their expertise, promote their institutions, and engage with scholars, students, media, and the public.<sup>196</sup>

Although I started this essay by disavowing attempts at simplified “tips” for online conduct, I am nonetheless providing some simple tips for reconciling social media and professional norms. These tips are not standardized boundaries of online conduct but rather guidelines for establishing your own set of rules to follow in virtual spaces.

#### A. Define Your Online Role

Different platforms serve different functions, so it is important to consider which platforms you will use, how often, and for what purpose. Part of this consideration is determining the role you plan to take in each setting. Facebook may be best for a personal role, such as for sharing information about hobbies and family updates. LinkedIn is designed to serve a pure professional role, but you should still define the parameters of what you plan share on that platform. For Twitter, consider whether you are tweeting about all areas that interest you (whether personal or professional) or if you are focusing on topics relating to your professional expertise.

For lawyers, all social media content, whether centered around one’s personal or professional role, must take into account the specific limitations placed upon lawyers under the applicable law governing lawyers. For judges, the standards imposed may be even greater, including avoiding even the appearance of impropriety.<sup>197</sup> For professors, even though a standardized set of rules or professional norms may not exist, be mindful of your position as expert, mentor, and representative of your university.

#### B. Define Your Networks

Once you contemplate the role you play on different platforms, consider the scope of your audience and determine your parameters for who you include in your network. For example, if you use Facebook and Instagram to post about your personal life and share pictures of your hobbies or family, consider using increased pri-

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195. See Stephen A. Dillard, *#Engage: It’s Time for Judges to Tweet, Like, & Share*, 101 JUDICATURE 11, 11–12 (2017), [https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/judicature/judicature\\_101-1\\_dillard.pdf](https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/judicature/judicature_101-1_dillard.pdf).

196. See Chris Walker, *Is There Any Reason Not to Be on Twitter*, PRAWFBLAWG (April 20, 2016), <https://prawfsblawg.blogs.com/prawfsblawg/2016/04/is-there-any-reason-not-to-be-on-twitter.html>; Hessick, *supra* note 104, at 922. See also Bateman, *supra* note 107 (discussing how junior scholars are often expected to promote their work and network with academic communities on Twitter); Stefanie Pietkiewicz, *Science and Social Media: Tweets Offer Glimpse into the Lives of Faculty*, STANFORD UNIV. (Oct. 25, 2018), <https://chemistry.stanford.edu/news/science-and-social-media-tweets-offer-glimpse-lives-faculty> (discussing how professors benefit from the community of scholars on Twitter and can use it to help educate the public); Glen Wright, *The Weird and Wonderful World of Academic Twitter*, TIMES HIGHER EDUCATION.COM (Sept. 2, 2015), <https://www.timeshighereducation.com/blog/weird-and-wonderful-world-academic-twitter> (discussing some of the useful information academics can find on Twitter).

197. MODEL RULES OF JUDICIAL CONDUCT r.1.2 (AM. BAR ASS’N 2014).

vacancy settings to keep your activity visible to a smaller audience. For LinkedIn, establish the boundaries of who will be a connection, keeping in mind that connections may see the names and professions of your other connections. For Twitter, if you are keeping your account public, think critically about who you follow or block.

If you choose to use privacy settings, establish a system for deciding who gets access to your private content. For example, do you connect with coworkers who supervise your work? What about coworkers who report to you? If you are a lawyer, do you establish social media connections with your clients? What about judges and opposing counsel? For judges, consider whether you will connect with litigants who regularly appear before you or with members of the community who may serve as jurors or witnesses in court. Ethics and other rules may be implicated based on who you connected with, so consult applicable rules to help guide how you define your networks.

For professors, be consistent with how you interact with students online. Do you follow current students back on Twitter if they have a private account? Are you willing to connect with students on LinkedIn? Do you give students access to your private Facebook or Instagram content? Consider whether you plan to connect on social media with current students or want to wait until a student is no longer enrolled at your university. Once you decide these boundaries for your online networks, implement them consistently.

For everyone, defining social networks only goes so far, as social circles inevitably overlap or expand. But creating some sort of standards for when to connect online and with whom is still advisable.

### C. Create Content Guidelines

Decide what content you are going to post on which platforms and stay consistent with your parameters.<sup>198</sup> Are you going to post interesting news articles that fall within your practice area or professional expertise? Are you going to focus on your hobbies, like your favorite sports team or topics of local interest? Is your goal only to post pictures of your children, with the occasional cat meme, or are you seeking to raise public awareness of other issues you care deeply about? Perhaps it is a combination of all of these.

When deciding what content to post, think about your role and your network from the first two tips above. This may help steer your decisions on what content you post on which platform. As noted throughout, however, all content – regardless of privacy settings or desired audience – should fall within the realm of what is acceptable under governing rules, policies, and professional norms. Additionally, be mindful of the pressure social media norms place on users to share and comment on hot topics that are still developing. Before you jump to share “breaking” content and stories, consider whether this is in line with your role, the expectations of your audience, and your vision of the content you wish to post.

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198. See generally Murphy, *supra* note 185.

For lawyers, remember that all content posted, regardless of privacy settings, must align with the ethics rules that apply to sharing confidential information,<sup>199</sup> publicizing cases,<sup>200</sup> or maintaining integrity.<sup>201</sup> Consider how personal opinions may impact your clients or potential clients. Additionally, lawyers should be mindful about the appearance of the profession as a whole and public perception of lawyers, which is one of the rationales for imposing professional norms on lawyers in the first place.<sup>202</sup> Similarly, for judges, all content must comply with the requirements of independence and impartiality of the judiciary and avoiding the mere appearance of impropriety.<sup>203</sup> The expectation that judges maintain dignity extends to their personal lives.<sup>204</sup>

For professors, topics relating to your academic area and expertise generally are suitable for sharing on social media. But opining widely on things outside of your area of expertise may be riskier.<sup>205</sup> Consider whether political opinions, no matter how seemingly benign, alienate students or members of the public.<sup>206</sup> Additionally, expression of personal political opinions may not align with institutional expectations.<sup>207</sup>

Although the internet is a beacon of free speech and self-expression, lawyers, judges, and law professors nevertheless should recognize the professional constraints and consequences for the content they post online. Recognizing the risks associated with certain content should help steer you to creating and maintaining your own guidelines on what you are willing to post.

#### D. Maintain Proper Tone and Civility

One of the biggest disconnects between professional norms and online norms is the tone and civility of interactions. For every interaction – regardless of role, audience, or substantive content – a civil tone must be maintained. For lawyers,

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199. See MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2018) (prohibiting a lawyer from revealing "information relating to the representation of a client"); see also MODEL RULES OF PROF'L CONDUCT r. 1.8(b) (AM. BAR. ASS'N 2018) ("A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent").

200. See *id.* r. 3.6(a) ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.").

201. See, e.g., *id.* r. 8.4 (focusing on maintaining the integrity of the profession and prohibiting dishonesty, deceit, or conduct that is "prejudicial to the administration of justice").

202. See MODEL RULES OF PROF'L CONDUCT Preamble 6 (AM. BAR ASS'N 2018) ("a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").

203. See MODEL CODE OF JUDICIAL CONDUCT Preamble 1 (AM. BAR ASS'N 2018) (noting that "judges must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.").

204. See *id.* Preamble 2 ("Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.").

205. See Hessick, *supra* note 104, at 916.

206. See *id.*

207. See discussion *supra* Section II.

the ethics rules require upholding the law in all activities.<sup>208</sup> Newly added Model Rule 8.4(g) expressly prohibits conduct that is harassment or discrimination in the practice of law.<sup>209</sup> For judges, dignity and integrity are paramount in both their professional and personal lives.<sup>210</sup>

For professors, academic freedom and undefined or variable professional norms may give the impression of more leeway with online activity. Greater thought may be necessary for professors to define the bounds of their online conduct. For example, decide whether you are going to delve into the potential abyss of personal political opinions or use Twitter for political activism. Consider whether you are getting wrapped up in the social media norms of (often uncivil) political debate and whether commenting into controversies is in line with your professional identity – and your employer’s standards. Make sure your tone is always civil, regardless of how disrespectful others’ comments are. Remember your role as mentor and that students may be part of your audience. Are you encouraging balanced discourse and an open environment, similar to what you cultivate in class?<sup>211</sup> Thinking proactively about approaches to these questions can help professors avoid the pitfalls of uncivil social media interactions.

#### E. Establish Your Own Social Media Policy

The four tips above should culminate with the development of an individualized “social media policy” of sorts. Set your own customized rules for social media based on your perception of your role, your audience, and your ideal content. Find a way to ensure professionalism and civility throughout. Your personal policy should reflect the boundaries that you feel comfortable operating within and should help you maintain consistency. When in doubt, consult your own personal policy before proceeding with online conduct.

Additionally, it is crucial to recognize the powerful forces of social media norms that push us to act unprofessionally in virtual spaces and find meaningful ways to resist them. Strategies for maintaining professionalism thus may vary from person to person (and by personality type). No single list of top tips can solve the ongoing problem of social media professionalism. By creating a personal social media policy, you can think critically about your online activity and identify potential missteps before they happen. Individual constraints and risk tolerances vary, which

208. See MODEL RULES OF PROF’L CONDUCT Preamble 5 (AM. BAR ASS’N 2018) (“A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”).

209. See MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018) (“It is professional misconduct for a lawyer to (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”). The addition of Rule 8.4(g) has been controversial. Although twenty states already had a pre-existing rule that is comparable to Rule 8.4(g), it appears only Vermont has adopted this provision so far, with nine states declining to adopt it. See AM. BAR ASS’N CENTER FOR PROF’L RESPONSIBILITY POLICY IMPLEMENTATION COMM., JURISDICTIONAL ADOPTION OF RULE 8.4(G) OF THE ABA MODEL RULES OF PROF’L CONDUCT 7 (2019) [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_adapt\\_8\\_4\\_g.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adapt_8_4_g.pdf).

210. See Model Code of Judicial Conduct Preamble 1 & 2 (Am. Bar Ass’n 2018).

211. See generally Hessick, *supra* note 104, at 917.

is why a standardized “policy” and “tips” do not work. But a proactive and personalized set of policies can serve as a tool to steer you away from the many pitfalls that exist online, particularly as social media norms continue to morph. Knowledge of the forces at play provides some context for forging ahead and finding the right balance. Many professionals recognize the risks of online missteps and have adopted strategies to help avoid them, and varied approaches can work as long as social media activity reflects basic professionalism across the board.

## V. CONCLUSION

Professional duties and social media norms often clash, and lawyers, judges, and law professors face unique challenges in maintaining professionalism online. The norms of behavior on social media are influenced both by top-down policies implemented by social media platforms and by the expectations and standards set by the community of platform users. Further, what is normal for conduct online does not always align with acceptable behavior in the real world. Disinhibition in online interactions often leads to oversharing. And the prevalence of online anonymity or disassociation from real-world personas further influences online behavior. The result is that we may share more, get more personal, and act uncivilly online in ways we would never tolerate in in-person conduct.

While social media norms continue to push the envelope of free expression, professional norms require a higher standard of conduct. For lawyers and judges, ethics codes and substantive law place limits on conduct, even in one’s personal life. For law professors, professional norms are less clearly defined, and notions of academic freedom may provide some leeway. Nonetheless, limitations exist in the form of university policies and general expectations of professionalism in the academy.

Unfortunately, social media norms and professional norms often clash. The result in the most extreme cases can be disbarment, removal from the bench, or a loss of an academic position. But the potentially grave consequences of online missteps largely can be avoided through an understanding of the forces at play and the risks involved.

Thus, we should all be mindful of the influences that are persuading us to overshare or lose civility online, as to both top-down policies or bottom-up norms. Think proactively to define your role online, identify your networks, set guidelines for content, and maintain civility across the board. Ultimately, a personal social media policy can be crafted to help maintain proper boundaries of online conduct. After all, social media, by its very architecture, inspires conduct that deviates from professional norms. Falling prey to social media’s siren song of disinhibition, oversharing, and irreverence may very well have real-world consequences for lawyers, judges, and law professors.