

PERSPECTIVES ON
STATE COURT LEADERSHIP

COURTS ARE CONVERSATIONS:

AN ARGUMENT FOR INCREASED ENGAGEMENT BY COURT LEADERS

*One in a series from the Executive Session
for State Court Leaders in the 21st Century*

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This is one in a series of papers that will be published as a result of the **Executive Session for State Court Leaders in the 21st Century**.

The Executive Sessions at the Harvard Kennedy School bring together individuals of independent standing who take joint responsibility for rethinking and improving society's responses to an issue.

Members of the Executive Session for State Court Leaders in the 21st Century over the course of three years sought to clarify the distinctive role of state court leaders in our democratic system of government and to develop and answer questions that the state courts will face in the foreseeable future. Themes addressed include principles for effective court governance, the tension between problem solving and decision making, the implications of social media for court legitimacy, how courts defend themselves from political attack, and the notion of chief justices as civic leaders. Many themes were developed by Session members into papers published in a series by the National Center for State Courts.

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INTRODUCTION

The brave new world of technology provides jurors today with more opportunities to disrupt the established purposes of the jury system than ever before. There was the Philadelphia juror who tweeted about the progress of deliberations, threatening to upend a five-month long corruption trial.¹ There was the juror in Arkansas, who after the verdict in his trial was announced, tweeted, “So, Johnathan, what did you do today? Oh, nothing really. I just gave away **twelve million dollars** of somebody else’s money!”² The lawyer for the corporate defendant who faced the \$12.6 million damage judgment tried to use the tweet as grounds for a new trial, alleging that the Twitter posting showed bias. There was the California juror who blogged the jury deliberations, causing the conviction to be vacated on appeal.³ In a different California case, a juror’s clandestine blogging was found not to be prejudicial, even though he’d posted a photo of the murder weapon, called fellow juror candidates “liars” and “bozos,” and wrote about the differences between a “medical examiner” and a “coroner” based on his own independent internet research.⁴ In another case, a juror looked up the scene of a disputed accident on Google Maps. A Florida jury foreman used his iPhone to look up the definition of “prudent” to help decide a manslaughter conviction.⁵ Then there was the English juror who, undecided herself, created a Facebook poll and posted details of the case to ask her friends whether the defendant was guilty.⁶ Jurors, also, can be the victims of these new technologies: a Kansas judge recently declared a mistrial in a murder case after a reporter’s camera phone picture of the courtroom accidentally showed a juror’s face.⁷

None of these incidents on its own would appear to be a systemic challenge to the way courts operate, but in the aggregate they point to an ongoing trend that could upend the way the legal system has traditionally done business. As social media and technology adoption increases, the public is increasingly bringing its daily communication habits into the courtroom. Trying to keep up with the ever-growing and evolving list of social media tools seems a losing battle. In Washington, D.C., juror instructions now specifically forbid sitting jurors from accessing even LinkedIn, the professional social-networking site.⁸ Perhaps there

is a fear that jurors would seek recommendations from lawyers whose cases they decide? On any given day, a Twitter search for “jury duty” reveals scores of tweets—some positive, some negative, most merely indifferent.⁹

The jury duty tweets are indicative of how courtroom walls today are more permeable to information than ever before, an accelerating and unstoppable trend that threatens the very foundations of the legal system. It is commonly stated that a trial is a “search for truth.” That is only partly accurate. The purpose of a trial is not to find the truth; it is to resolve a dispute. To that end, a trial is a search for truth only within the boundaries of the dispute as defined for the jury by the arguments of the attorneys and the applicable law. Jurors are not supposed to be private investigators. Their ability to investigate and find the “truth” is circumscribed by a variety of legal and policy considerations established through centuries of practice. Yet today, any person entering a courtroom with a smartphone—judge, attorney, plaintiff, defendant, or juror—carries the ability to access just about any piece of information ever created.

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At the same time, outside the courtroom these same tools offer a chance for courts to change the way they conduct their own business and communicate with the public. An English court has decreed that its proceedings can be tweeted;¹⁰ an Australian court has ruled that lawyers can post legally binding orders on defendants’ Facebook walls;¹¹ an Islamic court in Egypt has ruled that SMS texting can be used as a

legally binding divorce.¹² Domestically, the Florida court system has set up its own Twitter feed¹³ and the New Jersey court system has its own Facebook page complete with photo albums, wall posts, and 1,982 “likes.”¹⁴

Outside the courtroom, legal commentary has become a cottage industry more than ever before. The “Above the Law” blog tracks lawyers, legal scholars, and judges like paparazzi.¹⁵ On the federal level, D.C. attorney and Supreme Court specialist Tom Goldstein’s blog, “SCOTUSBlog,”¹⁶ has become arguably the sharpest observer of the Court out there, but it is far from the only one. Even at the state level, blogs and commentary have proliferated. In Texas, the “Supreme Court of Texas Blog”¹⁷ intimately tracks petitions before Texas’ high court, while the more opinionated “Jefferson Court Blog”¹⁸ tracks what it calls the Texas Supreme Court’s “Jury Verdict Wrecking Crew.” Even at the Texas appellate level, there is a blog written by a Texas attorney dedicated to the ins and outs of the judiciary.¹⁹

ORIGINS OF THE COMMUNICATIONS REVOLUTION

Whereas “Web 1.0”—the dot com boom that powered the incredible stock market bubble of the late 1990s and led to unproven startups like Pets.com devouring hundreds of millions of dollars in venture capital before failing gloriously—was about one-way communication and static web pages geared mostly towards e-commerce, “Web 2.0” ushered in an era of interactive, two-way communication.

Although it’s nearly impossible to nail down a single transformative moment that began the era of social media, the publication in April 1999 of “The Cluetrain Manifesto”²⁰ surely ranks as one of the signal moments of the new approach. Consisting of 95 “theses” and modeled on 95 theses that Martin Luther nailed to the door of Wittenberg Cathedral to kick off the Protestant Reformation, the Cluetrain Manifesto has come to define communication in a newly connected world. The introduction reads, “A powerful

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global conversation has begun. Through the internet, people are discovering and inventing new ways to share relevant knowledge with blinding speed. As a direct result, markets are getting smarter—and getting smarter faster than most companies.”²¹ Its first thesis, “Markets are conversations,” was a simple conceptual revolution in communications.²² For instance, a key focus of the Cluetrain Manifesto is the idea that this new era of communications relies on a “human voice.” Theses 3, 4, and 5, read, concurrently, “Conversations among human beings sound human. They are conducted in a human voice. Whether delivering information, opinions, perspectives, dissenting arguments or humorous asides, the human voice is typically open, natural, uncontrived. People recognize each other as such from the sound of this voice.”²³

This communication shift is set against a backdrop that has seen public trust in institutions falling nearly across the board. Studies like the Edelman Trust Barometer have shown a near universal drop—in some cases more like a collapse—in the public trust of churches, politicians, corporate leaders, and other major institutions.

A NEED TO LISTEN BETTER

While the Cluetrain Manifesto was primarily aimed at corporations, public relations, and other private businesses, the document is still useful for providing a construct to discuss the communication needs and requirements of courts and the legal system in the early years of the 21st Century.

Thus far, much of this communication revolution has happened outside the courtroom and the legal system. Whereas the other two branches of government have seen the expectations of their constituents

fundamentally altered by technology—engaging constituents through tweeting and Facebook is now de rigeur for just about any campaign for elected office, and woe be it to the candidate who forgets that any public appearance (and many private moments too) are now fair game for YouTube. Governors tweet and blog; congressmen and legislators write lengthy Facebook wall posts; state agencies create YouTube videos to highlight their programs and accomplishments. Much of this engagement has come late—after voters and constituents have already embraced these technologies, after the supporters of John McCain in 2000 and Howard Dean in 2004 demonstrated the immense power of distributed online networks. The political world’s embrace of social media is in many ways reminiscent of the perhaps apocryphal quote by French politician Alexandre Auguste Ledru-Rollin, who said, “There go the people. I must follow them, for I am their leader.”²⁴ Executive and legislative leaders realized that they must engage online because their voters and constituents already were—the conversation, as the Cluetrain Manifesto suggested, was going to happen with or without them. They couldn’t close the barn door; the horse had already bolted.

COURTS AND THE HUMAN VOICE

Overall, the judiciary has been slower to adopt and embrace social media than its executive and legislative counterparts. The Florida judicial Twitter feed²⁵ and the New Jersey Courts Facebook page²⁶ are notable particularly because they are rare examples. As opposed to the legislative and executive branches, the courts are in a unique position. They can actually attempt to control their environment; they can bar smartphones and social media at the courthouse

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door; they can advise jurors of harsh penalties for inappropriate tweeting, Facebook posts, or other new media transgressions. But that doesn’t mean they should seek to close the barn door. The world outside has changed; court leaders must recognize that and begin a discussion on how to ensure that they are not left behind. Embracing this new world provides exciting opportunities to better engage the public in the court’s work and underscore new media’s legitimacy as a tool of government.

Communication is central to a court’s very being. In fact, courts are among the most critical forums for conversation in a civilized society. They are the place to which society has delegated the responsibility to bring sparring partners together, convene a conversation, and adjudicate differences. The very premise of a court’s center tenet—equal justice under the law—implies a place where all voices—rich or poor, powerful or marginalized, loud or soft—are heard and treated with equal weight. Courts are the place where, in Booker T. Washington’s words, “the man farthest down” can theoretically take on a nation’s leaders or its most powerful company and be heard with equal standing.

In key ways, the Cluetrain-led revolution is nothing new to the legal system. The very precepts of our court system—the right to confront and question one’s accuser, the public duty to serve on a jury, the open testimony, the public records and transcripts—are about putting a human face and a human voice to disputes and accusations. In criminal proceedings, the government is incarnated in a district attorney or U.S. attorney; corporations have a human face in their lawyers, either as a plaintiff or a defendant. This contrasts sharply with the other end of the spectrum, where a key sign of an oppressive, authoritarian society is judges who exist as nameless, masked men on a bench, handing down verdicts with no accountability or identity. The very idea of “open courts” is prescribed in some state constitutions and there has been a growing movement in recent years to televise and web-stream more court proceedings, increasing access and transparency.

In many ways, in fact, the concept of “courts as conversations,” as a place to express voice and have

dialogue, makes even more sense than the Cluetrain Manifesto's premise of "markets as conversations."²⁷ At every stage courts represent conversations, dialogue, and expression. Of course, the litigating parties are expressing themselves, telling their stories, and finding voices in a deeper way. The pro se litigant is expressing something much more robust and more explicit by standing up for a legal claim. A jury is saying something more meaningful, even if they are stating only a one- or two-word collective judgment of guilty/not-guilty or liable/not-liable. Social media can amplify that voice and help with the parties' claims, especially the pro se litigant. A jury verdict is a limited voice, but social media allows individual jurors to speak out and say more—perhaps to defend a verdict to an angry public.²⁸

As a new generation arrives with different expectations for interaction—and different ways of knowing—state judicial leaders must not only learn how to communicate with new tools; they must also envision new means of judicial engagement with the public through the new social media that can further advance the legitimacy of courts in a democratic society.

COURTS ARE CONVERSATIONS: LISTENING (AND HEARING) BETTER

The ability to hear all voices is the key reason that, as a nation, we trust courts and court officials to settle disputes ranging from a neighbor's fence, a minor traffic ticket, a presidential election, or even the ultimate deprivation of liberty or life.

On the other hand, legal communications—by design, precedent, and tradition—are often uniquely nontransparent and non-human. Legal documents—from Supreme Court decisions to the 15,000-word iTunes "Terms of Service" necessary to purchase music from Apple's online store—are written in a precise, professional jargon intelligible only to trained practitioners, not the layperson. Not even the new media world is immune from this level of detail; the

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free-wheeling worlds of Facebook, Twitter, and YouTube are each governed by terms of service statements stretching to some 4,000 words.²⁹ While helping to ensure the correct interpretation for those tasked with enforcing and implementing such orders and decisions, this style means it is often difficult for the general public to understand legal communication. Court rulings and opinions, once decided, are not for the most part open to further debate, negotiation, or conversation. They can stand as precedent for decades or even centuries without further elaboration.

As a new generation arrives with different expectations for conversations and interactions, courts now face a fundamental challenge: How do they listen better to a public now used to conversing in different ways, on different platforms, and with different tools?

What we're witnessing today represents fundamental changes in communication and behavior for a new generation. The legal system runs a serious risk that this new generation will find courts increasingly out of touch, bearing little resemblance to their lives or their chosen means of communication. To a generation raised with free-wheeling, constant, global communication, courts—with their traditions and structure—may seem as anachronistic as the once-practiced legal tradition of tying a suspected witch to a stone to see if she sinks.

There are two levels necessary to this discussion—tactical and strategic. First, on the tactical level is basic new media communication—the ability of trial

courts to communicate more effectively with members of the public via sites like Facebook and Twitter about operational details, where to report for jury duty, when courts are open for business, and so on.

In some ways, this level—tactical communication—is easy, its path well understood. This is where the Florida and New Jersey courts, among others, are moving forward. There is no reason courts should avoid embracing these basic communications. In fact, courts have every incentive to use these tools to ensure smooth court operations and positive experiences for the public. At the same time, in this tactical arena, it makes sense to suppress some social media in the courts on a daily basis. For years, courts in this country have forbidden jurors from reading newspapers. For now, it makes sense that they forbid jurors from reading newspapers and using Facebook for research in individual trials and courtrooms.

Yet while some suppression is both necessary and expected, it's also hard to imagine that there is not more the courts could be doing to incorporate the social media revolution into their daily operations.

Looking at the rising trend of pro se litigants, how could the courts better use social media to allow those litigants to be heard and have their problems resolved? The tools available on blogs, Facebook, Twitter, and YouTube seem tailor-made to help educate pro se litigants on court procedure—how to file the correct paperwork, how to prepare for an oral argument, how to present evidence. Better-prepared litigants would help ensure smoother and more accessible courtroom proceedings that would then be better able to concentrate on the underlying dispute resolution.

The ease of communication that these tools provide—and the changing generational expectations vis-a-vis technology—means that there's no good reason anymore for courts to end at the courthouse walls. How could the courts incorporate social media and related new technologies like video conferencing into routine and more straightforward areas like traffic court to resolve cases and questions with less court face-time, less personnel, and less bureaucracy? While such a plan might encourage expanded use of limited court resources—lowering the barriers for contesting traffic

tickets, for example, would obviously increase such challenges—it seems that these technologies would also greatly increase access to justice and help those served by the legal system feel like their voices and complaints are both being heard and taken seriously. As experienced litigators, judges, and courtroom observers will attest, court cases are as much about the expression of the complaint as they are about the ultimate outcome, favorable or nonfavorable.

How can courts ensure they're communicating with their stakeholders in ways that make defendants, plaintiffs, lawyers, jurors, and court personnel all feel like they are being heard and treated fairly, intelligently, courteously, and efficiently? This area seems rich for innovative exploration and ultimately one where there's much potential to improve the operation and responsiveness of courts in daily operations.

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Lastly, courts must better understand how people are using these tools already. As people's lives become increasingly connected and reliant upon social media—college students today use texting, Twitter, and Facebook in many instances in place of “traditional” tools like email—courts must also be open to exploring how social media can and cannot integrate into the legal system. How effective are jury instructions in keeping jurors from conducting their own independent research? How can courts better educate jurors and litigants about the appropriate online boundaries inside the legal system?³⁰

DEMOCRACIES ARE CONVERSATIONS: COURT LEADERS AS COMMUNICATORS

Small “d” democratic governments are, in some ways, a societal collection of conversations, of differing opinions bouncing around, differing voices each laying out a path forward. On this playing field, the judiciary has another set of communication challenges. Outside the daily operations of a courtroom, the larger strategic questions about how the judicial branch should address and respond to the Cluetrain Revolution are still very much unanswered. Outside the walls of a courthouse, the judiciary as a branch cannot suppress the rise of social media and the changing expectations of a new generation. It is in this second arena—the strategic level—where the debate over judicial engagement becomes much more complicated: How can court leaders engage with the public at a more thoughtful level? How should chief justices use these tools and media to boost public perception of the vital role of courts in our society? How can chief justices, as leaders of the third branch of government, use social media to foster conversations about the importance and role of the judiciary?

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These strategic engagement questions are uniquely challenging for the judiciary. Traditionally, one of the unique attributes of the judiciary is that judges do not participate in many of the traditional “earned media” opportunities afforded to other governmental entities. By and large, judges don’t sit for television interviews to elaborate upon their decisions. They don’t write op-eds or hold press conferences arguing that their ruling was the right one. They don’t

tweet observations about court life. With a few notable rare exceptions like Justice Clarence Thomas’s recent memoir or the writings of Seventh Circuit U.S. Court of Appeals Judge Richard Posner, they don’t author books laying out their worldview and perspectives, an approach that seems a prerequisite for most high governmental officials in the country today. Even the issue of allowing still or video cameras in courtrooms—and particularly Supreme Court arguments—is hotly contested and unsettled some 33 years after C-SPAN opened up the federal legislative branch’s debates to the world.

Yet the world today does not necessarily allow the judiciary to be as silent as it has been in the past. The web has launched a new era of widespread incumbent vulnerability. Throughout the 20th century, incumbents had an enormous advantage in terms of fundraising, organization, and the use of the bully pulpit—as well as the not insignificant advantage of public trust. This trust in institutions has eroded steadily and rapidly in the last two decades, from churches to businesses to NGOs to governments. The rise of social media has only accelerated that trend of incumbent vulnerability—where mistakes and missteps are quickly amplified, where insurgents can rally against an unpopular leader with ever-increasing ease, and where the one-time advantages of authority are gone. These new rules play out in the news on an almost daily basis, from Egypt’s Tahrir Square³¹ to Anthony Weiner’s Twitter feed,³² from the back alleys of Syria³³ to Iowa’s Supreme Court retention election. While these disruptions have had some positive impacts—ensuring, for instance, a more responsive democracy and one where many more voices have an opportunity to be heard—this increased vulnerability for incumbents and institutions has troubling implications on judicial independence.

The answers here are much more unknown and yet the window for engagement is rapidly passing. The legislative branch and the executive branch are forging ahead. The judicial branch cannot cede all of this territory, all of these online conversations, to the other branches of government without a real cost to judicial independence. Courts cannot be left voiceless in this new world. While it’s important for the judicial branch to appear to be in touch with advances

in communication, certainly, the challenge presented by the social media revolution is more fundamental than merely hopping on the hot new tech trend. The Cluetrain Revolution is altering the expectations and habits of society. The ability of courts to execute their intended functions and to achieve their stated goals of dispute resolution and justice-seeking, will be contingent upon how smartly and thoughtfully they meet society's new expectations.

At some point in the not too distant future—perhaps this year, perhaps next, but for sure in the next five to ten years—every court will be confronted with a scenario that requires a thoughtful online communication strategy, one that incorporates YouTube, Facebook, Twitter, Tumblr, and platforms that today we can't even imagine, into a coherent media apparatus. As any expert in crisis communication will attest, that future point will be too late to begin figuring out this world. On the day that it's needed, the courts will already need to have the infrastructure and the following in place.

There is no silver bullet, no single correct answer for every state and every court. Instead, it is necessary for each court in every state to begin engaging as soon as it can.

Don't wait. The world has already changed.

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