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The Common Law Inside Social Media

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Leslie Y. Garfield Tenzer, Social Media and the Common Law, 88 **Brook. L. Rev.** 227 (2022).

Leslie Y. Garfield Tenzer and I have crossed paths only once, in an encounter that I found memorable. The venue was a 2014 symposium called Social Media and Social Justice. As one might expect at a law school event with social justice in its title, denunciation and concern abounded. The gloomy context caused a remark by Professor Tenzer to stand out: "I love social media!" When the time came to publish my presentation, I felt moved to quote this splash of good cheer.

Nine years later, Tenzer's love of this environment seems alive, though with a plangent note running through her insightful *Social Media and the Common Law* ("*Social Media*"). Tenzer says she "finds fault with the judiciary's failure" to impose accountability on the sector (P. 229) and worries about "the prevalence of unaddressed and unpunished social media harms" (*id.*) that include defamation, invasion of privacy, harassment, emotional distress (which can be severe enough to precipitate suicide, *see* P. 242) and the cluster of consequences that result from what now gets called cyberbullying. But *Social Media* seeks to mend rather than end what it observes. Its case for more tort liability is intended to make providers and communications healthier, not just more accountable for the injuries they inflict.

Social Media focuses on judges as political actors: Tenzer says they lag behind lawyers, legislatures, and administrative bodies in adapting to how we live now. Exercising power at an average age of 46, contemporary judges as a cohort became adults before 1997, the year Tenzer uses to mark the emergence of the internet, and their worldview lingers in a bygone day when they were young. Judges too readily write off what occurs online as transitory, lightweight, and of only passing interest.

Tenzer's dismay about unremedied harms contributes to the important literature that denounces the shelter from responsibility enjoyed by online service providers. Twenty-seven years ago, Congress wrote immunity into Section 230 of the Communications Decency Act. As the internet scholar Danielle Keats Citron observes in a valuable new article, disapproval of this choice, a stance she pioneered in 2008, is now almost conventional wisdom. Observers now agree on the harm of wide-scale immunity and diverge only on how to repair it. Though not alone in urging more from the judiciary, Tenzer has distinct points to make about judges' missteps.

Social Media lobs a particular helping of blame on federal courts in California for the problem of too much immunity. If I read her correctly (Pp. 238-41), Tenzer believes judges could have distinguished the defendants that dodged responsibility in Ninth Circuit courts—a group that includes Facebook, Roommates.com, and a dating site called Metrosplash.com—from immunity-enjoyers such as AOL and Prodigy, older businesses that look more neutral in the mode of utility plumbing.

Were they paying better attention, says *Social Media*, judges would recognize the breadth and depth of harm caused by and on social media. They could learn not only from claims of injury that litigants present to them but from their own work experiences. Tenzer cites the federal model instruction (P. 259) that tells them to order jurors to stay silent "on social media websites and apps (like Twitter, Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat)." Presumably, state court judges deliver a similar admonition. Content that judges themselves post on social media has provoked complaints of misconduct (Pp. 262-63). Judges also review discipline for lawyer misconduct (P. 261), a record that includes complaints involving social media. In short, judges have the information they need to "change with the times." (P. 263.)

The judiciary has failed to grasp not only the problem but an important doctrinal solution. Online communication, Tenzer contends, aligns with teachings from the common law. Having found progressive potential in this source myself—"The Common Law Inside Social Media," the title of this jot, echoes an earlier title of mine—I appreciated the evidence Tenzer has gathered to support applying authority from the eighteenth century to the twenty-first. Judges can apply a jurisprudential tradition whose origins lie in disputes about land and bulky physical objects to adjudicate actions and consequences that take place on a screen.

Because screen imagery looks fleeting and can be moved into apparent oblivion with a click, the harms of social media might also seem fleeting. Actually, however, they're durable. Durability affects the law of libel and slander, Tenzer observes (P. 248), and also makes invasions of privacy more hurtful and harder to erase. Any injury that the common law can remedy increases when durability makes it linger. Social media as an environment will itself stay durable, no matter how many judges think it just might flit away on the breeze it flew in on.

In what social media-speak might call "hashtag not all judges," Tenzer stirs instances of praise into her larger criticism of judicial responses to social media harm. Justice Samuel Alito, faulted on page 267 for questioning what Tenzer finds a self-evident truth—that judges are able to "apply pre-social media precedent to large social media companies"—wins what looks like approval on page 253 for taking seriously the threat that Supreme Court litigant Anthony Elonis posted on Facebook. Early in the internet age, Tenzer reminds us (P. 265), a federal district court found a remedy for a barrage of unsolicited emails in the venerable old tort of trespass to chattel. *Social Media* faults the judicial record with admirable nuance and fairness.

Speaking of praise: My esteem for *Social Media* goes further than agreeing with its thesis and commending Tenzer for the leadership provisioned in this work. I think *Social Media* hides its light under a bit of a bushel.

Real injuries, real doctrines, and real legal entitlements populate *Social Media*, but Tenzer lessens the clarity and tough-mindedness of this message when she hones in on a vaguer source of authority. The heading for Part IV, "Judicial Failure to Set Social Norms," joins similar phrasing throughout this article. Tenzer wants to encourage judge-generated and -midwived new "social norms" (*see* P. 226 and elsewhere), along with "societal norms" (Pp. 258, 267), "social media norms" (Pp. 227, 229, 253), and "common law norms" from the same source.

For lawyers, however, making law is more important than playing a role in the generation of norms—or at least it's a closer fit with their experience and expertise. I intend no disparagement of norms. "Law and norms" deserved to emerge in the legal academy as a focus of study, and norms are of more than academic interest. The influences and inspirations of norms shape a species that can't stay alive without social groups. But lawyers aren't only on the receiving end of this influence and pressure. They are instigators too. By doing its job, our profession pushes norms to emerge, evolve, and recede.

Judicial decisions also change norms, but here too as a byproduct rather than a direct goal. Take cyberbullying case law, for example. Tenzer faults courts for having "passed up the chance to signal normative behavior for social media use" (P. 269), a move that could ameliorate the harm of cyberbullying. Judges' forfeiture of their opportunity to signal has permitted dangerous conduct to flourish and spread.

Not quite, I think. Judges can indeed signal normative behavior. But the work Tenzer wants them to do is not so much signal anything as *decide cases correctly*. Her analysis in *Social Media* convinces me that "the chance" that the Supreme Court "passed up" in its relevant-to-cyberbullying *Mahanoy Area School District v. B.L.* decision of 2021 was to revisit old beliefs about school control that underlay *Tinker v. Des Moines Independent Community School District*, the student-speech chestnut decided in 1969.

Electronic-technology transformation has made brick-and-mortar geography at the center of *Tinker* obsolete, Tenzer argues. Agreed. Judicial craft to the rescue. But that craft manages precedent and issues judgments; only incidentally does it signal normative behavior.

Norm creation will emerge if Tenzer gets her way. I hope she does. But better social media norms are secondary to the law that *Social Media* improves.

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