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*A Critical Examination of the Current Framework for Public Employees' Speech Rights: Is Social Media Speech Taking Us Back to the Holmesian Era of Speech Protection?*

By: Jinkal Pujara

**INTRODUCTION**

The Supreme Court has long recognized the dual fundamental purpose of the first amendment's freedom of speech protection.<sup>1</sup> Freedom of speech allows for diffusion of information indispensable to the discovery of political truth.<sup>2</sup> It also protects individual autonomy and self-expression.<sup>3</sup> This constitutional liberty gives citizens the freedom to speak their mind and express their opinions on matters important to them.<sup>4</sup> Social media offers citizens yet another method of expressing themselves and the ability to digitally communicate with users globally within a matter of seconds.<sup>5</sup>

Social media refers to the numerous internet based websites and platforms that enhance information sharing and communication.<sup>6</sup> This includes blogs, social networking websites, and virtual worlds.<sup>7</sup> Popular social media outlets such as Facebook<sup>8</sup>, LinkedIn, Tumblr, Twitter<sup>9</sup> and

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<sup>1</sup> See, e.g. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980).

<sup>2</sup> See *id.* at 538.

<sup>3</sup> See *id.* at 537.

<sup>4</sup> See *id.*

<sup>5</sup> See T. Noble Foster and Christopher R. Greene, *Legal Issues of Online Social Networks and the Workplace*, 18 J.L. BUS. & ETH. 131, 132 (2012).

<sup>6</sup> See SOCIAL MEDIA DEFINED, <http://www.socialmediadefined.com/what-is-social-media/> (last visited Apr. 30, 2013).

<sup>7</sup> Galit Kiercut, *Recent Developments in Employment Law and the Impact of Technology on Workplace Trends*, in COMPLYING WITH EMPLOYMENT REGULATIONS, 2011 EDITION, LEADING LAWYERS ON ANALYZING LEGISLATION AND ADAPTING TO THE CHANGING STATE OF EMPLOYMENT LAW, available at 2011 WL 4452119 (Aug. 2011).

<sup>8</sup> WHAT IS FACEBOOK?, <http://www.wisegeek.org/what-is-facebook.htm> (last visited Apr. 30, 2013). Facebook is a social media networking website that lets users create a profile page containing the following sections: information about the user, status, list of friends, photos, groups and a wall. Users can become "friends" with other Facebook users, which allows users to view each other's profiles. Users can share photos, status updates, news stories, videos and other content with their friends or the public, based on the privacy setting selected for content displayed on the profile. Users can also write personal notes on other user's wall and tag them in statuses, videos and photos.

<sup>9</sup> TWITTER, <https://twitter.com/about> (last visited Apr. 30, 2013). "Twitter is a real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting."

Youtube collectively have billions of users.<sup>10</sup> Social media makes it possible for ordinary people to broadcast and share information with virtually anyone, with minimal effort.<sup>11</sup> It is the digital “word of mouth” with exponential reach and plays a significant role in everyday life.<sup>12</sup>

Social media is a substantial medium for speech as internet users in the United States spend 906,000,000 hours per month on social media websites and blogs as indicated by a recent nationwide report.<sup>13</sup> Social media outlets are utilized not only by citizens but also businesses, and government entities to express ideas during prominent events and for marketing purposes.<sup>14</sup>

Social media websites played a noteworthy role in the 2008 presidential election<sup>15</sup> and were also used to communicate to hundreds during Hurricane Sandy and the Boston Marathon tragedy.<sup>16</sup>

On a whole, online social media websites are another way for citizens to exercise their first amendment rights, whether by way of expressing opinions, or engaging in debate and advocating for ideals that they care about.<sup>17</sup>

The advent of social media presents trivial issues in the legal community, especially with regards to the employer-employee relationship in the public sector.<sup>18</sup> The first amendment affords government employees some form of recourse when their employers take adverse action

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<sup>10</sup> Kiercut, *supra* note 2; *Top 10 Social Networking Websites*, DISCOVERY NEWS, Dec. 12, 2012, available at <http://news.discovery.com/tech/apps/top-ten-social-networking-sites.htm> (last visited Apr. 2, 2013).

<sup>11</sup> Randy L. Dryer, *Advising Your Clients (and You!) in the New World of Social Media: What Every Lawyer Should Know About Twitter, Facebook, Youtube, & Wikis*, UTAH B.J., May/June 2010, at 16.

<sup>12</sup> Dryer, *supra* note 11.

<sup>13</sup> Foster and Greene, *supra* note 5.

<sup>14</sup> *See, e.g.*, Foster and Greene, *supra* note 5.

<sup>15</sup> Brief for Facebook as *Amicus Curiae* supporting Plaintiffs-Appellants Daniel Ray Carter, Jr. and In Support of Vacatur, *Bland v. Roberts*, 857 F. Supp. 2d 599 (E.D. Va. 2012) (No. 12-1671) at \*18 (citing, Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. Rev. 641, 659 & n.79 (2009)).

<sup>16</sup> *PEJ New Media Index: Hurricane Sandy and Twitter*, PEW RESEARCH CENTER'S PROJECT FOR EXCELLENCE IN JOURNALISM, [http://www.journalism.org/index\\_report/hurricane\\_sandy\\_and\\_twitter](http://www.journalism.org/index_report/hurricane_sandy_and_twitter) (last visited Apr. 30, 2013); Twitter Profile of the Boston Police Department, TWITTER, [https://twitter.com/Boston\\_Police](https://twitter.com/Boston_Police) (last updated Apr. 30, 2013 9:13AM).

<sup>17</sup> Brief for Facebook, *supra* note 15, at 7.

<sup>18</sup> *See, e.g.*, Foster and Greene, *supra* note 5.

on the basis of their speech.<sup>19</sup> However, these speech protections are increasingly narrow with respect to public employees' off-duty social media speech.<sup>20</sup> This paper addresses the nature of first amendment speech protection a government employee has in the context of off-duty social media based speech that is unrelated to employment. I argue that the current legal framework defining the contours of first amendment speech protection for government employees weigh heavily towards employer discretion and are insufficient to address the ubiquitous use of social media as a basis for expression and mass communication.<sup>21</sup> Accordingly, I argue for a modification of the current framework to appropriately account for employees' interest in off-duty speech.<sup>22</sup> To rectify, I advocate for a framework under which government employers cannot take adverse employment action based on the content of off-duty social media speech that is unrelated to employment and causes no tangible internal disruption within the workplace.<sup>23</sup>

To illustrate why a modification of the current legal framework is necessary to respond to an increase in social media based speech, Part I traces the inception of speech rights for public employees and provides insight into the rationales that predicate the foundation for the current framework depicting public employee' first amendment liberties.<sup>24</sup> Part II discusses the contemporary landscape of speech protection for government employees.<sup>25</sup> Part III concentrates on the shortcomings of the current framework in recognizing the first amendment values of off-duty speech and the novel first amendment concerns social media speech presents.<sup>26</sup> Lastly, Part

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<sup>19</sup> See e.g. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

<sup>20</sup> See discussions, *infra* Part III.

<sup>21</sup> See discussions, *infra* Part III.

<sup>22</sup> See discussions, *infra* Part IV.

<sup>23</sup> See discussions, *infra* Part IV.

<sup>24</sup> See discussions, *infra* Part I.

<sup>25</sup> See discussions, *infra* Part II.

<sup>26</sup> See discussions, *infra* Part III.

IV reconciles social media speech with past treatment of off-duty speech and outlines a proposed method of evaluating employees' off-duty social media speech.<sup>27</sup>

## **PART I: INCEPTION OF SPEECH PROTECTIONS FOR PUBLIC EMPLOYEES**

The first and fourteenth amendment of the United States Constitution unequivocally prohibit Congress and the states from enacting laws that abridge the freedom of speech of citizens.<sup>28</sup> Nonetheless, this protection did not always apply to those citizens employed by the government.<sup>29</sup> As early as 1882, the Supreme Court held that convictions under section six of the Act of August 16, 1896, which prohibited certain public employees from “requesting, giving to, or receiving from, any other officer or employee of the government any money or property or other thing of value for political purpose...” were constitutional.<sup>30</sup> Petitioner, Curtis, an employee of the United States challenged the constitutionality of the Act after being indicted and convicted under the Act.<sup>31</sup> A divided Supreme Court held the conviction constitutional, in favor of the stated government interest to “promote efficiency and integrity in the discharge of official duty and maintain proper discipline in the public service.”<sup>32</sup>

This line of thought evolved into the Holmesian model of speech rights, which was well settled in the early twentieth century and afforded government employees minimal speech rights.<sup>33</sup> Under this view, accepting employment with the government necessarily included a partial suspension of the constitutional right to free speech.<sup>34</sup> Significantly, in *McAuliffe v. City of New Bedford*, Justice Holmes upheld the termination of a police officer employed with the

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<sup>27</sup> See discussions, *infra* Part IV.

<sup>28</sup> U.S. Const. amend. I, XIV.

<sup>29</sup> *Ex Parte Curtis*, 106 U.S. 371, 372 (1882).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 372.

<sup>32</sup> *Id.* at 372.

<sup>33</sup> See *McAuliffe v. City of New Bedford*, 155 Mass. 216, 220 (Mass. 1892).

<sup>34</sup> *McAuliffe*, 155 Mass. at 220

City of New Bedford for violating a regulation that prohibited employees from soliciting money or aid on any pretense for political purpose.<sup>35</sup> Justice Holmes opined that the regulation, abridging civil liberties as a term of employment was constitutional.<sup>36</sup> Justice Holmes accepted this paradigm as reasonable in his illustrious statement, “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>37</sup> The Holmesian model placed government employers and private employers on equal footing, allowing government employers the power to dismiss employees for exerting their first amendment rights.<sup>38</sup> Employees did not have a constitutional right to employment with the government and thus it was permissible for government employers to proscribe terms of employment, even were they are repugnant to first amendment liberties.<sup>39</sup>

The Supreme Court rubberstamped this approach and continued to deprive public employees of their speech rights, particularly in the context of political affiliation. In *United States v. Wurzbach*, the Supreme Court upheld the constitutionality of the Foreign Corrupt Practices Act, which forbid congressmen or representatives from receiving money from federal employees for the purpose of supporting nomination for primary elections.<sup>40</sup>

Similarly the Supreme Court in *United Public Workers v. Mitchell*, upheld the Hatch Act’s prohibition on members of the federal executive branch participating in political management or campaigns.<sup>41</sup> Unlike Justice Holmes in *Wurzbach*, the Supreme Court acknowledged employees’ first amendment interests in *United Public Workers*.<sup>42</sup> Yet, the Supreme Court concluded that the interest of orderly management of personnel outweighs

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<sup>35</sup> *Id.* at 219-220.

<sup>36</sup> *Id.* at 220.

<sup>37</sup> *Id.* at 220.

<sup>38</sup> *Id.* at 220.

<sup>39</sup> *Id.* at 220.

<sup>40</sup> *United States v. Wurzbach*, 280 U.S. 296, 397 (1930).

<sup>41</sup> *United Public Workers v. Mitchell*, 330 U.S. 75, 78 (1947).

<sup>42</sup> *Id.* at 94.

individual employees' first amendment interests.<sup>43</sup> The Court also emphasized that federal employees can still exercise their political expressive rights by voting at the ballot box.<sup>44</sup>

The Holmesian paradigm was well rooted as the Supreme Court examined cases dealing with treasonable and seditious speech in the 1950's. In *Adler v. Board of Education of New York*, the Supreme Court upheld New York's Civil Service Law which denied employment in public schools to anyone who was a member of an organization advocating forceful overthrowing of the government.<sup>45</sup> Employees involved in such organizations were labeled unfit and as such, their disqualification from employment on this basis was not an abridgement of first amendment rights.<sup>46</sup> The Supreme Court revisited Justice Holmes's dogma from *McAuliffe*, stating that it "is...clear that [public school employees] have no right to work for the State in the school system on their own terms" as long as the State's terms are "reasonable."<sup>47</sup> In coming to this conclusion, the Supreme Court emphasized the schools' need to screen employees to ensure continuing operations and integrity in the school systems.<sup>48</sup> The Court also drew a parallel between government employers and private employers, suggesting that both should have the same ability to inquire into past conduct to determine fitness for a position, without posing first amendment issues.<sup>49</sup>

Cases in the late 1950's and 1960's begin to deconstruct the Holmesian model and forecasted the current framework for first amendment rights of government employees. In *Shelton v. Tucker*, a divided Supreme Court invalidated a statute that required state schools and college teachers to execute an annual affidavit disclosing all organizations they belonged to or

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<sup>43</sup> *Id.* at 94, 99.

<sup>44</sup> *Id.* at 94, 99.

<sup>45</sup> *Adler v. Bd. of Educ. of City of New York*, 342 U.S. 485, 485 (1952)

<sup>46</sup> *Id.* at 493.

<sup>47</sup> *Id.* at 492; see Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005).

<sup>48</sup> *Id.* at 493.

<sup>49</sup> *Id.* at 493 (citing, *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716, 720 (1951)).

contributed to regularly within the proceeding five years.<sup>50</sup> The Court recognized a legitimate purpose in investigating the competence and fitness of school teachers.<sup>51</sup> However, the affidavit required unlimited disclosure of past associations including associations that had no bearing on the teacher's competence or fitness.<sup>52</sup> The statute and affidavit required disclosure of any church the teacher belonged to, any organizations he supported financially, his political party, and any other associational tie, whether it be social, professional, political, avocational or religious.<sup>53</sup> The Supreme Court held that that the state's inquiry into the competency and fitness of its teachers did not justify the substantial interference with the association freedom rights of the teachers.<sup>54</sup>

In support, the Supreme Court cited to Justice Frankfurter's concurring opinion in *Weiman v. Updegraff*, suggesting that the statute will inhibit freedom of thought and association for teachers.<sup>55</sup> The Court reasoned that the statute put pressure on teachers to avoid any social or associational ties that the school board disapproves.<sup>56</sup> Discharging teachers for associating with "unpopular or minority organizations would simply operate to widen and aggravate the impairments of constitutional liberty."<sup>57</sup> In contrast to the Holmesian model, the Court suggested that employees do not always lose their first amendment rights upon accepting employment with the government.<sup>58</sup>

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<sup>50</sup> *Shelton v. Tucker*, 364 U.S. 479, 480 (1960).

<sup>51</sup> *Id.* at 488.

<sup>52</sup> *Id.* at 488.

<sup>53</sup> *Id.* at 488.

<sup>54</sup> *Id.* at 490.

<sup>55</sup> *Id.* at 487 (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J. concurring)).

<sup>56</sup> *Id.* at 486.

<sup>57</sup> *Id.* at 486.

<sup>58</sup> See, e.g., *Keyishian v. Regents of the Univ. of N.Y.*, 385 U.S. 589, 605-606(1967); see *supra* discussions, Part III.



## PART II: CURRENT LANDSCAPE OF SPEECH PROTECTION FOR GOVERNMENT EMPLOYEES

In 1968, the Supreme Court supplanted the Holmesian model in a watershed case, *Pickering v. Board of Education*, which afforded public employees qualified freedom of speech protection, in certain circumstances.<sup>59</sup> However, this seeming victory for employees' speech rights was short lived. The Supreme Court's decision in *Connick v. Myers* and then in *Garcetti v. Ceballos* swung the speech liberties pendulum back towards the restrictive Holmesian model.<sup>60</sup> These three cases combined represent the current multi-tiered jurisprudence of speech protection for government employees. Collectively, each case represents a categorical distinction that the employee must fulfill in order to successfully assert a first amendment protection claim for any adverse action on the basis of his or her speech.

### A. Speech Pursuant to Official Duties is Unprotected

The first categorical distinction that determines if a government employee's speech is protected within the purview of the first amendment lies in whether the speech is that of an employee or a citizen.<sup>61</sup> The Supreme Court, in *Garcetti v. Ceballos*, categorized speech pursuant to official work duties as beyond the scope of the first amendment.<sup>62</sup> Accordingly, if the role of the speaker is of an employee acting pursuant to official duties, then the speech is excluded from first amendment protection.<sup>63</sup> In contrast, if the speech is made by the employee's capacity as a citizen, then it may be protected.<sup>64</sup> For the first time, the Supreme Court made a

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<sup>59</sup> *Pickering v. Board of Education*, 391 U.S. 563, 572-573 (1968).

<sup>60</sup> *See Connick v. Myers*, 461 U.S. 138, 149 (1983); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

<sup>61</sup> *Garcetti*, 547 U.S. at 410.

<sup>62</sup> *Id.* at 421.

<sup>63</sup> *Id.* at 422.

<sup>64</sup> *Id.* at 422.

bright line distinction based on the role of the speaker, which presents a significant narrowing for government employees' first amendment rights.<sup>65</sup>

In *Garcetti v. Ceballos*, Richard Ceballos was employed as a deputy attorney for the Los Angeles County District Attorney's Office.<sup>66</sup> He wrote a memo criticizing misrepresentations contained in an affidavit used to obtain a search warrant.<sup>67</sup> He ultimately brought suit asserting a violation of his first amendment speech rights because of alleged retaliatory actions he faced after writing the memo.<sup>68</sup> The Supreme Court did not find such a violation.<sup>69</sup> Instead, the majority recognized that writing memos advising his supervisor on how to proceed with pending matters was in the ambit of Ceballos's duties as a deputy attorney.<sup>70</sup> On this basis, the Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline."<sup>71</sup> Ceballos was speaking as an employee when writing the memo because it was pursuant to his professional responsibilities.<sup>72</sup> Any retaliatory action he faced because of the memo can be attributed to the control that an employer has over evaluating the work product of its employees.<sup>73</sup> There is no judicial oversight over speech arising from official work duties because the employee is not speaking as a citizen, who ordinarily has first amendment rights.<sup>74</sup> Instead, when the speech is derivative of the public employer-employee relationship, regulation of that speech is left to managerial discretion.<sup>75</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 413.

<sup>67</sup> *Id.* at 414.

<sup>68</sup> *Id.* at 415.

<sup>69</sup> *Id.* at 421.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 422.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 423.

<sup>75</sup> *Id.* at 422.

The Supreme Court offered several other points in order to justify the rule it created in *Garcetti*. It noted that government employees must accept certain limits on constitutional liberties in favor of the government's interest in functioning efficiently.<sup>76</sup> The Supreme Court also cited to the government speech doctrine and stated that restrictions on employee speech reflect the overall control the agency has in commissioning its own mission.<sup>77</sup> Government speech allows the government to inform citizens on issues enabling them to assess their government's priorities and performance.<sup>78</sup> *Garcetti* reasons that if the public employee's speech undermines the agency's mission, then the employer has discretion to discipline and no first amendment claim arises.<sup>79</sup>

The majority's holding in *Garcetti* was not free from criticism. The dissent criticized the majority's failure to recognize that employees speaking on matters pursuant to official duty should be valued because they are most informed about those issues.<sup>80</sup> Justice Stevens dissented and argued that a government employer should not be able to discipline unwelcomed speech.<sup>81</sup> Instead, it should only be afforded the discretion to discipline inflammatory or misguided speech.<sup>82</sup> Justice Souter, joined by Justices Stevens and Ginsberg dissented as well. Justice Souter opined that the employee's interest in speaking on matters of official wrongdoing or threats to health and safety can outweigh government interest in restricting the speech in favor of efficient operations.<sup>83</sup> Whether or not the speech was pursuant to official duty should not be a

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 421-422, *see* *Rosenberg v. Rector & Visitor's of University of VA*, 515 U.S. 819, 833 (1995).

<sup>78</sup> Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 21 (2009) (citing Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1980)).

<sup>79</sup> *Garcetti*, 547 U.S. at 422; Norton, *supra* note 78, at 32.

<sup>80</sup> *Garcetti*, 547 U.S. at 430-431 (Souter, J. dissenting).

<sup>81</sup> *Id.* at 425-426.

<sup>82</sup> *Id.* at 425-426.

<sup>83</sup> *Id.* at 428.

consideration when employees are speaking on these matters.<sup>84</sup> Justice Souter ultimately questioned the majority's reasoning in concluding that government efficiency justifies a categorical exclusion of speech pursuant to official duty.<sup>85</sup>

### B. Speech Must be of Public Concern

Conversely, the first amendment is more protective of speech when a government employee speaks as a citizen as opposed to pursuant to his official duties.<sup>86</sup> In this context, the speech falls into the penumbra of first amendment protection if it relates to a matter of "public concern."<sup>87</sup> In determining whether speech is of a public concern, judges make content based determinations.<sup>88</sup> This is contrary to first amendment jurisprudence, which leaves citizens and the market place of ideas to determine when speech is of public concern.<sup>89</sup>

In *Connick v. Myers*, the Supreme Court made a content based distinction as to a subset of speech that is not of public concern. The Court held that a government employer is free to take adverse action on the basis of speech relating to employee dissatisfaction or complaints over internal office affairs because it is not of public concern.<sup>90</sup> In *Connick*, Sheila Myers was terminated for soliciting a questionnaire to fellow employees about the "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."<sup>91</sup> The Supreme Court drew a distinction between workplace disputes and matters relating to public concern, realizing that

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<sup>84</sup> *Id.* at 427.

<sup>85</sup> *Id.* at 434.

<sup>86</sup> *d.* at 422

<sup>87</sup> *Connick v. Myers*, 461 U.S. 138, 148 (1983).

<sup>88</sup> See Kozel, *supra* note 47, at 1996

<sup>89</sup> See Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 531 (1998).

<sup>90</sup> *Connick*, 461 U.S. at 149

<sup>91</sup> *Id.* at 141.

“government offices could not function if every employment decision became a constitutional matter.”<sup>92</sup> The majority of Myers’s questionnaire was not related to matters of public importance because it was about internal office matters.<sup>93</sup> Holistically, the questionnaire did not concern “public import” in evaluating the performance of the District Attorney, its government responsibilities, potential wrongdoing or breach of public trust.<sup>94</sup> Accordingly, the Court reasoned that when the employee’s speech does not substantially involve a matter of public concern, the employer has liberal discretion to discipline the employee.<sup>95</sup>

In *Connick*, the Supreme Court also provided additional guidance on what constitutes speech of public concern. Speech that relates to a matter of political, social or other concern to the community is characterized as of public concern.<sup>96</sup> Determining whether the employee’s speech is of public concern also involves an examination into the content, form and context of the speech, as revealed by the whole record.<sup>97</sup> The Supreme Court suggested that speech, which assists the public in evaluating elected officials and disclosing breach of public trust will be of public concern.<sup>98</sup>

*Connick* also allows for tiers of content based protections.<sup>99</sup> Speech “upon matters only of personal interest” is usually unprotected absent unusual circumstances.<sup>100</sup> Speech touching upon public concern in a limited sense, such as employee grievances is unprotected when the employer reasonably believes that it will disrupt the workplace.<sup>101</sup> Speech that involves

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<sup>92</sup> *Id.* at 143.

<sup>93</sup> *Id.* at 143.

<sup>94</sup> *Id.* at 148.

<sup>95</sup> *Id.* at 152.

<sup>96</sup> *Id.* at 146.

<sup>97</sup> *Id.* at 147.

<sup>98</sup> See Cynthia K.Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1117 (1988).

<sup>99</sup> Steven J. Stafstrom, Jr., *Government Employee, Are You A "Citizen"?: Garcetti v. Ceballos and the "Citizenship" Prong to the Pickering/Connick Protected Speech Test*, 52 ST. LOUIS U. L.J. 589, 607 (2008).

<sup>100</sup> See Rosenthal, *supra*, note 100 at 539.

<sup>101</sup> See Rosenthal, *supra*, note 100 at 539.

substantive matters of public concern is protected when it does not disrupt the workplace.<sup>102</sup>

Lastly, employees speaking as citizens on matters of general concern have similar speech liberties as any member of the public.<sup>103</sup>

Justice Brennan did not agree with the Connick holding and dissented for several reasons. Justice Brennan characterized Myers's entire questionnaire as speech of public concern.<sup>104</sup> He stated that the questionnaire discussed topics that could "be of interest to persons seeking to develop informed opinions" about the function of the government agency.<sup>105</sup> He opined that Myers's questionnaire related to a matter of public concern because it was an effort to determine the morale of the District Attorney's office.<sup>106</sup>

In addition to leaving workplace grievances unprotected, the Supreme Court created a second content based categorization of speech that is not of public concern in *City of San Diego v. Roe*.<sup>107</sup> John Roe was a San Diego police officer who was terminated, in part, for selling videos of himself stripping off a police uniform and masturbating on an online auction website, eBay.<sup>108</sup> Roe also sold official San Diego Police Department equipment on his eBay user account and indicated in his profile that he was employed in the field of law enforcement.<sup>109</sup> Roe's supervisor discovered the website and the police department subsequently ordered him to cease manufacturing and distributing sexually explicit material.<sup>110</sup> Roe partially complied and then was

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<sup>102</sup> See Rosenthal, *supra*, note 100 at 539.

<sup>103</sup> See Rosenthal, *supra*, note 100 at 539.

<sup>104</sup> *Connick*, 461 U.S. at 161 (Brennan J. dissenting)

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Kozel, *supra* note 47, at 1998

<sup>108</sup> *City of San Diego v. Roe*, 543 U.S. 77, 78 (2004)

<sup>109</sup> *Id.* at 78.

<sup>110</sup> *Id.* at 79.

terminated for violating the numerous department policies, such as, “conduct unbecoming of an officer, outside employment and immoral conduct.”<sup>111</sup>

In determining whether his termination infringed his first amendment speech rights, the Supreme Court concluded that Roe’s expressions were not of public concern.<sup>112</sup> The Supreme Court rejected the Ninth Circuit’s reliance on *United States v. Treasury Employees* in holding that Roe’s expressions were protected.<sup>113</sup> The Ninth Circuit concluded that Roe’s speech was protected under the first amendment because it did not address a workplace grievance, the speech was off-duty and had no bearing on Roe’s employment.<sup>114</sup> The Supreme Court disagreed and concluded that the speech was related to Roe’s employment because he took “deliberate steps to link the videos to his employment.”<sup>115</sup> The Court emphasized that Roe listed that he was employed in the law enforcement field, was stripping a police uniform in his video and also sold San Diego Police Department equipment on the website.<sup>116</sup>

The Supreme Court also stated that Roe’s speech was not of public concern because it did not inform the public on matters regarding the effective operations of the police department or any other matters touching upon public concern.<sup>117</sup> In support, the Supreme Court offered that expressions of public concern must address “something that is a subject of legitimate news interest, that is, a subject of general interest and of value and concern to the public at the time of the publication.”<sup>118</sup> Thus, the termination did not violate Roe’s first amendment rights because his

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<sup>111</sup> *Id.* at 79.

<sup>112</sup> *Id.* at 83

<sup>113</sup> *Id.* at 79; *United States v. Treasury Employees* held that when employees speak on issues off duty and unrelated to employment, the speech is protected under the first amendment unless the government’s justification for regulating it is “far stronger than mere speculation.” 513 U.S. 454, 465 (1995).

<sup>114</sup> *Roe*, 543 U.S.at 81

<sup>115</sup> *Id.* at 81.

<sup>116</sup> *Id.* at 81.

<sup>117</sup> *Id.* at 84.

<sup>118</sup> *Id.* at 83.

expressions did not address any subject of general interest, value or concern to the public.<sup>119</sup> Nor did it inform the public about the functioning of the San Diego Police Department or touch upon broader political issues.<sup>120</sup> Furthermore, according to the Court, Roe's speech expressions interfered with the mission of the police department and jeopardized the professionalism of the entire department.<sup>121</sup>

Hence, a government employer is free to take adverse action based on speech that possesses minimal social or political value.<sup>122</sup> Additionally, the government employer has unlimited latitude in restricting speech concerning private matters that implicate employment, but is not of public concern.<sup>123</sup> Courts will not question the government employers' motive in regulating this speech even if it causes no disruption and may be of value to the speaker and listener.<sup>124</sup> On the contrary, if the speech is substantially or inherently of public concern, then the court applies the *Pickering* balancing test to determine whether it is ultimately protected speech, with little employer deference.<sup>125</sup>

### C. Balancing of Employee and Employer Interests

If a court finds that a government employee's speech at issue is of public concern, then it applies the *Pickering* balancing test to balance the employee's interest in speaking on a matter of public concern with the employer's interest and justification for taking the adverse action against the employee.<sup>126</sup> When an employee is speaking on matters of public concern, the government employer's ability to regulate the speech does not differ significantly from its ability to regulate

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<sup>119</sup> See Rosenthal, *supra*, note 100 at 539.

<sup>120</sup> See Rosenthal, *supra*, note 100 at 539.

<sup>121</sup> *Roe*, 543 U.S. at 81.

<sup>122</sup> *Id.* at 84.

<sup>123</sup> *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

<sup>124</sup> *Id.*; see discussion, *supra* Part II.C.

<sup>125</sup> *Connick v. Myers*, 461 U.S. 138, 148 n.2, 158 (1983).

<sup>126</sup> *Pickering v. Board of Education*, 391 U.S. 568 (1968).



the speech of citizens.<sup>127</sup> Thus in order to regulate or take adverse action on the basis of an employee's speech of public concern, the employer must establish that the speech in question substantially interferes with the efficiency in discharging its own official duties and maintaining proper discipline of employees.<sup>128</sup>

In *Pickering*, Marvin Pickering, a teacher, was terminated for sending a letter to a local newspaper criticizing the Board of Education's allocation of funding between education and athletic programs.<sup>129</sup> The letter also criticized the Board's reasoning for why additional school funding was necessary and the way the Board's decided to inform tax payers of the increase.<sup>130</sup> Pickering was dismissed after the Board held a hearing, in which it concluded that the "statements in the letter were false and that the publication of the statements unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration."<sup>131</sup> The Board further justified the termination by asserting that the false statements damaged the professional reputation of the school and were disruptive to faculty discipline.<sup>132</sup>

The Supreme Court recognized the two divergent interests at stake. On the one hand, Justice Marshall noted the importance of free and open debate to the informed decision making process.<sup>133</sup> Government employees are in the best position to articulate informed opinions on matters of public concern.<sup>134</sup> The Supreme Court also recognized the interest of the employer in restricting employee speech in the name of efficiency.<sup>135</sup> Therefore, the Supreme Court crafted a

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<sup>127</sup> *Id.*

<sup>128</sup> *Connick*, 461 U.S. at 151 (quoting *Ex Parte Curtis*, 106 U.S. 371, 373 (1982)).

<sup>129</sup> *Pickering*, 391 U.S. at 569.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 566-567.

<sup>132</sup> *Id.* at 567.

<sup>133</sup> *Id.* at 571-572.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 568.

balancing test, which requires a “balance between the interest of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of public services it performs through its employees.”<sup>136</sup>

Returning to *Pickering*, the Court rejected the Board’s underlying contention that the letter had a detrimental impact on the school district’s ability to function and that Pickering owed a duty of loyalty by virtue of his public employment to support his superiors which limits his ability to publically speak on certain issues.<sup>137</sup> Further, the letter could not be the basis for discipline because the Board did not furnish any evidence that the statements in the letter were false and the letter did not affect Pickering’s ability to teach.<sup>138</sup> Additionally, there was no evidence that the letter interfered with the operations of the school.<sup>139</sup> After concluding that Pickering’s letter was a matter of public concern, the Court held that the Board’s interest in disciplining Pickering for the letter was no greater than if it the letter was written by a citizen.<sup>140</sup>

The Court emphasized that teachers, like Pickering, are in a unique position and have the ability to formulate informed opinions on how funding should be allocated between education and athletic programs and should be able to speak on these matters without fear of reprisal.<sup>141</sup> These are matters of public concern and unless the Board can show that Pickering knowingly made false statements in the letter, his rights to speak on the matter of public concern cannot be the basis for adverse action.<sup>142</sup>

In subsequent cases following *Pickering*, the Supreme Court offered further guidance with respect to the balancing inquiry a court must undertake if an employee’s speech is found to

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 568, 571.

<sup>138</sup> *Id.* at 572-573

<sup>139</sup> *Id.* at 572-573

<sup>140</sup> *Id.* at 573-574

<sup>141</sup> *Id.* at 571

<sup>142</sup> *Id.* at 574.

be of public concern. First, *Givhan* clarified an aspect of *Pickering's* holding. *Givhan* held that an employee's speech rights will not hinge on whether he or she communicated privately to the employer versus openly to the public.<sup>143</sup> In *Givhan*, a school teacher spoke privately with the principal about the school's discrimination practices and subsequently suffered adverse action on the basis of the speech.<sup>144</sup> In a footnote, the Court suggested when the speech at issue is relatively private the *Pickering* balancing test should encompass the content of the speech and also the manner, time and place where it is delivered.<sup>145</sup> The Court's rationale suggests that it requires the government employer to tolerate at least some internal critical speech on matters of public concern.<sup>146</sup> However, the additional factors in the balancing allow the government to protect against a situation in which the entire government agency's institutional efficiency may be threatened based on private encounters an employee has with a supervisor.<sup>147</sup>

Second, the Supreme Court's majority opinion in *Rankin v. McPherson* also clarified several aspects of the *Pickering* balancing test and *Connick's* public concern requirement. McPherson was a clerical employee for the office of the Constable of Harris County, Texas and was terminated for a statement she made during a private conversation with a fellow employee, who happened to be her boyfriend.<sup>148</sup> In response to learning that someone attempted to assassinate the president while discussing presidential administration policies, she said, "if they go for him, I hope they get him."<sup>149</sup> In viewing the statement in context of the entire conversation, the Court concluded that it was of public concern.<sup>150</sup> Upon applying the *Pickering*

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<sup>143</sup> *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979)

<sup>144</sup> *Id.* at 412.

<sup>145</sup> *Id.* at 415, n. 4.

<sup>146</sup> Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010, 2125 B.Y.U. L. REV. (2010).

<sup>147</sup> *Givhan*, 439 U.S. at 415-416.

<sup>148</sup> *Rankin v. McPherson*, 483 U.S. 378, 380 (1987)

<sup>149</sup> *Id.* at 381.

<sup>150</sup> *Id.* at 386.

balancing test, the majority concluded that there was no evidence of McPherson's statement interfering with operations of the employer.<sup>151</sup> The Court emphasized the position of the employee and the level of responsibility afforded as a factor in the *Pickering* balancing test.<sup>152</sup> The Court suggested that if the employee serves no confidential policy making or public contact role, then any interference with the agency's effective operations will be minimal.<sup>153</sup> As such, any concern the employer has that the employee's speech may impact operations will be attenuated and removed to justify discipline.<sup>154</sup>

Justice Powell offered another outlook in concluding that McPherson's speech was protected. He emphasized that the comment was made during a private conversation between McPherson and her boyfriend and that she had no intention or expectation that it be overheard.<sup>155</sup> In such circumstances, the speech should be protected so long as it is of public concern.<sup>156</sup> Justice Powell reasoned that if the speech is of public concern, then it is unlikely that the employer's legitimate interest will justify punishing the employee for regular private speech occurring in the workplace.<sup>157</sup> The *Pickering* balancing test should not be required because it is unlikely that a single private comment could disrupt the agency's operations.<sup>158</sup>

The dissent argued that McPherson's speech was not a political hyperbole and should be unprotected.<sup>159</sup> Instead her speech was on the border of unprotected speech and not at the heart of first amendment protection.<sup>160</sup> The dissent contended that regardless of whether McPherson's speech was of public concern, the government interest in restricting the speech outweighed her

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<sup>151</sup> *Id.* at 389.

<sup>152</sup> *Id.* at 390.

<sup>153</sup> *Id.* at 391.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 393 (J. Powell, concurring).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 393

<sup>158</sup> *Id.* at 393

<sup>159</sup> *Id.* at 396 (Scalia, J. dissenting)

<sup>160</sup> *Id.* at 397-398

first amendment interests.<sup>161</sup> According to the dissent, law enforcement had an interest in punishing such a violent statement, without having to show actual disruption or that the statement implicated unfitness of the employee.<sup>162</sup> With respect to McPherson's statement, it presented a risk to office operations because she did have telephone contact with the public.<sup>163</sup> The dissent disagreed with the majority, arguing that non-policy making employees can also negatively impact operations of the office as well.<sup>164</sup>

Furthermore, *Waters v. Churchill* clarifies the reasoning in *Pickering* and offers further justification on why the government as an employer is afforded broader discretion than the government as a sovereign in restricting speech.<sup>165</sup> The government as an employer functions by law to accomplish particular tasks.<sup>166</sup> To dispel these tasks efficiently, it hires employees.<sup>167</sup> These employees are paid a salary to contribute to the government employer's operations and to accomplish tasks effectively.<sup>168</sup> If the employees' activities and speech is detracting from the employer's effective operation, it needs to be afforded restraining power.<sup>169</sup> Ultimately, "where the government is employing someone for the very purpose of effectively achieving these goals, such restrictions [of speech] may well be appropriate."<sup>170</sup>

The majority in *Connick* used a similar justification when it redefined the *Pickering* balancing test. The majority concluded that when the employee's speech does not substantially involve a matter of public concern, the employer has discretion to discipline the employee

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<sup>161</sup> *Id.* at 399

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 400

<sup>164</sup> *Id.*

<sup>165</sup> *Waters v. Churchill*, 511 U.S. 661, 671 (1994).

<sup>166</sup> *Id.* at 675.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

without an actual manifestation of disruption in the workplace.<sup>171</sup> However, *Waters* broadened this and stated that employers can take adverse action on the basis of speech upon on a reasonable prediction of disruption, even when the speech is of public concern.<sup>172</sup> The interference with operations does not have to be imminent or actual.<sup>173</sup> Instead the employer can take adverse action, when the government employees' speech affects moral in the workplace, fosters disharmony, impedes the employee's own ability to perform duties, or obstructs established close working relationships.<sup>174</sup>

### **PART III: INADEQUACIES OF THE CURRENT SPEECH PROTECTION FRAMEWORK**

The current framework to determine whether a government employee's speech is protected under the first amendment is inadequate to protect off-duty social media speech that is unrelated to work. This can be attributed to the judicial weakening of the employee's civil liberties and the unique characteristics of social media based speech. There are two main criticisms and potential areas for reform in the current first amendment framework as applied to off-duty speech protections.<sup>175</sup> The first is the issue of viewpoint discrimination, which allows employers to make selective case-by-case judgments on what speech constitutes cause for

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<sup>171</sup> *Connick*, 461 U.S. at 15.

<sup>172</sup> *Waters*, 511 U.S. at 674.

<sup>173</sup> *Locurto v. Giuliani*, 447 F.3d. 158, 179 (2nd Cir. 2006); *see also Connick*, 461 U.S. at 152 ("...we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifested before taking action.")

<sup>174</sup> *Connick*, 461 U.S. at 151 (citing *Arnett v. Kennedy*, 416 U.S. 134 (1974)).

<sup>175</sup> While many argue that the *Garcetti's* categorical distinction, which leaves speech pursuant to official duty outside the scope of first amendment protection is counterintuitive to first amendment values, this paper focuses on the implications of the *Pickering-Connick* test and off-duty speech. *See, e.g. Garcetti*, 547 U.S. at 428-431 (Souter, J. dissenting); Beth Anne Roesler, *Garcetti v. Ceballos: Judicially Muzzling the Voices of Public Sector Employees*, 53 S.D. L.REV. 397, 417-422 (2008); Elizabeth M. Ellis, *Garcetti v. Ceballos: Public Employees Left to Decide "Your Conscience or Your Job"*, 41 IND. L. REV. 187, 208-412 (2008); *See supra* discussions Parts III.A, III.B, IV.

discipline.<sup>176</sup> The second is the fact that no *actual* workplace disruption is required in order for the employer to take adverse action on the basis of employee speech.<sup>177</sup>

These two issues are interrelated and bestow upon government employers the authority to use off-duty social media speech as the basis for discipline, even when it is not related to work.<sup>178</sup> Case precedent gives employers the ability to do this even when the speech does not pose a threat of interfering with the actual mission statement or operations of the employer.<sup>179</sup> Instead, employers can curtail speech when they do not agree with the content of the speech, upon showing a potential for disruption.<sup>180</sup> Collectively, these two problems enshrine the heckler's veto<sup>181</sup> and create a chilling effect<sup>182</sup> on government employee's social media speech.

Both criticisms of the current framework for speech protection are further complicated by the unique aspects of social media websites and their usage. There are innumerable social media websites, each with different expressive and commutative features it offers.<sup>183</sup> As a result, courts have difficulty determining what social media activity is speech under the first amendment.<sup>184</sup> For example, Facebook, a popular social media networking website enables its users to share and publish content in the form of statements, pictures, and videos with over 950 other million users.<sup>185</sup> Facebook features a "Like" button, which is depicted as a "thumb-up" icon.<sup>186</sup> This "Like" button appears next to content on Facebook and allows users to "Like"

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<sup>176</sup> See Rosenthal, *supra*, note 100 at 531.

<sup>177</sup> *Connick*, 461 U.S. at 146.

<sup>178</sup> See *e.g.*, *Roe*, 543 U.S. at 81;

<sup>179</sup> See Norton, *supra* note 78, at 61.

<sup>180</sup> See cases cited *supra* note 173 and accompanying text.

<sup>181</sup> See, *e.g.* *Ctr. For Bio-Ethical Reform, Inc. v. L.A. County Sheriff Dep't*, 533 F.3d 780, 787 n.4 (9th Cir. 2008) ("We use [heckler's veto] to describe restrictions on speech that stem from listeners' negative reactions to a particular message.")

<sup>182</sup> See *Connick*, 461 U.S. at 168 (Brennan, J. dissenting) (stating that restricting speech without an actual showing of disruption in the workplace will inherently inhibit certain speech employee)).

<sup>183</sup> See *Top 10 Social Networking Websites*, *supra* note 10.

<sup>184</sup> See *Bland v. Roberts*, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012).

<sup>185</sup> Brief for Facebook, *supra*, note 15 at \*7.

<sup>186</sup> Brief for Facebook, *supra*, note 15 at \*11.

various items.<sup>187</sup> By clicking the “Like” button, a user makes a connection to that content, and also announces to the user’s chosen audience that he or she “Likes” specific content or story.<sup>188</sup> In laymen terms, when a user clicks the “Like” button, “she is expressing an idea...she is telling other users something about who she is and what she likes.”<sup>189</sup>

Recently, a district court in Virginia addressed the issue of whether the action of clicking the “Like” button on Facebook is protected speech under the first amendment.<sup>190</sup> In *Bland v. Roberts* the court held that “Liking” a Facebook page is insufficient speech to merit constitutional protection.<sup>191</sup> The court distinguished “Liking” a Facebook page versus Facebook postings where actual statements are made.<sup>192</sup> In *Bland*, plaintiffs were employed by the Hampton Sheriff’s Office.<sup>193</sup> They expressed their support for one of the Sherriff’s opponents in an upcoming election and contended that they were terminated because of this.<sup>194</sup> Prior to the election, the Sheriff became aware of two of the plaintiffs “Liking” the opponent’s Facebook page.<sup>195</sup> The court boldly concluded that “simply liking a Facebook page is insufficient. It is not the kind of substantive statement that has previously warranted constitutional protection.”<sup>196</sup> Aside from distinguishing between actual statements made on Facebook and the act of “Liking” content on Facebook, the court did not offer an insight into its decision making process.<sup>197</sup>

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<sup>187</sup> Brief for Facebook, *supra*, note 15 at \*11-12.

<sup>188</sup> Brief for Facebook, *supra*, note 15 at \*12.

<sup>189</sup> Brief for Facebook, *supra*, note 15 at \*13.

<sup>190</sup> *Bland*, 857 F. Supp. 2d at 603.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 601.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 604.

<sup>197</sup> *Id.*



### A. Viewpoint Based Discrimination

A substantive criticism of the current employee speech protection framework is it allows employers to make viewpoint discriminations based on the content of an employee's speech and discipline accordingly.<sup>198</sup> This includes making content based determinations about an employee's off-duty speech that is not related to work.<sup>199</sup> *Connick* allows employer to discriminate based on the content of the employee's speech, a practice deemed unconstitutional in first amendment jurisprudence.<sup>200</sup> *Connick*'s holding that workplace grievances and complaints are not of public concern, is a distinct content based judgment as to when speech qualifies as of "public concern."<sup>201</sup> In essence the *Connick* majority permits employers to make case by case content based judgments about whether an employee's speech amounts to cause for discharge on the basis of public concern, a type of judgment traditionally reserved for citizens and the market place of ideas.<sup>202</sup>

Notwithstanding, *Connick* allows for this, without providing a distinct framework as to determine what speech amounts to a matter of public concern and invites a variety of interpretations.<sup>203</sup> For example, in *Rankin*, a divided court concluded that McPherson's statement was a matter of public concern.<sup>204</sup> The majority concluded that the statement was a matter of public concern irrespective of the private nature of the statement and lack of contribution to public discussion.<sup>205</sup> In contrast, *Givhan* held that private speech can be a matter of public concern based on its content.<sup>206</sup> Another inquiry focused on the intended audience of the speech,

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<sup>198</sup> See Rosenthal, *supra* note 100, at 541.

<sup>199</sup> Norton, *supra* note 78 at 18.

<sup>200</sup> See Rosenthal, *supra* note 100, at 541.

<sup>201</sup> See Rosenthal, *supra* note 100, at 542.

<sup>202</sup> See Rosenthal, *supra* note 100, at 531.

<sup>203</sup> See Papandrea, *supra* note 146 at 2142.

<sup>204</sup> *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

<sup>205</sup> See Papandrea, *supra* note 146 at 2142.

<sup>206</sup> See Papandrea, *supra* note 146 at 2142.

whether it was made off-duty and if it was related to the employee's job in determining if the speech addressed matters of public concern.<sup>207</sup> On the other hand, *Roe* offered a restrictive approach on the public concern inquiry.<sup>208</sup> According to *Roe* matters of public concern are subjects "of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."<sup>209</sup> An alternate inquiry concluded that speech made off-duty and unrelated to work is presumptively protected speech regardless of whether it touches upon a matter of public concern.<sup>210</sup>

In *Roe*, the Court characterized *Roe*'s off-duty speech as related to employment because of the "deliberate steps" he took to reference his employment.<sup>211</sup> The Supreme Court also suggested that *Roe*'s off-duty speech became work-related because it undercut the overarching mission of the Police Department and conveyed *Roe*'s own unfitness for the job.<sup>212</sup> By re-characterizing *Roe*'s off-duty speech as work-related in this matter, the Court expanded the scope of "work-related."<sup>213</sup> The Court subsequently reject *Roe*'s claim to first amendment protection by concluding that his speech was not of public concern because it was not related to values or concerns important to the public.<sup>214</sup>

Moreover, the Court also emphasized that *Roe*'s expressions jeopardized the professionalism of the entire department and the department's public image, because of his deliberate and purposeful reference to his employment.<sup>215</sup> This implies a focus on what *Roe*'s speech communicated about the police department as an institution and has no bearing on *Roe*'s

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<sup>207</sup> *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 466 (1995).

<sup>208</sup> *See Papandrea, supra* note 146 at 2143.

<sup>209</sup> *Roe*, 543 U.S. at 83-84.

<sup>210</sup> *Locurto*, 447 F.3d. at 175

<sup>211</sup> *Roe*, 543 U.S. at 81.

<sup>212</sup> *See Roe*, 543 U.S. at 81; *Papandrea, supra* note 146 at 2150.

<sup>213</sup> *See Roe*, 543 U.S. at 81; *Rosenthal, supra* note 100.

<sup>214</sup> *See supra* note 214.

<sup>215</sup> *Roe*, 543 U.S. at 81.

fitness as a police officer.<sup>216</sup> Hence, the Court suggested that Roe's off-duty speech is actually work-related because it disseminates a message about the police department as a whole, which the police department did not approve of.<sup>217</sup> Further, this analysis re-characterizes the speech as work-related and gives the employer the ability to control the content of the speech if it does not align with the employer's own interests or the public image it wants to maintain.<sup>218</sup>

This is problematic because it vests employers with carte blanche discretion to suppress virtually any and all employee speech, mindful that some nexus, however attenuated, could be concocted by the employer to show "work" relationship. In essence, an employer is entitled to abridge employee off-duty speech, by characterizing that speech as work-related when the content of the speech presents a threat to the employer's own expressive interests as an institution.<sup>219</sup> This development is far reaching compared to the general common sense interpretation of work-related speech that previous courts utilized.<sup>220</sup> The common sense inquiry is narrower with a focus on objective criterion, such as whether the speech referenced an internal workplace grievance, issues related to employment, co-workers or supervisors.<sup>221</sup> This narrow inquiry does not take into account the content of the employee's speech and consequently does not give employers the ability to make subjective content based determinations in order to characterize off-duty speech as on-duty speech.<sup>222</sup>

Lower courts have extended *Roe's* reasoning to allow employers to discipline employees for off-duty speech even when it does not implicate employment in any manner.<sup>223</sup> For instance,

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<sup>216</sup> *Roe*, 543 U.S. at 81; Norton, *supra* note 78 at 17.

<sup>217</sup> Norton, *supra* note 78 at 18; *see* Papandrea, *supra* note 146 at 2150.

<sup>218</sup> Norton, *supra* note 78 at 18.

<sup>219</sup> Norton, *supra* note 78 at 18.

<sup>220</sup> *See* Papandrea, *supra* note 146 at 2150 (citing *Pereira v. Comm'r of Soc. Servs.*, 733 N.E.2d 112, 120 (Mass. 2000)).

<sup>221</sup> *See supra* note 221.

<sup>222</sup> *See supra* note 221.

<sup>223</sup> Norton, *supra* note 78 at 18

The Ninth Circuit applied *Roe*'s expansive scope of work-relatedness in *Dible v. City of Chandler*. Ronald Dible was fired from his position with the Chandler Police Department when the Police Department discovered that he was operating a website that contained sexually explicit pictures and videos of his wife.<sup>224</sup> The website contained pictures of his wife in sexual poses and partaking in sexual activities with Dible and other inanimate objects.<sup>225</sup> Upon discovering the website, the Police Department placed Dible on administrative leave and ordered him to cease all activity on the website.<sup>226</sup> In the meantime, the police chief investigated and affirmed Dible's involvement with the website.<sup>227</sup>

Thereafter, the Police Department terminated Dible for violating "the department's regulation prohibiting its officers from bringing discredit to the city service."<sup>228</sup> Dible appealed his termination which resulted in an evidentiary hearing.<sup>229</sup> At the hearing, other officers stated that they were ridiculed because of the website.<sup>230</sup> The police chief testified that he believed that Dible's involvement with the website would negatively impact the department's ability to recruit female officers.<sup>231</sup> Upon review, the court determined that Dible's speech was not related to public concern and instead "simply vulgar and indecent."<sup>232</sup>

Nonetheless, the court still balanced the interest of the Police Department to maintain an efficient and effective workforce versus Dible's first amendment rights.<sup>233</sup> The court acknowledged the defamation to officers and the impact on recruitment that Dible's website had

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<sup>224</sup> *Dible v. City of Chandler*, 515 F.3d 918, 922 (9<sup>th</sup> Cir. 2007).

<sup>225</sup> *Id.* at 922.

<sup>226</sup> *Id.* at 923.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 927.

<sup>233</sup> *Id.* at 928.

on the Police Department.<sup>234</sup> It ultimately concluded that the Police Department could terminate Dible for his involvement with the website without violating his first amendment rights.<sup>235</sup> In doing so, the court inherently broadened the scope of the work-relatedness inquiry because there was no evidence of Dible taking any steps to associate his off-duty speech with his employment, as in *Roe*.<sup>236</sup> Instead, the court suggested that the off-duty speech and expressions of employees in the public eye are always subject to employer's scrutiny.<sup>237</sup>

In another case, the Palm Beach County Sherriff's Office terminated officers for participating in sexual activity that was displayed in the form of photographs and videos on a pay-per-view internet website.<sup>238</sup> Prior to the termination, an investigation revealed that the employees did not associate their employment as officers on the website.<sup>239</sup> Nonetheless, their superiors recommended termination and stated that they cannot "allow these men to blemish the integrity, honor, and reputation of this fine agency and the men and women who serve our community."<sup>240</sup> Ultimately, the court upheld the termination by concluding that the speech was not of public concern and stated there was no need to engage in a balancing test.<sup>241</sup> In doing so, the court allowed the employer to make a viewpoint discrimination regarding the content of the officers' speech because it may harm the reputation of the Sheriff's Office. The court afforded the Sheriff's Office the authority to terminate the officers and infringe on their first amendment liberties because their off-duty expressions, which were unrelated to work, did not fit within the department's public image.

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<sup>234</sup> *Id.* at 928-929.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 926.

<sup>237</sup> *Id.*

<sup>238</sup> *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1356 (11th Cir. 2006).

<sup>239</sup> *Id.* at 1345.

<sup>240</sup> *Id.* at 1348.

<sup>241</sup> *Id.* at 1356.

Similarly, a police officer and two firefighters employed by the town of Broad Channel, Queens were terminated for entering in a Labor Day parade float contest with a float negatively depicting the African American community.<sup>242</sup> In the past, the prize for the funniest float, which the plaintiffs' were hoping to win, had been awarded to floats featuring racial and ethnic stereotypes.<sup>243</sup> Plaintiffs had previously participated in these floats, without any issue.<sup>244</sup> However, this time, the plaintiffs' float received extensive media attention, as newspapers ran stories stating that according to "city officials," New York City police officers and firefighters participated in the "Racist Float."<sup>245</sup> All three plaintiffs were suspended without pay after their participation in the float was confirmed and Mayor Giuliani was quoted stating that all three would be terminated.<sup>246</sup>

After administrative hearings, all three were indeed fired and subsequently filed suit alleging a violation of their first amendment rights.<sup>247</sup> The district court concluded that their participation in the float was protected speech, addressing a matter of public concern and that they were improperly terminated "for the content of that speech..."<sup>248</sup> However, on appeal, the court found the terminations to be warranted and reasoned that the first amendment rights of the individuals must yield to the employers' "interest in maintaining a relationship of trust between the police and fire departments and the communities they service."<sup>249</sup> The court allowed the employers' to restrict employee speech because it did not agree with the controversial content of the parade float and was concerned about potential harm to its own public image.<sup>250</sup>

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<sup>242</sup> *Locurto v. Giuliani*, 447 F3d 159, 163 (2<sup>nd</sup> Cir. 2006).

<sup>243</sup> *Id.* at 164.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 165.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 168.

<sup>248</sup> *Id.* at 169.

<sup>249</sup> *Id.* at 183.

<sup>250</sup> *Id.*

These three cases demonstrate the courts willingness to defer to the employer's disciplinary actions by improperly categorizing employee off-duty speech that does not address issues related to employment, as work-related.<sup>251</sup> By doing so, courts are validating employers' contention that maintaining their own expressive interest and public image as an institution trumps any individual employee's civil liberties.<sup>252</sup> There exists a trend of increased deference to a government employer's judgment that the content of an employee's speech may imperil their own public persona and thus regulation of the employee's speech is necessary.<sup>253</sup> This sort of content based judgment is unconstitutional under traditional first amendment jurisprudence.<sup>254</sup> Yet, courts have no problem allowing the government as an employer to discipline employee speech in this fashion.<sup>255</sup> In practice, this is akin to constitutionalizing the heckler's veto<sup>256</sup>, which is explicitly prohibited under traditional first amendment precedent.<sup>257</sup> Permitting this sort of content based judgment also causes an overall chilling effect which *Pickering* recognized as it noted, "the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech."<sup>258</sup>

Social media based speech is especially vulnerable to this sort of content based judgment. Under the common sense inquiry undertaken to determine whether speech is work-related prior to *Roe*, social media speech will be labeled off-duty if it occurs beyond work hours and does not address internal workplace concerns or the subject matter of employment.<sup>259</sup> In contrast, *Roe* and

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<sup>251</sup> See Norton, *supra* note 78 at 18; Papandrea, *supra* note 146 at 2150.

<sup>252</sup> See Norton, *supra* note 78 at 18.

<sup>253</sup> See Norton, *supra* note 78 at 18.

<sup>254</sup> Cohen v. California, 403 U.S. 15, 23 (1971); see Rosenthal, *supra* note 100 at 531.

<sup>255</sup> Norton, *supra* note 78 at 47.

<sup>256</sup> Duke L.J. at 47, n.189 ("We use this term to describe restrictions on speech that stem from listeners' negative reactions to a particular message" (quoting Ctr. For Bio-Ethical Reform, Inc. v. L.A. County Sheriff Dep't, 533 F.3d 780, 787 n.4 (9th Cir. 2008))).

<sup>257</sup> See *supra* note 181 and accompanying text; Rosenthal, *supra* note 100 at 531.

<sup>258</sup> *Pickering*, 391 U.S. at 574

<sup>259</sup> See *supra* note 221 and accompanying text.

*Dible*'s expansive work-related inquiry may treat off-duty social media speech unrelated to employment as "work-related" based on the content of the speech.<sup>260</sup> It allows an employer to classify this speech as work-related if it undermines the overall mission of the employer.

By concluding that an employee's speech undermines the mission of the government agency, a public employer is free to make a content-based distinction as to the value of the employee's speech. If the employer decides that the employee's speech hinders the agency's overall message, the employer is given broad deference to regulate this speech. Thus, it gives employers a right to discipline employees for off-duty social media speech, even if communicated on private social media profiles.<sup>261</sup> Case precedent allow the employer to justify the adverse action based on content of the speech by arguing that the employee's speech projects a message about the employer as an agency that is contrary to the public image that the employer wishes to maintain.<sup>262</sup> This trend has already emerged, as many employers are disciplining and terminating employees based on the content of their social media speech which is unrelated to work and presumptively off-duty speech.

For instance, Jerry Buell, a public school teacher in Florida was suspended for anti-gay marriage postings on Facebook.<sup>263</sup> He made the comments after New York legalized same-sex marriage.<sup>264</sup> The Facebook postings were made on his private profile from his personal computer, while he was at home.<sup>265</sup> The teacher stated that he believed he was "exercising what [he] believed as a social studies teacher to be [his] First Amendment rights."<sup>266</sup> The school firmly

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<sup>260</sup> See *See Norton*, *supra* note 78 at 18.

<sup>261</sup> See *Dible*, 515 F.3d at 928-929.

<sup>262</sup> See cases cited *supra* note 107-125 and accompanying text.

<sup>263</sup> Todd Starnes, *Florida Teacher Suspended for Anti-Gay Marriage Posts on Personal Facebook Page*, FOXNEWS, Aug. 19, 2011, available at <http://www.foxnews.com/us/2011/08/19/florida-teacher-suspended-for-anti-gay-marriage-post-on-personal-facebook/> (last visited Apr. 2, 2013).

<sup>264</sup> Starnes, *supra* note 264.

<sup>265</sup> Starnes, *supra* note 264.

<sup>266</sup> Starnes, *supra* note 264.



stated that it has an obligation to take the comments seriously and complete a thorough investigation to see if the school's ethics code was violated.<sup>267</sup> According to the school, people were sending screen shots of the teacher's Facebook profile in order to facilitate the investigation, which could raise privacy concerns.<sup>268</sup> An attorney commenting on the suspension stated, "[a]ll he did was speak out on an issue of national importance and because his comments did not fit a particular mold, he is now being investigated and could possibly lose his job. What have we come to?"<sup>269</sup>

This instance also echoes the double standard between the off-duty social media speech protection of teachers and students within public school districts. The Third Circuit recently held that punishing a student for creating a MySpace profile making fun of her middle school principal was in violation of her first amendment rights.<sup>270</sup> The profile contained vulgar and sexually explicit content, but was still protected.<sup>271</sup> The court stated that another student furnishing a hard copy printout of the MySpace profile page to the principal did not transform the student's off-site speech into on-site speech.<sup>272</sup> Even with the double standard, the line may not be so clear with Buell's suspension, as some members of the community believed that gay students may feel uncomfortable in his class, which may impact the school's operations and efficiency.<sup>273</sup> However this belief was one-sided because many others created a Facebook group to advocate for Buell's reinstatement.<sup>274</sup>

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<sup>267</sup> Starnes, *supra* note 264.

<sup>268</sup> Starnes, *supra* note 264.

<sup>269</sup> Starnes, *supra* note 264.

<sup>270</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920, 933 (3d Cir. 2011) *cert. denied*, 132 S. Ct. 1097 (U.S. 2012).

<sup>271</sup> *Id.* at 920, 933.

<sup>272</sup> *Id.* at 933.

<sup>273</sup> Starnes, *supra* note 264.

<sup>274</sup> Starnes, *supra* note 264.

In another instance, Jeffery Cox, a Deputy Attorney General in Indiana was terminated after Tweeting that police in Wisconsin should use “live ammunition” to handle pro-labor protestors at the state’s capitol.<sup>275</sup> He also called protestors “political enemies” and “thugs.”<sup>276</sup> Soon after Cox Tweeted the statements, his employment with the Indiana Attorney General was discovered.<sup>277</sup> When a magazine, wrote to Cox , requesting context for some of the Tweets, he explicitly disclaimed any associational ties with the Indiana Attorney General’s Office by stating, “[a]ll my comments on twitter & my blog are my own and no one else’s.” Despite this, he was terminated.<sup>278</sup> In an effort to justify the termination, the Indiana Attorney General released a statement, “[c]ivility and courtesy toward all members of the public are very important to the Indiana attorney general.”<sup>279</sup>

Although the Attorney General recognized an individual’s first amendment right to voice personal views on an online forum off-duty, he stated “...but as public servants, state employees also should strive to conduct themselves with professionalism and appropriate decorum in their interactions with the public.”<sup>280</sup> This statement suggests that the Attorney General did not consider that Cox’s Tweets were made off-duty and were not associated with his employment. Instead, it seems that Cox was terminated because the content of his Tweets was not professional and inappropriate decorum in the eyes of his employer. This further resonates the problem of viewpoint discrimination with off-duty social media speech because it allows employers to

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<sup>275</sup> *Lawyer Fired For Comment Made on Twitter*, GOING PAPERLESS (Feb. 28, 2011 10:14AM), <http://goingpaperlessblog.com/2011/02/28/lawyer-fired-for-comment-made-on-twitter/>

<sup>276</sup> *Lawyer Fired For Comment Made on Twitter*, *supra* note 276.

<sup>277</sup> Adam Weinstein, *Indiana Official: “Use Live Ammunition” Against Wisconsin Protestors*, MOTHER JONES, Feb. 23, 2011 available at <http://www.motherjones.com/politics/2011/02/indiana-official-jeff-cox-live-ammunition-against-wisconsin-protesters#update> (last visited Apr. 27, 2013).

<sup>278</sup> Weinstein, *supra* note 278.

<sup>279</sup> *Lawyer Fired For Comment Made on Twitter*, *supra* note 276.

<sup>280</sup> Weinstein, *supra* note 277.

terminate employees, like Cox, for off-duty social media speech that is in purported conflict with the public image of the employer.

Similarly, Math Blahut, a police officer, employed by the Washington State Patrol was forced to resign because of his Facebook postings.<sup>281</sup> He was forced to resign for postings pictures of him drinking beer and also a picture of himself at a party.<sup>282</sup> Elsewhere on his Facebook profile, Blahut also displayed pictures of him in uniform, and pictures of him posing next to his cruiser.<sup>283</sup> A member of the community saw the pictures while his daughter was viewing the officer's private Facebook profile.<sup>284</sup> He brought them to the attention of the State Patrol, who subsequently terminated Blahut because the pictures did not "present a good image for the state patrol" and did "not show good judgment."<sup>285</sup>

His termination was the proximate result of the State Patrol making a judgment regarding the content of the pictures. Blahut's first amendment liberties were abridged because the State Patrol did not approve of his pictures depicting alcohol consumption and attending parties. This determination blatantly ignores the fact that the pictures were posted on a private profile page, during the employee's personal time and that there is nothing illegal about Blahut's alcohol consumption. The termination also undermines any expectation of privacy the police officer had in his private Facebook profile. Further, the Washington State Patrol's decision to take action because a member of the community oversaw Blahut's pictures while his daughter was viewing Blahut private Facebook page suggests that a public employee is always under the watchful eye of his employer.

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<sup>281</sup> Paula Horton, *Two Wash. officers fired over Facebook indiscretions*, THE TRI-CITY HERALD, Jan. 19, 2009, available at <http://www.policeone.com/police-technology/articles/1776582-Two-Wash-officers-fired-over-Facebook-indiscretions/> (last visited Apr. 2, 2013).

<sup>282</sup> Horton, *supra* note 282.

<sup>283</sup> Horton, *supra* note 282.

<sup>284</sup> Horton, *supra* note 282.

<sup>285</sup> Horton, *supra* note 282.

Likewise, Ashley Payne, a school teacher was given the option of either resigning or suspension when a parent complained about a picture she posted on Facebook.<sup>286</sup> It was a picture of Payne holding a glass of wine in one hand and a glass of beer in the other.<sup>287</sup> The picture was taken while she was on vacation in Europe.<sup>288</sup> Payne said she was baffled that a parent was able to view the pictures because she purposely made her Facebook profile and pictures private to public users.<sup>289</sup> To justify the constructive suspension, school officials claimed that teachers were warned about “unacceptable online activities” and claimed that Payne’s Facebook page promoted alcohol use and contained profanity.<sup>290</sup> Like the case of the Washington State Patrol Officer, Payne faced adverse action because her employer did not approve with the content of the pictures. The ramifications of this sort of the employer judgment are far reaching. One wonders if Ashley Payne or Math Blahut could have been terminated for posting a picture on their private Facebook profile of an innocent champagne toast at a private event.

Making content based judgments to regulate employee off-duty speech, which is unrelated to work, demonstrate the expansive reach of the implications of *Roe* and *Dible*’s majority as applied to social media speech. Even when an employee designates a limited audience for his or her speech and expressions, he or she may nonetheless be subjected to adverse action on the basis of that speech.<sup>291</sup> An employer can restrict and regulate employee social media speech by subjectively concluding that the speech does conform to the mission statement or public image of the employer.<sup>292</sup>

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<sup>286</sup> Lena Sullivan, *Teacher Ashley Payne Fired For Posting Picture of Herself Holding Beer on Facebook*, GA DAILY NEWS, Feb. 7, 2011, available at <http://www.gadailynews.com/news/61845-teacher-ashley-payne-fired-for-posting-picture-of-herself-holding-beer-on-facebook.html> (last visited Apr. 2, 2013).

<sup>287</sup> Sullivan, *supra* note 287.

<sup>288</sup> Sullivan, *supra* note 287.

<sup>289</sup> Sullivan, *supra* note 287.

<sup>290</sup> Sullivan, *supra* note 287.

<sup>291</sup> See *supra* text accompanying notes 282-291.

<sup>292</sup> See cases cited *supra* note 107-125 and accompanying text.

Further, a government agency can made impromptu decisions, even when there is no established mission statement that the employee's speech allegedly undercuts.<sup>293</sup> In the absence of an apparent conflict with a viewpoint of the agency, the employer can simply allege that the social media speech of the employee is "conduct unbecoming" of the employee that "doesn't present a good image" for the employer or "does not show good judgment."<sup>294</sup> This reasoning assumes that all unpopular or controversial messages will necessarily conflict with a government agency's public image.<sup>295</sup> This analysis as applied to social media speech that is unrelated to work implies that the employer is always allowed to control the content of the employee's speech. The intended protections of the *Connick-Pickering* test are severely diminished, as employers are permitted to "use authority over employees to silence discourse, not because it hampers public functions, but simply because superiors disagree with the content of the employees' speech."<sup>296</sup>

## B. ACTUAL SHOWING OF DISRUPTION

In addition to making content based judgments of employee off-site speech, employers are also permitted to regulate such speech absent a showing of actual disruption in the workplace.<sup>297</sup> Judicial expansion of the *Pickering* balancing test weighs in favor of an employer's ability to regulate the speech because no tangible showing of disruption or interference with work operations is required.<sup>298</sup> In *Pickering*, the Supreme Court stated that an actual showing of disruption is required to justify disciplining the employee for exercising his

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<sup>293</sup> See *supra* text accompanying notes 243-251, 276-281.

<sup>294</sup> *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989); *Horton*, *supra* note 281.

<sup>295</sup> See *Norton*, *supra* note 78 at 61.

<sup>296</sup> *Rankin*, 483 U.S. at 384.

<sup>297</sup> *Connick*, 461 U.S. at 154.

<sup>298</sup> See *id.*

first amendment right to speech.<sup>299</sup> Pickering's speech was protected because the employer failed to show that the letter, criticizing the allocation of school funding between educational and athletic programs, "in any way...interfered with the regular operations of the school."<sup>300</sup>

However, in *Connick*, the Court held that the employer need only show a reasonable belief that the speech "would disrupt the office, undermine [ ] authority, or destroy close working relationship" to justify adverse action on the basis of the speech.<sup>301</sup> Justice Brennan criticized the majority's holding and argued that the majority erred in allowing unfounded fear of disruption in the workplace to weigh in favor of the speech being unprotected.<sup>302</sup> He emphasized the lower court's finding that Myers's questionnaire did not violate an established office policy or *actually* disrupt the office atmosphere.<sup>303</sup> Justice Brennan recognized that restricting speech without a showing of actual disruption will inherently deter employee speech critical of the employer, thus depriving citizens of information regarding the performance of their elected officials.<sup>304</sup>

Merely requiring a reasonable belief of disruption in the workplace is a subjective standard that gives government employers the ability to make subjective decisions based on speculative belief as to the disruptive impact of employee speech.<sup>305</sup> The Court in *Connick* was quick to defer to the district attorney's concerns that Myers's questionnaire interfered with "the efficient and successful operation of the office."<sup>306</sup> The Court did this despite the lower court's determination that there was no actual showing that Myers's questionnaire negatively affected her ability to perform work duties.<sup>307</sup> Instead the Court relied solely on the employer's subjective

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<sup>299</sup> *Pickering*, 391 U.S. at 573.

<sup>300</sup> *Pickering*, 391 U.S. at 569, 573-574.

<sup>301</sup> *Connick*, 461 U.S. at 154; *see supra* text accompanying notes 165-174.

<sup>302</sup> *Connick*, 461 U.S. at 154.

<sup>303</sup> *Id.* at 166-169 (Brennan J. dissenting).

<sup>304</sup> *Id.* at 170.

<sup>305</sup> 30 J. Marshall L. Rev. 121 at 145.

<sup>306</sup> *Connick*, 461 U.S. at 151.

<sup>307</sup> *Connick*, 461 U.S. at 151

belief that Myers's actions were an act of insubordination and had the potential of negatively impacting close-working relationships of employees and supervisors.<sup>308</sup> Thus, absent an actual showing of disruption, the Court granted deference to the employer's judgment in deciding when to discipline the employee where the speech at issue had the potential to interfere with working relationships.<sup>309</sup> The Court distinctly stated that "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and destruction of working relationships is manifested before taking action."<sup>310</sup>

Subsequently, *Waters* also addressed the employer's burden in showing disruption for terminating an employee based on his or her speech. *Waters* focused on whether the "potential disruptiveness" of the employee's speech is enough to justify disciplinary action.<sup>311</sup> The Court determined that the employer's perception that the employee's speech, if allowed to continue, threatened to undermine the employer's authority dictated this inquiry.<sup>312</sup> A subsequent case clarifying *Waters* stated that the government's burden is merely to show that the employee's speech threatens to interfere with workplace operations and as such, no actual injury as a result of the speech is required prior to discipline.<sup>313</sup>

The Ninth Circuit in *Dible* also relied on *Waters* when it concluded that the employer met its burden for justifying a termination. The employer's justification had to be more than "mere speculation" but can still be premised on "reasonable predictions of disruption."<sup>314</sup> The court concluded that *if* Dible's involvement with the sexual explicit websites was to be known to the

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 152.

<sup>310</sup> *Id.* at 152.

<sup>311</sup> *Waters*, 511 U.S. at 680-681.

<sup>312</sup> *Id.*

<sup>313</sup> *Waters*, 511 U.S. at 673

<sup>314</sup> *Id.*

public, it would be detrimental to the mission and functions of the employer.<sup>315</sup> Thus, the court suggests that the public's external negative perception of Dible's speech will suffice as a showing of potential disruption to the employer's functions.<sup>316</sup> The potential disruption can be based on the public's perception of the employee's speech, which is external to workplace operations, and how public perception may affect overall the employer's operations.<sup>317</sup>

The notion that no actual showing of disruption is required to justify an infringement of first amendment rights coupled with an employer's latitude in making viewpoint discriminations is problematic. It allows an employer to make content based judgments about the employee's speech and then discipline the employee without a showing of actual disruption in the workplace.<sup>318</sup> The employer can make such judgments when it believes that the employee's speech interferes with the public image of the employer.<sup>319</sup> Further, the employer can use the potential of *external* disruption to justify disciplining employee speech.<sup>320</sup> Instead of focusing on the impact of the speech within the workplace, employers can focus on external disruption as a result of harm to public image.<sup>321</sup> Moreover, this external disruption can be speculative and conjectural, and still suffice the employer's burden to justify any termination.<sup>322</sup>

The practical consequences of these two caveats are unnerving. They essentially create a rule such that an employee "may be fired for engaging in expressive activities, unrelated to [his or her] employment, when [members] of the public disapprove of the expression vigorously and possibly disruptively."<sup>323</sup> It allows employers to use "disruption" attributable to the public's

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<sup>315</sup> *Dible*, 515 F.3d at 928.

<sup>316</sup> *Id.*

<sup>317</sup> *Locurto*, 447 F.3d at 179.

<sup>318</sup> *Connick*, 461 U.S. at 154.

<sup>319</sup> *See Dible*, 515 F.3d at 928.

<sup>320</sup> *See id.*

<sup>321</sup> *See id.*

<sup>322</sup> *See id.*

<sup>323</sup> *Dible*, 515 F.3d at 933 (Canby, J. concurring)



disapproval with the content of the employee's speech as the basis for discipline.<sup>324</sup> This rule enables the heckler's veto and is inconsistent with first amendment jurisprudence.<sup>325</sup> Allowing discipline based on content of the employee's off-duty speech could easily result in termination for employees participating "in a Gay Pride parade, or expressive cross-dressing, or any number of expressive activities that might fan the embers of antagonism smoldering in a part of the population."<sup>326</sup>

This logic as applied to social media based speech, which is presumptively off-duty speech, allows an employer to discipline the speaker even when there are no internal problems with workplace operations.<sup>327</sup> A simple Facebook post or a Tweet can be the basis of an employee's termination if the employer does not agree with the content and contends that it casts the employer in a negative light.<sup>328</sup> The employer can simply state that it reasonably anticipates public disapproval based on the content of the off-duty social media speech to justify regulating the speech.

Consider the instance of a police officer from the City of Atlanta that was denied a promotion for making the following Facebook post after an arrest: "Who would like to hear the story of how I arrested a forgery perp at Best Buy only to find out later at the precinct that he was the nephew of an Atlanta Police Investigator who stuck her ass in my case and obstructed it? Not to mention the fact that while he was in my custody, she took him into several other rooms alone before I knew they were related. Who thinks this is unethical?"<sup>329</sup> Plaintiff made this posting after an investigator who was related to the individual she arrested spoke with him and

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<sup>324</sup> *Id.*

<sup>325</sup> *Id.* (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

<sup>326</sup> *Id.* at 934

<sup>327</sup> *See Id.* at 933

<sup>328</sup> *See id.*

<sup>329</sup> *Gresham v. City of Atlanta*, 1:10-CV-1301-RWS, 2012 WL 1600439, \*1 (N.D. Ga. May 7, 2012)

removed evidence from his pockets without Plaintiff's knowledge.<sup>330</sup> When the plaintiff brought suit, the court concluded that the police department's interest in "maintaining unity and discipline within the police force [ ] and in preserving public confidence in its abilities" outweighed the plaintiff's first amendment rights in making the statement.<sup>331</sup> There was no actual showing of disruption with workplace operations and the judiciary simply deferred to the police department's interest in maintaining unity within the police force.

Correspondingly, Jerry Buell, Jeffery Cox, Math Blahut, and Ashley Payne all faced adverse action for their social media speech because without a showing of actual internal disruption in their workplaces.<sup>332</sup> Their employers took adverse action on the basis of off-duty social media speech, encroaching on individual first amendment liberties, in response to negative public disapproval of the speech.<sup>333</sup> Both Payne and Blahut lost their jobs because selected members of the community found their legal alcohol consumption to be incongruous with their employment as a teacher and police officer.<sup>334</sup>

Buell and Cox also encountered a similar fate because the public did not agree with the content of their views against gay rights and labor protests.<sup>335</sup> Granted with the case of Buell, there is a possibility that his opposition to gay rights may cause any homosexual students in his classroom to feel uncomfortable.<sup>336</sup> However this argument is attenuated as many students and members of the community turned to Facebook to display their support for the suspended teacher.<sup>337</sup> The argument is also moot because both Buell's and Cox's speech is of "a subject of

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<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *See supra* text accompanying notes 264-291.

<sup>333</sup> *See supra* text accompanying notes 264-291.

<sup>334</sup> *See supra* text accompanying notes 276-281.

<sup>335</sup> *See supra* text accompanying notes 276-281.

<sup>336</sup> *See supra* text accompanying notes 276-281.

<sup>337</sup> *See supra* text accompanying notes 276-281.

general interest and of value and concern to the public.”<sup>338</sup> Suspending Buell for voicing views on his personal time because a fraction of the community was hypercritical of them is counterintuitive to first amendment principles.<sup>339</sup> Certainly, silencing Buell and Cox for their seemingly unpopular speech with a pink slip is not what Justice Douglass meant when he wrote that the function of freedom of speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with...or even stirs people to anger.”<sup>340</sup>

These cases exemplify how taking adverse action against employees for their off-duty speech without a showing of substantive internal disturbance with workplace functioning acts as to devitalize first amendment liberties.<sup>341</sup> Surely, this is not the result anticipated by a jurisprudential spirit that would engage first amendment values to protect against the tyranny of the government heavy handedness.<sup>342</sup> This practice runs contrary to first amendment values, which are predicated on the notion that government may not regulate speech based on its content or effect on listeners.<sup>343</sup>

Another point of concern that complicates the quandary of viewpoint discrimination and deference to the employer’s prediction of disruption in the workplace is the reasonable expectation of privacy an employee has in his or her social media speech. Generally, government employees do enjoy an umbrella of privacy protection with regards to traditional off-site conduct that is unrelated to work.<sup>344</sup> The employer cannot terminate employees for such conduct for the sake of operational efficiency.<sup>345</sup> Instead the employer has to demonstrate a nexus between the

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<sup>338</sup> *Roe*, 543 U.S. at 83-84

<sup>339</sup> *See e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011)

<sup>340</sup> *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)

<sup>341</sup> *See cases cited supra* note 107-125 and accompanying text.

<sup>342</sup> *See e.g.*, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992)

<sup>343</sup> *Gacerti*, 547 U.S. at 422

<sup>344</sup> *See e.g.*, *Bonet v. United States Postal Service*, 661 F.2d 1071, 1078-79 (5th Cir. 1981), *Doe v. Dep't of Justice*, 565 F.3d 1375, 1379 (Fed. Cir. 2009)

<sup>345</sup> *See id.*

employee's conduct and adverse impact on workplace functioning.<sup>346</sup> Conversely, under the first amendment, off-duty social media speech that is unrelated to work is not analyzed under a similar stringent framework. This signifies in a diminished expectation of privacy for employee off-duty speech.

In addition, direct conflict exists between the expectations of privacy that employees and employers maintain with respect to social media usage. Due to courts deference to employers' judgments regarding viewpoint determinations and speculation of disruption in the workplace, employers are able to evade employees' reasonable expectations of privacy in their social media usage.<sup>347</sup> Increasing regulation of social media speech seems to reflect the view that employees should have limited or no expectations of privacy in their off-duty social media conduct.<sup>348</sup> It also entails that courts and government employers do not fully recognize the first amendment implications of social media speech.<sup>349</sup>

On the contrary, a number of government employers have recognized the nuisances of social media speech and responded with social media usage policies, governing both on-duty and off-duty social media usage.<sup>350</sup> Some of these policies that govern the off-duty social media usage speak to the diminished expectation of privacy afforded to employees.<sup>351</sup> Demonstratively, the City of Chicago Police Department's social media usage policy depicting acceptable personal use of social media states "[d]epartment members are prohibited from posting, displaying, or transmitting ...any communications that discredit or reflect poorly on the Department, its mission

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<sup>346</sup> See *id.*

<sup>347</sup> See Patricia Sanchez Abril et. al., *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 108 (2012); see e.g. Garry F. McCarthy, *Use of Social Media Outlets G09-01-06*, <http://directives.chicagopolice.org/directives-mobile/data/a7a57bf0-135f9205-ceb13-5f94-7e998c13b2be7890.html?ownapi=1> (last visited Apr. 30, 2013); Chloe Albanesius, *NYPD Rolls Out New Social Media Guidelines*, PC MAG, Mar. 29, 2013, 12:59 PM, <http://www.pcmag.com/article2/0,2817,2417231,00.asp>.

<sup>348</sup> See *supra* notes 264-290 and accompanying text.

<sup>349</sup> See *infra* notes 368-379 and accompanying text.

<sup>350</sup> See McCarthy, *supra* note 348; Albanesius, *supra* note 348.

<sup>351</sup> See *supra* note 351 and accompanying text.

or goals.”<sup>352</sup> Similarly, the City of Trenton’s School Board also implemented a social media policy, and advises employees that “their personal posts or photos can reflect back on the school district or their job — that means no rants against the school district or photos of drunken escapades.”<sup>353</sup> These policies make it explicit to employees’ that off-duty social media speech will not be judged under a content neutral lens.

Many of these policies also advise employees to refrain from disclosing their employment on their social media profiles.<sup>354</sup> This is a means to discourage the public from associating the personal opinions of the employee with the official views of the employer.<sup>355</sup> Hence, in theory, an employee can include a disclosure on his or her social media profile, effectuating the message, “the views and opinions listed on this profile are mine and do not reflect that of my employer” to sever any and all association ties with the employer. Once an employee does this, it should be difficult for an employer to argue that disciplining the employee for his or her speech is necessary to protect the public image and mission of the employer.<sup>356</sup> However, it is unclear if an employer will give weight to an employee’s attempt to disassociate work-related ties in this manner. Cox, the Deputy Attorney General from Indiana was terminated for his Tweets, despite stating that “[a]ll my comments on twitter & my blog are my own and no one else’s.”<sup>357</sup>

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<sup>352</sup> See McCarthy, *supra* note 348.

<sup>353</sup> Erin Duffy, *Trenton Schools Set Rules for Teachers on Facebook, Twitter Social Media Sites*, NJ.COM, Oct. 29, 2012 7:41AM, [http://www.nj.com/mercer/index.ssf/2012/10/trenton\\_school\\_board\\_sets\\_grou.html](http://www.nj.com/mercer/index.ssf/2012/10/trenton_school_board_sets_grou.html).

<sup>354</sup> See, e.g. McCarthy, *supra* note 348.

<sup>355</sup> *Roe*, 543 U.S. at 81

<sup>356</sup> *Id.*

<sup>357</sup> Weinstein, *supra* note 278

#### PART IV: PROPOSED TREATMENT OF OFF-DUTY SOCIAL MEDIA SPEECH

As the previous parts illustrate, the contemporary scheme of employee speech rights is restrictive and deferential to the employer.<sup>358</sup> It allows for government employers to discipline employees' speech based on content and subsequently allows speculated disruption instead of actual disruption to justify regulation.<sup>359</sup> It empowers employers to regulate social media speech, unrelated to work if it so "undermines" the employer's mission statement.<sup>360</sup> These deficiencies to the current speech protection framework present additional first amendment problems when applied to social media speech.

Social media allows for off-duty communications, which are essentially digital get-togethers or private conversations occurring in cyberspace.<sup>361</sup> Websites such as Facebook and Twitter present the opportunity for users to instantly share their opinions with hundreds of users with minimal effort.<sup>362</sup> They also allow users to stay connected with a close knit group of friends or family and share private thoughts with them, like how their day was or their views on a worthy news item.<sup>363</sup> Many social media networks also allow users to express themselves through symbolic speech, such as "liking" a Facebook page or "following" another user on Twitter.<sup>364</sup> Social media outlets also amplify a user's ability to disseminate their opinions instantly to a designated audience of their choice.<sup>365</sup> The current anemic standards for speech

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<sup>358</sup> See *supra* discussions Parts III. A, B.

<sup>359</sup> See *supra* discussions Parts III. A, B.

<sup>360</sup> See *supra* discussions Parts III, A, B.

<sup>361</sup> Dryer, *supra* note 11.

<sup>362</sup> See *supra* notes 8-9 and accompanying text.

<sup>363</sup> See *supra* notes 8-9 and accompanying text.

<sup>364</sup> Brief for Facebook, *supra*, note 15 at \*11-12; See *supra* note 9 and accompanying text.

<sup>365</sup> See *supra* notes 7-9 and accompanying text.

protection allow government employers to take these seemingly private, non-work related interactions and make them the basis for termination or discipline.<sup>366</sup>

As a threshold issue, *Bland's* holding which distinguishes “Liking” a Facebook page and Facebook postings narrows the spectrum of what social media activity constitutes “speech.”<sup>367</sup> *Bland* concluded that “Liking” a Facebook page does not invoke first amendment values because it does not involve making actual statements, as compared to making a Facebook post.<sup>368</sup> By extending the logic behind the court’s holding in *Bland*, other social media activity that does not consist of actual statements may not be protected on the grounds that the expression falls outside the first amendment. This can include a wide variety of activity such as following users on Twitter<sup>369</sup> or adding users as “friends” on Facebook<sup>370</sup> or other social media sites. The implications of *Bland* are significant, and apt to further erode speech protective values.

Thus, in theory a public employer is free to take adverse action on the basis of social media speech that does not consist of making statements, for purely subjective and arbitrary reasons, without any showing of disruption in the workplace.<sup>371</sup> This notion devalues social media as a medium for speech because case precedent protects expressions analogous to “Liking” a Facebook page when they are articulated without the use of social media.<sup>372</sup> This is also in imminent conflict with the Supreme Court’s case precedent governing symbolic speech, which protected acts such as burning the American flag and wearing arm bands to school

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<sup>366</sup> See *supra* discussions Part III.

<sup>367</sup> See *Bland*, 857 F. Supp. 2d. at 603; Brief for Facebook, *supra*, note 15 at \*17.

<sup>368</sup> See *Bland*, 857 F. Supp. 2d. at 603

<sup>369</sup> See *supra* note 9 and accompanying text.

<sup>370</sup> See *supra* note 8 and accompanying text.

<sup>371</sup> See *Bland*, 857 F. Supp. 2d. at 603.

<sup>372</sup> Brief for Facebook, *supra*, note 15 at \*17.

because these acts express a specific view and are symbolic, which in turn invoke the first amendment.<sup>373</sup>

Courts should treat social media expressive activity as equivalent to symbolic speech and recognize it as speech for first amendment purposes.<sup>374</sup> As Facebook emphasizes in its *amicus curiae* brief filled in *Bland*, “Liking” a political campaign Facebook page is akin to placing a campaign sign in your front yard, which is unequivocally protected under the first amendment.<sup>375</sup> The act is a form of symbolic speech that literally states to others that the user likes something and wants to share this support or approval with the Facebook community.<sup>376</sup> Ergo, “liking” content on Facebook should be protected for the same reasons campaign signs placed in yards are protected—the act provides information about the speaker’s identity and is a convenient form of communication for people of modest means.<sup>377</sup> Courts should presume that expressive social media activity that does not involve making actual statements is nonetheless “speech” for first amendment purposes because of its parallels to symbolic speech.<sup>378</sup>

To further protect employees’ substantive first amendment values, I first propose that social media speech that occurs off-site and is unrelated to work should rarely be the basis for any sort of employee disciplinary action in the workplace. No public concern analysis should be applied to this sort of speech, thus stripping an employer of the discretion to make viewpoint judgments about off-duty speech.<sup>379</sup> Social media speech such as Facebook postings and Tweets

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<sup>373</sup> See, e.g. *Texas v. Johnson*, 491 U.S. 397, 406 (1989); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505(1969).

<sup>374</sup> See Brief for Facebook, *supra*, note 15 at \*17.

<sup>375</sup> Brief for Facebook, *supra*, note 15 at \*17.

<sup>376</sup> Brief for American Civil Liberties Union and ACLU of Virginia as Amicus Curiae supporting Plaintiffs-Appellants Daniel Ray Carter, Jr. and In Support of Plaintiff-Appellants’ Appeal Seeking Reversal, \*6, *Bland v. Roberts*, 857 F. Supp. 2d 599 (E.D. Va. 2012) (No. 12-1671).

<sup>377</sup> Brief for Facebook, *supra*, note 15 at \*17 (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 54-55 (1994)).

<sup>378</sup> See, *Texas*, 491 U.S. at 406 (1989); *Tinker*, 393 U.S. at 505(1969); Brief for Facebook, *supra*, note 15 at \*17.

<sup>379</sup> See generally *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir.1989); *Berger v. Battaglia*, 779 F.2d 992 (4th Cir.1985), *cert. denied*, 476 U.S. 1159 (1986).



will necessarily be off-duty speech unless the employee makes such postings during work hours.<sup>380</sup> These postings should also be deemed off-duty under a common sense worked-related inquiry which looks to whether or not the speech addresses a subject matter of the employee's government employment, workplace affairs or disputes with supervisors.<sup>381</sup> As compared to the work-relatedness inquiry in *Roe*, the common sense inquiry is narrow and focuses on objective criteria. This proposed narrow work-related inquiry will not give employers the discretion to make content judgments to characterize off-duty speech as work-related using *Roe's* extensive inquiry.<sup>382</sup>

Judge Canby's concurrence in *Dible* offers a meaningful way to differentiate between an employee's on-duty and off-duty speech to determine whether the speech should be protected. I propose a framework similar to Judge Canby's treatment of off-duty speech that is unrelated to work to address social media speech based expressive rights of government employees. Recall in *Dible*, the website at issue was unrelated to Dible's employment as a police officer.<sup>383</sup> He did not take any steps to reveal his identity and employment with the police department through the website.<sup>384</sup> Because Dible's speech was unrelated to his employment, Justice Canby suggests that the public concern requirement should be irrelevant in determining whether the speech is protected under the first amendment.<sup>385</sup> He asserts that speech unrelated to employment, occurring outside of the workplace and directed to the public should *ipso facto* be a matter of

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<sup>380</sup> See Papandrea, *supra* note 146 at 2150.

<sup>381</sup> See Papandrea, *supra* note 146 at 2150.

<sup>382</sup> *Roe*, 543 U.S. at 81.

<sup>383</sup> *Dible*, 515 F.3d at 932 (Canby, J., concurring).

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

public concern.<sup>386</sup> Thus, no public concern inquiry is necessary when evaluating speech that occurs outside of work and is unrelated to employment.<sup>387</sup>

Courts should adopt this framework when analyzing speech claims arising from social media speech that is not related to work and refrain from applying the public concern test. Prior case law and the Supreme Court's own precedent suggest that the threshold application of a public concern test was not intended to apply to this subset of speech.<sup>388</sup> The public concern test helps identify speech "by an employee speaking as an employee upon matters only of personal interest."<sup>389</sup> When a person speaks as a citizen and not as an employee, the public concern test is irrelevant because its purpose is only to identify speech by employees "upon matters only of personal interest."<sup>390</sup> The public concern test is more suited to apply when an employee makes statements at work or related to work.<sup>391</sup> In such cases, the public concern test helps distinguish whether the speech addresses issues related to work or deals with employee grievances.<sup>392</sup>

Accordingly, if the employee's speech is not a grievance, then "it makes little sense to ask whether the speech is of public concern."<sup>393</sup> Some courts recognize that the public concern analysis does not squarely apply to off-duty speech that is unrelated to work because the public concern test was developed to address on-the-job expressive activity.<sup>394</sup> Bypassing the public concern test for off-duty speech that is unrelated to work also serves the dual function of

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<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Flanagan*, 890 F.2d at 1562, see Pengtian Ma, *Public Employment Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 127 (1996)

<sup>389</sup> *Flanagan*, 890 F.2d at 1564

<sup>390</sup> *Id.* at 1564

<sup>391</sup> *Id.* at 1564

<sup>392</sup> *Id.* at 1564.

<sup>393</sup> *Id.* at 1565

<sup>394</sup> *Locurto*, 447 F.3d at 174 (citing *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir.1985)).

narrowing *Roe*'s expansive work-related speech inquiry test and returning to a common sense interpretation of work-related.<sup>395</sup>

Second, I propose that when an employer seeks to regulate an employee's off-duty social media speech that is work-related under the narrow common sense inquiry, an overt modicum of interference in internal workplace operations should be required. Under a narrow inquiry of work-related, the off-duty speech must reference internal office affairs, the employee's own employment status or otherwise implicate the employer.<sup>396</sup> In order to regulate this speech, the employer must establish that harm caused by the employee's speech was "real, not merely conjectural."<sup>397</sup> To ensure the utmost protection for employee's social media speech as afforded under the first amendment, the employer should bear a heavy burden to show that the harm caused by the speech is internal and not dependent on personal or public disapproval of the speech. Case law prior to the judicial weakening of this burden serves as a guideline on what will suffice to show actual internal disruption.

For instance, in *Berger v. Battaglia*, the court held that a showing of disruption based on public reaction to a police officer's performance impersonating the late singer Al Jolson in black-face did not justify abridging the officer's first amendment liberties by ordering him to cease performing.<sup>398</sup> The court characterized Berger's off-duty speech as protected and valued the same as political speech or speech relating to social debate.<sup>399</sup> Judge Phillips explicitly stated that allowing public disapproval to justify the termination is comparable to advancing the heckler's veto, which is unconstitutional under first amendment jurisprudence.<sup>400</sup> Thus, the police department needed something beyond the public's disapproval of Berger's performance to

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<sup>395</sup> See Papandrea, *supra* note 146 at 2150.

<sup>396</sup> *Connick*, 461 U.S. at 151 (citing *Arnett v. Kennedy*, 416 U.S. 134 (1974)).

<sup>397</sup> *Dible*, 515 F.3d at 933 (citing *United States v. Nat'l Treasury Empl. Union*, 513 U.S. 454, 475 (1995)).

<sup>398</sup> *Berger v. Battaglia*, 779 F.2d 992, 993, 1001(1985)

<sup>399</sup> *Berger*, 779 F.2d at 999.

<sup>400</sup> *Id.* at 1001.

muzzle his first amendment speech rights.<sup>401</sup> In lieu of public disapproval, the police department had to show that the speech impacted the department's ability to perform its duties effectively and efficiently.<sup>402</sup>

Judge Canby in *Dible* memorializes Judge Phillips's reasoning and states that the finding of interference cannot be based on the notion that some people may think less of the employer, which may somehow inhibit the employer's functioning.<sup>403</sup> Judge Canby proposes a rule that "protects off-duty speech unrelated to employment when the speech itself causes no *internal* harm, and the only disruption is in the external relations between the [employer] and the public unhappy with the [employee's] expression."<sup>404</sup> Adopting this rule entails that the employer will not be able to make content based discriminations based on perceived public disapproval of the content of the employee's social media speech.<sup>405</sup>

Courts should adopt Judge Canby's reasoning when addressing first amendment claims with respect to social media speech to restructure the balancing equilibrium in favor of employee speech rights. Hence, if an employer wishes to discipline an employee based on his or her social media speech that is not related to work, the employer must demonstrate tangible disruption within the workplace.<sup>406</sup> The employer must present evidence of actual internal disruption to operations such as: problems with disciplining, disharmony or interference with close working relationship, or negative impact on performance.<sup>407</sup> Additional considerations to determine whether an actual disruption within the workplace exists are factors whether the speech was

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<sup>401</sup> *Id.* at 1000.

<sup>402</sup> *Id.*

<sup>403</sup> *Dible*, 515 F.3d at 933 (Canby, J. concurring) (citing *Flanagan*, 890 F.2d at 1565).

<sup>404</sup> *Id.* at 934 (citing *Flanagan*, 890 F.2d at 1566).

<sup>405</sup> *See Dible*, 515 F.3d at 933.

<sup>406</sup> *See id.* at 934 (citing *Flanagan*, 890 F.2d at 1565).

<sup>407</sup> *Flanagan*, 890 F.2d at 1566.

private; whether the employee intended or expected the speech to remain private; the manner, time and place where it was delivered; and the role and duties of the employee.<sup>408</sup>

Above all, the employer cannot use external disruption based on public relations to show interference with operations in order to discipline social media speech.<sup>409</sup> An employer cannot discipline social media speech because the public is offended and as a result, may not cooperate with the employer in the future.<sup>410</sup>

An example of how this proposed framework plays out practically is illustrated by the termination of Andrew Shirvell, an assistant attorney general in Michigan.<sup>411</sup> On his blog, Shirvell, accused the openly gay student body president of the University of Michigan for “anti-Christian behavior” and called the student body president “[s]atan's representative on the student assembly.”<sup>412</sup> Despite public upheaval, the Attorney General, Mike Cox did not take disciplinary action, stating that the speech is “after-hours and protected by the First Amendment.”<sup>413</sup> Cox also corrected the Governor, who posted to Twitter stating that she would have fired Shirvell.<sup>414</sup> Cox remarked, “I don't know why she's so freaking irresponsible... she went to Harvard Law School... [t]he civil service rules are a huge shield for free speech and she knows that.”<sup>415</sup>

Cox only suspended Shirvell after he engaged in harassing and stalking-like behavior and also made additional blog postings during work time.<sup>416</sup> In this instance, the government employer was cognizant of the employee’s off-duty first amendment rights and did not attempt to

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<sup>408</sup> See *Givhan*, 439 U.S. at 415, n.4, *Rankin*, 483 U.S. at 393 (J. Powell, concurring).

<sup>409</sup> *Flanagan*, 890 F.2d at 1566

<sup>410</sup> *Id.*

<sup>411</sup> Laura Berman, *Assistant AG Suspended Over Gay-Bashing Blog*, THE DETROIT NEWS, Oct. 1, 2010, available at <http://www.detroitnews.com/article/20101001/METRO/10010401/Assistant-AG-suspended-over-gay-bashing-blog> (last visited Apr. 21, 2013).

<sup>412</sup> Berman, *supra* note 412.

<sup>413</sup> Berman, *supra* note 412.

<sup>414</sup> Berman, *supra* note 412.

<sup>415</sup> Berman, *supra* note 412.

<sup>416</sup> Michael Winter, *Michigan Law Official Fired for Harassing Gay Student Leader*, USA TODAY, Nov. 8, 2011, available at <http://content.usatoday.com/communities/ondeadline/post/2010/11/michigan-law-official-fired-for-harassing-gay-student-leader/1#.UXQZwbXFWTk> (last visited Apr. 21, 2013).

regulate off-duty speech based on content or public disapproval. Instead, the employer only disciplined the employee for engaging in the speech during work hours, which makes it work-related under a narrow common sense inquiry.<sup>417</sup> The employee's speech was also accompanied by potentially criminal chargeable stalking and harassing.<sup>418</sup> Cox's handling of Shivell's speech exemplifies my proposed treatment of off-duty special media speech in practice. Employers should not discipline employee off-duty social media speech based on its content and the public disapproval's of the speech.

Holistically, my proposed framework protects an employee's social media speech from being subject to the heckler's veto, because a showing of internal disruption within the workplace will be prerequisite before the employer is justified in disciplining the employee for the speech.<sup>419</sup> This notion embodies the long standing principle that speech does not lose first amendment protection because society finds it offensive or distasteful.<sup>420</sup> Thus, external disapproval from the public should not be sufficient to curtail the employee's interest in exercising his or her first amendment rights. This framework protects employees from having their constitutional liberties in the hands of the public's personal objection.<sup>421</sup> It also returns the focus of balancing test on the employees' right to engage in the speech and bears no emphasis on the value of the speech itself.<sup>422</sup> Further, this framework gives employees a basis to predict when their social media based speech may become the basis for termination—when it is related to work and causes a substantial disruption of working operations.

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<sup>417</sup> See *supra* notes 220-223 and accompanying text.

<sup>418</sup> Berman, *supra* note 412.

<sup>419</sup> See *Dible*, 515 F.3d at 933.

<sup>420</sup> See *R.A.V.* 505 U.S. at 396.

<sup>421</sup> *Flanagan*, 890 F.2d at 1567

<sup>422</sup> *Id.* at 1566

## CONCLUSION

Although cases in the 1950's and 1960's forecasted a comprehensive speech protection regime for government employees, subsequent case law developments seem to restrict the scope of first amendment values back to the Holmesian era.<sup>423</sup> Extensive deference to an employer's ability to discipline off-duty social media speech bearing no relation to employment conveys the impression that the government, as an employer, is free to abridge employee speech as a term of employment.<sup>424</sup> To competently protect a public employee's first amendment values, courts should refrain from allowing employer's to discipline off-duty employee social speech based on its content.<sup>425</sup> Further, if an employee's social media speech is made while at work or implicates employment under a narrow common sense inquiry, courts should not submit to employers' speculative belief as to any potential harm the speech may cause.<sup>426</sup> Instead, courts should require employers to demonstrate that the employee's speech causes tangible internal workplace disruption.<sup>427</sup> Lastly, courts should acknowledge the similarities between expressive social media speech and symbolic speech and accord the former with the same first amendment protection as the later.<sup>428</sup>

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<sup>423</sup> See discussions, *supra* Parts II, III.A, III.B.

<sup>424</sup> See discussions, *supra* Parts III, IV.

<sup>425</sup> See discussions, *supra* Part IV.

<sup>426</sup> See discussions, *supra* Part IV.

<sup>427</sup> See discussions, *supra* Part IV.

<sup>428</sup> See discussions, *supra* Part IV.

