Brigham Young University Education and Law Journal

Volume 2011
Number 2 *Symposium: The Impact of Same-Sex Marriage on Education*

Article 18

Fall 3-2-2011

Teacher Facebook Speech: Protected or Not?

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TEACHER FACEBOOK SPEECH: PROTECTED OR NOT?

I. INTRODUCTION

June Talvitie-Siple, a 54 year-old math teacher, was forced to resign when she called her students "germbags" and the community "snobby" on her Facebook page with the settings unknowingly set "to public."[1] Similarly, in January 2010, high school teacher Ginger D'Amico was suspended from her teaching job in Pennsylvania because another person posted a picture of her with a male stripper at a bachelorette party that many of the district's teachers attended.[2] The picture was up for less than twenty-four hours, and D'Amico requested the individual remove the picture as soon as she became aware of it, but she nearly lost her job over the incident.[3]

The public often holds teachers to a higher moral and ethical standard than the general populace because they are mentors, coaches, and examples for the nation's youth. In the past, teachers have easily kept their private and public lives separate, and generally students and parents did not know what their teachers did or said outside of the classroom. However, with the explosion of Facebook and other social media outlets, teachers, like other private and public employees, are finding it more difficult to keep their private lives separate from work. Besides using electronic media to post homework assignments for school, they post about social events, which students and parents can access via networking sites.

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1. Allison Manning, *Educators Advised to Be Cautious on Facebook Profile*, EDUC. WK., Sept. 29, 2010, at 8.

2. Anya Sostek, *ACLU Puts Faces on Violations of Civil Liberties*, MCCLATCHY-TRIB. BUS. NEWS, Oct. 11, 2010, at 11.

3. *Settlement Reached in Teacher's Stripper Photo Suspension*, WPXI.COM, Aug. 17, 2010, http://www.wpxi.com/news/24657376/detail.html (reporting that the teacher was originally given a thirty-day suspension, but the ACLU threatened to sue on her behalf, whereupon the school district reinstated her, gave her back pay, and awarded her $10,000).

In the last few years, many school districts and states have passed policies that limit both teacher-student interaction on Facebook and the types of material that teachers can post on their personal pages. For example, Louisiana Governor Bobby Jindal recently signed legislation that would make teacher-student interaction on Facebook illegal.[4] Other states have taken milder approaches, such as the Utah Board of Education mandating that every district have its own policy[5] on social networking, and school districts in Texas focusing on a teacher's "professional code of ethics," which encourages a social distance between the teacher and student.[6] The reasons for such policy decisions mostly reflect a need to protect students from inappropriate contact with teachers that could lead to illegal actions.[7] For example, the New York City school district recently terminated the employment of three teachers for inappropriate communication with their students on Facebook.[8]

While most people want to protect students, some of the school districts' policies regarding teacher use of social media may be infringing on teacher free speech rights. School district social media policies usually prohibit teachers from befriending students, but they also tell teachers what they can or cannot post on their web pages. Most district policies ban what the public hopes teachers would have the good sense not to post anyway—provocative photographs, sexually explicit messages, the glorifying of alcohol or drugs, or confidential information.[9]

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4. Bob Sullivan *Teachers, Students and Facebook, a Toxic Mix*, MSNBC RED TAPE CHRONS. BLOG (Oct. 22, 2010, 10:00 a.m.), http://redtape.msnbc.msn.com/_news/2010/10/22/6345537-teachers-students-and-facebook-a-toxic-mix.

5. Katie Ash, *Policies Target Teacher-Student Cyber Talk*, EDUC. WK., Nov. 4, 2009, at 1.

6. *Id.*

7. *Id.*

8. Perry Chiaramonte & Yoav Gonen, *Teachers Fired for Flirting on Facebook with Students*, N.Y. POST, Oct. 18, 2010, http://www.nypost.com/p/news/local/teachers_friending_spree_JVfEO8TmN7XCnWpX5s5hnO. Bronx teacher Chadwin Reynolds befriended female students and wrote things like "this is sexy" under the girl's pictures as well as obtaining a female student's phone number and sending her flowers and a teddy bear. *Id.* Manhattan teacher Stephen D'Andrilli sent messages to female students telling them they were pretty, and Long Island City teacher, Laurie Hirsch, was fired for posting a picture of her kissing an 18-year-old male former student on the lips—and it was later revealed that they had had a sexual relationship for over a year. *Id.*

9. Laurie Welch, *Idaho School District Developing Policy Limiting Teacher Online Interaction with Students*, MAGIC VALLEY TIMES-NEWS, Oct. 20, 2010,

However, how far can a school district go in regulating a teacher's comments about his off-the-job legal conduct? The Massachusetts Association of School Committees recently passed a policy that stresses the "importance of maintaining proper decorum in the online, digital world," and which encourages[10] superintendents to "periodically conduct internet searches to see if teachers have posted inappropriate materials online."[11]

While parents and communities may want their students' teachers to set a high example, teachers are average people that go to parties (sometimes where alcohol is served) and rant out their frustrations of work or school to their friends (occasionally in unpleasant terms). Facebook can make private conversations or social gatherings public—sometimes because of lapse of judgment on the teacher's part, and sometimes involuntarily or unwittingly, as in the cases of June Talvitie-Siple and Ginger D'Amico above. Like the rest of the users on Facebook, teachers unquestionably engage in speech when they post pictures or comments. The federal circuit courts vary as to which doctrine to apply concerning teacher speech rights.[12] Half the circuits have applied a *Pickering-Connick-Garcetti* public employee model to teachers, while the other half has applied the student-oriented *Hazelwood* approach. Case law regulating teacher speech should give teachers the maximum freedom of expression possible, while still protecting students from potentially inappropriate teacher-student interaction. Teacher internet speech creates unique problems not seen elsewhere, but both approaches likely would permit a school district to prohibit their teachers from interacting with students via social networking. Therefore, while both speech models permit school districts to protect students, the Hazelwood model gives teachers the most liberal free speech rights in other areas of teacher internet speech.

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http://www.magicvalley.com/news/local/mini-cassia/article_f50d351e-5374-5b32-903b-ee92eb634ca6.html.

10. Peter Schworm, *Teachers Warned Not to "Friend" Students*, BOS. GLOBE, OCT. 25, 2010, at B1.

11. *Id.*

12. *See infra* section II-C.

II. APPROACHES TO TEACHER SPEECH

A. Pickering-Connick-Garcetti Public Official Model

The First Amendment protects a public official's speech if she speaks 1) as a citizen, 2) on a matter of public concern, and 3) not pursuant to her "official duties." The public official model, as applied to teacher free speech outside of the classroom, balances the interests of the school board as a public employer and the rights of the teacher to speak as a citizen on matters of public concern. In *Pickering v. Board of Education*, an Illinois school board dismissed Marvin Pickering, a high school teacher, after he sent a letter to the editor that criticized the board's handling of past tax revenues raised through bond elections.[13] The board allegedly dismissed the teacher because the letter was "detrimental to the efficient operation and administration of the schools,"[14] contained false information that "impugned" the reputation of the board and administration, was "disruptive of faculty discipline," and "foment[ed] controversy, conflict and dissension among the education staff."[15]

The United States Supreme Court held that teacher speech on matters of public concern, which is not knowingly false and not directed at persons where personal loyalty is needed, could not be subjected to dismissal even when the speech is critical of school authorities.[16] The Court weighed the interest of the teacher in speaking as a citizen on a matter of public concern and the interest of the state as an employer to maintain harmony and discipline in the workplace.[17] Factors in the *Pickering* balancing test include whether the speech interferes with 1) the employee's "daily duties in the classroom,"[18] 2) the "regular operation of the schools generally,"[19] 3) the working relationship between the speaker and the person or institution at whom the criticism is directed.[20] The public interest of free debate outweighs the interest of the school or board as an

13. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563 (1968).
14. *Id.* at 564.
15. *Id.* at 567.
16. *Id.* at 569–70.
17. *Id.* at 573.
18. *Id.* at 572.
19. *Id.*
20. *Id.* at 570.

employer, unless the teacher speaks in "reckless disregard"[21] of the truth, creates disharmonious relations in the workplace, undermines the immediate supervisor's discipline over the employee, or compromises the loyalty and confidence required of close working employees.[22] The *Pickering* Court decided for the teacher because the letter contained general criticisms of board decisions, did not particularly name individuals, and the teacher's responsibilities did not require that he maintain close relationships with board members.[23] Citizens often speak through letters to the editor about school board decisions regarding expenditure of public funds, and thus the issue was a matter of public concern.[24] Public officials often are in the best position to inform the debate, and therefore First Amendment policy should encourage their participation. However, teachers may not reveal confidential information.[25]

In 1983, the Supreme Court added another key piece to the public official doctrine in *Connick v. Meyers*, holding that employee speech on matters of internal employment issues or personal interests are not matters of public concern nor is the person speaking as a citizen and the speech is therefore, unprotected.[26] In *Connick*, Meyers, a former assistant district attorney in New Orleans, voiced her opposition of her upcoming transfer to her supervisors and distributed a questionnaire among her co-workers that requested their responses regarding office policies such as transfers, grievance processes, and confidence in superiors.[27] The district attorney's office thereafter dismissed her for refusing to accept the transfer and for insubordination in the form of the questionnaire, but Meyers alleged that the district attorney's office fired her for exercising her free speech rights.[28] According to the *Pickering* analysis, the Court weighed the interests of the employee to speak on matters of public concern and the interests of the state, as an employer, to promote efficiency in the workplace.[29]

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21. *Id.* at 573.
22. *Id.* at 570.
23. *Id.* at 569–70.
24. *Id.* at 571.
25. *Id.* at 572.
26. Connick v. Myers, 461 U.S. 138 (1983).
27. *Id.* at 141.
28. *Id.*
29. *Id.* at 146.

The Court held that Meyers did not speak as a citizen on a matter of public concern but as an employee on a matter of personal interest regarding internal employment procedures, and therefore her speech was unprotected because the Court did not want to get involved in internal personnel decisions.[30] The Court especially emphasized that the content, form, and context of speech are factors to consider in deciding if the speech is a matter of public concern.[31] However, the *Connick* Court dictated that personal matters discussed privately were not necessarily "totally beyond" First Amendment protection.[32] The dissent in *Connick* argued that private speech did not make it less of a public concern, and the questionnaire was a public issue because it dealt with how the district attorney was performing his duties as an elected official.[33] The majority responded that Myers did not make her complaints about the district attorney public, and even if she had, the questionnaire would not have revealed important public information, but rather only displayed mere grievances that one employee had about the "status quo."[34]

Later the Supreme Court affirmatively held in *Givhan v. Western Line Consolidated School District* that employee speech directed at a supervisor, rather than the public, does not necessarily lose First Amendment protection, but a *Pickering* balancing approach is used as the speech is evaluated in its content, form, and context as stated in *Connick*.[35] In *Givhan*, a public school teacher discussed with her immediate supervisor her dissatisfaction with the district's achievements in desegregation.[36] The court ruled that the content of speech, desegregation, was a matter of public concern and the teacher was speaking as a citizen, even though it was to her immediate supervisor.[37]

The Supreme Court gave a broad reading to a "matter of public concern" in *Rankin v. McPherson* when it held that a private conversation between co-workers was protected when a

30. *Id.* at 154.
31. *Id.* at 147–48.
32. *Id.* at 147.
33. *Id.* at 163.
34. *Id.* at 148.
35. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979).
36. *Id.* at 412–13.
37. *Id.* at 415–16.

clerical worker in a county constable's office wished that if another assassination were attempted on then-President Ronald Reagan's life, it would be successful.[38] The Court held that a discussion of Ronald Reagan's policies was a matter of public concern, and given the content and context of the speech, the employer's interest in an efficient workplace did not outweigh the employee's right to speak.[39] The Court applied the *Pickering* balancing approach between the employer and employee, but reasoned that the speech was entirely private, did not disrupt the workplace, or interfere with working relationships in the office. Specifically, the employee was not in a public or policymaking position.[40]

The Supreme Court added the last and sometimes controversial piece (as applied to teachers and college professors) in *Garcetti v. Celballos*[41] in holding that an employee does not speak as a citizen when he is acting "pursuant to his official duties."[42] *Garcetti* involved a deputy public prosecutor who recommended dismissal of a case because of government misconduct.[43] According to the Court, managerial discretion took precedent over judicial supervision, and since the deputy prosecutor was acting pursuant to his official duties, he was acting as an employee rather than a citizen and the public official free speech doctrine did not protect him.[44] In his dissent, Justice Souter argued that the new "official duties" step would "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'"[45] The Court declined to define "official duties" in *Garcetti*,[46] but the majority responded to Justice Souter's concern by declining to determine whether the holding applied to "scholarship or teaching" because of the "additional constitutional interests that are not fully accounted

38. Rankin v. McPherson, 483 U.S. 378, 383–84, 381 (1987).
39. *Id.* at 386–87.
40. *Id.* at 389.
41. Garcetti v. Ceballos, 547 U.S. 410 (2006).
42. *Id.* at 421.
43. *Id.* at 414–15.
44. *Id.* at 422–23
45. *Id.* at 438 (Souter, J., dissenting).
46. *Id.* at 423 (majority opinion).

for by [the] Court's customary employee-speech jurisprudence."[47]

To prove an unlawful censorship of speech according to a public official doctrine, the employee must first carry the burden that the First Amendment protects his or her speech. Next, the employee must show that the protected speech was a motivating factor for the government in executing the dismissal or disciplinary action.[48] However, the court will give the government employer an opportunity to rebut by showing by a preponderance of evidence that it would have reached same employment decision even if the protected speech were absent.[49] In *Mount Healthy City School District v. Doyle*, a teacher's contract was not renewed after he called into a local radio station complaining about a newly instituted teachers' dress code.[50] The Supreme Court held that while the radio speech was protected and that is was a substantial motivating factor in the decision not to rehire the teacher, the district court should have decided whether the school district would have made the same decision even if the teacher had not expressed the protected speech.[51] The Court did not wish to protect an employee who engaged in previous unprofessional conduct worthy of dismissal just because he made one constitutionally protected comment in a bid for reinstatement based on a free speech claim.[52] The school district in *Mount Healthy* alleged that it dismissed the teacher for the unprofessional conduct of engaging in a public altercation with another teacher and directing vulgar hand gestures at female students.[53]

Perry v. Sindermann is an important aspect of the public official doctrine in education cases because the Supreme Court held that the government could not deny a benefit to an employee based on his constitutionally protected speech even if the employee is non-tenured and has no contractual right to the benefit.[54] In *Perry*, a junior college chose not to renew a

47. *Id.* at 425.
48. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).
49. *Id.* at 285–86.
50. *Id.* at 274.
51. *Id.* at 285–86.
52. *Id.*
53. *Id.* at 274.
54. Perry v. Sindermann, 408 U.S. 593 (1972).

non-tenured professor's contract because of his criticism of the governing board's policies.[55] Even though the contract was at-will, the university had to give the professor due process and could not dismiss the professor only for his constitutionally protected speech.[56]

1. What is a matter of "public concern"?

The courts have not precisely defined a matter of "public concern," but the Supreme Court has directed that the form, context, and manner of the speech should be considered. The Third Circuit said in *Borden v. School District of the Township of East Brunswick*, "the content of speech on a matter of public concern generally addresses a social or political concern of the community,"[57] and the Supreme Court has said, "speech on matters of purely private concern is of less First Amendment concern" because "there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."[58] The Second Circuit has held, "speech on a purely private matter, such as an employee's dissatisfaction with the conditions of his employment, does not pertain to a matter of public concern."[59]

An issue is a matter of public concern in education if it is "speech by a public school employee about a policy or practice which can substantially and detrimentally affect the welfare of the children attending the school."[60] Other examples of matters of public concern in the school setting include speaking about the use of corporal punishment during a public debate,[61] student violence against teachers,[62] discussion of team hazing

55. *Id.* at 595.

56. *Id.* at 597.

57. Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153, 169–70 (3d Cir. 2008).

58. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759–60 (1985).

59. Lewis v. Cowen, 165 F.3d 154, 163–64 (2d Cir. 1999).

60. Morfin v. Albuquerque Pub. Schs., 906 F.2d 1434, 1437–38 (10th Cir. 1990).

61. Rankin v. Indep. Sch. Dist. No. 1-3, Noble Cnty., Okla., 876 F.2d 838, 843 (10th Cir. 1989).

62. Weintraub v. Bd. of Educ. of N.Y.C., 423 F. Supp. 2d 38, 50–52 (E.D. N.Y. 2006).

by an athletic director,[63] speech about violations of Title IX,[64] a letter to the newspaper about sexual discrimination,[65] and opposition to war on a MySpace account.[66] Examples of speech that has not been protected in an education setting include speaking on the use of caffeine to enhance athletics,[67] large class sizes,[68] and criticizing supervisors.[69]

The courts have made it clear that the school board has the authority to set the curriculum and that it can discipline a teacher for failing to follow the proscribed curriculum.[70] However, two recent circuit court cases have emphasized that a teacher speaks "pursuant to her official duties" when she speaks in the classroom, meaning that such speech fails the *Garcetti* prong of the *Pickering* analysis and is not a matter of public concern and thus unprotected by the First Amendment.[71]

2. *Summary of public official free speech doctrine*

The First Amendment protects a public official's speech if she speaks 1) as a citizen, 2) on a matter of public concern, 3) and not pursuant to her "official duties."[72] While courts have not specifically defined "public concern," political or social

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63. Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ., 444 F.3d 158, 164 (2d Cir. 2006).

64. Samuelson v. LaPorte Cmty. Sch. Corp., No. 3:05-CV-99RM, 2006 WL 3365774 (N.D. Ind. Nov. 17, 2006).

65. Seemuller v. Fairfax Cnty. Sch. Bd., 878 F.2d 1578 (4th Cir. 1989).

66. Spanierman v. Hughes, 576 F. Supp. 2d 292, 310–11 (D. Conn. 2008).

67. Schul v. Sherard, 102 F. Supp. 2d 877 (S.D. Ohio 2000).

68. Cliff v. Bd. of Sch. Comm'rs of Indianapolis, Ind., 42 F.3d 403, 409 (7th Cir. 1994).

69. Saia v. Haddonfield Area Sch. Dist., No. 05-2876, 2007 WL 2694182 (D. N.J. Sept. 10, 2007).

70. Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990) (citing Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973)) (noting that academic freedom does not permit teachers to "choos[e] their own curriculum or classroom management techniques in contravention of school-policy or dictates"); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989) (holding that secondary school teachers do not have academic freedom and thus do not have "control of public school curricula"); Palmer v. Bd. of Educ. of Chi., 603 F.2d 1271, 1273 (7th Cir. 1979) ("First Amendment [is] not a teacher's license for uncontrolled expression at variance with established curricular content").

71. Evans-Marshall v. Bd of Educ. of Tipp City Exempted Village Sch. Dist., 624 F.3d 332 (6th Cir. 2010); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007).

72. Garcetti v. Ceballos, 547 U.S. 410 (2006); Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563 (1968).

issues of the community[73] are more likely to be matters of public concern than internal employment grievances;[74] however, courts will look at the time, content, form, and context of the speech,[75] and employee speech to supervisors is not necessarily unprotected.[76] Finally, it is the employee's burden to prove that the disputed speech was protected and a motivating factor in the government employer's adverse employment decision, which the government can rebut by showing it would have made the same decision even if the protected speech were absent.[77]

While the public official free speech doctrine seems usable in off-the-job teacher speech via the internet, it would not be very protective of personal posts and comments in an online social environment because most posts would not be a matter of public concern, although the posts could demonstrate behavior or communicate in ways that are legal.

B. Tinker-Hazelwood Student Speech Model

Other circuit courts use the *Tinker-Hazelwood* student free speech model to determine if teacher speech is protected. In *Tinker v. Des Moines*, principals from the town's high school and middle school heard of an anti-Vietnam group's plan to wear armbands in opposition to the war, and the principals banned the armbands.[78] Three students wore black armbands with peace signs to school and the principals suspended the students for violating the ban.[79] The Supreme Court held that to censor speech a school must show that it based the regulation on "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[80] The school can only censor the speech when it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the

73. Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153 (2008).
74. Connick v. Myers, 461 U.S. 138, 149 (1983).
75. *Id.*
76. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979).
77. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).
78. Tinker v. Des Moines, 393 U.S. 503, 504 (1969).
79. *Id.*
80. *Id.* at 509.

school." The Court held that the armbands did not pose such a disruption.[81]

The Supreme Court added to the *Tinker* doctrine in *Hazelwood v. Kulmeier* in holding that a school can regulate speech that students, parents, or the public might reasonably perceive to bear the "imprimatur of the school"[82] if the censorship is related to a "legitimate pedagogical concern"[83] and if the location of the speech is not a traditional public forum.[84] The *Hazelwood* Court held that a principal could delete articles from a school newspaper because the newspaper bore the "imprimatur of the school," was not a traditional public forum, and because protecting student identities and ensuring age-appropriate material was a "legitimate pedagogical concern."[85]

The Supreme Court ruled in *Bethel v. Fraser* that a school could discipline a high school student for delivering a speech that contained sexual innuendo to an assembly of his fellow students.[86] The Court emphasized the students were a captive audience and that it is a school's responsibility to teach civil discourse.[87] Additionally, it is the school board's privilege and responsibility to set and ensure age-appropriate material curriculum,[88] and unlike *Tinker*, the Bethel school board did not censure the speech based on viewpoint.[89]

A student in *Morse v. Fredricksberg* held up a sign during a school-sponsored parade that said "Bong hits for Jesus," which the school saw purely as a drug reference, with the student attempting to make his speech a hybrid case with religion.[90] The Supreme Court called the student's bluff and ruled that his speech did not concern a sincerely held belief and therefore the school could discipline the student for the speech because it was "reasonably regarded as encouraging illegal drug use."[91]

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81. *Id.*
82. Hazelwood v. Kuhlmeier, 484 U.S. 260, 271 (1988).
83. *Id.* at 273.
84. *Id.* at 267.
85. *Id.* at 274.
86. Bethel v. Fraser, 478 U.S. 675 (1986).
87. *Id.*
88. *Id.* at 683.
89. *Id.* at 680.
90. Morse v. Frederick, 551 U.S. 393 (2007).
91. *Id.*

At least one court has used a *Tinker-Hazelwood*-like approach to teacher internet speech.[92] A modified *Tinker-Hazelwood* approach can be used to regulate teacher internet speech that both protects students and provides a speech protective internet environment for teachers. Particularly, the prongs that analyze whether the speech is a substantial interruption to school operations and if a legitimate pedagogical concern justifies regulation are useful in the teacher internet speech analysis. Using this model, teachers could be prohibited from interacting with students online because it likely would cause a substantial interruption of the learning environment and the districts would thus have a pedagogical reason to limit it. Other teacher internet speech like personal posts and comments would be protected under the *Tinker-Hazelwood* model because they likely would not be a substantial interruption of the work environment, particularly if students are prohibited from accessing teacher websites. Admittedly, the prongs that ask whether the speech bears the "imprimatur of the school" and whether the forum is public are a little more difficult in the teacher internet speech world. On one hand, teachers speaking to students in whatever context could possibly bear the "imprimatur of the school" and could be used to curb such speech. However, social network sites likely would be considered public forums where administrators would not have as much room to regulate teacher speech. Nevertheless, a modified use of the *Tinker-Hazelwood* approach using the first two questions discussed above would be useful to protect students and protect teacher speech.

C. Circuit Court Applications of the Pickering and Hazelwood Models

The Third, Fourth, Fifth, Sixth, and Seventh Circuits apply the public official model to teacher speech.[93] Among those districts, the Third, Sixth, and Seventh Circuits have specifically applied the *Garcetti* "official duties" test, arguing that the possible exception that the Supreme Court carved out for "scholarship and teaching" applied to universities and

92. Spanierman v. Hughes, 576 F. Supp. 2d 292 (D. Conn. 2008). See *infra* section III, which discusses the case in detail.

93. *See generally* Kimberly Lee, *Establishing a Constitutional Standard that Protects Public School Teacher Classroom Expression*, 38 J.L. & EDUC. 409 (2009).

academic freedom and was not applicable in public secondary schools.[94] In two recent cases, the application of *Garcetti* was the determining factor against two teacher free-speech claims. In *Evans-Marshall v. Board of Education*, decided in 2010, the Sixth Circuit found that a teacher's selection of a book list for her high school English students was an action pursuant to her official duties and thus not protected speech.[95] Evans-Marshall was teaching a unit on government censorship and provided a list of books to her students that had commonly been censored in the past.[96] After choosing a book from the list, the students created a project that addressed why their particular book may have been challenged.[97] Although the court found that the teacher was speaking as a citizen and that government censorship was a matter of public concern, she was also teaching pursuant to her official duties and so the school district could choose not to renew her contract.[98] The Seventh Circuit ruled similarly in 2007, in *Mayer v. Monroe County Community School Corporation*, that a school district could terminate the employment of an elementary teacher who implied her opposition to the Iraq war during class time as part of a lesson on civic involvement.[99] The teacher was acting pursuant to her official duties when she was in the classroom and "teachers hire out their own speech and must provide the service for which employers are willing to pay."[100]

Piver v. Pender County Board of Education is a Fourth Circuit case where the teacher survived the public official free speech doctrine.[101] The teacher defended a beleaguered school principal, and the school district subsequently notified the teacher that it had reassigned him to a school forty minutes from his home.[102] When the district eventually fired the principal, it also forced the teacher to sign a statement of support for the new principal, before they would reassign the

94. Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist., 624 F.3d 332 (6th Cir. 2010); Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009); Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007).

95. *Evans-Marshall*, 624 F.3d 332.

96. *Id.* at 334–35.

97. *Id.* at 335.

98. *Id.* at 342.

99. 474 F.3d at 479.

100. *Id.*

101. Piver v. Pender Cnty. Bd. of Educ., 835 F.2d 1076 (4th Cir. 1987).

102. *Id.* at 1077.

teacher to his original school.[103] However, the teacher nonetheless filed a 42 U.S.C. § 1983 claim, alleging that the adverse employment action was the result of his constitutionally protected First Amendment free speech rights.[104] The court agreed that Piver spoke as a citizen at a public meeting on a matter of public concern, and that teachers should be able to contribute to such debates because they are among the people who are best situated to know the issues.[105]

The First, Second, Eighth, and Tenth Circuits have used a *Hazelwood* student speech model to decide whether schools can regulate teacher speech.[106] Under the student-speech model, the school can regulate the speech if it bears the "imprimatur of the school," will "substantially interfere . . . with the operations of the school,"[107] and the regulation has a reasonable relationship to a "legitimate pedagogical concern."[108] In *Conward v. Cambridge*, a teacher picked up from the floor a student paper that had written on it "Application for a Piece of Ass," and gave it to another student as an example of inappropriate language.[109] The First Circuit held that the school district could legally discipline the teacher because "keeping scatological documents away from impressionable youngsters is certainly a reasonable

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103. *Id.*

104. *Id.*

105. *Id.* at 1080. Examples of other lower court decisions that have applied a Pickering approach to teacher speech include: Gorum v. Sessoms, 561 F.3d 179 (3d Cir. 2009) (holding that a professor at a public university was not protected because his speech defending a student-athlete and rescinding an invitation to the university president were clearly not "related to scholarship or teaching"); Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153 (3d Cir. 2008) (holding high school football coach's participation in student-initiated prayer was not protected speech because he did not speak as a citizen and it was not a matter of public concern); Lee v. York Cnty. Sch. Div., 484 F.3d 687, 695 (4th Cir. 2007) (declining to apply *Garcetti* but ruling that religious posters on a classroom bulletin board were curricular and thus not protected); Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364 (4th Cir. 1998) (upholding teacher's firing after she produced a school play that involved homosexual themes, even though speech was outside of classroom and teacher had principal's approval, because the play was still curricular and thus she was not speaking as a citizen); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172 (3d Cir. 1990) (holding that teaching methodology is curricular and thus not a matter of public concern); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 799 (5th Cir. 1989) (holding that teacher speech in the form of a book list is not a matter of public concern and thus unprotected).

106. *See generally* Lee, *supra* note 93.

107. Tinker v. Des Moines, 393 U.S. 503, 509 (1969).

108. Hazelwood v. Kuhlmeier, 484 U.S. 260, 271, 273 (1988).

109. Conward v. Cambridge Sch., 171 F.3d 12, 17 (1st Cir. 1999).

educational objective."[110] In 1991, the Tenth Circuit upheld a school district's dismissal of a teacher for commenting in class concerning a school rumor about certain students' romantic involvement.[111] The court ruled that according to *Hazelwood*, the comments were a substantial disruption and the district had a reasonable pedagogical reason to dismiss the teacher.[112]

III. ISSUES OF TEACHER INTERNET SPEECH

Regulating teacher internet speech raises concerns not generally seen in other teacher speech cases because internet speech usually takes place during non-working hours at the teachers' own homes. It is therefore off-the-job speech or activity and any regulation of it appears to be big-brotherly. For example, as mentioned above, the Massachusetts Association of School Committees has encouraged its superintendents to search teacher websites periodically to see if there is any inappropriate material posted.[113] In the past teachers might have commented in person to each other, their friends, or neighbors that they disapproved of certain school policies, disliked their students, or that they went out and got drunk the previous night, and because those conversations remained private, teachers did not suffer adverse employment actions. However, with the advent of Facebook, MySpace, blogs, and other social media, teachers can post the same information and feelings that formerly they privately expressed—to such a large group of family, friends, and acquaintances, that the electronic posts could almost be regarded as letters-to-the editor, which was the medium of speech that *Pickering* originally addressed.

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110. *Id.* at 22.

111. Miles v. Denver Pub. Schs., 944 F.2d 773, 774–77 (10th Cir. 1991).

112. *Id.* Examples of lower court decisions that have applied a *Hazelwood* approach to teacher free speech include: Lacks v. Ferguson, 154 F.3d 904 (8th Cir. 1998) (holding dismissal of teacher who allowed students to use profanity in the classroom was legitimately related to a pedagogical concern); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723–24 (2d Cir. 1994) (holding guest speaker could be banned from campus for showing two pictures of women who were naked waist up as part of his slideshow); Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993) (holding dismissal of teacher for discussing abortion of down syndrome fetuses was reasonably related to a pedagogical concern).

113. Schworm, *supra* note 10.

Facebook has been widespread among college campuses since 2005[114]—meaning that plenty of young teachers have used Facebook for many years and consider it part of their daily activities and speech. Young teachers may also not have figured out yet how to separate their college partying days from their professional lives.[115] Facebook has been open to the general public since September 2006, and has more than 750 million active users,[116] with plenty of older teachers joining in recent years who may not be as familiar with the privacy settings.[117] Facebook encourages its users to describe their personal lives and their feelings, but when teachers make off-hand remarks about their school, students, or principal, they can get in trouble.

The public expects its teachers to be in-school role models for students and to maintain professional boundaries between teachers and students. No one would question the dismissal of the three New York teachers who were fired last summer for inappropriate contact with students through Facebook that later led to illegal relationships.[118] Bill Shaw, a professor of law and ethics in business said about teacher internet speech, "school teachers are supposed to be mature enough not to titillate their students . . . . A teacher is more or less expected to be a guide or . . . demonstrably mature."[119] Teachers' personal behavior as well as their judgment regarding what to make public online or through other avenues are clearly grounds for disciplinary action.[120] It is when teachers suffer adverse employment decisions from innocent posts or comments to their family and friends that the majority of free speech rights seem to arise, or when another person posts an inappropriate message or picture of the teacher without his or her knowledge, such as in the D'Amico case above. As Randy Turner, President of the Delaware City Teachers Association said, "there is a higher standard [for teachers] . . . but I don't

114. *Timeline*, FACEBOOK.COM, http://www.facebook.com/press/info.php?statistics#!/press/info.php?timeline (last visited July 5, 2011).

115. Sullivan, *supra* note 4.

116. *Statistics*, FACEBOOK.COM, http://www.facebook.com/press/info.php?statistics (last visited July 5, 2011).

117. Sullivan, *supra* note 4.

118. Chiaramonte & Gonen, *supra* note 8.

119. Sullivan, *supra* note 4.

120. *Id.*

think that means that teachers aren't normal people that do everything everybody else does."[121] Jeffrey Chambers, a spokesman for Ohio Schools Boards Association, said in Education Week, "Anywhere [teachers] go, any time of the day, they almost have to be on their best behavior."[122]

IV. CASE LAW ON TEACHER INTERNET SPEECH

This is an emerging area of the law, and while there is a lot of case law on teacher in-school speech, there is very little off-the-job teacher speech or teacher internet speech, partly because these cases tend to settle out of court. However, in *Spanierman v. Hughes*, in the federal trial court of the District of Connecticut, the court upheld the dismissal of a high school teacher for the teacher's MySpace pages, which the court held contained inappropriate speech that was not a matter of public concern.[123] A fellow teacher discovered Mr. Spanierman's MySpace account and found that he was engaging in "peer-to-peer" conversation with his students.[124] Additionally, the administration found pictures of students with pictures of naked men nearby and "inappropriate comments underneath them."[125] The school administration spoke to Mr. Spanierman about the inappropriateness of the content of his page and the inappropriateness of engaging on-line with students, and Mr. Spanierman deactivated his original MySpace page.[126] However, a few months later he created a new page with a different profile name, but practically the same information.[127] At the end of the year, the school board decided not to renew Mr. Spanierman's contract and he brought suit.[128]

Mr. Spanierman alleged that he was dismissed because of a poem that he posted on his MySpace page that opposed the Iraq war.[129] The district court held that the poem was protected speech, but that Mr. Spanierman could not show a

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121. Manning, *supra* note 1.
122. *Id.*
123. Spanierman v. Hughes, 576 F. Supp. 2d 292 (D. Conn. 2008).
124. *Id.* at 298.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 299.
129. *Id.* at 310.

connection between the protected speech and his dismissal.[130] Rather, the school board decided not to renew Mr. Spaniermann's contract because of his unprofessional communication with students that the court found could be disruptive in the school—particularly when the Mr. Spaniermann commented on his students' romantic lives.[131] Such speech was not a matter of public concern and thus not protected and the school had the discretion to execute its employment decisions. Thus, at least one district has applied a *Tinker-Hazelwood*-like approach in dismissing a teacher for online speech with a student because it was disruptive of the learning environment.

In *Snyder v. Millersville University*, the university refused to award a student teacher her education degree because the cooperating school where she performed her student-teaching coursework dismissed her for reasons that stemmed from her use of social media websites.[132] Millersville University informed their student teachers in a training meeting that they would be expected to "maintain the same professional standards expected of the teaching employees of the cooperating school."[133] During the course of the semester, the student teacher, Snyder, received less than favorable evaluations from her cooperating teacher, Mrs. Reinking, particularly concerning inappropriate and peer-like conversations with the students.[134] Mrs. Reinking, advised the student teacher not to discuss her MySpace account with her students, but Snyder allowed several students access to her page.[135] Another teacher from the cooperating school found on Snyder's page a remark that she would not be applying for employment at the cooperating school because of an individual who was a "certain problem."[136] Mrs. Reinking felt that the remark was directed at her and that it showed Snyder's insubordination.[137] The school also objected to a photo of

130. *Id.* at 311.

131. *Id.* at 312.

132. Snyder v. Millersville Univ., No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008).

133. *Id.* at *3.

134. *Id.* at *4.

135. *Id.* at *5.

136. *Id.*

137. *Id.* at *6.

Snyder wearing a pirate hat and holding a plastic cup with a caption that read, "drunken pirate."[138] The school refused to let Snyder finish her student-teaching experience; consequently, she failed her student-teaching credits and the university denied her an education diploma.[139]

Although Snyder was a student-teacher, the district court treated the case as if she had been a teacher because she was expected to maintain all the standards of a paid teacher.[140] Snyder argued that dismissing her for her drunken pirate picture and the remarks she made about her school were a violation of her free speech. The district court applied the *Pickering-Connick* public official test, and held that the drunken-pirate photo and the comments Snyder implied about her cooperating teacher were not a matter of public concern and therefore not protected.[141] The school district's interests at maintaining employment harmony thus outweighed Snyder's interests to speak to her students online, make a possibly disparaging comment about her supervisor, and display photos of the previous night's party.[142] The court never held whether one of Snyder's online transgressions alone would have been sufficient for the school to dismiss her. However, presumably none of the speech—whether with students, about her supervisor, or about the alcoholic party—was protected as a matter of public concern. At least in this setting, the *Pickering-Connick* doctrine does not seem speech protective for teachers—even when they comment about legal activity or only imply criticism of a supervisor.

V. APPLICATION OF THE TWO MODELS TO TEACHER INTERNET SPEECH

There are basically four types of internet speech that could put at risk a teacher's relationship with his or her school district: 1) befriending students on social media sites and communicating inappropriately with them, 2) criticizing the district, school, students, parents, or the community online, 3) posting what school districts may deem as inappropriate photos

138. *Id.*
139. *Id.* at *8–*9.
140. *Id.* at *15.
141. *Id.* at *16.
142. *Id.*

or comments (usually things that are sexually explicit or that promote alcohol or drug use, and 4) commenting on political or social issues.

A. Public Official Doctrine

First, it is unlikely that teacher internet speech would conflict with the *Garcetti* "official duties" prong of the test. Most of the internet speech at issue is off-the job on-line socializing that teachers engage in from their own homes. Hypothetically, a teacher could be acting "pursuant to official duties" as she communicated electronically in advising students concerning school matters, and in which case her speech would not be protected according to the *Garcetti* approach. However, most of the cases likely will not have to deal with the *Garcetti* problem, which overall makes the analysis much easier.

1. Comments on political or social issues

Comments regarding political or social issues likely would be the easiest cases under the public official doctrine. If a teacher were to comment about a war, a public school-district issue, or perhaps about issues that face teenagers generally—then presumably he would pass the citizen/public concern test that *Pickering* mandates. The Third Circuit has held that speech on political or social issues is a matter of public concern, and thus the balance would likely be in favor of the teacher to add his voice to public debate. The school would have difficulty showing that its interest in employment efficiency should overcome core political speech.

2. Teacher online criticism of the school, faculty, students, or community

Teacher use of social media to criticize the school, faculty, students, or community likely would be a more common and difficult case for the courts if the speech disrupts the employment environment. For example, a Florida teacher was fired for saying that he "hated" his students and his school.[143] While teachers likely often use such speech when talking with

143. Christopher O'Donnel, *Union Battles Website Rules*, SARASOTA HERALD TRIB., Oct. 24, 2010, at B1.

one another, similar speech on the internet is public and creates permanent evidence, creating more potential for liability and greater possibility that the school community will learn of the teacher's negative opinion. The above case as well as the *Talvitie-Siple* case (teacher called town snobby) would likely fail the public-official balancing analysis because the courts would hold that derogatory statements regarding the school community is not a matter of public concern and that the school has the greater interest to ensure harmony in its workplace and professional relationships among teachers and students. The teacher speech above is likely more akin to the *Connick* personal grievance or personal speech than the *Pickering* public debate speech.[144] The Second Circuit held, "expressing dissatisfaction with working conditions is not, by itself, speech on matters of public concern."[145] There likely are scenarios however, where an issue relating to the school becomes a matter of public concern and like any citizen, the teacher would be able to comment on the issue in a public forum—whether that is a letter-to-the-editor or a more modern Facebook approach. That sort of case would be fact sensitive as the courts consider the content, form, and context of the speech. Since many of the social networking sites have become, or are becoming, mainstream, voicing an opinion to an online community via Facebook could be akin to voicing an opinion through a letter-to-the-editor in the community newspaper and would likely pass the public official doctrine if the court ruled that the speech was a matter of public concern.

3. Posting personal comments or photos online

Administrations preventing teachers from posting photos or comments online likely create a significant free speech issue because of the discretion that it places on school administrations to decide what is appropriate in teachers' private, off-the-job, speech. While communities want teacher role models for their students, it is legal for teachers to drink, go to bars, use profanity, or engage in other adult activities, or presumably to talk about those things with their friends. This is where online social media brings a new element that was not present in the past. Teachers used to hold these conversations

144. Connick v. Myers, 461 U.S. 138, 149 (1983).

145. Tiltti v. Weise, 155 F.3d 596, 603 (2d Cir. 1998).

with their friends and relatives through the telephone, letters, and e-mail. With the mainstreaming of social media, personal conversations have become more public and the law has to answer whether it will allow school districts to curb this sort of teacher speech. For example, can Massachusetts legally encourage their superintendents to "periodically conduct Internet searches to see if teachers have posted inappropriate material on-line"?[146]

Under a *Pickering* approach, teachers who dispute with their schools about private posts would likely lose the balancing test because posting of personal photos and conversations is by definition not a matter of public concern. In *Snyder v. Millersville University*, the district court upheld the dismissal of a student teacher who had posted a drunken-pirate photo of herself, engaged in possible insubordinate speech against her supervisor, and had inappropriate communications with her students.[147] However, it is unclear if the court would have upheld the dismissal for just one discretion, or if it was a combination of the teacher's online behavior that balanced the scale for the university.[148] As discussed above, Ginger D'Amico was suspended from her 10-year teaching job because *someone else* posted a picture of her posing with a male stripper at a bachelorette party.[149] Therefore, the school punished her because of her legal behavior, and not because of her "maturity" to know whether it was appropriate to post adult material on Facebook.[150] It is difficult to say where a D'Amico case would come out in the *Pickering* model since D'Amico was not the person speaking through social media. However, pictures of a wild party likely would not be a matter of public concern and thus could be regulated.

Presumably, one of the primary issues with teachers posting adult material on the internet is the opportunity that students may have to see their teachers implicitly endorsing alcohol use or exposing students to sexually explicit material, but if teachers are careful to shut out their students from their

146. Schworm, *supra* note 10.

147. *Snyder*, 2008 WL 5093140.

148. *Id.*

149. Sostek, *supra* note 2.

150. D'Amico was reinstated and settled with her district before the case went to trial.

web pages, then teachers should be able to have conversations with their peers without employers looking over their backs.

4. Teachers befriending students online

Prohibiting public school teachers from befriending their students online seems like a reasonable policy to protect students.[151] Examples such as the three New York teachers, who engaged in inappropriate communication with their students where they either explicitly endorsed alcohol, made sexual comments, or used the electronic interaction to initiate real illegal relationships, cause districts to pass electronic media polices that can overreach.[152] If teachers want to use technology to communicate with students about assignments and activities, then they should use school-sponsored web pages, profiles, or e-mail so that the administration can monitor the communication. Under a *Pickering* analysis teacher-student speech would not be a matter of public concern and courts would likely balance in the favor of the schools to maintain professional distance so that teachers can responsibly carry out their duties.

B. Student Speech Doctrine

Under the student-speech doctrine, a school can regulate teacher speech if the speech would "substantially interfere with . . . the operation of the school," and if the school has a reasonable pedagogical concern to censor the speech.[153] In some ways, the *Hazelwood* approach seems more appropriate for in-school or curricular speech. Almost all the cases that have applied the *Hazelwood* analysis involve in-school speech. However, the threshold question of whether the speech substantially interferes with the operation of a school and

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151. Cyber bullying has become a major issue in recent years with all sorts of legislation to protect students' peers from driving them to drastic actions through relentless persecution at school and on-line. Presumably this would not be an issue in the teacher-student relationship, unless a teacher used his position of power to intimidate and harass a disliked student electronically as well as in-class. But this scenario is unlikely as most teachers are more than glad to avoid contact with difficult students out-of-class (unless of course we are assuming a relationship similar to the fictional relationship between Professor Snape and Harry Potter).

152. Chiaramonte & Gonen, *supra* note 8.

153. Hazelwood v. Kuhlmeier, 484 U.S. 260, 271 (1988); Tinker v. Des Moines, 393 U.S. 503, 504 (1969).

whether there is a reasonable pedagogical concern to limit the speech is a good indicator whether teacher internet speech is appropriate.

1. Comments on political and social issues

Under the *Tinker-Hazelwood* approach, teacher online speech about political or social issues would likely pass. The Court did not allow the school to discipline the students in *Tinker* who used armbands to protest the Vietnam War during school; therefore, it is likely that teachers would be able to voice their political views out of school without it "substantially interrupting the operations of the school."[154] If the community is debating a political, social, or educational issue, then a teacher could likely make a comment on the issue without substantially disrupting the school whether it is through Facebook or some other means.

2. Criticism of school, students, parents, community

At first, it seems possible that public criticism of the school, parents, or community could disrupt the learning atmosphere. However, the outcome under a *Hazelwood* analysis would likely depend on the severity and/or frequency of such comments. It is unlikely that one ill-advised remark that only a few people view—even if it is later discussed in wider circles—could really "substantially interrupt the operations of the school."[155] Gossip frequently circulates around schools, and while a teacher may have negative social backlash for her criticism of the school community, it is unreasonable that most of this sort of speech would interfere with the learning environment. However, if the teacher named a student or supervisor specifically, then the comment, depending on its nature, could possibly injure the learning or working environment for the particular student or employee and others. If the teacher criticizes internal administration decisions or policies of the school to such a point that it rises to insubordination or spreads discord among the faculty, then it would be reasonable that the speech could cause substantial harm to the learning environment and the teacher could be disciplined because of a pedagogical concern.

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154. *Tinker*, 393 U.S. at 504.

155. *Id.*

3. Posting personal comments or photos online

If students have access to teacher websites that even implicitly endorse alcohol use or contain sexually explicit material, then it is likely that a teacher could come under fire in a student-speech analysis of teacher speech. In *Bethel v. Fraser*,[156] the Court upheld discipline for a student who used sexual innuendos in a high school assembly speech, and in *Morse v. Frederick*,[157] the Court upheld a school suspension for a student who endorsed drugs. It did not matter that the speech would be protected in an adult setting. The Court simply found that it was reasonable to protect a captive and minor audience from speech that disrupted the civic instruction of the curriculum.[158] Similarly, in *Lacks v. Ferguson*,[159] the Eighth Circuit found that the school had a reasonable pedagogical reason to discipline a teacher who allowed profanity in the classroom, and as mentioned above, the First Circuit allowed a district to discipline a teacher for merely picking up a student paper from the floor that was entitled "Application for a Piece of Ass" and handing it to another student as an example of inappropriate language.[160] The main difference between the above examples and teacher Internet speech is that one occurs on-campus in front of a captive audience, while the other is off-the-job speech where a person is free to browse or turn away from the material. However, a court could rule that student access to teacher websites that contain sexually explicit material or even innuendos such as in the *Hazelwood* case could substantially interrupt the operations of the school and therefore should be regulated. If students do not have access to the material however, then there would be no reason for it to interrupt the school or give a pedagogical reason to limit the speech.

4. Befriending students online

Student-teacher online social networking would likely fail under a student speech doctrine because it has huge potential to create interruptions at the school as teachers lose the

156. 478 U.S. 675 (1986).
157. 551 U.S. 393 (2007).
158. *Id.*
159. 154 F.3d 904 (1998).
160. Conward v. Cambridge Sch., 171 F.3d 12 (1st Cir. 1999).

professional distance between themselves and their students. It is easy to see pedagogical concerns limiting electronic teacher-student speech because electronic relationships could be the first step that lead to illegal teacher-student interaction. In *Miles v. Denver Public Schools*,[161] the Tenth Circuit held that a district appropriately disciplined a teacher for commenting in-class about certain students' romantic lives because it was connected to a reasonable pedagogical concern. It is likely that teachers who inappropriately comment on their students' social lives via the Internet would also cause substantial interruption to the school environment and the school would have a reasonable pedagogical concern to regulate it.

C. *Which Doctrine Should Courts Apply to Teacher Internet Speech?*

First, school administrations should ban student-teacher conversations via Facebook or other social networking websites unless it occurs through school sponsored pages or methods that can be monitored. Professional distance between teachers and students is healthy and Facebook and MySpace are not professional forums; rather they are social electronic gatherings with opportunity for abuse by an unethical educator. Therefore, students and teachers should not befriend each other on Facebook and students should not have access to their teachers' social websites, which could contain inappropriate material for minors when teachers are interacting with their adult friends. Both the *Pickering* and *Hazelwood* doctrines likely would allow school districts to prohibit student-teacher speech via social network sites because the speech is not a matter of public concern and likely could be disruptive.

Without the possibility of minors accessing their teachers' private pictures and comments, the most speech protective doctrine should apply to teacher internet speech. The government should not scrutinize teacher Internet speech more strictly than it would with its other employees who do not work with students. Teachers should have liberal reign to post whatever personal comments or pictures they wish to their adult friends even if it would be inappropriate for minors. If

161. 944 F.2d 773 (1991).

students cannot access their teachers' websites, superintendents should not be encouraged, nor would they have reason to police their employees' online activity.

Between the *Pickering* and *Hazelwood* doctrines, the *Hazelwood* doctrine would likely protect more teacher internet speech, while also protecting schoolchildren. Under a *Hazelwood* approach, teacher internet speech would be unprotected only if it interferes with the learning environment and therefore gives schools a reasonable pedagogical concern to regulate it. If students cannot access the websites, teachers could be free to post their personal pictures and profiles without concern for disruption. Teachers would have the freedom to make political speeches and even criticize the school as long as the speech was not so extreme or so frequent that it interfered with the operation of the school—meaning the ability of students to learn and teachers to teach. One colorful comment about the school by a frustrated teacher seems unlikely to interfere with school operations.

While the *Pickering* approach would also work to protect against teacher-student online interaction via social network sites and protect online political speech, it would be less protective when teachers post criticisms of the school or post personal comments and photos. The *Pickering* approach gives school districts substantial discretion in deciding what kind of speech is appropriate. Most speech on social networking sites is not a matter of public concern, and therefore would fail the *Pickering* analysis. Schools should not be able to discipline teachers for photos or comments that they display to their adult friends and schools should certainly not be searching for such material. Teachers, like their private-employee counterparts should face consequences for ill-advised, potentially public remarks that are so extreme that it interferes with work relationships or the work environment, but the *Hazelwood* student-speech analysis would regulate that kind of speech if were truly disruptive, while still permitting teachers to make unrelated employment posts without fear of retribution.

The question remains how to treat teacher online speech to which students gain access because the teacher accidentally had settings set to public or where students view pictures of their teachers in adult settings because another person besides the teacher made them available for public viewing. School

administrators should instruct and train their employees about social networking sites and the dangers of allowing student access. Clear guidelines should be established notifying teachers that they should not purposefully befriend students and settings should be set to private. As long as fair warning is given, administrators who want to take a hard-line stance on student-teacher interaction via social networking, even if it is only accidental, likely would be supported by both the *Pickering* and *Hazelwood* approaches. While it may seem harsh, strictly prohibiting students from viewing teacher social networking web pages should allow teachers more freedom to communicate with their friends without the worry of minors for whom they are responsible viewing inappropriate material and interrupting the school or work environment. Finally, teachers should not be held responsible for pictures or comments that are made about them outside of their control, as long as the teacher is not the speaker and it depicts the teacher participating in legal activity.

VI. CONCLUSION

Regulation of teacher internet speech creates First Amendment concerns that usually do not exist in the normal teacher in-school speech analysis. Internet speech is a private activity where teachers, like others, post personal material. Students and teachers should be prohibited from interacting with each other or having access to one another's social networking web pages to both protect the student and to protect the teacher's ability to speak freely on legal, adult, subjects. When students are eliminated from the scene, teachers should be given broad internet free speech rights. Although almost counterintuitive, the *Hazelwood* student-speech approach would likely give teachers more speech rights on the internet because schools could only discipline the teacher speech if it amounted to a substantial disruption of the school that the school had a pedagogical reason to regulate. Without students in the mix, the speech would have to be extremely critical of the school before it would actually disrupt the work environment.

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