POSTS BY POLICE: DISCIPLINING LAW ENFORCEMENT FOR SPEECH ON SOCIAL MEDIA

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INTRODUCTION

Justice Oliver Wendell Holmes, Jr., once wrote that a man has "a constitutional right to talk politics, but he has no constitutional right to be a policeman."[1] The Supreme Court later changed course, holding that the government "may not condition public employment on an employee's exercise of his or her First Amendment rights."[2] More recently, amidst high-profile cases of police brutality[3] and a growing distrust of law enforcement,[4] police departments face increasing scrutiny from the public and have an interest in protecting their public image. These departments must manage their relationship to the communities they police using tools that do not violate the First Amendment rights of their officers.

In *Fenico v. City of Philadelphia*,[5] the Third Circuit warned that government employers need to carefully identify the speech at issue when taking adverse action against employees in response to social

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1. McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892), *abrogation recognized by* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996).

2. *O'Hare Truck Serv.*, 518 U.S. at 717.

3. *See* Tamara F. Lawson, Commentary, *Awakening the American Jury: Did the Killing of George Floyd Alter Juror Deliberations Forever?*, 58 HOUS. L. REV. 847, 849 (2021); Stephen Rushin, *Foreword: Policing the Police*, 8 ALA. C.R. & C.L. L. REV., at i, iii (2017).

4. *See, e.g.*, Lois Beckett, *One in 20 US Homicides Are Committed by Police—and the Numbers Aren't Falling*, GUARDIAN (Feb. 15, 2023), https://perma.cc/C83P-PGKA; Jennifer Jenkins et al., *Police Shootings Database 2015–2024: Search by Race, Age, Department*, WASH. POST (Dec. 31, 2024), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk_inline_enhanced-template; Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

5. 70 F.4th 151 (3d Cir. 2023).

media activity.[6] Calling the First Amendment a "bitter medicine,"[7] the court reversed the dismissal of a First Amendment retaliation claim brought by police officers who were disciplined after their public Facebook posts and comments led to a widespread scandal.[8] The district court had held that the plaintiffs collectively "fail[ed] to show that their right to free speech outweigh[ed] the government[] interest in regulating that speech."[9] On remand, the district court again held for the government, but it did so at the summary judgment stage, after it undertook a fact-based analysis of the evidence of each officer's statements.[10]

The *Fenico* decision highlights a broader dilemma concerning social media use by government employees. Social media users sometimes speak informally and candidly even when their profiles are public, and they do not always anticipate the potential reach of their statements, which are often preserved online.[11]

Government employees can and do use social media in ways that do not impact their employers, but this Note focuses on the more extreme examples that have resulted in significant public outcry. While government employers need bright-line employment policies, courts will scrutinize the decision to discipline an employee for speech on an individualized basis. Nowhere is this tension more salient than in the realm of policing, where inflammatory comments by individual officers can sow doubt in their communities about whether entire police forces will act with integrity when making life-or-death decisions.

The standard test for government employee speech, from *Pickering v. Board of Education*,[12] balances the speaker's interest "in commenting upon matters of public concern" against the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[13] *Pickering* predates social media, so it did not contemplate one of the most consequential forms of employee speech today.

This Note argues that *Pickering* leaves police departments in uncertain territory regarding speech on social media. Speech by a police officer about police misconduct in particular is not easily

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6. *Id.* at 162.

7. *Id.* at 153.

8. *Id.* at 162.

9. *See* Fenico v. City of Philadelphia, 582 F. Supp. 3d 229, 242 (E.D. Pa. 2022), *rev'd*, 70 F.4th 151 (3d Cir. 2023).

10. Fenico v. City of Philadelphia, 755 F. Supp. 3d 602, 618–29 (E.D. Pa. 2024).

11. *See, e.g.*, Gary D. Robertson, *Several Mark Robinson Campaign Staffers Quit as Fallout Over Online Posts Continues*, ASSOCIATED PRESS (Sept. 22, 2024), https://apnews.com/article/north-carolina-governor-mark-robinson-5fa5e739329bbabbc7cc0c9ed286ed23.

12. 391 U.S. 563 (1968).

13. *Id.* at 568.

divorced from the speaker's employer, and neither is speech disparaging populations that interact with the police. Section II.A argues that in the context of police scandals, the two prongs of *Pickering* often directly correlate, making the balancing test difficult to apply. Section II.B compares the *Fenico* court's call for an "officer-by-officer" or "post-by-post" review of social media speech and argues that an officer-by-officer approach results in richer analysis of the speech's content, form, and context. Lastly, Section II.C explores the approaches available to plan for and avoid scandals like the one underpinning *Fenico* and the potential consequences of each approach.

I. BACKGROUND

A. The Plain View Project

In late 2017,[14] a group of attorneys led by Emily Baker-White founded the Plain View Project (PVP), which began to compile a database of "concerning" Facebook posts and comments from accounts belonging to police officers.[15] Baker-White had researched several officers' Facebook activity while working on a police brutality case and began to wonder if some departments had a "culture" of endorsing police misconduct online.[16] Baker-White stated that she was particularly struck by a "meme of a police dog trying to run," with the accompanying text stating the dog "likes fast food."[17]

After verifying the accounts of more than 3,500 police officers, the researchers behind PVP reviewed all publicly available posts and comments from each account.[18] The researchers then archived and compiled each post that they determined "could undermine public trust and confidence in police."[19] PVP describes its methodology as subjective and says its team compiled only the content that its reviewers "*believe* meet this criterion."[20] On June 1, 2019, PVP made its findings public, and its parent organization published a companion article in collaboration with *Buzzfeed News*.[21] The database is

14. *About the Project*, PLAIN VIEW PROJECT (2025) [hereinafter PLAIN VIEW PROJECT], https://perma.cc/2LZM-7MQF.

15. Dakin Andone, *This Group Found Thousands of Offensive Facebook Comments by Police. Here's What You Should Know*, CNN (June 20, 2019), https://perma.cc/MK9Q-CXYD.

16. *Id.*

17. *Id.*

18. PLAIN VIEW PROJECT, *supra* note 14.

19. *Id.*

20. *Id.* (emphasis added).

21. Chris Palmer et al., *Group Catalogs Racist, Intolerant Facebook Posts by Hundreds of Philly Police Officers*, PHILA. INQUIRER (June 1, 2019), https://www.inquirer.com/news/philadelphia/police-philadelphia-facebook-comments-racist-20190601.html. *See generally* Emily Hoerner & Rick Tulsky, *"Good Day for a Choke Hold,"* BUZZFEED NEWS (July 23, 2019),

available online, where the public can search "by officer name, rank, badge number, and jurisdiction."[22] Its publication has inspired protests and a federal congressional investigation.[23]

PVP's stated goal was not to see specific officers disciplined but rather to encourage "a national dialogue" about police integrity.[24] Even so, police departments in all eight of the jurisdictions analyzed by PVP shared the concerns of PVP's researchers enough to investigate further.[25] Many agencies terminated, suspended, or otherwise disciplined officers who appeared in the database.[26] In St. Louis, the lead prosecutor placed twenty-two of these officers on an "exclusion list," meaning that the officers were not allowed to bring new cases to prosecutors or obtain search warrants.[27]

B. Impact in Philadelphia

In February 2019, PVP sent a letter to the Philadelphia Police Department explaining its work and listing seven Department officers who would appear in its report.[28] The named officers also received a copy of the letter.[29] The Department investigated the officers but could not locate the posts in question, "[p]resumably [because] the officers deleted the content or otherwise made their profiles unavailable" after receiving PVP's letter.[30]

When PVP made its findings public in June 2019, the database contained roughly 3,000 posts attributed to 328 Department police

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https://www.buzzfeednews.com/article/emilyhoerner/police-facebook-racist-violent-posts-comments-philadelphia.

22. PLAIN VIEW PROJECT, *supra* note 14.

23. *See* Michaela Winberg, *Hundreds Protest at Philly Police HQ, Call for Action on Intolerant Facebook Posts*, WHYY (June 7, 2019), https://perma.cc/WS5F-SHKP; Press Release, House Comm. on Oversight & Accountability Democrats, Subcommittee Seeks Documents in Investigation of White Supremacists Infiltrating Law Enforcement Agencies (Sept. 29, 2020), https://perma.cc/M7JP-ZAUX; Carlos Ballesteros & Emily Hoerner, *U.S. House Subcommittee Investigates Cops Tied to Racist, Xenophobic Facebook Posts*, INJUSTICE WATCH (Sept. 28, 2020), https://perma.cc/D7NJ-AFRD.

24. Andone, *supra* note 15.

25. *See* Erin Donaghue, *Texas Officers Punished amid Nationwide Fallout over Racist, Violent Facebook Posts*, CBS NEWS (June 21, 2019), https://perma.cc/9SV2-C5DV.

26. *Id.*

27. Jim Salter, *Prosecutor Adds 22 St. Louis Officers to Exclusion List*, ASSOCIATED PRESS (June 19, 2019), https://apnews.com/general-news-f31560afcbbb4f9e86ede7b3835576fe.

28. POLICE ADVISORY COMM'N, CITY OF PHILA., A REVIEW OF THE PPD'S RESPONSE TO THE PLAIN VIEW PROJECT 22 (2020) [hereinafter PAC REPORT], https://perma.cc/7N7L-YGQS. The PAC Report consolidates several documents with different pagination. For clarity, this Note uses the page numbers of the PDF itself.

29. *Id.*

30. *Id.*

officers,[31] including the officers mentioned in the letter.[32] Roughly 200 protesters gathered at the Department's headquarters to call on the Department to take action.[33] In response, Philadelphia's Commissioner of Police "pulled 72 officers from the streets"[34] and placed them on administrative leave.[35] Some of these officers were later terminated, and others were "barred from testifying in court" due to doubts about their integrity.[36]

On October 14, 2020, the Police Advisory Commission (PAC) for the City of Philadelphia released a report on the PVP database and the "several scandals and major events" impacting the Department in the subsequent year.[37] In an analysis of the Department employees' posts and comments within the PVP database, the PAC Report identified groups of posts "making light of use of force," endorsing "extra-judicial violence" and "vigilante justice," or otherwise suggesting a disdain for due process.[38] Others were identified as "Islamophobic," "misogynystic/sexist," using "coded racist language," or otherwise indicating animosity towards specific groups of people.[39]

C. The Case

Twelve Department officers who were terminated or otherwise disciplined because of Facebook activity captured by PVP sued the City for First Amendment retaliation.[40] The Department had a Code of Ethics, a required Oath, and a Social Media Policy.[41] The Code of Ethics required officers to "keep their private lives unsullied as an example to all," respect all persons' Constitutional rights, prevent bias from influencing their work, and recognize their positions as "a symbol of public faith."[42] In the Oath, each officer "swore to uphold the law 'without consideration to a person's race, color, sex, gender identity, religious creed, sexual orientation, age, national origin, ancestry, handicap or disability.'"[43] The Social Media Policy stated that off-duty employees did not represent their employer but still

31. Fenico v. City of Philadelphia, 70 F.4th 151, 154 (3d Cir. 2023); Winberg, *supra* note 23.

32. PAC REPORT, *supra* note 28, at 22.

33. Winberg, *supra* note 23.

34. Mitch Smith, *72 Philadelphia Officers Benched after Offensive Social Media Posts*, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/us/philly-cops-plain-view-project.html.

35. Andone, *supra* note 15.

36. *Fenico*, 70 F.4th at 160.

37. PAC REPORT, *supra* note 28, at 1, 3.

38. *Id.* at 15.

39. *See id.* (citation modified).

40. *Fenico*, 70 F.4th at 153.

41. Fenico v. City of Philadelphia, 582 F. Supp. 3d 229, 232 (E.D. Pa. 2022).

42. Brief for Appellee at 8 n.6, Fenico v. City of Philadelphia, 70 F.4th 151 (3d Cir. 2023) (No. 22-1326).

43. *Id.* at 8.

characterized each employee as "an ambassador of the department."[44] It also required police officers to "strive to maintain public trust and confidence" when engaging in online activities and stated that their personal online conduct must adhere to the Department's "professional expectations and standards."[45] According to the City, each terminated officer had at least one post that was "incompatible with" these authorities.[46]

On November 2, 2020, the City moved to dismiss the Complaint for failure to state a claim.[47] As shown in its Table of Contents, the City tied the actions taken against each plaintiff to at least one statement attributed to that plaintiff:

> A. Christian Fenico: "Hates Every Last [Muslim Refugee]" . . .
> B. Thomas Young: Called for "Ban [of] Islam from all Western Nations." . . .
> C. Thomas Gack: Compared "Obama Voters" to Chimpanzees. . . .
> D. Edward McCammitt: Promoted extreme violence against Protesters. . . .
> E. Tanya Grandizio: Asked "Can a Muslim be a Good American?" . . .
> F. Anthony Anzideo: Promoted Vigilante Justice. . . .
> G. Anthony Acquaviva: Compared Muslim Women and Children to trash bags. . . .
> H. Kristine Amato: Promoted excessive use of force. . . .
> I. Joseph Przepiorka: Called for "Death to Islam." . . .
> J. Francis Sheridan: Celebrated prison rape. . . .
> K. William Bowdren: Promoted violence against protesters. . . .
> L. Raphael McGough: Called for the "extermination" of "alt left extremists."[48]

In doing so, the City attempted to illustrate why *Pickering* justified each adverse action taken.[49]

On January 26, 2022, The United States District Court for the Eastern District of Pennsylvania granted the City's Motion to Dismiss.[50] The district court held that the plaintiffs "fail[ed] to show that their right to free speech outweighs the government[']s interest

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44. *Fenico*, 582 F. Supp. 3d at 233.

45. *Id.*

46. Brief for Appellee, *supra* note 42, at 35 n.24.

47. *See* Defendant City of Philadelphia's Motion to Dismiss for Failure to State a Claim, Fenico v. City of Philadelphia, 582 F. Supp. 3d 229 (E.D. Pa. 2022) (No. 20-cv-03336) [hereinafter Motion to Dismiss].

48. *Id.* at 3.

49. *Id.* at 32–35 (arguing that, as a matter of law, *Pickering* balancing weighed in favor of the Department).

50. *See* Fenico v. City of Philadelphia, 582 F. Supp. 3d 229, 231 (E.D. Pa. 2022).

in regulating that speech."[51] It also adopted the City's argument that social media posts are "*per se* disruptive," and therefore outweighed by the government's interest in community relations, if they "promote extrajudicial violence, vigilante justice, police brutality, and demonstrate a clear bias against African-Americans, Muslims, and members of the LGBTQ community."[52]

On appeal, the Third Circuit criticized the district court for failing to engage in an "individualized analysis" before concluding that all 250 Facebook posts at issue were "of nominal public concern."[53] It predicted that the officers would have a "steep uphill battle in ultimately proving their case" but nevertheless concluded that the Complaint alleged a claim that could survive the City's motion.[54]

D. Governing Law

Private employers can punish employees for their speech, absent specific protections such as Title VII's anti-retaliation provision[55] or the National Labor Relations Act's protection of "concerted activities" among employees.[56] These limited protections typically extend to social media activity.[57] Government employees have greater protection because the First Amendment prevents the government from restricting "the freedom of speech,"[58] but their speech still "receives less protection than speech by members of the public."[59] In addition, just as lawmakers have carved out protections for certain private employee speech, they have also carved *in* to public employees' speech rights in certain contexts, such as to prevent federal employees from using their positions to influence elections.[60] The Supreme Court has allowed these limitations on government employee speech.[61]

Government employers have managerial discretion to allow or disallow certain employee behaviors that can negatively impact the

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51. *Id.* at 242.

52. *Id.*

53. Fenico v. City of Philadelphia, 70 F.4th 151, 162 (3d Cir. 2023).

54. *Id.* at 163.

55. *See* Tinio v. St. Joseph Reg'l Med. Ctr., 645 F. App'x 173, 176 (3d Cir. 2016) (discussing Title VII's protections for employees who engage in "protected activity" such as opposing harassment or participating in investigations).

56. *See* 29 U.S.C. § 157.

57. *See Social Media*, NAT'L LAB. RELS. BD. (2025), https://perma.cc/S5YZ-DNMU.

58. *See* U.S. CONST. amend. I.

59. Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty., 39 F.4th 95, 103 (3d Cir. 2022).

60. *See, e.g.*, *Federal Employee Hatch Act Information*, U.S. OFF. SPECIAL COUNS. (2025), https://perma.cc/WP8P-D6E6.

61. *See, e.g.*, U.S. Civ. Serv. Comm'n v. Nat'l Ass'n Letter Carriers, 413 U.S. 548, 567 (1973) (upholding the Hatch Act); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 102–03 (1947) (same).

employment enterprise.[62] As in private workplaces, a "disruptive" or "unsatisfactory" government employee can have a range of negative impacts on the workplace, varying from efficiency to morale.[63] The government employer's interest in "the maintenance of employee efficiency and discipline" broadly aligns with the public interest because the government serves the public.[64]

A government employee who is disciplined or terminated over speech may bring a First Amendment retaliation claim if the speech at issue is protected by the First Amendment—i.e., if the employee spoke as a citizen on a matter of public concern.[65] First, the speech must be made by the speaker "as a citizen," not "as an employee."[66] For example, speech directly criticizing one's supervisor fails this element because employees are not entitled to "constitutionalize the employee grievance."[67] Second, the speech must pertain to "matters of public concern."[68] Courts examine the "content, form, and context of a given statement" to determine whether the statement is on a matter of public concern.[69]

The foundational test for the First Amendment rights of public employees comes from *Pickering v. Board of Education*.[70] In *Pickering*, a county school board terminated a teacher because he wrote a letter to the local paper regarding a proposed tax increase and critiqued his employer's previous attempts to increase funding for schools.[71] Concluding that it was "necessary to regard the teacher as [a] member of the general public" rather than merely an employee, the Supreme Court held that his termination for exercising his First Amendment rights was unconstitutional.[72] Under the *Pickering* test, courts "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[73]

If the *Pickering* balancing weighs in the employee's favor, the court then considers causation, the final element of the retaliation claim.[74] If the protected activity in question was "a substantial factor

62. *See* Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part).
63. *Id.*
64. *Id.*
65. Connick v. Myers, 461 U.S. 138, 143 (1983).
66. *Id.* at 147.
67. *Id.* at 154.
68. *Id.* at 142.
69. *Id.* at 147–48.
70. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
71. *Id.* at 564.
72. *Id.* at 574.
73. *Id.* at 568.
74. Hill v. Borough of Kutztown, 455 F.3d 225, 241 (3d Cir. 2006).

in the alleged retaliatory action," this element is satisfied, and the plaintiff has a valid retaliation claim.[75]

Pickering balancing is innately subjective due to the nebulous nature of both interests, making the test difficult to predict.[76] On one side of the scale, the purported value of an individual's interest in speaking is difficult for anyone other than the speaker to value. The other side of the scale, which weighs the government employer's interest in suppressing the speech, requires an estimate of the severity of the potential disruption the speech could cause.[77] *Pickering* balancing is ultimately a question of law, so it grants the court the authority to weigh these two interests.[78] Absent a clear showing of disruption that has *already happened*, however, judges must merely take their best guess as to the disruption that could be stirred up in response to a particular statement. Such a hazy test lends itself to inconsistent applications because it relies too much on the court's imagination.

This exact problem emerges in *Fenico*: the Third Circuit criticized the district court's dismissal of the case because "[t]he current record . . . includes only unadorned speculation about the potential disruption the Officers' posts pose."[79] According to the Third Circuit, such a generous reading of potential disruption ignores "causational questions" regarding "posts that had been public for years, purportedly without issue."[80] Yet the district court had examined the posts contained within the Amended Complaint and concluded that "any and all the posts Plaintiffs provided . . . [were] sufficient" to justify the city's response under the *Pickering* standard.[81]

Looking beyond the record before the Third Circuit, it is clear that there was not only potential disruption but *actual* disruption, as evidenced by the June 7, 2019 protest in direct response to PVP's posts from City officers.[82] The Third Circuit's decision therefore hinged largely on the procedural posture of the case, which had been dismissed on a Rule 12(b)(6) motion.[83] This made for a sparse record from which the court needed to take as true the facts alleged by the plaintiffs. The Third Circuit predicted that the plaintiffs would "undoubtedly face a steep uphill battle" in proving their case on the

75. *Id.*

76. *See* McEvoy v. Spencer, 124 F.3d 92, 98 n.3 (2d Cir. 1997).

77. *Pickering*, 391 U.S. at 568.

78. *See* Locurto v. Safir, 264 F.3d 154, 166 (2d Cir. 2001).

79. Fenico v. City of Philadelphia, 70 F.4th 151, 154 (3d Cir. 2023).

80. *Id.*

81. Fenico v. City of Philadelphia, 582 F. Supp. 3d 229, 245 (E.D. Pa. 2022).

82. Chris Palmer, *150 Protest at Roundhouse as Police Facebook Scandal Fallout Continues*, PHILA. INQUIRER (June 7, 2019), https://www.inquirer.com/news/philadelphia-police-facebook-posts-racist-offensive-protest-20190607.html; Winberg, *supra* note 23 (reporting a headcount of "roughly 200").

83. *Fenico*, 70 F.4th at 153.

merits but still gave them the chance to proceed.[84] On remand, the district court again held that the City's interest outweighed those of every plaintiff, but it did so only after engaging in an individualized analysis of each officer's statements.[85]

II. ARGUMENT

Police departments rely on the cooperation and participation of the communities they police. In a given year, individuals in the United States report tens of millions of incidents to law enforcement.[86] Yet several studies indicate that declining trust in the police can make individuals less likely to report crimes.[87] The current *Pickering* test is unpredictable and difficult to apply to law enforcement, leaving police departments uncertain about when they can discipline an officer for speech. As a result, departments are left to gamble on the legality of their disciplinary decisions.

Section II.A of this Note considers the shortcomings of *Pickering* balancing in the law enforcement context. Section II.B argues that in the context of social media posts, courts should choose the "officer-by-officer" basis offered in *Fenico* over a post-by-post approach because a more holistic look at each officer's account promotes a more thorough application of *Pickering*. Finally, Section II.C explores the other tools available to government entities attempting to do something about statements like those captured by PVP: office policies, employee surveillance, and *Giglio* lists.

A. Pickering *Provides Limited Use in the Context of Police Because the Two Factors It Weighs Are Usually Intertwined*

The reason the *Fenico* plaintiffs' speech is protected is because it touches on "matters of public concern."[88] This same reason is exactly what makes it disruptive: while posts regarding "race relations" are "inherently of public concern,"[89] police statements that make light of racial injustice have led to community outcry. In the context of police officer speech, the two sides of *Pickering* will often directly correlate, making it an ineffective test.

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84. *Id.* at 163.

85. Fenico v. City of Philadelphia, 755 F. Supp. 3d 602, 878 (E.D. Pa. 2024).

86. *See* ERIKA HARRELL & ELIZABETH DAVIS, BUREAU OF JUST. STAT., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES, at 3–4 (2023), https://perma.cc/5BB7-NQU3 (reporting more than 27 million "resident-initiated" contacts with police in 2015 and more than 35 million in 2018).

87. *See generally* Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. REV. 857, 858 (2016); Min Xie et al., *Declining Trends in Crime Reporting and Victims' Trust of Police in the United States and Major Metropolitan Areas in the 21st Century*, 40 J. CONTEMP. CRIM. JUST. 138 (2024).

88. *See* Connick v. Myers, 461 U.S. 137, 142 (1983).

89. *Fenico*, 70 F.4th at 165 (quoting *Connick*, 461 U.S. at 148 n.8).

Speech on matters of public concern can take many forms, but as illustrated by *Fenico*, police officers are particularly at risk of placing themselves and their employers in hot water when they express opinions on topics like politics, race, and policing. Prior to the Third Circuit's reversal of *Fenico*, the lower court had accepted the City's argument that speech of police officers would be "per se disruptive" if it endorsed "violence, extrajudicial punishment, vigilantism, police brutality, misuse of power, or lack of respect for due process" or if it exhibited "bias or animus regarding race, ethnicity, religion, sexual orientation or gender identity."[90] After the Third Circuit's reversal, which warned the district court to separate "the posts' vituperative tone" from "their underlying content," thorny issues remain as to how to handle both of these types of speech.[91]

One potential solution could be to add a third factor, such as the impact of an officer's speech and continued employment on the public interest. This new factor could, for example, distinguish speech that calls into question an officer's ability to serve from speech that serves the public's interest in police accountability and government transparency. However, because *Pickering* first requires that the employee was speaking "as a citizen,"[92] speech where an officer purports to speak as an insider or witness to police misconduct would typically fall outside of the scope of *Pickering*. In addition, while *Pickering* inherently allows for some content-based discrimination, any additional content-based wrinkle to the test would be subject to strict scrutiny.[93]

1. Speech Regarding Due Process and Police Accountability

Many of the statements classified in the PAC Report related to the criminal justice system and public trust in policing. For example, the Philadelphia police officer posts and comments in the PVP database included 284 statements classified as "making light of use of force," 211 pertaining to "extra-judicial violence," 179 pertaining to "vigilante justice," 78 pertaining to "extra-judicial justice/lack of due process," 72 pertaining to "demonstrated disdain for constituents," and 35 "mocking civilian complaints."[94] These posts undermined public trust in the Department because they suggest a discrepancy between the officers' actual priorities and the Department's official goals of protecting the community and supporting the criminal justice system. Police officers are tasked with enforcing the law, but those

90. *See* Jonathan Abel, *Cop-"Like": The First Amendment, Criminal Procedure, and the Regulation of Police Social Media Speech*, 74 STAN. L. REV. 1199, 1217 (2022) (quoting Motion to Dismiss, *supra* note 47, at 35).

91. *See Fenico*, 70 F.4th at 166.

92. *See Connick*, 461 U.S. at 154 (rejecting an attempt to "constitutionalize the employee grievance").

93. Free Speech Coal., Inc. v. Att'y Gen. U.S., 974 F.3d 408, 418 (3d Cir. 2020).

94. PAC REPORT, *supra* note 28, at 15 (citation modified).

laws include constitutional protections like due process and equal protection.[95]

At the same time, these statements touch on a matter of public concern in a realm police officers interact with much more so than the general public: law enforcement. The *Pickering* Court, which considered a teacher's statement about school funding, placed a heightened value on speech that cuts close to a public employee's professional experience.[96] It reasoned:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[97]

As in *Pickering*, where a teacher had a valuable perspective on a matter of public concern because the matter affected schools, some statements about law enforcement expressed by law enforcement officers will provide valuable insight due to the perspective of the speaker. Some police officers, for example, will have both used force and witnessed their colleagues' use of force. Statements made by police officers regarding topics such as vigilante justice and unauthorized use of force can shed light on the realities of policing in the United States, when force becomes excessive, and how often officers stray from official protocol in high-pressure situations. Regardless of whether these statements negatively impact a police department's public image, as was the case in *Fenico*, they relate to matters of public concern. The two prongs of the balancing test—the speaker's interest in allowing the speech and the employer's interest in suppressing it—are therefore inherently in tension when police officers speak candidly about their views of policing.

Aside from the officer's interest in speaking, the public has an interest in hearing what police officers have to say about policing. These perspectives could reflect poorly on police departments and therefore undermine public trust, but the public can benefit from having access to information about what police officers say and think. These statements bring the officers' perspectives out into the open. Even if certain statements by police officers inadvertently reinforce the public's "worst fears" about police, they contribute to the "informed decision-making by the electorate" laid out in *Pickering* as

95. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

96. Pickering v. Bd. of Educ., 391 U.S. 563, 571–72 (1968).

97. *Id.* at 572.

the societal benefit gained from protecting the government employee's speech.[98]

A less flattering look—what PVP would consider a "plain view"—of officer speech negatively impacts departments when the officers engage in controversial speech, but the resulting public outcry is an important public conversation. After all, Facebook is not the first or only platform for police officers to voice opinions about their work. When the officers make these statements more privately, the public response is limited, but the potential connection to their work is not.

2. Speech Regarding Race and Identity

Another subset of posts and comments from the Philadelphia officers were classified as "racist," using "coded racist language," or having "racist symbol[s]."[99] Others were classified as "Islamophobic," "misogynistic/sexist," "anti-immigrant/anti-refugee," or "anti-LGBTQ."[100] Such posts negatively impacted the Department's public image goals because they could make individuals in the targeted groups feel like the police will not protect them or that they should not report crimes to the police. Even this perception can reduce crime reporting.[101] In addition, this class of post undermined the Department's goal of effective policing because the statements in question could contribute to a culture of racial, religious, cultural, or other animus among police officers, potentially impacting how the police force operates in relation to the population it polices.

The *Fenico* court noted that "speech touching on race relations is 'inherently of public concern.'"[102] The Second Circuit agreed in *Locurto v. Giuliani*[103] that "commentary on race is, beyond peradventure, within the core protections of the First Amendment."[104] The *Locurto* court, however, recognized that *police departments* can easily overcome this portion of the balancing test because, as public servants, "part of [officers'] job is to safeguard the public's opinion of them."[105] The government's interest in restricting employee speech is strongest when the employee "is often the representative with whom the public interacts."[106] Police officers are some of the most public-facing government employees in the United States: in 2018, for

98. *See Fenico*, 70 F.4th at 154 (discussing how the plaintiffs' comments "have the capacity to confirm the community's worst fears about bias in policing"); *see also Pickering*, 391 U.S. at 572.

99. PAC REPORT, *supra* note 28, at 9–10.

100. *Id.* (citation modified).

101. *See generally* Desmond et al., *supra* note 87; Xie et al., *supra* note 87.

102. *Fenico*, 70 F.4th at 165 (quoting Connick v. Myers, 461 U.S. 138, 148 n.8 (1983)).

103. 447 F.3d 159 (2d Cir. 2006).

104. *Id.* at 183.

105. *Id.* at 178.

106. *See id.* at 179 (quoting Pappas v. Giuliani, 290 F.3d 143, 156 (2d Cir. 2002) (Sotomayor, J., dissenting)).

example, 24 percent of U.S. residents had some level of contact with police.[107] Police departments therefore have a particularly strong argument on the government employer side of the *Pickering* scale.

The Third Circuit acknowledged the City's "interest in protecting a perception that police exist to serve the entire community regardless of race, ethnicity, national origin, religion, sex, gender expression, sexual orientation, or political beliefs."[108] It also conceded that the posts in question "have the capacity to confirm the community's worst fears about bias in policing," potentially jeopardizing "the effectiveness of public safety efforts in Philadelphia."[109] Even so, the *Fenico* decision casts doubt on whether a government employer can ever overcome a well-written complaint at the motion-to-dismiss stage when speech regarding race is at issue.

3. Pickering *as a Procedural Problem*

Ultimately, most of the district court's error lies in its willingness to decide the case on a motion to dismiss for failure to state a claim. The Tenth Circuit—also in the context of police officers' social media speech—recently held that *Pickering* balancing "is usually inappropriate—if not impossible—at the motion to dismiss stage" because it is so fact-based.[110] Several other circuits have already reached a similar conclusion.[111] Even though the *Fenico* plaintiffs included information about their posts and the subsequent disruption in their Complaint, the Third Circuit did not consider the court to have adequately undertaken *Pickering* balancing. Given other circuits' more explicit decision to delay application of the test, courts in the Third Circuit will likely want to hold off until they have more of a factual record. For now, government employers who want to resolve a *Pickering* case as quickly as possible should instead prioritize their summary judgment arguments.[112]

B. An Officer-by-Officer Approach to the "Potential Disruption" Arm of Pickering Best Addresses the Third Circuit's Concerns Over Social Media Speech

Because *Pickering* predates social media, it comes from a time when speech outside of work was less capable of reaching an

107. HARRELL & DAVIS, *supra* note 86, at 1.

108. *Fenico*, 70 F.4th at 153–54.

109. *Id.* at 154.

110. Brown v. City of Tulsa, 124 F.4th 1251, 1269 (10th Cir. 2025).

111. *See, e.g.*, Garza v. Escobar, 972 F.3d 721, 728 (5th Cir. 2020) (recognizing "a *rebuttable presumption* at the motion-to-dismiss stage" that the claim would survive *Pickering* balancing); Perry v. McGinnis, 209 F.3d 597, 607 (6th Cir. 2000) (reversing dismissal because "the facts were not well enough developed in the pleadings" for *Pickering* dismissal); Hernandez v. City of Phoenix, 43 F.4th 966, 979 (9th Cir. 2022) (reversing dismissal because there was not enough of a factual record for *Pickering* balancing).

112. *See* FED. R. CIV. P. 12(d).

employer. In-person conversations are ephemeral, but online speech is often available in a public archive. Today, statements of public concern are often housed online and therefore searchable. The shareability of social media content can also take speech beyond its intended audience. In more extreme scenarios, such as the PVP database, posts can be captured and published in a new context without the original speaker.

In a 2022 *Stanford Law Review* article, Professor Jonathan Abel argued that courts have developed "an easily administrable rule" for applying *Pickering* to police speech on social media, citing the *Fenico* lower court's discussion of why certain posts were "per se disruptive."[113] In Abel's view, police speech will be easy to classify when it "fit[s] neatly within the bias and violence boxes."[114] The Third Circuit's subsequent rejection of the "per se disruptive" standard muddies these waters. As a result, district courts will likely be more detailed in their handling of *Pickering* balancing, as the district court was on remand, to provide a more thoroughly supported opinion.

The Third Circuit charged the district court on remand with applying *Pickering* to the *Fenico* plaintiffs "on an officer-by-officer basis, if not a post-by-post basis."[115] Under a post-by-post approach, the City would need to pick at least one specific post or comment per officer and provide a more detailed justification of how the statement at issue directly relates to potential disruption.

A post-by-post approach artificially isolates each statement. The first step of a First Amendment retaliation claim requires consideration of a statement's "content, form, and context" to determine if the statement is entitled to protection.[116] It makes little sense to completely remove this framework when moving to *Pickering* balancing. Doing so places disproportionate weight on an individual post instead of viewing an officer's account activity in the aggregate. An officer-by-officer or account-by-account approach allows the court to consider facts such as whether the account represents that the account holder is a police officer, whether an individual post is part of a pattern of activity, and how an individual comment fits within a larger conversation.

As the Third Circuit pointed out, many of the plaintiffs' posts and comments had "been public for years, purportedly without issue" before they appeared in the PVP database.[117] This discrepancy highlights a key problem for the Department and other police departments looking to prevent scandals: it is difficult to establish "potential" disruptiveness until actual disruption occurs. For example, Christian Fenico's 2013 comment "Should have shot him" on an article about a criminal suspect had been viewable by the public

113. Abel, *supra* note 90, at 1216–17.
114. *Id.* at 1219.
115. Fenico v. City of Philadelphia, 70 F.4th 151, 166 (3d Cir. 2023).
116. Connick v. Myers, 461 U.S. 138, 147–48 (1983).
117. *Fenico*, 70 F.4th at 154.

for six years before PVP brought it to light.[118] Its potential for disruption, present the entire time, lay dormant. The inclusion of the officers' posts in the PVP database, in turn, generated disruption precisely because it brought attention to the posts. Litigation only exacerbated the disruption because the case garnered media attention and required the City to exert resources to defend itself.[119] Yet the question asked by PVP in determining what content to include in the database—"Is this a post that might erode public trust in policing?"—mirrors *Pickering*'s inquiry.[120] By definition, "potential" disruption is capable of developing into actual disruption.[121]

A post-by-post approach would require courts to stratify different forms of public employee speech on social media due to the medium in question and the extent to which the speech or conduct even amounts to a statement. For instance, the Fourth Circuit has recognized a "like" of another user's post as a distinct form of expression. [122] In contrast to the Third Circuit in *Fenico*, the Fourth Circuit has left "an open question" as to "[w]hether a series of related posts and 'likes' . . . constitute 'a single expression of speech.'"[123]

The Third Circuit did not make clear whether its suggested post-by-post review should involve the officers' comments, leaving courts without guidance for how to parse through an officer's social media activity more narrowly than on an officer-by-officer analysis. On remand, the district court chose the "officer-by-officer" route, which still allowed it to "consider[] each Plaintiff's claim individually."[124] Doing so avoided the "one-size-fits-all approach" denounced by the Third Circuit.[125]

Consideration of a statement's medium, such as comment versus post, is necessary to understand the "content, form, and context" of the speech. In the words of Marshall McLuhan, "The medium is the

118. *See id.* at 156.

119. *See, e.g.*, Jeremy Roebuck, *Court Tosses Suit from Philly Cops Who Claimed Their Racist Facebook Posts Made Them Victims of Discrimination*, PHILA. INQUIRER (Feb. 2, 2022), https://www.inquirer.com/news/philly-police-plainview-project-racist-facebook-posts-20220202.html; Timothy Hoppe & J. Todd Bernhardt, *Bitter Medicine: Third Circuit Holds Officers Disciplined for Offensive Social Media Posts Stated a First Amendment Claim*, JD SUPRA (June 22, 2023), https://perma.cc/8DYN-JP66.

120. *See* Shaila Dewan, *When Police Officers Vent on Facebook*, N.Y. TIMES (June 3, 2019), https://www.nytimes.com/2019/06/03/us/politics/police-officers-facebook.html?bgrp=t&smid=url-share.

121. *See Potential*, MERRIAM-WEBSTER (2025), https://perma.cc/P22U-4F7A.

122. Grutzmacher v. Howard Cnty., 851 F.3d 332, 344 (4th Cir. 2017).

123. *Id.* (quoting Stroman v. Colleton Cnty. Sch. Dist., 981 F.2d 152, 157 (4th Cir. 1993)).

124. Fenico v. City of Philadelphia, 755 F. Supp. 3d 602, 613 n.2 (E.D. Penn. 2024).

125. *Id. at* 621.

message."[126] PVP's research focused on posts and comments, but users on social media often "like" or share posts made by others. Several courts have recognized that "liking" a page "communicates the user's approval" and therefore constitutes a form of speech.[127] In 2016, Facebook introduced "Reactions," allowing users to select options including "Angry," "Sad," and "Wow."[128] These reactions allow for greater specificity than merely liking a post. For example, leaving a laughing reaction on a news story about a protester being injured would suggest a different meaning than leaving a "sad" reaction would.

The word "post" itself is ultimately inadequate to capture the nuances of a social media user's expression on a given platform. The *Fenico* case included many "shares" where the officer did not author the post, and there are times when someone might share a post without approving of it.[129] Likewise, an "angry" reaction may reflect anger at the post itself (disagreement) or may side with a post that itself expresses anger (agreement). Courts therefore need to be able to engage flexibly with the speech capabilities of a given social media platform. In a case like *Fenico*, viewing each officer's posts collectively—the "officer-by-officer" approach rather than the "post-by-post" approach—places the posts, likes, and other activity in context. *Fenico*, at its core, is about whether each individual officer's speech crossed a particular threshold. The officer-by-officer approach maintains the distinction between each plaintiff's claim and allows for a more informed analysis of each.

Furthermore, social media trends change, and caselaw designed around one social media platform will not always map smoothly onto others. YouTube is currently the most popular social media platform in the United States, and while Facebook is in second place, its American user base has stopped growing.[130] A test that considers an account's overall activity or that considers *all* challenged activity from the account as one unit will be better suited to new platforms. The officer-by-officer approach also equips the parties with more tools to establish the nature and meaning of the speech at issue, the

126. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (MIT Press 1994).

127. *See, e.g.*, Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (analyzing Facebook "likes" before the introduction of "reactions"); United States v. Yassin, No. 16-3024, 2017 WL 1324141, at *5 (W.D. Mo. Feb. 23, 2017) (discussing "retweets" on the platform formerly known as Twitter).

128. Yasmeen Abutaleb & Arathy S. Nair, *'Wow': Facebook Launches "Reactions" Worldwide*, REUTERS (Feb. 24, 2016), https://www.reuters.com/article/idUSKCN0VX1LE/.

129. *See* N.Y. TIMES CUSTOMER INSIGHT GRP., THE PSYCHOLOGY OF SHARING: WHY DO PEOPLE SHARE ONLINE? (2011), https://templatelab.com/the-psychology-of-sharing/.

130. Jeffrey Gottfried, *Americans' Social Media Use*, PEW RSCH. CTR. (Jan. 31, 2024), https://perma.cc/WVN2-7AAJ.

protection afforded to the speech, and the ways in which the speech could impact an employer.

In all likelihood, classification issues will persist in other cases with multiple plaintiffs and will impact *Pickering* balancing for years to come. An approach that views each officer's account holistically allows for consideration of the content, form, and context surrounding the statement at issue. If courts need to parse out the expressive value of individual interactions that alone may not even rise to the level of "statements," a post-by-post basis will lead to flatter and less effective analysis. An approach that groups an individual officer's account activity also helps the judiciary through the nuanced differences in each social media platform's expressive capabilities.

C. Post-Scandal Disciplinary Decisions Are Not the Government's Only Tool for Addressing Inflammatory Statements by Officers

The *Fenico* court noted that courts often defer to employers' reasonable concerns about disruption when applying *Pickering* and that other circuits have done so in the context of policing.[131] Even so, as the Second Circuit has lamented, *Pickering* balancing inherently requires a subjective analysis:

> As with most 'weighing' tasks assigned by the Supreme Court to courts of appeals and district courts, the calibration of weights has not been specified. The "weighing" metaphor conveys the appearance of precise quantification of competing interests, while tolerating in practice rather subjective qualitative consideration of the importance of the values at stake."[132]

As a result, judges can easily reach differing conclusions on how to balance the same interests. This subjectivity makes it difficult for government employers to predict whether their own application of *Pickering* will hold up in court. *Pickering* balancing is a legal question reviewed *de novo*, so district court judges also cannot know for certain whether the appellate court will attribute the same weight to the two sides and reach the same conclusion.[133] In short, *Pickering* is hard to predict.

Police departments would benefit from revisiting their social media policies in light of the *Fenico* decision. In *Hernandez v. City of Phoenix*,[134] a plaintiff who similarly faced disciplinary action stemming from PVP's inclusion of his Facebook posts successfully appealed the district court's dismissal of his First Amendment retaliation claim.[135] The Ninth Circuit did not, however, accept the plaintiff's facial challenge to his police department's social media

131. Fenico v. City of Philadelphia, 70 F.4th 151, 168 (3d Cir. 2023).
132. McEvoy v. Spencer, 124 F.3d 92, 98 n.3 (2d Cir. 1997).
133. *See* Lumpkin v. Aransas County, 712 F. App'x 350, 355 (5th Cir. 2017).
134. 43 F.4th 966 (9th Cir. 2022).
135. *Id.* at 973.

policy because the provisions "track[ed] the language that the Supreme Court has used to describe the circumstances in which government employers have a strong interest in restricting employee speech."[136] Government employers, and police departments in particular, should follow the City of Phoenix's approach, mirroring Supreme Court language so that policies stay within a clear framework of what speech is legally actionable.

1. The Reactive Approach: Waiting and Seeing

Overly restrictive social media policies—including, for example, requiring officers to make their accounts private—may constitute a prior restraint at odds with the First Amendment. One alternative is to wait and see whether disruption occurs before taking action. Some police departments may choose to follow this approach, first waiting for disruption and then documenting the evidence of said disruption.

The obvious downside to this approach is that it requires the department to let the public discover any controversial statements made by officers, at which point the department risks its image. The American public has made clear that it cares about police accountability: protests against police misconduct have had greater turnout than any other known cause in United States history.[137] Police departments, as government offices, have a clear obligation to "effective[ly] and efficient[ly]" serve the public, and scandals that undermine public trust in the police pose a major obstacle to this goal.[138]

On the other hand, waiting for the disruption to occur gives departments greater justification for disciplining individual officers. A reactive approach may therefore lead to more severe repercussions for officers because their employers may feel pressure to announce that the officers in question have been suspended or terminated. For example, protesters in Philadelphia responded to PVP's publication with calls for the removal of the implicated officers, chanting, "[o]ff the streets!"[139] Disciplining the officers in question allowed the Department to appease the public even if it may not have taken those same actions privately. Even though *Pickering* does not require employers to show *actual* disruption, at the summary judgment stage of a First Amendment retaliation claim, producing evidence of actual disruption can help a police department establish its interest in suppressing the speech because the *potential* for disruption has already been proven. While waiting for a scandal to occur will hurt a department's reputation, retaliation against the officers in question helps a department save face and lays the groundwork for a stronger

136. *Id.* at 982.

137. *See, e.g.*, Buchanan et al., *supra* note 4 (analyzing data indicating that "15 million people to 26 million people in the United States" took part in protests against "racism and police violence" around June 2020).

138. Connick v. Myers, 461 U.S. 138, 150 (1983).

139. Palmer, *supra* note 82.

defense against retaliation claims. This approach therefore might result in harsher consequences for the officers in question.

When making disciplinary decisions under the reactive approach, departments should first consider the role of any employee whose speech is at issue. For example, in *Rankin v. McPherson*,[140] where an office employee at a police department joked about hoping for a successful presidential assassination, the Supreme Court held for the employee and explained that any danger from her speech was "minimal" because she did not set policies or interact with the public.[141] Justice Antonin Scalia lamented in his *Rankin* dissent that "no law enforcement agency is required by the First Amendment to permit one of its employees to 'ride with the cops and cheer for the robbers.'"[142] Police officers are distinguishable from the plaintiff in *Rankin* because they interact with the public extensively and handle confidential information, making their speech particularly relevant to their employers. However, an officer with no outward-facing job duties could be more analogous to the plaintiff in *Rankin* and therefore able to speak more freely.

2. The Proactive Approach: Surveillance

One option police departments may consider after *Fenico* is to surveil the social media activity of employees. Doing so would allow departments to object to posts *before* scandals occur instead of needing to take a reactive stance. Professor Abel, a proponent of surveilling police officer social media activity, notes that many police departments already invest resources in monitoring the social media speech of the populations they police.[143]

The repercussions for officers may be milder under this approach because departments will likely tread more carefully if they do not have evidence of actual disruption. For example, an officer could be encouraged to take down a disruptive post before it can be seen by members of the public who may demand the officer's resignation.

Even so, this approach comes with several major drawbacks for departments. First, it would be administratively burdensome because departments would need to either hire a new employee or assign this additional work to an existing employee. Diverting public resources towards an employee surveillance program would potentially take away from more important uses of government funding.

Second, as noted in both *Fenico* and *Hernandez*, posts with the potential to cause disruption can sit on publicly available profiles for years before coming to light.[144] While the potential severity of public

140. 483 U.S. 378 (1987).

141. *Id.* at 390–91.

142. *Id.* at 394 (Scalia, J., dissenting) (citation omitted).

143. Abel, *supra* note 90, at 1230.

144. *See* Fenico v. City of Philadelphia, 70 F.4th 151, 154 (3d Cir. 2023) (admonishing "unadorned speculation about the potential disruption" of posts that "had been public for years, purportedly without issue"); Hernandez v. City

outcry over a post may be high, the likelihood of its virality is speculative, making it unclear how much a department can restrict the speech and whether a judge would agree with the department's justification.

Third, the Fourth Amendment of the Constitution expressly protects individuals from "unreasonable searches and seizures" by the government.[145] The Fourteenth Amendment incorporated this protection against state governments, including government employers.[146] Government employees only benefit from the Fourth Amendment where they have a reasonable expectation of privacy, and it would be unreasonable to expect publicly-available posts to remain private. Officers with private accounts, though, may have this expectation of privacy, making surveillance less reasonable. Given that PVP only focused on public accounts, surveillance of only public accounts would still serve the goal of identifying statements likely to cause public disruption. After all, public disruption requires that the public learned of the statement in question, and a statement on a private account would not become publicly available unless shared by a third party.

Fourth, proactive surveillance of police social media speech will not always prevent the public from learning about the most inflammatory comments by police officers because these statements can end up in courtrooms. Personnel records "constitute a potential gold mine" for criminal defense attorneys seeking to undermine an officer's credibility as a witness.[147]

Several legal scholars have posited that social media posts by police can constitute *Brady* material that must be disclosed to defense attorneys.[148] Under the standard set in *Brady v. Maryland*,[149] the government must disclose material evidence or information "favorable to an accused" ahead of criminal trials.[150] *Brady* has since been extended to include not only exculpatory information but also impeachment evidence.[151] *Giglio v. United States*[152] established that the *Brady* doctrine includes "evidence affecting credibility" of a government witness, such as evidence that a police officer holds

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of Phoenix, 43 F.4th 966, 974 (9th Cir. 2022) (noting that "[f]or more than five years, none of these posts came to the attention of the public or caused any turmoil within the Phoenix Police Department").

145. U.S. CONST. amend. IV.

146. O'Connor v. Ortega, 480 U.S. 709, 714–15 (1987).

147. Jeffrey F. Ghent, Annotation, *Accused's Right to Discovery or Inspection of Records of Prior Complaints Against, or Similar Personnel Records of, Peace Officer Involved in the Case*, 86 A.L.R.3d 1170 § 2(a) (1978).

148. *See* Rachel Moran, Brady *Lists*, 107 MINN. L. REV. 657, 673 (2022); Abel, *supra* note 90, at 1247.

149. 373 U.S. 83 (1963).

150. *Id.* at 87.

151. Banks v. Dretke, 540 U.S. 668, 675–76 (2004).

152. 405 U.S. 150 (1972).

certain biases.[153] While *Brady* requires disclosure to the defense, *Giglio* requires disclosure to the jury.[154] Because *Brady* applies to information in the government's possession, including information possessed by the police department,[155] a department may acquire potential *Brady* material whenever it gathers information about its officers.

Professor Vida Johnson has suggested that the *Brady* doctrine calls for greater disclosure of "evidence of racial animus" from the police officers involved in an investigation, including evidence of statements made by the officers on social media.[156] She writes that racist posts on social media undermine an officer's credibility, particularly when the defendant is a member of a racial minority, and advocates for police departments to monitor officers' social media activity.[157] Similarly, Abel argues that the "duty to seek out and disclose" *Brady* material "imposes a duty on the prosecution team to proactively monitor officers' speech."[158] According to Abel, the due process rights of defendants require this scrutiny of officer speech, regardless of whether the First Amendment protects the officer who made the statement.[159]

A surveillance approach therefore may open up Pandora's box for police departments, but it would also provide transparency that can safeguard the rights of criminal defendants. The underlying potential for public disruption in response to the speech remains under either a proactive or reactive approach, but there are upsides to disclosure. Transparency can serve the public in its own way: promoting police accountability.[160]

3. Disciplinary Challenges

A successful First Amendment retaliation claim requires a "retaliatory" adverse employment action for which the employee's protected speech was a "substantial factor."[161] The actions taken by the Department in *Fenico* included clear-cut adverse actions like suspension and termination.[162] The court mentioned another

153. *Id.* at 154.
154. *Id.* at 154–55.
155. *Banks*, 540 U.S. at 675–76.
156. Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 213 (2019).
157. *Id.* at 239–40.
158. Abel, *supra* note 90, at 1207.
159. *Id.* at 1207–08.
160. *See* Rushin, *supra* note 3, at i (discussing the "accountability mechanism" that is "publicity of police misconduct").
161. Hill v. Borough of Kutztown, 455 F.3d 225, 241 (3d Cir. 2006); *see also* Moser v. Las Vegas Metro. Pol. Dep't, 984 F.3d 900, 904 (9th Cir. 2021).
162. *See* Fenico v. City of Philadelphia, 70 F.4th 151, 153 (3d Cir. 2023).

significant consequence of the Department's investigation: barring officers from testifying.[163]

Several of the *Fenico* plaintiffs were placed on a "Giglio list" of officers "barred from testifying in court because of concerns about [their] credibility."[164] The parties' briefs indicate that the District Attorney's Office managed the list and then informed the Department of its determinations.[165] Many prosecutors' offices maintain a "*Giglio* list" of officers who will be easily impeachable as witnesses because of the *Giglio* disclosures required if they testify.[166] In some jurisdictions, placement on this list means that the prosecutor's office has determined it will no longer call this officer as a witness because the risk of the officer undermining the entire case is too great.[167] Some prosecutors send "*Giglio* letters" to each officer's department, as the Philadelphia District Attorney did here, so that the officer's employer knows about the credibility concerns.[168] Abel advocates for *Brady*'s use by prosecutors to "impose severe, if informal, discipline" on police officers engaging in racist speech on social media: prosecutors do not have the authority to make termination decisions but can choose not to call an officer to testify.[169] While some prosecutors' offices use *Giglio* lists as an accountability measure, others may use them as merely a tool to avoid building a case around a witness the jury might doubt.

Giglio's critics note that placement on a *Giglio* list "is a scarlet letter" that can hinder an officer's professional advancement.[170] A department that knows of an officer's *Giglio* status may factor this status into personnel decisions indefinitely. Prosecutors, not police departments, maintain these lists, so the actor naming these officers is not the officers' employer.[171] As a result, even though both are government offices, the state action of labeling an officer with *Giglio* status is not a direct employment action. The potential adverse employment action only arises when the impact of a *Giglio* letter goes beyond the prosecutor's office and results in discipline from the police department itself.

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163. *Id.* at 158.

164. *Id.* at 158, 160; *see also* Brief of Plaintiffs-Appellants at 27–28, Fenico v. City of Philadelphia, 70 F.4th 151 (3d Cir. 2023) (No. 22-1326).

165. *See* Brief of Plaintiffs-Appellants, *supra* note 164, at 27–28; Brief for Appellee, *supra* note 42, at 18, 28–29.

166. *See* Jeff Welty, *Does an Officer Who Receives a Giglio Letter Have a Right to a Name Clearing Hearing?*, N.C. CRIM. L. (June 5, 2023), https://perma.cc/U4RC-PTKD.

167. *Id.*

168. *Id.*

169. Abel, *supra* note 90, at 1262.

170. *See, e.g.*, Jeffrey Steven McConnell Warren, *The Scarlet Letter: North Carolina,* Giglio*, and the Injury in Search of a Remedy*, 12 WAKE FOREST L. REV. ONLINE 24, 43 (2022).

171. *See* Welty, *supra* note 166.

The Supreme Court in 2024 lowered the threshold for adverse employment actions in at least the Title VII context, holding that transferring an employee can be an adverse action even without the employee demonstrating the transfer caused a "significant" disadvantage.[172] Because employment retaliation claims are also available in the First Amendment context,[173] police officers may be able to argue that their department's steps in response to a *Giglio* letter constitute an adverse employment action. Officers may suffer indirect consequences from such a determination if, for example, the officer's inability to testify negatively impacts the officer's annual evaluations. On the other hand, *Giglio* status supports a department's argument that it had a legitimate, nonretaliatory reason for demoting, reassigning, or otherwise taking adverse action against the officer in question because the officer is unable to perform an important job duty.[174]

Ultimately, as Abel notes, an officer's ability to testify bears not only on issues of free speech but also on criminal procedure.[175] *Giglio* determinations and the downstream consequences of a *Giglio* letter therefore warrant more deference than other potentially retaliatory responses to speech. Often, the reasons for questioning an officer's credibility are nonretaliatory.[176] Where genuine concerns about an officer's credibility exist, criminal defendants' due process rights require *Giglio* disclosures if the officer testifies, and the prosecutor has the discretion not to call an unpersuasive witness.

The indirect discipline of the *Giglio* process is both less retaliatory and less severe than directly disciplining officers for their speech, particularly since *Giglio* itself does not require an officer to be terminated or placed on leave. The constitutional requirements underpinning *Giglio* also allow departments to navigate employee disputes on a clearer playing field than the hazier *Pickering* test. When a department has a clear case of employee misconduct, however, the backdoor discipline of *Giglio*-related consequences may be too attenuated to provide an adequate remedy. Direct discipline therefore still has a role to play in response to situations like PVP's report, and so do retaliation claims and *Pickering* balancing.

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172. Muldrow v. City of St. Louis, 144 S. Ct. 967, 974 (2024).

173. Courts have recognized First Amendment retaliation claims under 42 U.S.C. § 1983. *See, e.g.*, Fenico v. City of Philadelphia, 582 F. Supp. 3d 229, 242 (E.D. Pa. 2022).

174. *See* Brief for Appellee, *supra* note 42, at 43–44; *see also* Lane v. Franks, 573 U.S. 228, 247 (2014) (Thomas, J., concurring) (characterizing testimony as "a routine and critical part of [a police officer's] duties").

175. Abel, *supra* note 90, at 1206, 1236.

176. Jennifer Sellitti, *Breaking Blue: Challenging Police Officer Credibility at Motions to Suppress*, NAT'L ASS'N CRIM. DEF. LAWS. (Aug. 31, 2022), https://perma.cc/FS4N-96L2.

CONCLUSION

The *Pickering* test is particularly unpredictable in the context of police officers' speech on social media. An officer-by-officer approach like the one identified in *Fenico* allows the parties more flexibility to hone in on what exactly the speaker communicated and whether such a communication weighs heavily on either side of the *Pickering* scale. As courts trend away from dismissing First Amendment retaliation claims without a developed factual record, the officer-by-officer approach will allow for richer analysis and will foster the development of caselaw that makes room for new social media tools with different communicative capabilities.

Enforcement of a department's social media policies involves competing interests, not only between officer and employer, but between public image and accountability. While indirect tools like *Giglio* lists can serve as checks on officer behavior, a situation like the one in *Fenico* brings misconduct into view, and the Department successfully defended its disciplinary decisions on remand. Law enforcement agencies should factor in a particular jurisdiction's past struggles with police misconduct when picking the right tools to police the police.