IACP
Law Enforcement Policy Center

Concepts & Issues Paper

Updated: May 2019

Social Media

I. INTRODUCTION

A. PURPOSE OF DOCUMENT

This paper is designed to accompany the Considerations Document on Social Media published by the IACP Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide a greater understanding of the recommendations and guidance provided in the Considerations Document. This material may be of value to law enforcement executives in their efforts to develop their own policies that meet the requirements and circumstances of their communities and their law enforcement agencies.

B. BACKGROUND

Social media has many potential uses for law enforcement agencies.[1] The characteristics of collaboration and interactive communication that are at the core of social media align well with the goals of law enforcement. Social media provides a potentially valuable means of assisting law enforcement agencies in meeting community outreach, problem-solving, investigative, and crime prevention objectives. In addition, social media can be used to enhance communication, collaboration, and information exchange; streamline processes; and foster productivity.

The increase in personal social media usage across demographics also means that more law enforcement personnel are engaging in these tools on a personal level. Since misuse of social media can lead to harsh consequences for both the individual and their employer, agencies should be prepared to address personal use of social media by employees.

C. POLICY DEVELOPMENT

In response to the rise in the use of social media, law enforcement agencies should draft and implement policies that regulate social media use among their employees, as well as to determine proper and effective agency use. However, many of the legal issues surrounding personal employee use of social media have not yet been settled in the court system. When developing policies related to personal use of social media, agencies should be particularly aware of any implications that agency-established guidelines may have on an employee's free speech rights. Policies in this area should be reviewed regularly by the agency's legal advisor to ensure they comply with any applicable laws or collective bargaining agreements.

In addition, before determining what needs to be accomplished and addressed in a social media policy, an agency may wish to bring together communications, legal, and other officials within the agency and jurisdiction to perform a needs assessment. Agencies should also note that many issues may be resolved by citing other policies that may already be in place such as those related to Internet use, electronic messaging, standards of conduct, and media relations.

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[1] For the purpose of this discussion paper, social media is defined as a category of Internet-based resources that integrate user-generated content and user participation.

II. POTENTIAL USES

Social media can be used for a variety of purposes to further the mission of law enforcement agencies. To follow is a brief discussion of some of the most notable uses, with the understanding that new and unique uses may be identified as the popularity and sophistication of social media increases.

Investigations. Agencies may use social media as an investigative tool when seeking evidence or information about missing or wanted persons, and web-based crimes such as cyberstalking or cyberbullying. In addition, individuals such as participants or observers may post photos or videos of a crime on a social media platform. Once identified, this information can then be used by law enforcement to further an investigation.

Community Outreach and Information. Agencies can use social media tools to enhance community policing initiatives by "promoting better communications, providing greater access to information, fostering greater transparency, allowing for great accountability, encouraging broader participation, and providing a vehicle for collaborative problem solving."[2] Agencies are using various social media tools to reach out to their communities in new ways and foster valuable connections throughout their jurisdictions. For example, crime prevention tips may be posted through various online avenues, online reporting opportunities may be offered, crime maps and other data may be shared, tips can be solicited regarding unsolved crimes, questions from community members can be answered directly, and valuable community and alert information can be distributed. In addition, social media provides a two-way tool to enhance and promote community trust building.

Notifications. Social media also provides a number of excellent platforms for releasing time-sensitive notifications. These notifications may be related to items such as road closures, special events, weather emergencies, and missing or endangered persons. For instance, social media is an ideal means for distributing Amber or Silver Alerts to the community.

Media. Law enforcement agencies should recognize that information, whether it is confirmed or even correct, can rapidly spread via social media outlets. Agencies can utilize social media to inform the media and the community by serving as the source of information regarding critical incidents and distributing accurate information in a timely manner. Agencies can also use their social media presence to dispel rumors and correct misinformation. In addition, the agency's message and information are magnified when posts are shared by the media or by others on their own platforms.

Recruitment and Employment. To be competitive employers, law enforcement agencies should be creative in their outreach efforts. Social media gives law enforcement the ability to attract, engage, and inform potential applicants on a new level. Some agencies utilize social media tools such as blogs, social networks, and multimedia-sharing sites to provide potential applicants and recruits a unique view of law enforcement work. Social media sites also allow agencies to make connections with the public and answer questions potential applicants may have about a future career in law enforcement.

III. AGENCY USE OF SOCIAL MEDIA

Prior to using social media as part of its community outreach efforts, a law enforcement agency should establish policies and procedures guiding the use of social media platforms by agency employees.

A. STANDARD ITEMS

Each agency-sponsored social media page should include standard information to ensure consistency across all platforms. These items may include

- an introductory statement that clearly specifies the purpose and scope of the agency's presence on the page;
- a statement that indicates that the page is maintained by the agency;
- a link to the agency's official website; and
- the agency's contact information.

In addition, agencies should consider including disclaimers regarding monitoring of the page, statements of opinion by visitors, and public disclosure. For instance, social media platforms are generally not continuously monitored by law enforcement agencies. Therefore, agency social media pages should indicate this and stress that visitors should instead contact the agency via pre-existing traditional means (for example, by calling 911 or a non-emergency number, as

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[2] Mary Lou Leary and Mary Rappaport, *Beyond the Beat: Ethical Considerations for Community Policing in the Digital Age* (Washington, DC: National Centers for Victims of Crime, November 2008), 9.

appropriate). In addition, since agencies cannot anticipate every comment potentially posted by visitors, there should be a disclaimer stating that the opinions expressed by visitors of the page do not necessarily reflect the opinions of the agency. Finally, the fact that any content posted or submitted for posting is subject to public disclosure should be highlighted.

B. SOCIAL MEDIA STRATEGY

In addition to creating policies and procedures, agencies should also consider developing a social media strategy that guides the manner in which the agency utilizes the technology. As part of this strategy, agencies should identify the target audience(s) they hope to reach, such as youth or potential recruits, and design their social media presence accordingly. Agencies should also consider cultivating a personality or persona that they will follow when posting on social networks. This persona should take into account community expectations, voice and tone, and the appropriate use of humor. Agencies with multiple personnel involved in social media posts should stress consistency in voice. Organizations should penetrate down to the neighborhood level with social media messaging so that community outreach efforts are impacted in a positive manner.

Agencies should consider adding an evaluation component to their social media strategy. Many social media platforms offer metrics for tracking the number of views, comments, and interactions from users. This data can be used to tailor your content to your community's needs and interests.

C. AUTHORIZATION AND ADMINISTRATION

Agencies should determine who has the authority to approve social media content and who is responsible for maintaining the agency's social media presence. This designation could be the agency public information officer (PIO) or authorized press representative. In this role, the PIO or an authorized representative should evaluate all requests for use, verify staff being authorized to use social media tools, and confirm completion of training for social media. PIOs or authorized representatives should also be responsible for maintaining a list of all social media platform domain names in use, the names of employees with administrator privileges for these accounts, as well as the associated user identifications and passwords currently active within their respective agencies. If anyone who has access to the account is removed from these responsibilities or is no longer employed by the agency, the PIO or an authorized representative should immediately change all passwords and account information.

Personnel should be prohibited from accessing social media platforms using agency computers without authorization. This prohibition may also extend to use of personally owned devices to access social media platforms when the employee is on duty.

D. TERMS OF USE

Agencies should confer with their legal advisors on a regular basis to ensure that social media content adheres to applicable laws, regulations, and policies. This may apply to information technology and records management policies; content or ideas protected by law, such as through copyright, trademark, and service mark restrictions; and public records laws. The legal advisor should always be involved if an agency elects to establish terms of use. These terms of use should be clearly communicated to the public and should at a minimum address such items as

- how comments posted by the public on agency social media pages will be monitored; and
- if or when public posts will be hidden or deleted, considering potential free speech implications.

Notwithstanding having a content-neutral terms of use policy, agencies must refrain from committing viewpoint discrimination by blocking third-party users or removing or hiding third-party user content. In the United States, the consensus is that posting to social media sites falls within the purview of the First Amendment. In some instances, this means that a court may protect opinions voiced on social media similarly to how it protects opinions voiced on public forums, ruling that constituents' opinions may not be suppressed—or blocked.[3] As a result, agency personnel with the ability to control third-party user access and posts should receive training on the implications of the rights related to free speech in this realm. Agencies should be aware that when a comment is hidden on Facebook or Instagram, the person who posted the comment is not notified and there is no indication that the comment has been hidden. In addition, the individual who posted the comment is still able to see the comment and their friends have the ability to reply to the comment, with the reply also being hidden.[4]

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[3] See *Davison v. Randall,* No. 17-2002 (4th Cir. 2019), https://law.justia.com/cases/federal/appellate-courts/ca4/17-2002/17-2002-2019-01-07.html.

[4] See "The Unseen Consequences of Hiding Social Comments" at http://www.govtech.com/govgirl/The-Unseen-Consequences-of-Hiding-Social-Comments.html.

E. GUIDELINES FOR POSTING ON SOCIAL NETWORKS

In addition to developing a social media strategy and identifying who is responsible for overseeing the social media program, law enforcement agencies should create guidelines for employees who will be posting on social networks on behalf of the agency and for what content should be posted. For instance, posts should be limited to incidents occurring within the agency's jurisdiction to avoid misinformation or confusion. This is especially true when an officer-involved incident or line-of-duty death occurs. Guidance should be developed encouraging coordination with neighboring agencies when crossover does occur.

All employees who are authorized to post on behalf of the agency should exhibit appropriate conduct, to include observing agency policy on standards of conduct and conventionally accepted protocols and proper decorum, and they should always clearly identify themselves as members of the agency. Limitations should be established regarding specific content, to include, but not be limited to, statements about the guilt or innocence of a suspect or arrestee; comments concerning pending prosecutions; confidential information; and information related to agency training, activities, or work-related assignments. Express approval should be obtained from the appropriate individual before content of this type is posted.

F. ADDITIONAL ITEMS

Background Investigations. In addition to the foregoing items, agencies should determine whether social media will be used when conducting background investigations on job candidates during the hiring process. Candidates may be asked for access to their personal social media networks so that agencies can determine whether they contain any objectionable or concerning information. Refusal by the candidate to supply access may result in their immediate removal for consideration of employment.

Records Retention. Law enforcement agencies should adhere to applicable laws and existing policy related to record retention, availability, and archiving in relation to social media content. In the United States, this may include guidelines imposed by the Freedom of Information Act (FOIA).

Quality Control. To ensure consistent voice and tone and to verify the accuracy of information disseminated through social media platforms, agencies should develop a quality control component. This may include a regular and/or random audit of all social media content. Any items of concern discovered during these audits should be shared with the individual(s) responsible for administering and overseeing the agency's social media program and the chief executive or their designee.

Training. Initial and ongoing training should be provided to all staff who are tasked with participating in the agency's social media program. This training should reinforce existing agency policies and guidelines related to social media while providing an opportunity for employees to learn about emerging social media technology and contemporary best practices. Networking with peers and sharing best practices should be strongly encouraged for all staff.

IV. PERSONAL USE OF SOCIAL MEDIA

With millions of individuals engaging in the use of social media, it is obvious that law enforcement personnel will be among the users. Content posted by law enforcement officials on social media sites has the potential to be disseminated broadly, even if posted under strict privacy settings. Therefore, it is crucial that law enforcement agencies develop policies and procedures that outline an employee's personal use of social media. These policies should take into account the employee's individual rights and freedoms to post content while balancing the potential negative impact some content may have on the individual's employment and the agency as a whole.[5]

Even if content is posted while personnel are off duty, it can still have detrimental effects. Social media site content may be used by defense attorneys to impugn a person's reputation or show bias. Further, the safety and security of personnel and their families is of paramount concern. Agency employees must be made aware of the fact that, regardless of privacy settings, the pictures, videos, and text they post online could be made available to individuals for whom it was not intended.

Agency policy should consider employees' rights to express themselves as private community members speaking on matters of public concern on social networks. However, these rights may be limited when such speech is outweighed

[5] For a more in-depth discussion of the legal implications of policy in this area in the United States, please refer to the Appendix.

by the agency's interests related to items that interfere with the operation of the agency or the maintenance of discipline by supervisors; impair working relationships of the agency that are based on loyalty and confidentiality; obstruct performance of duties; or amount to abuse of authority.[6]

Agencies should also consider whether their policies establish limits on what employees may post on their personal social media pages. These limitations may be based on safety and security reasons and may include prohibitions against

- disclosing their employment with the agency;
- displaying agency logos, uniforms, or similar identifying items;
- posting photographs or providing similar means of personal recognition that may cause them, or other individuals, to be identified as an employee of the agency; and
- posting any form of visual or personal identification if the employee is or may reasonably be expected to work in undercover operations.

Agencies may also wish to clearly indicate in their social media policies that existing policies on standards of conduct must be followed at all times, even when using social media for personal reasons. For instance, agencies may prohibit employees from making any statements, speeches, appearances, and endorsements or publishing materials that could reasonably be considered to represent the views or positions of the agency without express authorization. In relation to this, guidelines should be developed for employees to report violations of the agency's policy on personal use of social media.

In addition to these agency-imposed limitations, employees should avoid the following, as they may result in civil litigation:

- publishing or posting false information that harms the reputation of another person, group, or organization;
- publishing or posting private facts and personal information about someone without their permission that have not been previously revealed to the public, are not of legitimate public concern, and would be offensive to a reasonable person;
- using someone else's name, likeness, or other personal attributes without that person's permission for an exploitative purpose; or
- publishing the creative work of another, trademarks, or certain confidential business information without the permission of the owner.

Employees should be made aware that speech made pursuant to their official duties is not protected speech and may form the basis for discipline. In addition, posts made on personal social media platforms may undermine or result in impeachment of an officer's testimony in criminal proceedings, which could later affect an individual's efficacy in their employment. Employees should also be notified that the agency has the ability to access any information created, transmitted, downloaded, exchanged, or discussed in a public online forum at any time without prior notice.

It is essential that agencies educate both new and existing personnel on the proper and improper use of social media tools. Proper training mechanisms should be in place to ensure that all agency personnel are aware of the potential repercussions of their online behaviors.

V. CONCLUSION

The benefits of social media as a cost-effective tool for law enforcement agencies are numerous. Among these benefits are increased community outreach, service development, officer and volunteer recruitment, and enhancement of criminal investigations. When establishing a social media program, agencies should develop an overall social media strategy to be integrated with their overarching communications and outreach plan, as well as accompanying policies and procedures guiding the program's use.

In addition, agencies must address personal use of social media by employees, to include prohibited behavior. This should be accompanied by training and education regarding the responsible use of social media, as well as the possible results of its misuse.

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[6] For the purposes of this document, speech is defined as expression or communication of thoughts or opinions in spoken words; in writing; or by expressive conduct, symbolism, photographs, videotape, or related forms of communication.

Every effort has been made to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. Readers outside of the United States should note that, while this document promotes procedures reflective of a democratic society, its legal basis follows United States Supreme Court rulings and other federal laws and statutes.

Law enforcement administrators should be cautioned that each law enforcement agency operates in a unique environment of court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered, and should therefore consult its legal advisor before implementing any policy.

APPENDIX
Legal Aspects of Personal Social Media Usage in the United States

Freedom of speech for law enforcement officers and other similarly situated public employees has been a difficult issue for many years. The courts have struggled to define the limits of this protected right, and the case law on this point has become complex and at times difficult to apply. U.S. courts have long recognized that while the First Amendment's guarantee is a vital part of U.S. freedoms, it is not unlimited and may be curtailed when its exercise causes harm to other important government interests. The problem for the courts—and for law enforcement agencies—has been to determine where to draw the line and how to properly inform law enforcement officers of these legal limitations.

The complexity of the issue is increased by the courts' making distinctions between statements made in a public employee's official capacity and those made as a private citizen. This distinction is sometimes complicated by the fact that law enforcement officers are widely considered to be on duty at all times, increasing the difficulty of determining into which category the officer's speech falls.

A. THE FIRST AMENDMENT AND THE PUBLIC EMPLOYEE

The First Amendment to the U.S. Constitution protects most speech. In this context, the term speech may refer to oral or written communications or other forms of conduct. In some instances, such communications or conduct may be deemed detrimental to a law enforcement agency and the accomplishment of its mission. In these cases, discipline may be imposed in order to repair such damage, prevent future such incidents, or both. Employees often resist these personnel actions on the grounds that the communication or conduct was privileged under the First Amendment.

Statements made in an official capacity. The extent of a public employee's First Amendment rights depends heavily upon whether the statements in question were or were not made in the employee's official capacity. If the statements were made in an official capacity, the employee's speech is generally not protected by the First Amendment.

As the U.S. Supreme Court has noted, for many years the rule has been that "a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."[7] As a recent decision states, "when a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."[8]

In *Garcetti* v. *Ceballos*, Ceballos, a deputy district attorney, was asked by defense counsel to review a case in which, the defense counsel claimed, the affidavit police used to obtain a search warrant was inaccurate. Concluding after the review that the affidavit contained misrepresentations, Ceballos relayed his findings to his supervisors, and thereafter wrote a memorandum recommending dismissal of the case.[9]

Subsequently, Ceballos claimed that his employers had retaliated against him for his memo in violation of the First and Fourteenth Amendments, and he filed suit under 42 U.S.C. §1983. The district court rejected Ceballos's claim, ruling that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties. The Ninth Circuit reversed on the grounds that the memo's allegations were protected under the First Amendment. Upon appeal to the U.S. Supreme Court, however, the Ninth Circuit was reversed, holding that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the U.S. Constitution therefore does not insulate their communications from employer discipline.[10] The court said:

> *Our holding ... is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.*

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[7] *Connick* v. *Myers*, 461 U.S. 138, 143 (1983), citing *McAuliffe* v. *Mayor* of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) and *Adler* v. *Board of Education*, 342 U.S. 485 (1952); *Garner* v. *Los Angeles Bd. of Public Works*, 341 U.S. 716 (1951); *Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *United States* v. *Wurzbach*, 280 U.S. 396 (1930); *Ex Parte Curtis*, 106 U.S. 371 (1882).

[8] *Garcetti* v. *Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 1958 (2006), citing *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994).

[9] Id.

[10] Id.

> *We reject ... the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.*[11]

Since law enforcement officers are public employees, it appears that the First Amendment will not prohibit a law enforcement agency from taking disciplinary action against an officer whose official statements are deemed to warrant it. But what constitutes an official statement is often at issue. Of particular interest to criminal justice personnel are the cases in which an agency employee has reported to superiors about perceived misconduct or other problems within the agency. Such criticisms have frequently been held to be official statements and, therefore, not subject to First Amendment protection—even though they are about matters that are not within areas of the speaker's own immediate responsibility.[12]

However, the courts have pointed out that although First Amendment protection does not apply, the employee may be shielded from disciplinary action by other protections. As the U.S. Supreme Court observed in *Garcetti*,

> *Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in* Connick *[*Connick *v.* Myers*, 461 U.S. 138 (1983)] public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing… These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.*[13]

Statements by public employees not made in an official capacity. While official statements are not, under *Garcetti*, protected by the First Amendment, the situation is quite different if the public employee is not speaking in an official capacity, but instead in their capacity as a private citizen. Whether or not the employee is speaking as a private citizen may sometimes be at issue, but where the communication in question is not about an official matter, this determination is usually not too difficult.

If the public employee is speaking only in the role of a private citizen, the employee's speech may be protected by the First Amendment if the communication touches upon a matter of public concern.[14] This is true even when the topic on which the employee is speaking relates to the employee's public employment or concerns information learned during that employment.[15] However, determining what is or is not a matter of public concern can be very difficult, and the courts have recognized this. In several cases, the U.S. Supreme Court has attempted to clarify the concept. For example, in *City of San Diego v. Roe*,[16] the court said that "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[17] The same court further described matters of public concern as being "typically matters concerning government policies that are of interest to the public at large."[18]

If the matter is indeed one of public concern, the courts give the officer considerable latitude to speak out or to engage in conduct that the courts consider constitutionally protected speech. Thus, one of the first inquiries that a court will make in such cases is whether or not the speech engaged in by the officer falls within the area of matters of public concern.[19]

Even if some forms of speech relate to a matter that falls within an area of public concern, the First Amendment might not necessarily preclude the agency from taking steps to discipline the officer for it. Even when speaking as a private citizen

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11 *Garcetti*, 547 U.S. at 422–426, four justices filed dissenting opinions in the case.

12 See, e.g., *Vose* v. *Kliment*, 506 F.3d 565, 572 (7th Cir. 2007) (narcotics sergeant voiced concerns to management regarding another unit; court held that "Vose's speech, albeit an honorable attempt to correct alleged wrongdoing, was not protected by the First Amendment.").

13 *Garcetti*, 547 U.S. at 425–426 [other external case citations omitted], citing 5 U.S.C. 2302(b)(8) and other protections.

14 *Connick,* 461 U.S. 138; *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

15 *Lane v. Franks*, 573 U.S. ___, 134 S. Ct. 2369 (2014).

16 *City of San Diego* v. *Roe*, 543 U.S. 77 (2004).

17 *Id*. at 78.

18 *Id.* at 80, citing *Connick*, 461 U.S. 138, and *Pickering,* 391 U.S. 563.

19 See *Pickering*, 391 U.S. 563 (1968), cited in *Garcetti*, 547 U.S. 410.

about matters of public concern, employees may be subject to "speech restrictions that are necessary for their employers to operate efficiently and effectively."[20]

Thus, if an officer's speech (including conduct) has been significantly harmful to the agency and its mission, the agency may take action to prevent further damage. In *Roe*, the court restates the balancing test, adopted by the *Pickering* court to be used.

To reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission the *Pickering* court adopted a balancing test. It requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[21]

Note that this *Pickering* balancing test is applicable only if the matter that is the subject of the officer's speech or conduct is found to be one of public concern.

B. PERSONAL USES OF SOCIAL NETWORKING DETRIMENTAL TO THE AGENCY

Law enforcement personnel, like many community members today, engage in social networking, participate in blogging, or otherwise use the Internet for individual purposes. While much of this activity is perfectly proper, in some instances what is said or done by employees on the Internet could be considered detrimental to the department and its mission in a number of ways.

Revelation of sensitive information. Blogs or other communications may, inadvertently or otherwise, reveal sensitive information about the agency's activities. For example, the communication may include facts potentially damaging to an ongoing investigation, disclose agency plans for raids or traffic checkpoints, or compromise the identities of officers engaged in undercover work.

Sexually explicit communications. Several major court cases have dealt with litigation over personnel actions based upon an employee's use of social media to communicate sexually explicit statements, pictures, videos, or other such material.[22] Where the person posting such material identifies himself or herself as a law enforcement officer, or can be identified as one, the potential for damage to the agency's reputation and hence its effectiveness may be considerable.[23]

Defamatory material. Posting defamatory material by an employee not only is an embarrassment to the agency, but also creates an obvious risk of lawsuits against the agency, the officer, and even supervisors who may have failed to prevent or remedy the impropriety.

Communications derogatory of, or offensive to, protected classes of individuals. Posting racial comments or other material offensive to persons of a particular race, gender, religion, ethnic background, or other protected class, can be potentially damaging to the agency in several ways. It may strain community relations, inhibit recruiting, and generate litigation under various federal and state laws. It may also interfere with the successful prosecution of some present or future court case when officers of the agency post such material, as noted below.

Social media communications and impeachment of law enforcement witnesses. Almost any statement or conduct by a law enforcement officer that calls into question the officer's credibility as a witness may be used at a trial either to impeach that officer's testimony or to cause them to be excluded from testifying. The implications for the officer's career and for law enforcement in general are obvious.

Further, statements or conduct of an officer that would affect their credibility fall under the requirements of *Brady* v. *Maryland*.[24] In 1972, in *Giglio* v. *United States*,[25] the U.S. Supreme Court extended the *Brady* rule to require that the prosecution disclose to the defense any information relevant to the credibility of the government's witnesses. The

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[20] *Garcetti*, 547 U.S. at 421.

[21] *Roe*, 543 U.S. at 82, citing *Pickering*, 391 U.S. at 568; for an excellent discussion of the rules applicable to employee speech, see Baker, "Speech and the Public Employee," *FBI Law Enforcement Bulletin* 77, no. 8 (August 2008): 23–32.

[22] See, e.g., *Roe*, 543 U.S. 77 (2004), discussed further in the Employee Discipline for Inappropriate Use of Social Media section of this paper

[23] See, more recently, *Ontario* v. *Quon*, 560 U.S. 746 (2010).

[24] *Brady* v. *Maryland*, 373 U.S. 83 (1963); see, e.g., Jeff Noble, "Police Officer Truthfulness and the Brady Decision," *The Police Chief* 70, no. 10 (October 2003): 92–101, http://www.policechiefmagazine.org/police-officer-truthfulness-and-the-brady-decision.

[25] *Giglio* v. *United States*, 405 U.S. 150 (1972) (prosecution's promise of leniency to the witness was not disclosed to the defense).

disclosure requirement applies to both prosecution and law enforcement and imposes a duty upon law enforcement not only to disclose known information but also to learn of such information.[26] This learn-and-disclose requirement may extend to communications made by officers—even in their private lives—via social media.

In light of the above, some attorneys, particularly defense counsel in criminal cases, search for material posted by law enforcement officers on websites with the hope of finding incriminating statements that can be used at trial. Such findings have been used to impeach officers in a number of criminal cases. When an officer's postings indicate bias or a propensity toward violence in particular, they become of great value to defense lawyers seeking to impeach an officer's testimony and may seriously affect the outcome of the case.[27]

This potential for impeachment may extend beyond one particular case. Criminal defense lawyers are known to engage in networking with their colleagues to identify officers whose speech or conduct may call into question their credibility in any future case in which the officer testifies. In some instances, this may reduce the officer's usefulness to the agency to the point that the officer must be placed on desk duty or terminated.

C. EMPLOYEE DISCIPLINE FOR INAPPROPRIATE USE OF SOCIAL MEDIA

When an employee uses social media as a means of communicating matters that give rise to one or more of the foregoing problems, an agency may seek to impose discipline upon the employee. Such discipline may lawfully be imposed only under the rules discussed previously. Since in most cases the conduct in question will fall into the category of unofficial, personal communications, discipline is possible only when (1) the situation is not a matter of public concern, or (2) though a matter of public concern, the *Pickering* balancing test finds that the departmental interests outweigh the First Amendment interests of the officer.

These principles have been applied in numerous court cases involving social networking and other uses of electronic social media by law enforcement officers. Many of these cases have resulted in a finding that the officer's use of social media was not a matter of public interest and that the officer was therefore not shielded from disciplinary action by the First Amendment.

One of the best-known court decisions of this type is that of *City of San Diego* v. *Roe*.[28] In *Roe*, the court considered a First Amendment case involving sexually explicit behavior by a police officer.[29] According to the court, Roe, a San Diego police officer, was terminated for having

> *made a video of himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of eBay, the popular online auction site. ... Roe also sold custom videos, as well as police equipment, including official uniforms of the San Diego Police Department (SDPD), and various other items such as men's underwear. Roe's eBay user profile identified him as employed in the field of law enforcement.*
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> *When this conduct came to the attention of Roe's department, an investigation was initiated. ... Thereafter, the department ... began proceedings which resulted in Roe's dismissal from the force. Roe then brought suit alleging that the termination violated his rights of freedom of speech.*[30]

The court found in favor of the City of San Diego, holding that the officer's conduct did not relate to a matter of public concern for First Amendment purposes and, therefore, did not preclude disciplinary action against the officer. The court said:

> *Although Roe's activities took place outside the workplace and purported to be about subjects not related to his employment, the SDPD demonstrated legitimate and substantial interests of its own that were compromised by his [Roe's] speech. Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer. The use of*

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[26] See the IACP Model Policy and Concepts & Issues Paper on Duty to Disclose Exculpatory Evidence available at https://www.theiacp.org/resources/policy-center-resource/brady-disclosure-requirements.

[27] See "Online Networking, Texting, and Blogging by Peace Officers;" for example, it has been reported that in a New York case an acquittal resulted after the defense brought to light at the trial information about an NYPD officer's website postings, apparently because the website postings created a reasonable doubt as to the guilt of the defendant; see Los Angeles County Sheriff's Department Newsletter 9, no. 7 (2009).

[28] *City of San Diego* v. *Roe*, 543 U.S. 77 (2004).

[29] *Id.*

[30] *Id.*

the uniform, the law enforcement reference in the Web site, the listing of the speaker as "in the field of law enforcement," and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute.

[T]here is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test.

The speech in question was detrimental to the mission and functions of the employer. There is no basis for finding that it was of concern to the community as the Court's cases have understood that term in the context of restrictions by governmental entities on the speech of their employees.[31]

On this rationale, the court upheld the City's action in terminating Roe.[32] Thus a law enforcement agency may discipline or terminate an employee for improper use of social media, provided that the court finds that the speech in question did not touch upon a matter of public concern, or that, if it did, the department's interests outweigh the First Amendment interests of the officer in the case.[33]

Note, however, that whether the matter is one of public concern is not always clear, and often will be hotly contested in any litigation arising out of the agency's disciplinary actions.

D. POLICY IMPLICATIONS

Agencies must ensure that their social media policy is vetted by their legal counsel. In *Liverman v. City of Petersburg*, the Fourth Circuit ruled that the City of Petersburg, Virginia, Police Department's social media policy violated the First Amendment and also denied the police chief's qualified immunity defense on the grounds of the "patent overbreadth of the policy."[34] The two provisions of the social media policy that the court seemed to take exception with included the "Negative Comments Provision," which provided that

Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law.[35]

The court also focused on the fact that the policy "strongly discourages employees from posting information regarding off-duty activities" and provides that violations will be forwarded to the chief of police for "appropriate disciplinary action."[36]

Importantly, this decision does not impact the *Pickering* balancing test described above.

The decision does nothing with respect to the analysis that is used to determine what statements made by public employees are protected by the First Amendment. Indeed, public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." However, that is not the end of the analysis. A public employee's speech may be protected under the First Amendment only if: (1) the employee was not speaking pursuant to his or her ordinary job duties; (2) the employee was speaking on a matter of public concern; and (3) the employee's interests outweigh the interests of

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31 *Roe*, 543 U.S. at 81–85.

32 *City of San Diego* v. *Roe*, 543 U.S. 77 (2004); for another case involving social media publication of sexual material resulting in dismissal of an employee, see *Dible v. City of Chandler*, 502 F.3d 1040 (9th Cir. 2007) (officer published sexual material on website, dismissal upheld).

33 In *Dible*, 502 F.3d at 1048 (9th Cir. 2007) (officer published sexual material on website, dismissal upheld), the 9th Circuit observed "It would not seem to require an astute moral philosopher or a brilliant social scientist to discern the fact that Ronald Dible's activities, when known to the public, would be 'detrimental to the mission and functions of the employer.' ... And although the government's justification cannot be mere speculation, it is entitled to rely on 'reasonable predictions of disruption.'" (citing and quoting *Waters v. Churchill,* 511 U.S. 161 (1994); again, departments should keep in mind that not all cases will be seen by the courts as being so clear.

34 *Liverman* v. *City of Petersburg*, 844 F.3d 400, 414 (4th Cir. 2016).

35 *Id*. at 409.

36 *Id*. at 404.

the employer.[37]

Likewise, the court's analysis of the policy was consistent with constitutional jurisprudence and provides guidance as to how social media policies may be scrutinized.

> *The analysis used by the* Liverman *court closely tracks the same test previously announced by the U.S. Supreme Court, requiring that a more stringent standard be applied to instances involving a prior restraint which "chills potential speech before it happens," The application of that standard to the policy in Liverman could produce only one conclusion: the policy as a whole was unconstitutionally overbroad. Despite this determination, the focus of the scathing opinion was primarily on the Negative Comments Provision and the provision that strongly discouraged officers from posting regarding off-duty activities. The Liverman court was substantially more accepting of the Public Concern Provision in the policy, which was "ostensibly more aligned with the case-by-case analysis of* Connick *and* Pickering*." However, in light of the aforementioned unconstitutional provisions, the court could not uphold the validity of the social media policy on the existence of the Public Concern Provision alone.*[38]

The decision also provides guidance with respect to the issue of qualified immunity in the area of drafting social media policies. The court admitted that officials "are not liable for bad guesses in gray areas"; however, "this case does not involve gray areas: the right against such a sweeping prior restraint on speech was clearly established and then some."[39]

In light of this decision, it is imperative that an agency's social media policy prohibits only conduct that is not protected by the First Amendment. This is not to say that agencies may not discipline employees for inappropriate social media posts. In the absence of a specific prohibition in a social media policy, agencies may still utilize the "conduct unbecoming" charge to police employee speech online.

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[37] Eric R. Atstupenas, "Life After *Liverman*: Continuing to Police Employee Speech on Social Media," Chief's Counsel, *The Police Chief* 85, no. 6 (June 2018): 20-21, citing *Pickering* v. *Bd. of Educ*., 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 149 (1983); *Lane* v. *Franks*, 573 U.S. ___ , 134 S. Ct. 2369, 2378 (2014); and *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006).

[38] Atstupenas, "Life After *Liverman*," citing *Liverman*, 844 F .3d at 407 and 409 and *United States* v. *Nat'l Treasury Employees Union (NTEU)*, 513 U.S. 454, 468 (1995).

[39] *Liverman*, 844 F.3d at 411 (in part citing *Maciariello* v. *Summer*, 973 F.2d 295, 298 (4th Cir. 1992).