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What Happens When the Facebook Generation Grows Up and Keep it Real (Ugly) on Social Media: The Intersection of First Amendment Values and Family Law: The Limits of Judicial Authority in Curbing Litigants' Use of Social Media

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WHAT HAPPENS WHEN THE FACEBOOK GENERATION GROWS UP AND KEEP IT REAL (UGLY) ON SOCIAL MEDIA

THE INTERSECTION OF FIRST AMENDMENT VALUES AND FAMILY LAW: THE LIMITS OF JUDICIAL AUTHORITY IN CURBING LITIGANTS' USE OF SOCIAL

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I. INTRODUCTION

On November 23, 2011, Mark Byron took to his Facebook page to vent about his frustrations with his ongoing divorce and child visitation court battle.[1] In his post, Byron included the following, "…if you are an evil, vindictive woman who wants to ruin your husband's life and take your son's father away from him completely – all you need to do is say that you're scared of your husband or domestic partner…"[2] Byron's wife, although blocked from his Facebook page, eventually learned about the post and brought it to the court's attention.[3] Byron's wife used the post as evidence that Byron had violated an existing protective order that prevented Byron from doing anything to cause his wife "to suffer physical and/or mental abuse, harassment, annoyance or bodily injury." [4] The presiding Magistrate found Byron in contempt of the protective order and gave Byron a choice between posting an apology on his Facebook page for thirty (30) consecutive days or going to jail for sixty (60) days, Byron chose the former.[5] Byron's case is an example of how family law judges are reacting to the increased use of social media related evidence by litigants. Unfortunately, family law courts have

[1] Byron v. Byron, No. DR1101368 (C.P. Jan. 26, 2012) available at http://news.cincinnati.com/assets/AB185467221.PDF; KIMBALL PERRY, CINCINNATI.COM JUDGE: JAIL OR FACEBOOK APOLOGY, (2012), http://news.cincinnati.com/article/20120222/NEWS/302220184.

[2] PERRY, *supra* note 1 at 1.

[3] Id.

[4] Id.

[5] Id.

struggled to find a way to properly address issues related to the increased use of social media. This is evident by the ever more inconsistent basis with which judges are handling social media-related evidence.

Our First Amendment right is a feature that distinguishes us from other free nations where freedom of speech and expression has been curtailed in one way or another in effort to protect certain groups.[6] However, our First Amendment protections are not without limitations.[7] With the growing popularity of social media websites like Facebook, and blogging platforms like Tumblr and Twitter, the issue of how to balance free speech/expression rights with the court's interest in maintaining privacy and legal order has arisen. This issue has not yet been addressed by the United States Supreme Court.

This paper explores the issue of whether family law judges are vested with the authority and discretion to curtail or prohibit a litigants' freedom of speech and expression via social media in efforts to protect children, privacy[8] and maintain legal order. Part II of this paper discusses the emergence of social media services and their increased popularity as outlets for communication and expression. This part will also include some examples of how judges are using social media in their practice. Part III will highlight several family law cases that have addressed litigants' use of social media while under the jurisdiction of the court. These cases show the implication that judge-made rules on social media have litigants' First Amendment

[6] Jonathan Turly, Op-Ed., *Shut up and play nice: How the Western world is limiting free speech*, WASH. POST, Oct. 12, 2012, at 1, *available at* http://articles.washingtonpost.com/2012-10-12/opinions/35499274_1_free-speech-defeat-jihad-muslim-man (For example, Denmark, France, Britain, Greece, Italy, Ireland and Russia have restrictions on anti-religious expression. Also, countries like Canada and France ban hateful and discriminatory speech.

[7] Timothy L. Allsup, United States v. Cassidy: The Federal Interstate Stalking Statute And Freedom Of Speech, 13 N.C. J.L & Tech. On. 227, 238 (2012).

[8] Although it is acknowledge that privacy is an important issue implicated by the increased use of Social Media, this paper will not address the Fourth Amendment right to privacy or any other subsidiary issues.

rights. Part IV will look at how courts have addressed the intersection of social media and First Amendment rights within the context of education, employment and criminal law. Lastly, in Part V this paper will propose a test for family law judges to use in balancing litigants' freedom of speech and expression via social media with the court's interest in protecting maintaining legal order.

II. THE SOCIAL MEDIA PHENOMENON AND ITS IMPACT ON THE LAW

Social media is defined as "forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content (as videos)."[9] Through social media platforms, users are able to create an internet identity, update/change content, freely express opinion, interact with other users in the community, and exchange information in a way unparalleled to any other form of communication.[10] In order to truly understand the impact that social media has had on our society, it is important to understand how fast-paced the progression and growth of social networking has been over the last eleven (11) years.[11]

The social media revolution is said to have started with the birth of Friendster in 2002.[12] Friendster is considered the "grandaddy" of social networks.[13] The service allowed users to contact other members, maintain those contacts, and share online content and media with those

[9] M-W.COM, SOCIAL MEDIA, http://www.merriam-webster.com/dictionary/social%20media (last visited May 5, 2013).

[10] Hannah Rogers Metcalfe, Libel in the Blogosphere and Social Media: Thoughts on Reaching Adolescence, 5 Charleston L. Rev. 481, 492 (2010-2011).

[11] STEVEN J. VENEZIA, THE NEW HAMPSHIRE BAR JOURNAL, THE INTERACTION OF SOCIAL MEDIA AND THE LAW AND HOW TO SURVIVE THE SOCIAL MEDIA REVOLUTION, 24 (2012), http://www.nhbar.org/uploads/pdf/BJ-Winter2012-Vol52-No4-Pg24.pdf; http://en.wikipedia.org/wiki/Friendster.

[12] Id.

[13] Ling Woo Liu, *Friendster Moves to Asia*, TIME, Jan. 29, 2008, at 1 *available at* http://www.time.com/time/business/article/0,8599,1707760,00.html; Wikipedia, *Friendster*, http://en.wikipedia.org/wiki/Friendster (last visited Apr. 2, 2013).

contacts.[14] The website was also used for dating and discovering new events, bands, and hobbies.[15] It is said that this website pioneered the connection of "friends."[16] Friendster's user base grew to over 3 million in the first three months.[17]

Following the growth of Friendster, in August 2003, several eUniverse employees with Friendster accounts decided to create a new social networking site that mimicked the more popular features of the website but added a music and gamming component to create MySpace.[18] MySpace's popularity was short-lived, and in 2004, the social networking giant Facebook was launched.[19] The website's membership was initially limited by the founders to Harvard students, but was subsequently expanded to other colleges and high school students.[20] Today, Facebook allows any person at least 13 years old to become a registered user of the site.[21] As of September 2012, Facebook had over one billion active users, more than half of whom access Facebook on their personal mobile device.[22]

In 2005, YouTube arrived on the social media scene promoting itself as a "video-sharing" website. Like its other social media predecessors YouTube also allows its members to create

[14] Id.
[15] Id.
[16] Id.
[17] *See* VENEZIA, *supra* note 11.
[18] Felix Gillette, *The Rise and Inglorious Fall of Myspace*, BLOOMBERG BUSINESSWEEK, Jun. 27, 2011, at 1, *available at* http://www.businessweek.com/magazine/content/11_27/b4235053917570.htm.
[19] Id.
[20] Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN, Jul. 25, 2008, at 1, *available at* http://www.guardian.co.uk/technology/2007/jul/25/media.newmedia.
[21] Facebook, Information for Parents and Educators, https://www.facebook.com/help/parents (last viewed Apr. 2, 2013).
[22] Geoffrey A. Fowler, *Facebook Tops Billion-User Mark*, THE WALL STREET JOURNAL, Oct. 4, 2012, at 1, *available at* http://online.wsj.com/article/SB10000872396390443635404578036164027386112.html.

unique profiles. However, YouTube is most known for its video sharing capabilities. YouTube is recognized as the third most popular website in the world.[23]

Newer additions to the social media phenomenon include microblogging platforms, most notably Twitter and Tumblr. Twitter and Tumblr are considered hybrid social networking/microblogging services. Twitter enables its users to send and read text-based messages of up to 140 characters, known as "tweets".[24] As of 2012, Twitter had over 500 million registered users. Alternatively, Tumbler, allows users to post multimedia and other content to a short-form blog. Users can follow other users' blogs, as well as make their blogs private.[25] As of October 13, 2012, Tumblr had over 77 million blogs.[26] Tumblr scored 13.4 million unique visitors in the United States alone in July 2011—up 218% from July 2010.[27]

The social media revolution has transcended generations; people from all walks of life have taken to the web and adapted to this alternative forum of communication. In 2011, it was estimated that approximately eighty percent (80%) of adults in the United States who had computers used social media and most reported spending a majority of their computer time on social media websites, like Facebook.[28] Recent statistics show that "the average Facebook user creates ninety pieces of content each month, and there are more than 30 billion pieces of content,

[23] Reuters, *YouTube Serves Up 100 Million Videos a Day Online*, USA TODAY, Jul. 16, 2006, at 1, *available at* http://usatoday30.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm.

[24] http://en.wikipedia.org/wiki/Twitter.

[25] http://en.wikipedia.org/wiki/Tumblr.

[26] Id.

[27] Id.

[28] Dolly Hernandez, ABA Webinar, *The Impact of Social Media on a Divorce Case: Big Brother is Watching* (2011).

including blog posts, photos, and news stores shared each month."[29] It is reported that Twitter generates over 340 million tweets a day and handles over 1.6 billion search queries per day.[30]

Society has taken to social media as our new favorite medium of communicating with the outside world. These online platforms provide the instant gratification of being able to speak your mind with the ease of a few key strokes and a click. However, there are drawbacks to this form of communication. A user of social media runs the risk of having his or her online activities used against him or her in court. Consequently, this increased use of social media has had an impact on many areas of the law.[31] For example, Facebook status updates and photos can reveal anything from a person's location, physical condition, stated of mind, and even aid in identifying potential witnesses.[32] And, although social media-related evidence is subject to formal discovery requirements[33]; the ease of access of this type of evidence has made it a favorite among attorneys and pro se litigants in divorce and child custody proceedings.[34] Unfortunately, our courts have struggled to find a way to properly address issues related to society's increased use of social media.

In her 2009 article, *Social Networks Help Judges Do Their Duty*, Miriam Rozen provides examples of how judges are using litigants' social media posts in their practice.[35] Among the judges highlighted is Judge Kathryn Lanan, who presides over the detention and adjudication

[29] Jeff Bullas, 50 Fascinating Facebook Facts And Figures, http://www.jeffbullas.com/2011/04/28/50-fascinating-facebook-facts-and-figures/ (last visited Apr 2, 2013).

[30] Id.

[31] *See* VENEZIA, *supra* note 11.

[32] Cassandra Burke Robertson, The Facebook Disruption: How Social Media May Transform Civil Litigation and Facilitate Access to Justice, 65 ARK. L. REV. 75, 81 (2012).

[33] *See* VENEZIA, *supra* note 11.

[34] *See* Burk Robertson *supra* note 32 ("…Facebook and other social-media sites may offer substantial evidence gathering capabilities to individual litigants, both through formal and information discovery mechanisms.").

[35] Miriam Rozen, *Social Networks Help Judges Do Their Duty*, LAW TECHNOLOGY NEWS, Aug. 25, 2009, at 1, *available at* http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202433293771.

hearings at the Gavelston Juvenile Justice Center in Texas. Judge Lanan has taken an unconventional way of tracking the juveniles under her court's jurisdiction,[36] she requires that the juveniles "friend" her on their respective Facebook or MySpace pages so that she can keep track of all the content on their pages (pictures, posts, likes, etc.).[37] According to Rozem's article, over the past two years, Judge Lanan has tied her juvenile offenders' social networking to the terms of their probation by limiting the types of Social Media posts they are allowed to make to those she classifies as "age appropriate".[38] Judge Lanan shared that some defense lawyers have objected to her monitoring the juvenile's social media pages as a violation of their client's First Amendment rights. Judge Lanan defends her unconventional monitoring by stating that it is her way of guarding her probationer's privacy.[39]

A second example provided by Rozen is that of family law Judge Orlinda Naranjo of Travis County, Texas. Judge Naranjo states that she has seen first-hand the impact that social media has had over the family law cases she presides.[40] According to Judge Naranjo, the number of attorneys introducing social media-related evidence has increased in recent years.[41] Naranjo acknowledged that when litigants produce this type of evidence, she does look at the content of the social media posts when making a determination, especially in child-custody related matters.[42]

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[36] Id at 3.

[37] Id.

[38] Id. ("If a juvenile probationer posts content that involves sex, drugs or gangs, for example, she requires them to return to her court for a compliance hearing. She tells the juvenile that they must remove the offensive material or stay in detention until it is removed…").

[39] *See* Rozen *supra* note 35 ("Lanan believes that monitoring the sites reduced the chances that the juveniles will post comments or photos they will regret as adults.).

[40] Id. at 4.

[41] Id. ("In 2006, Texas became one of the first states in the nation to adopt rules governing the admission of evidence in civil proceedings obtained from social networking sites and individual pages…").

[42] Id.

III. THE IMPACT OF SOCIAL MEDIA ON FAMILY LAW PROCEEDINGS AND LITIGANTS' FIRST AMENDMENT RIGHTS

The protections afforded by the First Amendment give us the right to post on social media, but the law has been unhurried to afford protections once those posts have been made. The reality is that even today, most users of social media never contemplate having their online activities used against them in a court of law and yet it is happening ever more. In the family law context, social media-related evidence has become commonplace however judges have been provided little guidance on how to appropriately respond to this type of evidence. The cases that follow demonstrate the impact that social media has had in family law proceedings by focusing on how judges respond to litigants' social media activities and the implications on the litigants' First Amendment rights.

a. Social Media Evidence in Family Law

The 2006 e-discovery amendments to the Federal Rules of Civil Procedure ("the Federal Rules") made it possible for litigants to request production of electronically stored information ("ESI") that can include any content stored in social media.[43] Currently, 42 states have adopted e-Discovery rules similar to the 2006 amendments to the Federal Rules.[44] The impact of social media has been particularly great in divorce cases where social media related evidence has become the standard.[45] According to a 2010 survey by the American Academy of Matrimonial Lawyers, "an overwhelming 81% of the nation's top divorce attorneys say they have seen an

[43] FED. R. CIV. P. 26 26(a)(1), 33, and 34; *See* VENEZIA, *supra* note 11 at 25.

[44] K&L Gates, Current Listing of States that Have Enacted E-Discovery Rules, http://www.ediscoverylaw.com/promo/state-district-court-rules/ (last visited May 4, 2013).

[45] *See* VENEZIA, *supra* note 11 at 27; (The results of an American Bar Association poll showed that Facebook was the website most cited for those introducing social media-related evidence in family law proceedings.)

increase in the number of cases using social networking evidence during the past five years…" it is probably safe assume the that number has gone up since then. [46] Moreover, with sixty-six present (66%) of attorneys citing it as the primary source for social media-related evidence, Facebook has become a 'go to' source in divorce proceedings.[47]

Examples abound of ways in which attorneys are effectively using social media-related evidence to obtain favorable outcomes in their family law cases. For example, in a recent custody dispute a father was able to use Facebook evidence to show the negative impact that his wife's online gaming habits had on his children.[48] Specifically, the father was able to use evidence from Facebook to show that the mother was playing Farmville during days and time when their children were recorded as being late for school. The father was granted physical custody of the children.[49]

As states continue adopt and reformat e-discovery rules to meet litigants' needs, other subsidiary issues arise. For example, in *Gallion v. Gallion*, Connecticut Judge Kenneth Shluger ordered divorcing couple, Stephan and Courtney Gallion to swap their Facebook and dating website login names and passwords so that their respective attorneys can search for evidence of cheating.[50] Judge Shluger's order carries huge implications for the Gallions and other couples similarly situated. First, Judge Shluger's order is in direct violation of Facebook's "Terms of

[46] American Academy of Matrimonial Lawyers, Nation's Top Divorce Lawyers Note Dramatic Rise In Electronic Evidence, http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/nations-top-divorce-lawyers-note-dramatic-rise-el (last visited on May 4, 2013).

[47] Id.

[48] Michael Bowman, *Social Media Wins — and Loses — Family Law Cases*, JDSUPRALAWNEWS, Oct. 12, 2012, http://www.jdsupra.com/legalnews/social-media-wins-and-loses-family-l-48947/.

[49] Id.

[50] Gallion v. Gallion, No. FA114116955S, 2011 Conn. Super. LEXIS 2517 at *1(Conn. Super. Ct. Sept. 30, 2011); Kashmir Hill, *Judge Orders Divorcing Couple to Swap Facebook and Dating Site Passwords*, FORBES, Nov. 7, 2011, http://www.forbes.com/sites/kashmirhill/2011/11/07/judge-orders-divorcing-couple-to-swap-facebook-and-dating-site-passwords/.

Service", which prohibits the sharing of passwords.[51] Next, the order represents an invasion of privacy by granting opposing counsel unfettered access to the litigants' cyber identity that goes beyond allowing discovery of ESI. Most importantly, the order implicates litigant's First Amendment rights. Specifically, the order has a chilling effect on the litigants' freedom of expression, by inadvertently signaling to them that their online speech will be more highly scrutinized and ultimately afforded less protection. Judge's Shluger's order seems to go beyond the scope of e-discovery into dangerous and unchartered waters.

b. Content-Based Restrictions on Litigants' Social Media Posts

The Supreme Court has declared numerous times that the United States Constitution does not prohibit nor condemn otherwise protected speech just because it may be offensive in nature.[52] On the contrary, the Court has stated that "the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[53] Thus, any content-based restriction on speech is presumed invalid unless, it can satisfy the requirements of a strict scrutiny standard.[54] In order to overcome strict scrutiny, the governmental action, law, or regulation must "be narrowly tailored to promote a compelling governmental interest", and "there must not be a less restrictive alternative" that would serve said purpose.[55] The Court has carved out a few narrowly-defined categories of speech that fall outside First Amendment

[51] Facebook, Statement of Rights and Responsibilities, https://www.facebook.com/legal/terms (last visited on Apr. 2, 2013).

[52] *See* Erznoznik v. Jacksonville, 422 U.S. 205, 210 (1975).

[53] Erznoznik 422 U.S. at 210-211; Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).

[54] *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.")

[55] Id.

protection, which includes: true threats,[56] obscenity,[57] defamation,[58] fraud,[59] incitement,[60] and speech integral to criminal conduct.[61] The Court's commitment to limiting the categories of speech that fall outside First Amendment's protection is reflective of the value Americans place on their freedom of speech and how much they are willing to tolerate in its defense.[62]

In *Morelli v. Morelli* case, Anthony Morelli created a blog, "ThePsychoExWife" to vent about his bitter divorce and custody battle against his wife, Allison Morelli.[63] However, Pennsylvania Judge Diane E. Gibbons ordered Morelli to take down the site and forbade him from making any further comments about his ex-wife on any form of public media.[64] Judge Gibbons has stated that her decision was based on a balancing of Morelli's First Amendment rights against his children's best interest.[65] This case exemplifies a conflict between the family judges' use of the best interest of the child standard and a content-based restriction on Morelli's speech.

Based on the facts provided, it is doubtful that Judge Gibbons' restriction on Morelli's speech would satisfy the strict scrutiny standard for a content-based restriction on speech. Family law judges, like Judge Gibbons, have used the wide range of discretion that the best interest of the child standard grants them to impose restrictions on the Parent's First Amendment

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[56] *See* Watts v. United States, 394 U.S. 705, 708 (1969).
[57] *See* Roth v. United States, 354 U.S. 476 485 (1957).
[58] *See* Beauharnais v. Ill., 343 U.S. 250, 261 (1952).
[59] *See* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976).
[60] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[61] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); Allsup, *supra* note 7 at 239.
[62] *See* United States v. Stevens, 559 U.S. 460 (2010).
[63] Morelli v. Morelli, No. A06-04-60750-C, (C.P. Aug. 30, 2011) *available at* http://www.savethepsychoexwife.com/wordpress/wp-content/uploads/2011/09/083011-Gibbons-Opinion-Appeal.pdf.
[64] Lylah M. Alphonse, *Bashing Your Ex In Public May Be Free Speech, But Is It In Your Children's Best Interest?*, YAHOO, Aug. 9, 2011, http://shine.yahoo.com/love-sex/bashing-your-ex-in-public-may-be-free-speech-but-is-it-in-your-childrens-best-interests-2523754.htmlId.
[65] Id.

rights.[66] The best interest of the child standard ("the standard") is used in child custody and visitation hearings.[67] Although there are some state to state variations of the elements that comprise the standard, generally it allows family law judges to consider a parent's ideology when making their determination.[68] First Amendment scholar, Eugene Volokh, has argued that "the best interest test lets courts engage in a wide range of [otherwise unconstitutional] viewpoint-based speech restrictions."[69] Furthermore, Volokh argues that the First Amendment is implicated not only when courts issue orders restricting parents' speech, but also when courts make custody or visitation decisions based on such speech."[70] Unlike the strict scrutiny standard that is applied to other content-based restrictions on speech, appellate review of child custody or visitation orders that contain restrictions on parents' speech apply an abuse of discretion standard, and are rarely set aside.[71]

c. Compelled Speech as a Form of Redress

Under our First Amendment doctrine, speech compulsions and restrictions on speech are afforded the same level of protection.[72] Any government regulation aimed at compelling speech is deemed "an infringement on a person's right not to speak and not to associate, rights the First Amendment ensures."[73] The *Byron v. Byron* case (referenced in Part I. "Introduction" of this paper); received wide media attention when an Ohio Magistrate presiding over Domestic

[66] *See* Eugene Volokh, Parent-Child Speech and Child Custody Speech Restrictions, 81 N.Y.U. L. Rev. 631 (2006).

[67] Id.

[68] Id.

[69] Id. at 638 (citing Hogue v. Hogue, 147 S.W.3d 245, 254 (2004), reversed a lower court decision that ordered parent to conceal homosexual preference from their child).

[70] Volokh *supra* note 66 at 631.

[71] *See* Volokh *supra* note 66 at 647.

[72] *See* Volokh *supra* note 66 at 652 ("compelled affirmations, especially affirmations of opinion, are indeed treated the same as speech restrictions.").

[73] Laurel S. Banks, Schutz v. Schutz, 31 U. Louisville J. Fam. L. 105, 117 (1992-1993).

Relations Court issued an order that both restricted and compelled a litigant's speech over social media.[74]

On December 2, 2011 Elizabeth Byron ("Elizabeth") filed Motion for Contempt against her then estranged husband Mark Byron ("Mark").[75] Elizabeth contended that Mark violated a prior Civil Order of Protection that prohibited Mark from having any "direct or indirect" contact with Elizabeth when he posted the following comments on his Facebook wall:[76]

> Reunited [with son] after four months apart
>
> If you are an evil, vindictive woman who wants to ruin your husband's life and take your son's father away from him completely, all you need to do is say that you're scared of your husband or domestic partner and they'll take him away.
>
> She filed false DV against me along with a false Civil Protection Order[77]

After reviewing the contents of the Facebook posts, Ohio Magistrate, Paul W. Myers, found Mark in contempt of the Civil Protection Order.[78] Specifically, the Magistrate's found that Mark violated the Civil Protection Order by:

> [p]osting only his self-serving belief that the domestic violence charge was false and failing to include anything regarding the judicial process which led to the issuance of the civil protection order [although] clearly not illegal … was just as clearly intended to mentally abuse, harass, and annoy [Elizabeth] and to generate a negative and venomous response toward her from his Facebook friends…[79]

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[74] *See* Byron *supra* note 1.
[75] Id.
[76] Id.
[77] *See* Byron *supra* note 1.
[78] Id.
[79] Id.; (Some of the comments generated by Mark's Facebook venting against his wife and legal proceedings include: "Fuck that bitch", "She must be Funky Rotten" and "What an evil bitch!").

Mark was subsequently sentenced to sixty (60) days in jail and a fine. [80] Or, in the alterative, Mark was given the option of purging himself of the contempt and avoiding both the sixty (60) day jail sentence and fine by posting on his Facebook wall ("every day no later than 9:00 A.M. for a period of 30 days commencing February 1, 2013") an apology to Elizabeth that was authored by the Magistrate himself. The apology included the following statements:

> I would like to apologize to my wife, Elizabeth Byron, for the comments regarding her and our son … which were posted on my Facebook wall on or about November 23, 2011. I hereby acknowledge that two judicial officials … have heard evidence and determined that I committed an act of domestic violence against Elizabeth on January 17, 2011. I hereby apologize to Elizabeth for casting her in an unfavorable light by suggesting that she withheld [our son] from me or that she in any way prevented me from seeing [our son] during that period. That decision was mine and mine alone. I further apologize to all my Facebook Friends for attempting to mislead them … which caused several of my Facebook Friends to respond with angry, venomous, and inflammatory comments of their own. …[81]

Mark chose to post the apology over serving the sixty day jail sentence and paying a fine.[82] Aside from having to post the Facebook apology for thirty (30) consecutive days, Mark was also forbidden from eliminating or in any manner reducing the number of his Facebook Friends who had access to his Facebook comments.[83] Mark was further instructed to designate Elizabeth or another individual designated by her as his Facebook Friend to monitor compliance with the order.[84]

The *Byron* case is interesting because it implicated Mark's First Amendment rights by (1) effectuating a content-based restriction on his social media speech and (2) compelling Mark to post an apology drafted by a court magistrate that clearly cut against his personally held beliefs

[80] Id.
[81] *See* Byron *supra* note 1.
[82] Id.
[83] Id.
[84] Id.

on the matter. By finding Mark in contempt of the Civil Protection Order the court placed a content-based restriction on Mark's speech. The magistrate found Mark in contempt although he arguably took precautions (Elizabeth was blocked from his Facebook wall and his comments never addressed her by name) to avoid his wife finding out about his Facebook comments.[85] And yet, the Magistrate held that Mark's comments were "clearly intended to be mentally abusive, harassing and annoying to his wife."[86] The Magistrate's findings raise important questions about the scope of Civil Protection Orders and their effect on a litigant's freedom of expression, especially in a case like *Byron*, where the speech did not directly reference nor specifically address the person the Civil Order of Protection sought to protect.

Second, the choice the Magistrate gave Mark between serving time in jail for sixty (60) days and posting the Facebook for thirty (30) days clearly fell within the parameters of compelled speech which the Supreme Court deemed in 1943.[87] In *West Virginia State Board of Education v. Barnette*, the court addressed the issue compulsory speech in the context of a statewide regulation that required public school children to salute the United States flag while reciting the pledge of allegiance.[88] Ultimately, the Court declared the statewide regulation unconstitutional, by eloquently stating that compelled speech, like a flag saluting mandate, "transcends constitutional limitations on [the state's] power… … no official, high or petty, can prescribe what shall be orthodox… or other matters of opinion or force citizens to confess by word or act..."[89] Mark Byron was never really presented with a choice of punishments, the order compelled him to publish an apology authored by the Magistrate that clearly contradicted his personal opinions on the matter.

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[85] Id..
[86] Id.
[87] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)
[88] Id. at 626.
[89] Id. at 642.

The cases above show the great level of discretion and deference afforded to the judges that preside over family law cases. However, these cases also highlight some of the dangers associated with giving judges unfettered discretion in dealing with social media-related evidence and impact these decisions have on litigants' freedom of speech and expression. Litigants' First Amendment rights should not have to be sacrificed in the absence of an acceptable a framework within which to analyze social media-related evidence.

IV. THE INTERSECTION OF FIRST AMENDMENT RIGHTS AND SOCIAL MEDIA IN OTHER AREAS OF THE LAW

A review of how other areas of the law have addressed the intersection of social media and First Amendment rights is presented below. The areas of education, employment and criminal law are analyzed in an attempt to identify the usage or standardization of a basic framework for balancing First Amendment rights within the context of social media.

a. Education law Intersection of Social Media and First Amendment Rights

In recent years, we have become ever more aware of the negative impact that bullying has on students. The issue has been exacerbated by the fact that bullying has transcended the schoolyard and evolved with the increased use of the internet and growth in popularity of social media as a communication platform. Currently, a more sophisticated, and in some ways more damaging, form of bullying is occurring via the World Wide Web known as cyberbulling.[90] Cyberbulling has been defined as "willful and repeated harm inflicted through the use of computers, cell phone and other devices…"[91] Since most incidents of cyberbulling take place off campus, school administrators and courts have grappled with how to properly deal with this new

[90] *See* Nicole P. Grant, Mean Girls and Boys: The intersection of Cyberbulling and Privacy Law and Its Social-Political Implications, 56 How. L. J. 169, 172 (2012).

[91] Sameer Hinduja & Justin W. Patchin, Bulling Beyond the Schoolyard: Preventing and Responding to Cyberbulling 5 (2009).

form of bullying and its damaging effects on students.[92] At the heart of the problem is the fact that, attempts by school administrators to regulate cyberbulling implicates students' First Amendment rights. Today, schools continue to rely on a few seminal Supreme Court's decisions that have attempted to balance students' First Amendment rights with the schools duty to maintain order and protect students from harm.[93]

i. *Tinker* and its Successors

Tinker v. Des Moines Independent Community School District is the Supreme Court's first attempt at addressing the issue of students' on campus speech.[94] Decided in 1969, *Tinker* set a standard for regulating student speech that is still relied upon by courts and school officials today.[95] The *Tinker* standard provides that "…conduct by the student, in class or out of it, which for any reason … materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[96] While the *Tinker* standard empowers school officials to regulate certain types of student speech, it clearly stated that the school must be able to show that "its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[97]

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[92] *See* Rita J. Verga, Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech, 23 Santa Clara Computer & High Tech. L.J. 727, 730 (2007).

[93] *See* Brandon James Hoover, The First Amendment Implications of Facebook, MySpace, and Other Online Activity of Students in Public High Schools, 18 S. Cal. Interdis. L.J.309 (2009); *See* Grant *supra* note 90.

[94] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (The *Tinker* case involved a group of students who wore black armbands to school in protest against the Vietnam War. The students wore the armbands despite the fact that a few days prior, the school had adopted a policy prohibiting the use of black armbands in school. When asked to remove the armbands, the *Tinker* students refused. Therefore, the students were sent home and suspended until they were willing to comply with the school's no-armband policy. The student's parents brought an action on their behalf alleging a violation of their children's First Amendment rights.).

[95] *See* Grant *supra* note 90.

[96] Tinker, 393 U.S. at 513.

[97] Tinker, 393 U.S. at 509.

In his now famous opinion, Justice Fortas stated that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[98] The Court found that Tinker had engaged in a form of symbolic speech protected by the First Amendment.[99] The Court noted that the school was not able show that the students' actions substantially interfered with the school's appropriate level of discipline and its ability to maintain safety.[100] Ultimately, the Court found that the school was in violation of the students' First Amendment rights to free speech and expression.[101]

Since *Tinker*, the Supreme Court has revisited the issue of student speech on three separate occasions. First, in 1986, the Supreme Court decided *Bethel School District No. 403 v. Fraser*.[102] In *Fraser* the Court distinguished between the protections that the First Amendment grants adults in making "use of an offensive form of expression" and that of public school children.[103] The Court found it a "highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[104] The Court held that the First Amendment did not prevent the school administrators from disciplining students for the use of "offensively lewd and indecent speech" in a school event.[105]

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[98] Tinker, 393 U.S. at 506.
[99] See Tinker, 393 U.S. at 505-506.
[100] Tinker, 393 U.S. at 504.
[101] Tinker, 393 U.S. at 514.
[102] *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (*Fraser* involved a high school student who gave a speech nominating another student for a class office. During the speech, Matthew Fraser described his fellow classmate using "elaborate, graphic and explicit sexual metaphor". Fraser had been forewarned by his teachers that the speech was inappropriate and he should not deliver it. Nonetheless, Fraser disregarded his teachers' advice and delivered the speech. Fraser was disciplined pursuant to one of the school's disciplinary rules which stated that, "[c]onduct which materially and substantially interferes with the educational process is prohibited; including the use of obscene, profane language or gestures.").
[103] *See* Fraser, 478 U.S. at 682.
[104] Id.
[105] Fraser, 478 U.S. at 675.

Next, in 1988, the Supreme Court decided *Hazelwood School District v. Kuhlmeier*.[106] In *Kuhlmeier*, the Court noted that "public schools do not possess all of the attributes of … public forums …" and therefore, "…school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community."[107] Moreover, the Court held that public schools can "exercise editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns".[108]

Lastly, in 2007, the Supreme Court decided *Morse v. Frederick.*[109] In *Morse*, the Supreme Court held that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." [110] The Court noted that it did not base its decision on the fact that the student speech in this was either disruptive (Tinker)[111] or offensive (Fraser)[112] but rather focused on the illegal nature of the activity the speech promoted and the existing problem of drug among school-aged children.[113]

1. Applying *Tinker* to Student Off-Campus Internet Speech

[106] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260(1988) (In Hazelwood, student staff members of a school sponsored newspaper brought an action against their school after their principal decided to pull two articles from publication. The principal pulled the articles from publication because he felt that some of the topics covered by the articles were not appropriate, especially for some of the younger students in the school and because he felt that the identity of some of the people discussed in the articles would be easily ascertained.).

[107] Kuhlmeier, 484 U.S. at 267.

[108] Kuhlmeier, 484 U.S. at 273.

[109] Morse v. Frederick, 551 U.S. 393(2007) (In *Morse*, high school student Joseph Federick attended a school sponsored event carrying a banner that read "Bong Hits 4 Jesus". The Principal confiscated the banner and suspended Federick from school on the grounds that the banner promoted illegal drug use.).

[110] Morse, 551 U.S. at 403.

[111] Morse, 551 U.S. at 408-409.

[112] Morse, 551 U.S. at 409.

[113] Morse, 551 U.S. at 407.

The Supreme Court's decisions addressing student speech have been limited to on-campus or school sponsored events and activities.[114] However, in recent years lower courts have dealt with the issue of whether schools should regulate student speech that causes disruption within the school but occurs off-campus (as part of a non-school sponsored event or activity) or on the internet.[115] District Courts have uniformly applied the *Tinker* standard to examine off-campus internet student speech,[116] however courts are divided on the issue of whether a school must establish a "sufficient nexus"[117] between the off-campus internet speech before the Tinker standard is applied.[118] A majority of courts have not required schools to establish this sufficient nexus standard.[119] However, in some courts have imposed a two part test for examining student off-campus internet speech. In these jurisdictions, a school must first show a substantial nexus between the student speech and the school.[120] Next, these courts use the *Tinker* standard to examine the extent that the student speech "materially and substantially

[114] *See* Kara D. Williams, Public School vs. MySpace & Facebook: The Newest Challenge to Sutdent Speech Rights, 76 U. Cin. L.Rev. 707, 712 (2007-2008); Laura Fishwick, Student Speech Rights on the Internet: Summary of The Recent Case Law, Jolt Digest, http://jolt.law.harvard.edu/digest/internet/student-free-speech-rights-on-the-internet-summary-of-the-recent-case-law (last visted on April 2, 2013).

[115] Id.

[116] *See* Williams *supra* note 114

[117] J.S. v. Bethlehem Area Sch. Dist., 569 Pa. 638, 667 (2002).

[118] *See* Fishwick *supra* note 114

[119] *See* J.S. v. Blue Mt. Sch. Dist., 593 F.3d 286, 301 (2010) ("[W]e hold that off-campus speech that causes or reasonably threatens to cause a substantial disruption . . . with a school need not satisfy any geographical technicality in order to be regulated pursuant to Tinker."); Fishwick *supra* note 114.

[120] *See* Fishwick *supra* note 114 "The majority of district courts have not required this threshold inquiry, but some courts, notably the Second Circuit, have required that a nexus be shown by proving that it was "reasonably foreseeable" that the speech would reach a school's campus. See J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010) (summarizing the rift among courts on the nexus threshold question). Courts that ask the nexus question are concerned with whether the student, at the time he posted the expression, should have foreseen that the speech would enter and affect activities on campus."

interfere[d] with the requirements of appropriate discipline in the operation of the school."[121] In examining this second prong, courts consider the "intensity of on campus discussions surrounding the expression, the burden the expression places on the administration, and whether the expression contains violent content."[122]

Most recently, the Tinker standard was applied to a cyberbulling case in *Kowalski v. Berkeley Cnty. Sch.*[123] In this case, Kowalski, a high school senior used her home computer to create a fake MySpace profile in which she ridiculed a fellow classmate.[124] After creating the fake profile, Kowalski invited one hundred (100) classmates to "friend" the page and join in the ridicule of the student.[125] The targeted student and her parents became aware of the page and reported it to school administrators.[126] Kowalski was subsequently suspended from school.[127] Kowalski brought an action against the school.[128] Among her many claims, Kowalski alleged that the school was in violation of her First Amendment rights by punishing her for speech that occurred outside the school.[129] The District Court granted summary judgment in favor of the school, holding that the school acted within its authority when it punished Kowalski.[130] On Appeal, the court held that the school had not violated Kowalski's First Amendment rights because, (1) there was a nexus between her speech and "the school's pedagogical interests … to

[121] Fishwick *supra* note 114 (The Tinker standard …is concerned with whether the expression has caused or foreseeably will cause substantial disruption on campus, from the perspective of the school officials when they decided to punish the student or prevent the conduct.").

[122] Fishwick *supra* note 114.

[123] *See* Kowalski v. Berkeley County Sch., 652 F.3d 565 (2011).

[124] *See* Kowalski 652 F.3d at 567.

[125] Id.

[126] *See* Kowalski 652 F.3d at 568.

[127] *See* Kowalski 652 F.3d at 568-569. ("School administrators concluded that Kowalski had created a "hate website," in violation of the school policy against "harassment, bullying, and intimidation." For punishment, they suspended Kowalski from school for 10 days and issued her a 90-day "social suspension," which prevented her from attending school events in which she was not a direct participant.")

[128] *See* Kowalski 652 F.3d at 570.

[129] Id.

[130] Id.

justify the action taken by administrators …,[131] (2) the speech was materially and substantially disruptive in that it interfered with the school's work and collided with the rights of other students to be secure and to be let alone,[132] and (3) it was foreseeable that her conduct would reach the school..."[133] The Supreme Court has since denied Kowalski a writ of certiorari.[134]

b. Employment law: the Intersection of Social Media and First Amendment Rights

In the last five years we have seen an increase in litigations resulting from employers terminating employees because of their internet speech.[135] Some attribute the phenomenon to the fact that the average aged Facebook user has transitioned from the school to the work environment. [136] Some opine that at the heart of the problem lies in the fact that "[w]hile most business executives assert they have a right to know about all of their employees' social networking activities, most employees believe their bosses have not right to inquire into their non-work lives." [137] The Supreme Court has addressed the issue of employees' First Amendment rights in the context of retaliation, where an employee suffers adverse employment action for criticizing her employer.[138] However, the Court has not addressed the issue of an Employee's First Amendment rights with respect to off-duty, non-work related speech.[139] Nonetheless, lower courts faced with increased wrongful termination lawsuits resulting from an employee's use of

[131] Kowalski 652 F.3d at 573.
[132] Kowalski 652 F.3d at 573-574.
[133] Kowalski 652 F.3d at 574 (4th Cir. W. Va. 2011)
[134] *See* Kowalski v. Berkeley County Sch., 132 S. Ct. 1095 (2012)
[135] *See* Catherine Crane, Note, Social Networking v. The Employment at Will Doctrine: A Potential Defense For Employees Fired For Facebooking, Terminated For Twittering, Booted for Blogging, and Sacked for Social Networking, 89 Wash. U. L. Rev. 639, 639-640 (2012).
[136] Id.
[137] Id. at 640.
[138] Christopher Dunn, Social Media, Public Employees and the First Amendment, NYCLU, http://www.nyclu.org/oped/column-social-media-public-employees-and-first-amendment-new-york-law-journal (last visted on May 5, 2013).
[139] Id.

social media, have had to make decisions based on statues that did not contemplate the social media phenomenon when crafted.[140]

Before addressing First Amendment protections afforded in the employment context, it is important to note that the law draws a distinction between private and public employees.[141] Private employees are afforded less free speech protection than their public sector counterparts.[142] The majority of private sector employees are considered "at will". Under the employment-at-will-doctrine and employee can be terminated with or without cause, so long as the reason for termination does not contravene public policy or protected under a limited category of protected speech.[143] Therefore, a private sector employer is within his rights to terminate an employee for social media posts the employer finds objectionable, even if it is completely non-work related.

Contrastingly, public sector employees have enjoyed more robust free speech protections in the workplace than private sector employees; public employers are subject to the restraints of the First Amendment.[144] In 2006 the Supreme Court set out the current test for disputes arising out of adverse employment action resulting from an employee's speech or expression related to work.[145] In *Garcetti*, the Court set out a three-part test to determine whether an employee's speech should be afforded First Amendment protection and insulated from adverse action. First, the court must decide whether the employee was speaking as a private citizen rather than within

[140] *See* Laura J. Thalacker, & Courtney Miller O'mara, Public Employees and The First Amendment: The Intersection of Free Speech Rights and Social Media, 20 Nevada Lawyer 13, 14 (2012).

[141] *See* Crane *supra* note 135 at 642

[142] Id.

[143] Active use of social media, is not one of the stated public policies protected under the employment-at-will-doctrine. Some of the limited statutory speech protections afforded to private sector employees include protections for: whistleblowing, those who testify in judicial or administrative proceedings, federal and state antidiscrimination laws (Title VII), concerted activities for the purpose of mutual protection even apart from formation of a union, public policy tort, and contract.

[144] *See* Crane *supra* note 135 at 644.

[145] See Garcetti v. Ceballos, 547 U.S. 410 (2006).

his official capacity as a public employee.[146] Next, the court must determine whether the speech was a matter of public concern.[147] Lastly, if the court determines that the speech was a matter of public concern, then the court must determine whether the employer's interest in maintaining an effective workplace outweighs the employee's free speech rights.[148]

In 2010, the National Relations Board ("NLRB") announced that the National Relations Act's ("NLRA") coverage expanded to protect employees' social media speech.[149] The NLRA's coverage is expended to most private employees.[150] However, it is important to note that in the 2010 expansion of the NLRA coverage, social media-related speech is limited to protect employee concerted activity for the purpose of mutual aid and protection. [151] Therefore, an employee who resorts to his Facebook wall to vent about his how much he dislikes his supervisor or co-workers is likely not afforded the protection of the NLRA. [152]

c. Criminal law: Intersection of Social Media and First Amendment Rights

There are currently two federal statutes in place to combat what has been classified as "cyberstalking" or abuse via social media, the Federal Interstate Stalking Statue, 18 U.S.C. § 2261A and the Interstate Communications Act, 18 U.S.C. § 875 (c).[153] The Federal Interstate Stalking Statue, 18 U.S.C. § 2261A was enacted in 1996 as part of the Violence Against Women Act ("VAWA").[154] The statute was subsequently amended to cover electronic communications

[146] Id.
[147] Id.
[148] Id.
[149] *See* Ann C. McGinley and Ryan P. McGinley-Stempel, Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media, 30 Hofstra Lab. & Emp. L.J. 75, 80 (2012).
[150] *See* Steven Greenhouse, *Even if it Enrages Your Boss, Social Net Speech is Protected*, NEW YORK TIMES, Jan. 21, 2013, *available at* http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?pagewanted=all&_r=0.
[151] *See* McGinley *supra* note 149.
[152] *See* Greenhouse supra note 150.
[153] 18 U.S.C. § 875; *See* Allsup, *supra* note 7 at 236.
[154] 18 U.S.C. § 2261; *See* Allsup, *supra* note 7 at 233.

that took place across state lines.[155] The amendment imposes criminal liability to anyone who with intent:

> travels in interstate … or … uses the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress to that person or places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described ….[156]

In effect, the statue extends to emails, tweets, blogs and other social media posts where the stalker can be shown to have the requisite intent and the victim has suffered emotional distress or fear as a result.[157] However, the statute is limited in that it is only applicable when the cyberstalker and the victim live in different states. Furthermore, the Federal Interstate Stalking Statute does not protect against incidents of anonymous cyberstalking.[158]

A second federal statute offering some protection to victims of harassment/cyberstalking is the Interstate Communications Act, 18 U.S.C. § 875 (c).[159] Under the Interstate Communications Act:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both. [160]

Unlike the Interstate Stalking Statute, the Interstate Communications Act attaches to all forms of online communications, whether anonymous or not.[161] Nonetheless, this statute requires that the online behavior rise to the level of "threat of injury."[162] Therefore, online

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[155] Allsup, *supra* note 7 at 233.
[156] 18 U.S.C. § 2261.
[157] *See* Allsup, *supra* note 7at 233.
[158] Id.
[159] 18 U.S.C. § 875; Allsup, *supra* note 7 at 236.
[160] 18 U.S.C. § 875 (c).
[161] *See* Allsup, *supra* note 7 at 236.
[162] Id.

harassing behavior such as repeated messages containing graphic sexually implicit messages, posting embarrassing photos over social media, or negative commentary of a person are not covered by this statute.[163] The statute is limited to "true threats,"[164] one of the few categories of speech that fall outside First Amendment Protection.

After a close review of the three areas of the law (education, employment and criminal) mentioned above it is evident that there is some great variation among the tests applied in evaluating evidence of social media however, there were two common trends. Specifically, all three areas considered whether there was a nexus between the social media speech and the impacted party. And, all three considered the impact the litigants' social media speech had on the opposing party and provide a threshold standard the speech must meet before adverse consequences can apply.

V. TOWARDS A WORKING PARADIGM FOR ASSESSING THE PROPRIETY OF JUDICIAL RESPONSES TO LITIGANTS' USE OF SOCIAL MEDIA

Our judicial system has been caught off guard by the social media phenomenon. Courts have struggled to find a balance between the robust free speech values afforded by the First Amendment and the need to regulate online speech. The impact of social media has been especially hard felt by litigants in family law disputes where First Amendment rights have been sacrificed in the name of judicial discretion.

It is important to acknowledge that family law judges have valid interest in maintaining order and protecting the rights of all the litigants that come before them. Additionally, because of the diverse needs of families and individuals in family court is anything but predictable, it is

[163] Id.

[164] *See* Allsup, *supra* note 7 at 236. ("The Supreme Court has not established a specific standard for what constitutes a true threat, this category of unprotected speech is narrow.").

important that any proposed framework for analyzing a litigant's social media speech have some built-in level of flexibility to allow judges to adapt the ever changing circumstances they are confronted with. Lastly, an effective framework for analyzing a litigant's social media speech is one that attempts to balance First Amendment rights and the court's interest in maintaining legal order. A proposed test for family law judges analyzing a litigant's social media speech would require the judge to consider the following:

1. A nexus exist between the speech and the judicial proceeding
2. The speech has to be substantially disruptive to the effective resolution of the contested matter or
    - The standard would require a more than a statement of dissent against your former spouse but less than a threat of physical harm.
3. The speech violates either some aspect of a standing order or undermines the court's authority.
    - This prong would address violations of standing orders of protection
4. Was the litigant's speech accessible to the opposing party
    - This prong would require the court to look into the litigant's social media privacy settings. The fact that the litigant intentionally restricted access to his social media accounts specifically restricted the opposing party's ability to view his speech should be weighed in favor of the litigant. After all, the Supreme Court has noted that "the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[165]

[165] Erznoznik, 422 U.S. at 210-211; Phelps, 131 S. Ct. at 1220.

This framework would also limit the litigant's liability for third party comments generated by his posts. And lastly, if the litigants' speech meet the standards above and the court chooses to enforce a content-based restriction on the litigant, such restriction on speech should be limited to the completion of the judicial proceeding or standing order in cases where there is an active restraining order.

Furthermore, there are other options family law judges can explore in lieu of ordering content based restrictions. Judges can order litigants to discontinue visiting each other's social media pages. Judges can also order litigants' to attend classes that focus on the implication social media has on an individual's privacy and detail the risks involved with using social media.

Lastly, social media providers should be held to some level of accountability when they fail to act in instances where the speech posted on their platforms rises to the level of severe harassment or threat. Specifically, social media providers should be liable for their failure to remove posts that within one of the categories of unprotected speech and have been appropriately flagged or reported for removal.