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Just Cause Discipline for Social Networking in the New Gilded Age: Will the Law Look the Other Way?

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JUST CAUSE DISCIPLINE FOR SOCIAL NETWORKING IN THE NEW GILDED AGE: WILL THE LAW LOOK THE OTHER WAY?

*William A. Herbert and Alicia McNally**

I. INTRODUCTION

We live and work in an era with the moniker of the New Gilded Age to describe the growth in societal income inequality.¹ The appropriateness of the designation is not limited to empirical evidence of the growing gap in wealth distribution. Another clear emblem of our age is the sharp rise in employment without security, which includes contingent and part-time work.² This situation is attributable to many factors including the economic impact of the Great Recession, the fissuration of work,³ the domination of a deregulatory ideology concerning fundamental aspects of the employment relationship, and the related contraction in union density.

The slide in job security protections and expectations has been steady since 1980. The historical decline is reflected in a comment by President Bill Clinton two decades ago that “[t]he average worker will now change jobs eight times in a lifetime,” during a speech where he

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¹ See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 1–6 (2008); STEVE FRASER, *THE AGE OF ACQUIESCENCE: THE LIFE AND DEATH OF AMERICAN RESISTANCE TO ORGANIZED WEALTH AND POWER* 8–13, 290–96 (2015); *THE NEW GILDED AGE: THE CRITICAL INEQUALITY DEBATE OF OUR TIME* 1–5 (David Grusky & Tamar Kricheli-Katz eds., 2012); Howard Fineman, *A New Gilded Age Threatens The State Of Our Union*, HUFF. POST (Jan. 23, 2014), http://www.huffingtonpost.com/2014/01/23/gilded-age-state-of-the-union_n_4647348.html; Ron Fourier, *Obama, Detroit, and the New Gilded Age*, NAT. J. (Dec. 5, 2013), <http://www.nationaljournal.com/politics/obama-detroit-and-the-new-gilded-age-20131205>; Elizabeth Williamson, *What Sequester? Washington Booms as a New Gilded Age Takes Root*, WALL ST. J. (May 31, 2013), <http://online.wsj.com/news/articles/SB10001424127887323798104578455311507007562>. Referencing the current era as the New Gilded Age is not without its critics. See also James Livingston, *The Myth of a ‘Second Gilded Age,’* THE CHRONICLE OF HIGHER EDUC. (Jan. 31, 2016), <http://chronicle.com/article/The-Myth-of-a-Second-Gilded/235072>.

² Stephen F. Belfort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 366–67 (2002).

³ See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014); see also STEVEN GREENHOUSE, *THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER* (2008).

emphasized the need for improved education and job training.⁴ We now have a large percentage of atomized free-floating working individuals who comprise what some call the precariat.⁵

According to one advocate for contingent workers, there are currently 42 million freelancers, independent contractors and temporary employees in the United States.⁶ Technology is enabling the so-called “Uberization” of jobs that can undermine both income and job security.⁷ A prime example of the trend toward the casualization of work and job insecurity is found in higher education, where contingent faculty now represents over 70% of the professoriate.⁸ This trend has consequences beyond the normalization of job insecurity and the irregularity of work. The loss of tenure track positions in colleges and universities over the past four decades impacts academic freedom and pedagogy.⁹

In the New Gilded Age, opponents of tenure and similar job security protections in the private and public sectors are in the ascendancy. There are numerous examples of contemporary efforts to end enforceable job security as we know it. They include the constriction of faculty tenure protections in Wisconsin,¹⁰ a Sixth Circuit decision holding that a tenured law school professor did not have a right to continued employment beyond

⁴ President Bill Clinton, Remarks to the Export-Import Bank Conference (May 6, 1993), <http://www.presidency.ucsb.edu/ws/?pid=46526>. Former Secretary of Labor Robert Reich made a similar remark in 1996: “[T]he job security many workers experienced in the three decades after World War II is probably gone forever.” FRASER, *supra* note 1, at 262.

⁵ FRASER, *supra* note 1, at 255–56, 333.

⁶ Sara Horowitz, *America, Say Goodbye to the Era of Big Work*, L.A. TIMES (Aug. 25, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-horowitz-work-freelancers-20140826-story.html>.

⁷ Farhad Manjoo, *Uber’s Business Model Could Change Your Work*, N.Y. TIMES (Jan. 28, 2015), http://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html?partner=rssnyt&emc=rss&_r=1.

⁸ ELLEN SCHRECKER, *THE LOST SOUL OF HIGHER EDUCATION: CORPORATIZATION, THE ASSAULT ON ACADEMIC FREEDOM, AND THE END OF THE AMERICAN UNIVERSITY 200–04* (2010).

⁹ *Id.* at 212–15; see also David Montgomery, *Planning for Our Futures*, in *AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA* 64, 65 (Steven Fraser & Joshua B. Freeman eds., 1997) (“[Faculty, managers and professional employees] have been major targets of casualization at academic institutions throughout the country. The trend of our times is to create a highly paid core of administrators and superstar professors while turning the bulk of teaching over to adjunct faculty in smaller colleges and to graduate-student teachers at major research universities. The abolition of tenure has also come under lively consideration by trustees at many colleges and universities.”).

¹⁰ Act of July 13, 2015, § 1209, 2015 Wis. Sess. Laws 55, at 277 (repealing WIS. STAT. § 36.13, which governed tenure in higher education); see also Wis. Bd. of Regents, *Regent Policy Document 20-9, Periodic Post-Tenure Review in Support of Tenured Faculty Development* (Mar. 10, 2016), <https://www.wisconsin.edu/regents/policies/periodic-post-tenure-review-in-support-of-tenured-faculty-development/>; Wis. Bd. of Regents *Regent Policy Document 20-23 Faculty Tenure* (Mar.10, 2016), <https://www.wisconsin.edu/regents/policies/faculty-tenure/>.

the explicit terms of her written employment contract,¹¹ and even proposals to modify life tenure for Supreme Court justices under Article III of the United States Constitution.¹² Currently, there is litigation in California and New York seeking to strike down tenure laws for primary and secondary teachers on the basis that the application of statutory due process is responsible for depriving students of a proper education.¹³ Additionally, other states have ended or substantially modified job security, including Indiana's transformation of most of its state workers into at-will employees,¹⁴ and Florida's ending of teacher tenure and replacing it with one year contracts following probation.¹⁵

Even a civil liberties organization has argued against legislation that would have permitted collective bargaining over police disciplinary procedures that might lead to negotiated just cause provisions for police officers.¹⁶ As part of its rationale, the organization embraced the reasoning of a court decision finding that laws from the first Gilded Age ossified New York public policy concerning due process protections, thereby prohibiting collective bargaining concerning procedures for the discipline of police officers.¹⁷

¹¹ See *Branham v. Thomas M. Cooley Law Sch.*, 689 F.3d 558, 562–63 (6th Cir. 2012).

¹² See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 771–72 (2007).

¹³ *Vergara v. California*, No. BC484642, 2014 WL 6478415, at *2 (Cal. Super. Ct. L.A. Cty. June 10, 2014); Al Baker, *Lawsuit Challenges New York's Teacher Tenure Laws*, N.Y. TIMES (Jul. 3, 2014), http://www.nytimes.com/2014/07/04/nyregion/lawsuit-contests-new-yorks-teacher-tenure-laws.html?_r=0. Leslie Brody, *Another Lawsuit Challenge Tenure in New York*, WALL ST. J. (July 28, 2014), <http://online.wsj.com/articles/another-lawsuit-challenges-tenure-in-new-york-1406600721>.

¹⁴ See William A. Herbert, *The Chill of a Wintry Light? Borough of Durvea v. Guarneri and the Right to Petition in Public Employment*, 43 U. TOL. L. REV. 583, 586 (2012).

¹⁵ FLA. ST. § 1012.33 (2014). While attacks on academic tenure is not a new phenomenon, the scope and effectiveness of the current nationwide campaign to ban or limit job security in all lines of work is unprecedented. See Ralph S. Brown, Jr. & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 327 (1990) (“But academic tenure is *always* under attack. Usually we hear only grumbling and rumbling, as of distant artillery. But occasionally there is a prolonged fire-fight. The last such episode flared up in the early 1970s, when the long postwar expansion of higher education slowed. Jobs became scarce. Many institutions that had been lavish in conferring tenure proclaimed themselves ‘over tenured.’” (emphasis in original)).

¹⁶ Letter from Donna Lieberman et al., Exec. Dir., New York Civil Liberties Union, to Andrew Cuomo, Governor of N.Y. (July 23, 2014), http://www.nyclu.org/files/releases/Veto_rec_S7801-A9853_FINAL.pdf (urging a veto of S7801/A9853). The proposed legislation was the subject of a pocket veto when Governor Cuomo did not act on the legislation within the required 30 days after receiving it from the state legislature. Kenneth Lovett, *Cuomo Kills Bill That Would Have Made Disciplining Cops Subject to Contract Negotiations*, N.Y. DAILY NEWS (Jan. 30, 2015), <http://www.nydailynews.com/news/politics/cuomo-kills-police-discipline-bill-article-1.2097755>.

¹⁷ See *In re Patrolmen's Benevolent Ass'n of New York v. New York State Pub. Emp't Relations Bd.*, 848 N.E.2d 448, 6 N.Y.3d 563, 573 (2006). The historical premises underlying the decision are open to serious question. See JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO*

Support for the deprivation of the associational right to bargain over workplace due process is perhaps the archetypal position to take in the New Gilded Age.¹⁸ It implicitly incorporates the myth that enforceable workplace due process rights guarantee permanent employment regardless of misconduct or incompetence. While effective measures to combat police brutality are a necessity, the fruit of labor negotiations can take many forms. A contract can require, for example, particular penalties for gross acts of misconduct and other abuses of authority.¹⁹ Gross misconduct, such as excessive use of force, is a terminable offense under a just cause standard.²⁰

Contemporary practices of some unions that prioritize resources for defending most if not all cases of alleged misconduct would probably have shocked union leaders from the Gilded Age.²¹ During that period, many skilled trade unions promulgated and enforced their own workplace codes and disciplinary rules,²² while other unions focused on organizing for an

1901, at 83–123, 227–28, 238–42, 268–83 (1970) (describing the historical state-city tensions over the administration of the New York City Police Department including multiple efforts to rid patronage from the department).

¹⁸ Restricting collective bargaining conflicts with internationally recognized right to association principles. See ILO Declaration on Fundamental Principle and Rights at Work and its Follow-Up, International Labour Conference, June 18, 1996, 86 Sess. (rev. June 15, 2010), <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>. Tellingly, the New York Civil Liberties Union (“NYCLU”) letter supporting restrictions on collective bargaining was sent a little more than a week before the Wisconsin Supreme Court rejected a constitutional challenge to legislation substantially restricting negotiations under that state’s collective bargaining law. *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 384 (Wis. 2014). Michael Kazin has observed with respect to the American Civil Liberties Union that “[t]he group whose original mission was to aid believers in a collective commonwealth is now best known for defending erotic artists, physicians who perform abortions, and citizens who protest religious displays on public property.” MICHAEL KAZIN, *AMERICAN DREAMERS: HOW THE LEFT CHANGED A NATION* 154 (2011). To its credit, the NYCLU supports extending collective bargaining rights to farmworkers in New York. See Memorandum from the N.Y. Civil Liberties Union to the N.Y. Legislature in Support of the Farmworkers Fair Labor Practices Act (May 18, 2015), <http://www.nyclu.org/content/regarding-farmworkers-fair-labor-practices-act>.

¹⁹ See, e.g., *Civil Serv. Comm’n of Phila. v. Wojtusik*, 525 A.2d 1255, 1257 (Pa. Commw. Ct. 1987) (determining that assault by a police officer was conduct unbecoming of an officer and constituted just cause for discharge).

²⁰ See *id.*

²¹ See Danny Haim, *At State-Run Homes, Abuse and Impunity*, N.Y. TIMES (Mar. 12, 2011), http://www.nytimes.com/2011/03/13/nyregion/13homes.html?pagewanted=all&module=Search&mabReward=relbias%3Ar%2C{%221%22%3A%22RI%3A5%22}&_r=0 (quoting a union representative stating “[w]hen we know the person is guilty, we try to convince the person to get out of it by resigning. But if the person decides to go forward, we have to do our best job.”).

²² See Sanford M. Jacoby, *Progressive Discipline in American Industry: Its Origins, Development, and Consequences*, in 3 *ADVANCES IN INDUSTRIAL AND LABOR RELATIONS: A RESEARCH ANNUAL* 213, 224 (David P. Lipsky & David Lewin, eds., 1986); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925*, at 18–22 (1987); Dorothy Sue Cobble, *Response*, 10 *LAB. STUD. WORKING-CLASS HIST. AMS.*, 111, 115 (2013).

eight-hour day and other collective action in the face of powerful employers and a hostile judiciary.²³

The imbalance in the dialogue today concerning job security is fostered, in part, by the diminution of union density, which stands at 11.1%, with a public sector density rate of 35.2% and a private sector rate of only 6.7%.²⁴ While neoliberals and political conservatives disagree on various non-economic social issues, they agree on the purported economic need for a contingent and insecure workforce. In fact, the New Gilded Age has seen the rise of a class of individuals who in the late 19th Century would have been labeled “Bourbon Democrats” because of their support for regressive tax policies, and their opposition to reforms to alleviate the concentration of wealth and power.²⁵

In the current era, there is a general lack of knowledge concerning the history, public policy, and practical purposes of workplace due process and employment security. To help fill that void, we present in Parts II and III, *infra*, a history of the introduction, evolution, and application of the just cause doctrine.

Part II, *infra*, reviews Republican President William McKinley’s introduction of the just cause doctrine into American labor law during the first Gilded Age, just as the employment at-will doctrine became a more

²³ It should not be forgotten or unstated that elements of the Gilded Age labor movement promoted and practiced policies of racial exclusion, nativism and sexism. See PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES, VOLUME II: FROM THE FOUNDING OF THE AMERICAN FEDERATION OF LABOR TO THE EMERGENCE OF AMERICAN IMPERIALISM 355–68 (1975); RAY GINGER, AGE OF EXCESS: THE UNITED STATES FROM 1877 TO 1914, at 243–44 (1965); JACKSON LEARS, REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA, 1877-1920, at 98–99 (2009); STERLING D. SPERO & ABRAM L. HARRIS, THE BLACK WORKER: THE NEGRO AND THE LABOR MOVEMENT 53–57, 87–89 (1931). A few years after resigning as Grand Master of the Knights of Labor, Terence V. Powderly was appointed by President William McKinley to head the United States Bureau of Immigration where he played a key role in the aggressive enforcement of laws excluding Chinese immigration. See, Delber L. McKee, “The Chinese Must Go!” *Commissioner General Powderly and Chinese Immigration, 1897-1902*, 44 PENN. HIST., no. 1, Jan. 1997, 37–51. The Knights of Labor and other unions actively supported federal legislation to ban Chinese immigration and took affirmative steps to suppress the employment of Chinese workers. See MONTGOMERY, *supra* note 22, at 85–86. The Knights of Labor, however, did not embrace other forms of discriminatory policies and practices. See LEON FINK, WORKINGMEN’S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS 169 (1983) (“On the whole, it can be said that the Knights loomed in the mid-1880s as a beacon of racial enlightenment in a dark sea. In no other contemporary organization, it appears, was there such a quickening dynamic toward, rather than away from, race equality.”); see also KAZIN, *supra* note 18, at 90–92, 127; LEARS, *supra* note 23, at 83.

²⁴ See U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS ECON. NEWS RELEASE, UNION MEMBERS SUMMARY (2016), <http://www.bls.gov/news.release/union2.nr0.htm>.

²⁵ See MICHAEL KAZIN, A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN 20–21 (2006); LEARS, *supra* note 23, at 150, 176.

firmly accepted common law rule.²⁶ The fact that President McKinley was responsible for introducing just cause on a national level might surprise those arguing in the New Gilded Age that “a sense of contingent and temporary attachment to the firm represents the most technologically congruent, culturally sophisticated industrial relations policy.”²⁷ McKinley’s responsibility for introducing just cause counters nostalgic visions of the 19th Century by contemporary critics of workplace due process protections.²⁸

The evolution and application of just cause in the 20th century is examined in Part III. That history demonstrates the overlooked influence public sector workplace due process principles had on the development of private sector labor law. Following World War II, just cause became a normative workplace doctrine and practice in the private and public sectors under collective bargaining agreements and public sector statutes. Currently, enforceable just cause protections exist in collective bargaining agreements and in employment contracts with individuals with sufficient leverage to successfully bargain for enforceable job security protections. It also exists in certain state statutes and rules.²⁹ Most private sector employees remain subject to the at-will doctrine, with the exception of those workers in jurisdictions like Montana, Puerto Rico, and the Virgin Islands with wrongful discharge statutes.³⁰ In other states, courts have

²⁶ See Belfort, *supra* note 2, at 356–57; Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEG. HIST. 118, 118–19 (1976); Egon Guttman, *The Development and Exercise of Appellate Powers in Adverse Action Appeals*, 19 AM. U. L. REV. 323, 323–24 (1970); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 85 (1982); *cf.*, Deborah A. Ballam, *The Development of the Employment at Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. L.J. 75, 85–86 (1995) (challenging Feinman’s historical conclusions concerning the development of the at-will doctrine).

²⁷ NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 17 (2002).

²⁸ Penny Starr, *Krugman: Republicans Want ‘To Push Back to 1894’ on Social Issues*, CNSNEWS.COM (Sept. 8, 2014, 2:55 PM), <http://cnsnews.com/news/article/penny-starr/krugman-republicans-want-push-us-back-1894-social-issues>. In the guise of “reform,” Wisconsin enacted legislation eviscerating state civil service reforms enacted during the Gilded Age. See THE ASSOC. PRESS, *Wisconsin Recasts Its Civil Service Rules on Hiring, Firing, Punishment and Pay*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/wisconsin-recasts-its-civil-service-rules-on-hiring-firing-punishment-and-pay.html>.

²⁹ See *infra* Part III.

³⁰ See MONT. CODE ANN. § 39-2-904 (2015); P.R. LAWS ANN. tit. 29, §§ 185a-185m (2008); V.I. CODE ANN. tit. 24 §§ 76–79 (1996). See *generally* Otero-Burgos v. Inter American Univ., 558 F.3d 1, 13–14 (1st Cir. 2009) (describing the scope of Puerto Rico’s wrongful discharge statute and ruling that the law is inapplicable to a professor with a tenure contract).

found that the terms of an employee handbook can create an enforceable just cause termination contract.³¹

In Part IV, we examine the application of just cause disciplinary protections concerning employee use of social media. Social networking is a useful tool for collective communications and actions over workplace issues and other protected activities. It is also a very public platform for everyday complaints about work, which were formerly limited to co-workers, family and actual friends. Too often, it is a forum for trivial expressions and pursuits that can have adverse employment consequences.³²

The speed and breadth of electronic communicative interactions constitute a troublesome formula that can lead even highly educated professionals and academics to post or tweet needlessly inflammatory comments leading to employment problems.³³ For some, discernment and strategic thinking are old-fashioned attributes that have been replaced with a compulsion to produce banal, snarky, insulting or adolescent electronic messages.³⁴ The confluence of the decline in job security with the advent of social networking in the New Gilded Age creates a perfect storm for workplace controversies and litigation.

Our analysis concerning the application of just cause to social media activities is premised upon the view that the doctrine's principles are an important and necessary counter-weight to the ever-present temptation for overreaction in the Web 2.0 culture. The core principles of proper notice, a

³¹ See *Freeze v. City of Decherd*, 753 F.3d 661, 666–68 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 489 (2014) (discussing where a city's resolution that unequivocally adopted a police handbook that included a provision limiting discharges only for good cause created a contractual right protected by the Due Process Clause of the United States Constitution); *Osterkamp v. Alkota Mfg., Inc.*, 332 N.W.2d 275, 277 (S.D. 1983); see also Natalie Bucciarelli Pederson, *A Subjective Approach to Contracts?: How Courts Interpret Employee Handbook Disclaimers*, 26 HOFSTRA LAB. & EMP. L.J. 101, 106–07 (2008) (discussing the purposes of employee handbooks and providing examples of cases where courts found an implied contract in the employee handbook); Michael Rhodes Wallace, *Employee Manuals as Implied Contracts: The Guidelines That Bind*, 27 TULSA L.J. 263, 263–64 (1991) (discussing instances where Texas and Oklahoma courts found implied contracts in handbooks).

³² William A. Herbert, *Can't Escape from the Memory: Social Media and Public Sector Labor Law*, 40 N. KY. L. REV. 427 (2013).

³³ See Colleen Flaherty, *Protected Tweet?*, INSIDE HIGHER EDUC. (Sept. 23, 2013), <https://www.insidehighered.com/news/2013/09/23/u-kansas-professor-suspended-after-anti-nra-tweet> (describing controversy at the University of Kansas concerning a tenured journalism professor's tweet about gun violence in response to recent shootings in Washington, D.C.); Debra Cassens Weiss, *Suspended Lawyer Blames Leisure Lifestyle for Misstatements, Acknowledges Snarky Emails*, ABA J. DAILY NEWS (Sept. 10, 2014, 5:45 AM), http://www.abajournal.com/news/article/suspended_lawyer_blames_leisure_lifestyle_for_misstatements_acknowledges_sn; see also Herbert, *supra* note 32, at 429–31 (noting multiple examples where professionals were disciplined for their inappropriate comments on social media).

³⁴ See Weiss, *supra* note 33.

fair evidentiary investigation, an opportunity to be heard, nondiscriminatory treatment, and progressive discipline are essential ingredients for workplace due process.³⁵ Those principles are important because they help encourage employee and employer discernment when it comes to the use of, and response to, social networking.

The velocity of image and information distribution through social networking and other media tends to eclipse patience for due process. A flawed or overzealous process can lead to counterproductive decisions for the employer and even false employee confessions.³⁶ In contrast, a substantively clear and procedurally rich process has a greater likelihood of leading to a reasonable and proper decision, employee acceptance of the decision to discipline, and the avoidance of litigation or grievances.³⁷

The electronic media culture of the 21st Century breeds overreaction, the antithesis of deliberative fact gathering and analysis.³⁸ The forced resignation of Shirley Sherrod from the U.S. Department of Agriculture in 2010 is a prime example. There, rapid technologically distributed “evidence” of purported misconduct led to the roar of a wave of overreaction that drowned out any semblance of workplace fairness.³⁹

State laws, discussed in Part IV *infra*, prohibiting employers from requiring employees to permit access to personal social media pages reflect a growing concern over employee electronic privacy and employer overzealousness.⁴⁰ However, such laws represent only a speed bump when it comes to workplace due process.

Even in the absence of enforceable just cause requirements in a particular workplace, the application of the doctrine’s principles to social media misconduct is advantageous for employers and employees. An important bi-product of procedural justice is the strong evidentiary record that would become relevant in subsequent litigated claims of alleged unlawful motivation behind the imposition of discipline.

³⁵ J. Michael McGuinness, *Procedural Due Process Rights of Public Employees: Basic Rules and a Rationale for a Return to Rule-Oriented Process*, 33 NEW ENG. L. REV. 931, 935 (1999).

³⁶ See Saul Elbein, *When Employees Confess, Sometimes Falsely*, N.Y. TIMES (Mar. 8, 2014), http://www.nytimes.com/2014/03/09/business/when-employees-confess-sometimes-falsely.html?_r=0.

³⁷ See Mark Harcourt et al., *Employment at Will Versus Just Cause Dismissal: Applying the Due Process Model of Procedural Justice*, LAB. L.J., June 1, 2013.

³⁸ See, e.g., Richard Cohen, *The Firing of Shirley Sherrod—And the Cowardice of Tom Vislack*, WASH. POST (July 21, 2010), http://voices.washingtonpost.com/postpartisan/2010/07/the_firing_of_shirley_sherrod.html.

³⁹ *Id.*; U.S. DEP’T OF AGRICULTURE, LESSONS LEARNED FROM USDA’S HANDLING OF THE SHIRLEY SHERROD RESIGNATION, <http://www.usda.gov/documents/USDA%20internal%20review.pdf>.

⁴⁰ See Robert Sprague, *No Surfing Allowed: A Review & Analysis of Legislation Prohibiting Employers from Demanding Access to Employees’ & Job Applicants’ Social Media Accounts*, 24 ALB. L.J. SCI. & TECH. 481, 485–88 (2014).

In analyzing the proper application of just cause to alleged electronic misconduct, we are cognizant of the scholarly debate over whether the at-will doctrine should be replaced by a universal just cause employment rule.⁴¹ Just cause principles have been legislated for decades, but primarily with respect to public sector employment.⁴² As we note in Part V, it is highly unlikely that new broad just cause legislation will be enacted in the near future in the absence of concerted efforts to bring the doctrine's workplace fairness principles back into national consciousness.⁴³ Instead, we propose a narrower remedial approach responsive to the growth in workplace rules that effectively mandate arbitration to resolve employee statutory claims.

II. THE INTRODUCTION OF JUST CAUSE IN THE GILDED AGE

The common law employment at-will doctrine solidified in the United States during the Gilded Age following publication of Horace Gray Wood's influential book, *A Treatise on the Law of Master and Servant*.⁴⁴ According to Wood,

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.⁴⁵

The doctrine remains today "the legal norm for the vast majority of American workers."⁴⁶ It is the default rule that underlies most employer-

⁴¹ Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 SW. L. REV. 275, 276 (2013).

⁴² See Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8, 31 n.83 (1993).

⁴³ Arguably, the low union density rate should precipitate unions and their supporters to proactively organize in support of just cause legislation and referenda.. See Rand Wilson, "Just Cause: Isn't it Time for All Workers to Have More Job Security?", TRUTHOUT (Aug. 3, 2013, 2:06 PM), <http://www.truth-out.org/opinion/item/17964-just-cause-isnt-it-time-for-all-workers-to-have-more-job-security>.

⁴⁴ See *Martin v. New York Life Ins. Co.*, 42 N.E. 416, 417 (N.Y. 1895); Feinman, *supra* note 26, at 125–27 (setting forth a legal historic description of the solidification of the at-will doctrine during the Gilded Age).

⁴⁵ HORACE GRAY WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* § 134, at 272 (Albany, N.Y., Weeds, Parsons and Co. 1877); see Belfort, *supra* note 32, at 356–57.

⁴⁶ Schwab, *supra* note 42, at 28; see also Feinman, *supra* note 26, at 118; Jacoby, *supra* note 26; cf. Ballam, *supra* note 26.

employee relationships.⁴⁷ Under the doctrine, an employee can be terminated at any time without being given any explanation, notice, an opportunity to respond, a hearing or a neutral decision-maker.⁴⁸ Employees subject to the employment at-will doctrine remain protected against unlawfully motivated employer actions under federal and state anti-discrimination laws.⁴⁹

It is often forgotten that another alternative doctrine, just cause, was introduced into American labor law during the Gilded Age. In 1897, President McKinley, following his defeat of William Jennings Bryan, mandated just cause termination through an amendment to federal civil service rules. This reform unilaterally restricted his administration's discretion in discharging federal civil service employees by imposing important procedural safeguards. Like President Martin Van Buren's 1840 executive order imposing a ten-hour day in federal public works, McKinley's 1897 order is an example of the unremembered principle that the government should function as a model employer when it comes to labor standards rather than as a follower of prevalent private sector standards.⁵⁰

The action by McKinley of placing restraints on the executive power of discharge was in keeping with his relative moderation on labor issues during his career.⁵¹ As a congressman, he favored legislation to mandate an eight-hour day in federal employment and for work performed by employees of government contractors.⁵² As Governor of Ohio, he

⁴⁷ See Feinman, *supra* note 26, at 118.

⁴⁸ See *id.* (explaining that the at-will doctrine allows an employer to “discharge an employee without notice and without cause”); Schwab, *supra* note 42, at 8 (explaining that under the at-will doctrine, “an employer can fire [employees] for a good reason, bad reason, or no reason at all”).

⁴⁹ Schwab, *supra* note 42, at 8. However, court cases involving allegations of unlawful motivated discrimination are costly for all concerned, notoriously difficult to prove, and are commonly dismissed at summary judgment. See Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556–57 (2001).

⁵⁰ See DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862-1872*, at 321 (1981) (describing efforts in the 1860s to convince Congress to make the federal government a model employer by imposing an 8-hour day for federal workers); STERLING D. SPERO, *GOVERNMENT AS EMPLOYER* 83–84 (1948). The model employer rationale was utilized by Samuel Gompers in his August 1883 testimony before Congress in support of a law mandating an 8-hour day for federal workers. Samuel Gompers, *Excerpts from Samuel Gompers' Testimony before the Education and Labor Committee of the U.S. Senate, Aug. 16, 1883*, in 1 *THE SAMUEL GOMPERS PAPERS: THE MAKING OF A UNION LEADER, 1850-86*, at 289, 321–24 (Stuart B. Kaufman, ed. 1986).

⁵¹ See, e.g., CONGRESSMAN WILLIAM MCKINLEY, *THE EIGHT-HOUR LAW* (1890), reprinted in SAMUEL FALLOWS, *LIFE OF WILLIAM MCKINLEY, OUR MARTYRED PRESIDENT* 243, 243–45 (1901).

⁵² *Id.* (“The tendency of the times the world over is for shorter hours for labor, shorter hours in the interest of health, shorter hours in the interest of humanity, shorter hours in the interest of the home and the family; and the United States can do no better service to labor and its own citizens than to set the

supported workplace safety legislation and introduced a system of voluntary interest arbitration as a means of preventing and resolving labor disputes.⁵³ During his presidency, he created a commission to examine garment industry sweatshops.⁵⁴ Referencing those actions is not to suggest that McKinley was or is a labor icon. His key political advisor, Senator Mark Hanna, was described by Gabriel Kolko as being “as pro-union as one could be without giving up a commitment to the open shop.”⁵⁵ The relative moderation of McKinley in the Gilded Age concerning labor and civil service, however, is a significant contrast to New Gilded Age opponents of unions, and job security.

While many issues were debated in the 1896 election, most notably bimetallism and tariff policy, the issue of just cause termination was not a topic of discussion.⁵⁶ The 1896 Republican platform called for the honest enforcement and possible extension of the federal merit system under the Civil Service Act of 1883,⁵⁷ which mandated competitive examinations for applicants to federal classified positions and prohibited politically motivated discharges.⁵⁸ In contrast, Bryan argued for fixed terms of office in all federal civil departments, reflecting the Democratic Party platform.⁵⁹ One Bryan critic described his call for fixed terms as masking “a general

example to states, to corporations and to individuals employing men by declaring that, so far as the government is concerned, eight hours shall constitute a day’s work, and be all that is required of its laboring force.”).

⁵³ SCOTT MILLER, *THE PRESIDENT AND THE ASSASSIN: MCKINLEY, TERROR, AND EMPIRE AT THE DAWN OF THE AMERICAN CENTURY* 48 (2011); H. WAYNE MORGAN, *WILLIAM MCKINLEY AND HIS AMERICA* 121–22 (rev. ed. 2003). In terms of labor history, however, McKinley’s use of federal troops to break the strike of the Western Federation of Miners in Coeur d’Alene, Idaho in 1899 overshadows his earlier relative moderation. See J. ANTHONY LUCAS, *BIG TROUBLE: A MURDER IN A SMALL WESTERN TOWN SETS OFF A STRUGGLE FOR THE SOUL OF AMERICA* 115–18, at 139–54 (1997).

⁵⁴ WEIL, *supra* note 3, at 224.

⁵⁵ GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916*, at 65 (1963); see also PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA* 235 (2010) (Hanna stated: “My plan is to have organized union labor Americanized in the best sense, and thoroughly educated to an understanding of its responsibilities, and in this way to make it the ally of the capitalist, rather than a foe with which to grapple.”) (quoting MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920* (2003)).

⁵⁶ See *William McKinley: Campaigns and Elections*, MILLER CTR. PUB. AFFAIRS (2015), <http://millercenter.org/~president/biography/mckinley-campaigns-and-elections>.

⁵⁷ Act of Jan. 16, 1883, ch. 27, 22 Stat. 403.

⁵⁸ *Id.* sec. 2, sec. 13.

⁵⁹ WILLIAM J. BRYAN, *THE FIRST BATTLE: A STORY OF THE CAMPAIGN OF 1896* 459–62 (1896), http://segonku.unl.edu/~nsanderson/speeches/Trip3/Sept19_Washington,DC.html. The Democrat Platform stated: “We are opposed to life tenure in the public service, except as provided in the Constitution. We favor appointments based on merit, fixed terms of office, and such an administration of the civil-service laws as will afford equal opportunities to all citizens of ascertained fitness.” Gerhard Peters & John T. Woolley, *Political Party Platforms: Democratic Party Platform of 1896*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29586>.

attack upon the [civil service] system which bases appointment upon established fitness, and continuance and advancement in office upon the degree of ability and fidelity displayed in the service.”⁶⁰ As Steve Fraser has noted, Bryan’s Cross of Gold speech at the Democratic convention focused on the coinage of silver to the exclusion of most labor subjects.⁶¹ Bryan’s efforts to obtain labor support for his campaign resulted in an endorsement by Eugene V. Debs but not from Samuel Gompers or Terence V. Powderly.⁶²

The Democratic Party platform that year, and Bryan’s deemphasizing of labor issues in his famous speech, contrasted with the 1892 Populist Party platform. In 1892, the Populist Party called for a constitutional amendment to mandate that “all persons engaged in the Government service shall be placed under a civil service regulation of the most rigid character”⁶³ Additionally, the Populist Party expressed sympathy for “efforts of organized workingmen to shorten the hours of labor, and demand a rigid enforcement of the existing eight-hour law on Government work, and ask that a penalty clause be added to the said law.”⁶⁴

During the course of the 1896 campaign, federal employees organized the National Civil Service Association, which held a convention in Washington, D.C. with delegates from around the country.⁶⁵ Among the convention’s resolutions was a demand that civil service discharges be based on cause, that the allegations be set forth in writing and the employee be given an opportunity to respond to the charges.⁶⁶

Less than five months after taking office, McKinley issued an order on July 27, 1897 modifying Civil Service Rule II contained in a May 1896 Executive Order by his predecessor, Grover Cleveland.⁶⁷ Prior to

⁶⁰ H.T. Newcomb, *The Crisis of Civil Service Reform*, 166 N. AM. REV. 196, 197 (1898).

⁶¹ Steve Fraser, *Two Gilded Ages*, RARITAN, vol. 29, no. 1, 2009, at 18, 29–30.

⁶² KAZIN, *supra* note 18, at 68–69; NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 158–59 (1982). In response to an inquiry concerning the 1896 election, Powderly stated “I have no doubt that Mr. McKinley will be elected. I am not only not in favor of Mr. Bryan’s election, but am unequivocally in favor of the election of Major McKinley.” *Mr. Powderly for McKinley*, N.Y. TIMES (Aug. 28, 1896), <http://query.nytimes.com/mem/archive-free/pdf?res=9504EFD91E3AE533A2575BC2A96E9C94679ED7CF>. While the American Federation of Labor was officially neutral during the campaign, Gompers may have privately supported and voted for Bryan. See BERNARD MANDEL, SAMUEL GOMPERS: A BIOGRAPHY 160–61 (1963).

⁶³ *The Populist Party Platform*, 1892, in RICHARD D. HEFFNER & ALEXANDER HEFFNER, A DOCUMENTARY HISTORY OF THE UNITED STATES 267, 270 (Penguin Books 2013) (1952).

⁶⁴ *Id.* at 272.

⁶⁵ SPERO, *supra* note 50, at 169–71.

⁶⁶ *Id.* at 171.

⁶⁷ President Grover Cleveland, *May 7, 1896 Executive Order*, in LIST AND INDEX OF PRESIDENTIAL EXECUTIVE ORDERS: UNNUMBERED SERIES 1789–1941, at 165 (Clifford L. Lord, ed., Michael Glazier, Inc. 1979) (1944).

McKinley's order, Civil Service Rule II prohibited politically and religiously motivated discharges.⁶⁸ It also prohibited disparate treatment by requiring that disciplinary "penalties like in character shall be imposed for like offenses"⁶⁹

McKinley's order added a new paragraph eight to Civil Service Rule II mandating federal officials to have just cause before terminating a civil servant appointed pursuant to a competitive examination.⁷⁰ The civil service rule amendment stated:

(8) No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have notice and opportunity to make defense.⁷¹

The just cause amendment echoed a three year old administrative order imposed by Postmaster-General W.S. Bissell that stated "[n]o carrier shall be removed except for cause, and upon written charges filed with the Post-Office Department, and of which the carrier shall have full notice, and an opportunity to make defense."⁷² The post office directive applied to letter carriers, a group that had unionized in conjunction with the Knights of Labor over issues including the eight-hour day.⁷³

The core rationale for instituting basic due process procedures in the 19th Century was conservative in nature: to bolster the merit-based civil service system by requiring an evidentiary-based decision making process thereby decreasing the likelihood of intemperate, arbitrary and discriminatory discipline.⁷⁴ It represented a top-down directive to further

⁶⁸ Gerhard Peters & John T. Woolley, *Grover Cleveland: Executive Order – Civil Service Rules*, Rule II, § 3, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=70805>.

⁶⁹ *Id.* at Rule II, § 6.

⁷⁰ Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 27 (2004).

⁷¹ President William McKinley, *July 9, 1897 Executive Order*, in FIFTEENTH ANNUAL REPORT OF THE U.S. CIVIL SERV. COMM'N JULY 1, 1897, TO JUNE 30, 1898, at 19 (1898) [hereinafter FIFTEENTH ANNUAL REPORT].

⁷² *Order No. 235, Order of the Postmaster-General Forbidding Removals of Carriers Except for Cause* (June 29, 1894), in THIRTEENTH REPORT OF THE U.S. CIVIL SERV. COMM'N, JULY 1, 1895 TO JUNE 30, 1896, at 52 (1897); see also *Employes Reassured*, N.Y. TIMES (July 29, 1897) (describing the relationship between McKinley's civil service amendment and Postmaster General Bissell's 1894 directive).

⁷³ STERLING DENHARD SPERO, *THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY: A STUDY OF EMPLOYEE ORGANIZATION IN THE POSTAL SERVICE 63–73* (reprint ed., Arno Press 1971) (1927).

⁷⁴ See EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 399 (1979); see also ARI HOOGENBOOM, *OUTLAWING THE SPOILS: HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865–1883* (2d ed. 1968) (detailing the history of the civil service reform movement prior to the enactment of

effectuate civil service reform and to help stabilize and rationalize the federal civil service.⁷⁵

As Edmund Morris has aptly noted, it is difficult for a modern citizen “to understand the emotions which Civil Service Reform aroused in the last quarter of the nineteenth” century.⁷⁶ The middle-class civil service reform movement’s sought to replace “personal, informal, and political methods of management in favor of more rational and bureaucratic administrative techniques” as the size of the federal workforce grew following the Civil War.⁷⁷ The movement was comprised of professionals and businessmen who sought to replace the control of government by political partisans with “a meritorious, intellectual, patrician elite” that would lead to more efficient and dependable governmental services.⁷⁸

The nature of the movement is reflected in the fact that civil service reform advocates were or had been proponents of suffrage restrictions to check mass democracy and bring administrative efficiencies to public service.⁷⁹ Theodore Roosevelt described the leadership as “tepidly indifferent or actively hostile to reforms that were of profound and far-reaching social and industrial consequence,” “at best lukewarm” about efforts to improve working class conditions, and “positively hostile to movements” seeking to curb corporate power.⁸⁰ The reform movement’s leadership opposed the formation of public sector unions, viewing such associational activities as antithetical to efforts at depoliticizing the administration of government.⁸¹

The National Civil Service Reform League, the reform movement’s primary organization did not seek the support of the American labor movement, although the American Federation of Labor (“AFL”) favored civil service reform at all levels of government.⁸² One exception to the lack

the Civil Service Act of 1883).

⁷⁵ See *First Annual Message (December 6, 1897) – William McKinley*, MILLER CTR. PUB. AFFAIRS, <http://millercenter.org/president/mckinley/speeches/speech-3769> (McKinley’s civil service changes placed it upon “a still firmer basis of business methods and personal merit.”).

⁷⁶ MORRIS, *supra* note 74, at 398.

⁷⁷ CINDY SONDIK ARON, *LADIES AND GENTLEMEN OF THE CIVIL SERVICE: MIDDLE-CLASS WORKERS IN VICTORIAN AMERICA* 7, 96 (1987).

⁷⁸ *Id.* at 106.

⁷⁹ See DAVID QUIGLEY, *SECOND FOUNDING: NEW YORK CITY, RECONSTRUCTION AND THE MAKING OF AMERICAN DEMOCRACY* 167 (2004); MARTIN J. SCHIESL, *THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA 1880-1920*, at 6–7, 9, 26–27 (1977).

⁸⁰ THEODORE ROOSEVELT: *AN AUTOBIOGRAPHY* 146 (1913); see also HOOGENBOOM, *supra* note 74 (detailing a history of the civil service reform movement prior to the enactment of the Civil Service Act of 1883).

⁸¹ See SPERO, *supra* note 73, at 26–27.

⁸² FRANK MANN STEWART, *THE NATIONAL CIVIL SERVICE REFORM LEAGUE: HISTORY, ACTIVITIES, AND PROBLEMS* 100 (1929). At its 1892 convention, the AFL approved the following

of outreach was the 1888 address by civil service reform leader Henry A. Richmond to the Buffalo Central Labor Union. In his speech, Richmond urged labor support for civil service reform to help improve public education through the elimination of patronage employment.⁸³

By definition, McKinley's introduction of just cause as an extension of civil service reform was limited to a small percentage of middle-class men and women in the American workforce who held classified positions at federal agencies subject to competitive examinations.⁸⁴ Those holding temporary positions or who worked as laborers for the federal government were excluded from coverage under the federal Civil Service Act of 1883.⁸⁵

Besides being limited to a select middle-class group in the federal service, the McKinley order contained another flaw replicated today in most contracts and laws with a just cause standard: it did not define the meaning of just cause.⁸⁶ Nevertheless, the civil service reform put into place in McKinley's first term included core components of just cause that would become central to workplace due process in the 20th century—written disciplinary charges with notice, and an opportunity to defend against those charges.⁸⁷ It also supplemented two other important elements of just cause, already contained in the civil service rules: nondiscrimination, and equal treatment in disciplinary penalties.⁸⁸

The significance of McKinley's executive reform was not lost on Gilded Age observers. Banker Frank Vanderlip, then serving as Assistant Secretary of Treasury, emphasized that:

These amendments to the civil service rules which the President has signed are the most distinct steps forward that have been made in the civil service regulations since the passage of the [Civil Service Law of 1883]. Up to the present time nearly all the regulations have been aimed at throwing safeguards around the method of entry into the service. There

resolution: "That we declare in favor of municipal, state and national civil service reform." REPORT OF PROCEEDINGS, TWELFTH ANNUAL CONVENTION OF THE AMERICAN FEDERATION OF LABOR 46 (1892), reprinted in PROCEEDINGS OF THE AMERICAN FEDERATION OF LABOR (1906).

⁸³ See HENRY A. RICHMOND, *THE WORKINGMEN'S INTEREST IN CIVIL SERVICE REFORM: THE SPOILS SYSTEM IN THE PUBLIC SCHOOLS: ADDRESS OF HENRY A. RICHMOND BEFORE THE CENTRAL LABOR UNION OF BUFFALO* (1888).

⁸⁴ See Matthew W. Finkin, "A Higher Order of Liberty in the Workplace": *Academic Freedom and Tenure in the Vortex of Employment Practices and Law*, 53 L. & CONTEMP. PROBS., 357, 358 n.8 (1990).

⁸⁵ See ARON, *supra* note 77, at 107, 117.

⁸⁶ See FIFTEENTH ANNUAL REPORT, *supra* note 71.

⁸⁷ *Id.*

⁸⁸ President Grover Cleveland, *May 7, 1896 Executive Order*, in LIST AND INDEX OF PRESIDENTIAL EXECUTIVE ORDERS: UNNUMBERED SERIES 1789–1941, at 165 (Clifford L. Lord, ed., Michael Glazier, Inc. 1979) (1944).

has been almost nothing looking toward the enforcement of the spirit of civil service reform within the service itself.

Many prominent civil service reformers believe that regulations enforcing proper observance of the spirit of civil service reform within the service would be of much greater importance than anything that could be formulated in regard to the entry into the service itself, and it is in this direction the amendment which has just been signed by the President is aimed.⁸⁹

During a speech in December 1897 before the National Civil Service Reform League, Carl Schurz stated that “[i]t is no exaggeration to say that [the imposition of just cause] was greeted with a round of applause that resounded all over the country” and received support from “[t]he best part of the public press.”⁹⁰ Gilded Age business leaders also supported McKinley’s civil service rule change because they believed it would improve stability in government and strengthen the morale of federal employees.⁹¹ The following year, the United States Civil Service Commission described the new rule as “one of the most important ever issued relating to the executive civil service, and after a full year’s operation has met the hearty approval of the public and of most of the executive officers of the Government.”⁹²

Following issuance of McKinley’s order, however, the New York Times expressed a clear ambivalence to the imposition of just cause:

The privilege of “full notice and opportunity to make defense” given to the person removed is open to two objections. One is that it breaks the force of strict discipline; the other is that, as the rules have the force of law, occasion may be taken by the courts to adjudge, first, whether the cause of removal is “just”; second, whether the “written charges” are sustained, and

⁸⁹ *The Civil Service Rules: Important Changes Promulgated by President McKinley Yesterday*, N.Y. TIMES (July 28, 1897), <http://query.nytimes.com/mem/archive-free/pdf?res=9B02E4D61E3AE533A2575AC2A9619C94669ED7C>. In the following decades, Vanderlip became president of the First National City Bank, and later was involved in the development of proposed legislation, which was the precursor of the Federal Reserve Act. LEARS, *supra* note 23, at 319. He and his wife Narcissa Vanderlip were active reformers and were later colleagues of Eleanor Roosevelt. See BLANCHE WIESEN COOK, ELEANOR ROOSEVELT: VOLUME ONE 1884-1933, at 288-90 (1992).

⁹⁰ Carl Schurz, President, League to Mun. Reform Ass’ns, Address of the Annual Meeting of the Nat’l Civil Serv. Reform League at Cincinnati: The Democracy of the Merit System (Dec. 16, 1897), <http://www.angelfire.com/ma3/bobwb/schurz/speech/merit.html>.

⁹¹ *Civil Service Reform: Value of Permanency to Washington Business Men*, N.Y. TIMES (Aug. 13, 1897), <http://query.nytimes.com/mem/archive-free/pdf?res=9A06E0DF1330E333A25750C1A96E9C94669ED7CF>.

⁹² FIFTEENTH ANNUAL REPORT, *supra* note 71.

thus introduce confusion in the service.⁹³

The objections expressed in the New York Times' editorial continue to reverberate today because enforceable just cause remains at odds with the at-will employment rule.⁹⁴ Just cause principles continue to be overshadowed by the hegemony of at-will employment prerogatives that make due process in most private sector workplaces subject to employer self-regulation and restraint.

The New York Times editorial's focus on the absence of a definition for just cause in McKinley's order was prescient, as well.⁹⁵ There remain today significant differences over the substantive and procedural meaning emanating from the simple two-word phrase. Those differences affect how employers, arbitrators, and the courts will treat alleged employee misconduct in cyberspace.

The newspaper's concern over judicial encroachment into executive authority to discipline resulting from McKinley's just cause amendment, however, was misplaced. In fact, the courts during the Gilded Age were openly hostile to labor rights, active in enjoining strikes and boycotts, and resistant to enforcing legal limitations on employer authority.⁹⁶ As William E. Forbath has written:

Gilded Age labor also discovered that it was the courts that principally determined how labor legislation once passed, would fare. Judicial review was the most visible and dramatic fashion in which courts curtailed labor's ability to use laws to redress asymmetries of power in the employment relationship. By the turn of the century state and federal courts had invalidated roughly sixty labor laws. During the 1880s and 1890s courts were far more likely than not to strike down the very laws that labor sought most avidly.⁹⁷

Judicial hostility to labor law reform in the Gilded Age is best represented by *Lochner v. New York*,⁹⁸ where the Supreme Court struck down a state law prohibiting a bakery or confectionary employee from

⁹³ *Mr. McKinley and the Civil Service*, N.Y. TIMES (July 30, 1897), <http://query.nytimes.com/mem/article-free/pdf?res=9E07E7D91F39E433A25753C3A9619C94669ED7CF>.

⁹⁴ See Fineman, *supra* note 41, at 275.

⁹⁵ See *Mr. McKinley and the Civil Service*, *supra* note 93.

⁹⁶ CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 60–67 (1985).

⁹⁷ WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 38 (1991) (footnotes omitted); see also ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY*, 64–68 (1949).

⁹⁸ 198 U.S. 45, 57–61 (1905).

being permitted or required to work more than sixty hours a week or more than ten hours in a day. In *Lochner*, the Court concluded that the state prohibition was unconstitutional under the Fourteenth Amendment because it purportedly interfered with the liberty of contract between employers and individual employees.⁹⁹

In light of the ideological predisposition of the Gilded Age judiciary, it is not surprising that McKinley's just cause rule and similar rules were unenforceable in court. In *Page v. Moffett*¹⁰⁰ and *Carr v. Gordon*,¹⁰¹ employees unsuccessfully sought to enjoin their terminations with federal judges concluding that while McKinley had the power to impose just cause on the exercise of the power of removal, the limitation was not enforceable in court because it was not codified in the Civil Service Law of 1883 and was rescindable by the president.¹⁰²

In *Shrulleff v. United States*,¹⁰³ the Supreme Court held that McKinley had an unfettered right to summarily terminate a federal appraiser of merchandise without notice and a hearing when the reason for discharge was not for "inefficiency, neglect of duty, or malfeasance in office" as set forth in statute.¹⁰⁴ In reaching its decision, the Supreme Court emphasized that:

To construe the statute as contended for by appellant is to give an appraiser of merchandise the right to hold that office during his life or until he shall be found guilty for some act specified in the statute. If this be true, a complete revolution in the general tenure of office is effected, by implication, with regard to this particular office. We think it quite inadmissible to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such an intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences.¹⁰⁵

The problems associated with defining just cause and enforcing its principles were highlighted following McKinley's assassination. Upon

⁹⁹ *Id.* at 57–58, 62.

¹⁰⁰ 85 F. 38 (D. N.J. 1898).

¹⁰¹ 82 F. 373 (N.D. Ill. 1897).

¹⁰² See *Page*, 85 F. at 40–41; *Carr*, 82 F. at 379–80.

¹⁰³ 189 U.S. 311 (1903).

¹⁰⁴ See *id.* at 313–15 (quoting Customs Administrative Act, ch. 407, § 12, 26 Stat. 131, 136 (1890)).

¹⁰⁵ *Id.* at 316; see also *Keim v. United States*, 177 U.S. 290, 294 (1900) ("Unless, therefore, there be some specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed.").

taking office, Theodore Roosevelt issued an order to narrow the substance and procedure of the just cause rule. This action, along with his subsequent open shop mandate for federal agencies,¹⁰⁶ and his severe restrictions on the right of federal workers to petition Congress,¹⁰⁷ are indicative of Roosevelt's own patrician hostility to collective labor rights, particularly in the public sector.

Under the guise of eliminating what Roosevelt termed "misunderstandings," his May 1902 declaration limited the just cause rule to a prohibition against discharges motivated by political or religious considerations, permitted terminations for "any cause" promoting "efficiency of the service" and narrowed the due process component of the rule by making a hearing discretionary:¹⁰⁸

Now, for the purpose of preventing all such misunderstandings and improper constructions of said section, it is hereby declared that the term "just cause," as used in Section 8, Civil Service Rule II, is intended to mean any cause, other than one merely political or religious, which will promote the efficiency of the service; and nothing contained in said rule shall be construed to require the examination of witnesses or any trial or hearing except in the discretion of the officer making the removal.¹⁰⁹

Subsequent executive orders by Roosevelt and his successor William Howard Taft resulted in further modification of the just cause provision.¹¹⁰ The period of fluctuation regarding just cause for federal employees through presidential orders ended when Congress enacted the Lloyd-La Follette Act of 1912, which mandated that discharge in the federal service be based upon:

[C]ause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him and be furnished with a copy thereof, and also be allowed a reasonable time for personally answer the same in writing; and affidavits in support thereof; but no

¹⁰⁶ EDMUND MORRIS, *THEODORE REX* 266, 271–72 (2001).

¹⁰⁷ See Herbert, *supra* note 14, at 591.

¹⁰⁸ See EIGHTEENTH REPORT OF THE UNITED STATES CIVIL SERVICE COMMISSION, JULY 1, 1900 TO JUNE 30, 1901, at 58 (1902) [hereinafter EIGHTEENTH REPORT]; Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U PA. L. REV. 942, 956–57 (1976) (quoting the same).

¹⁰⁹ EIGHTEENTH REPORT, *supra* note 108.

¹¹⁰ See Frug, *supra* note 108, at 957–58; Guttman, *supra* note 26, at 324 (describing how Congress pressured Taft to return to McKinley's approach, which required just cause for removal, notice of removal, and an opportunity to respond).

examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal¹¹¹

The redefinition of just cause as a discharge promoting workplace efficiency was elastic in nature and granted far more management discretion. The definition maintained a prohibition against irrational employer criteria such as certain forms of workplace discrimination and a mandate for evenhanded penalties consistent with the nature of the misconduct.¹¹² Procedurally, just cause continued to require written allegations, proper notice to the employee, and an opportunity to be heard.¹¹³ These basic procedures were aimed at requiring an evidentiary-based decision making process to evaluate alleged misconduct or incompetence, thereby checking the temptation of managerial overreach.¹¹⁴ They demonstrated a clear understanding of the importance of enforceable checks and balances and fair treatment within the workplace, values that are dissipating in the New Gilded Age.

The Gilded Age just cause procedures, however, did not guarantee a fair hearing, the examination of witnesses and a disinterested decision-maker.¹¹⁵ The lack of those additional elements, along with a judiciary unwilling to enforce the just cause requirement and hostile to labor reform, substantially undermined procedural workplace justice in that period.

III. DEFINING JUST CAUSE IN THE 20TH CENTURY

The rise of trade unions and collective bargaining in the late 19th and early 20th centuries began to alter the existing asymmetrical bargaining position of employer and employee.

At the time of McKinley's 1897 executive order, the Chicago lathers' union had a contract that mandated an eight-hour workday but gave the employer "the right to discharge such men at his option, without any interference from the Lathers' Union."¹¹⁶ In contrast, one of the first

¹¹¹ Lloyd-La Follette Act of 1912, Pub. L. No. 62-336, § 6, 37 Stat. 555 (codified at 5 U.S.C. §§ 7211, 7511-14 (2012)); Frug, *supra* note 108, at 958 n.78 (citing Lloyd-La Follette Act of 1912); *see also* Herbert, *supra* note 15, at 592-94 (discussing the history and purpose of the Lloyd-La Follette Act).

¹¹² *See* Lloyd-La Follette Act § 6.

¹¹³ *See id.*

¹¹⁴ *See* Frug, *supra* note 108, at 958 (stating that Congress essentially codified Taft's 1912 Executive Order in the Lloyd-La Follette Act).

¹¹⁵ *See* Lloyd-La Follette Act § 6.

¹¹⁶ *Agreement with the Chicago Journeymen Lathers' Independent Union in WRITTEN TRADE AGREEMENTS IN COLLECTIVE BARGAINING*, NAT'L LABOR RELATIONS BD., DIV. OF ECON. RESEARCH, Bulletin No. 4, Appendix A (1939) [hereinafter WRITTEN TRADE AGREEMENTS].

arbitration decisions to apply just cause might have been a 1904 arbitral ruling resolving a dispute over the discharge of a newspaper employee.¹¹⁷ The 1904 and 1905 contracts between the International Longshoremen, Marin and Transport Workers' Association and the Dock Managers at Lake Erie ports mandated that employees not be discharged without just cause and anyone discharged will be notified of the cause.¹¹⁸

The 1910 garment workers strike in Chicago resulted in the Hart Schaffner & Marx agreement with the Amalgamated Clothing Workers of America. The agreement mandated that discipline be imposed "with justice and with due regard to the reasonable rights of the employee"¹¹⁹ While it did not require an employer to have just cause to discipline, the agreement did grant a discharged employee the right to challenge her or his termination through an appeal to a tripartite Trade Board.¹²⁰

During World War I, the War Labor Policies Board proposed impartial arbitration as a means for regulating the imposition of discipline and discharge in private sector employment.¹²¹ Nevertheless, prior to "1920 only a few industries had well-developed grievance procedures terminating in arbitration, namely, coal, the railroads, men's clothing, and women's garments."¹²² Importantly, "[l]ittle is known about the principles that were applied in the settlement of disciplinary grievances in these early years."¹²³ What is known is that most of the negotiated grievance procedures from the 1920s did not end in binding arbitration.¹²⁴

Just cause limitations on discipline in negotiated agreements constitute collective rights stemming from a vision of industrial democracy, which include due process components similar to what McKinley imposed on the federal civil service system. Industrial democracy as a reformist principle came to prominence during the Progressive Era.¹²⁵ For example, when

¹¹⁷ See Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA L. REV. 373, 391 (1983).

¹¹⁸ *The Longshoremen's Agreement: Wages, Hours and Working Conditions at Lake Erie Ports for the Coming Year*, NAT'L CIV. FED. REV., June 1904, at 4, <https://archive.org/details/NationalCivicFederationReview-Vol.1And2>.

¹¹⁹ EARL DEAN HOWARD, *THE HART SCHAFFNER & MARX LABOR AGREEMENT: BEING A COMPILATION AND CODIFICATION OF THE AGREEMENTS OF 1911, 1913 AND 1916 AND DECISIONS RENDERED BY THE BOARD OF ARBITRATION 14* (rev. ed. 1922-1925).

¹²⁰ *Id.* at 4-5, 13-14.

¹²¹ See STEVEN FRASER, *LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR* 121 (1991).

¹²² Jacoby, *supra* note 26, at 225.

¹²³ *Id.*

¹²⁴ See IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933*, at 74 (1960).

¹²⁵ See JOSEPH A. MCCARTIN, *LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1919-1921*, at 27-28 (1997).

President Wilson's President's Mediation Commission helped to settle an Arizona copper miners' strike in 1917 it emphasized that:

In place of dislocation strikes the Government must assure the [miners], for their own and the Government's protection, security in their employment, (where there is no just cause for discharge,) as well as fair and practical machinery for the ordinary adjustment of grievances whether real or imaginary, without causing any stoppage of production.¹²⁶

A related development during the Progressive Era was the American Association of University Professors' ("AAUP") 1915 Declaration of Principles on Academic Freedom and Academic Tenure, which defined tenure as a permanent faculty appointment in higher education subject to dismissal following an internal judicial hearing.¹²⁷ In 1940, the AAUP issued its *Statement of Principles on Academic Freedom and Tenure*, which states that following probation "teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies."¹²⁸ Although the AAUP at the time refused to be labeled a union,¹²⁹ the 1940 *Statement of Principles* incorporated many procedural elements of just cause in its definition of acceptable academic practices for terminating a tenured teacher:

Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against [the teacher] and should have the opportunity to be heard in [his or her] own defense by all bodies that pass judgment upon [the] case. [The teacher] should be permitted to [be accompanied by] an advisor of his [or her] own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of

¹²⁶ *Federal Mediators End Copper Strike*, NY Times, Nov. 2, 1917, at 24, <http://query.nytimes.com/gst/abstract.html?res=9806E5DB113AE433A25751C0A9679D946696D6CF>.

¹²⁷ See Edward R.A. Seligman et al., *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 BULL. AM. ASS'N U. PROFESSORS 15, 40-42 (1915).

¹²⁸ *Academic Freedom and Tenure: Statement of Principles, 1940*, 28 BULL. AM. ASS'N U. PROFESSORS 84, 86 (1942) [hereinafter *1940 Statement*].

¹²⁹ See PHILO A. HUTCHESON, A PROFESSIONAL PROFESSORiate: UNIONIZATION, BUREAUCRATIZATION AND THE AAUP 14-15 (2000).

incompetence[,] the testimony should include that of teachers and other scholars, either from [the teacher's] own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.¹³⁰

Following the enactment of the National Labor Relations Act (“NLRA”) in 1935,¹³¹ and subsequent public sector collective bargaining laws, just cause became a fixture in many labor-management contracts, as an essential element of industrial democracy.¹³²

Early contracts following the NLRA’s enactment, like the May 1938 contract between B.F. Goodrich Company and the United Rubber Workers of America, required that the employer have “proper cause,” and included an agreed upon list of twenty offenses that could form the basis for discipline.¹³³ Contracts negotiated by the Steel Workers Organizing Committee in 1937, and the United Mine Workers in 1939, provided for reinstatement and back wages for employees only if it was determined “that an injustice has been dealt” the employee.¹³⁴

Ever since the Gilded Age and the Progressive Era, unanimity concerning the precise substance and procedure meant by just cause has remained elusive. A common omission in collective bargaining provisions is a definition of the phrase.¹³⁵ The result has been a general lack of

¹³⁰ 1940 Statement, *supra* note 128, at 85–86.

¹³¹ Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§151–169 (2012)).

¹³² See LICHTENSTEIN, *supra* note 27, at 63 (“Workers could not be discharged without ‘just cause’; instead a system of ‘progressive discipline’ ensured that most workers had a second or third or fourth chance.”); Clyde W. Summers, *Industrial Democracy: America’s Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 48 (1979).

¹³³ *Goodrich Rubber Agreement with the United Rubber Workers of America* (May 27, 1938), in WRITTEN TRADE AGREEMENTS, *supra* note 116, at 309–25, Art. XIII, Appendix C.

¹³⁴ *Appalachian Agreement between United Mine Workers and Coal Operators’ Associations* (May 12, 1939), in WRITTEN TRADE AGREEMENTS, *supra* note 116, at 281–93; *Carnegie-Illinois Steel Corporation Agreement and Steel Workers Organizing Committee* (Mar. 17, 1937), in WRITTEN TRADE AGREEMENTS, *supra* note 116, at 305–08, § 9.

¹³⁵ See *Three D, LLC*, 361 N.L.R.B. No.31, 200 L.R.R.M. (BNA) 1569, 1583 n.9 (Aug. 22, 2014) (Miscimarra, M., dissenting in part) (describing the ubiquitous nature of “just cause” provisions and the difficulty of drafting such provisions); Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of ‘Just Cause’ in Employee Discipline Cases*, 1985 DUKE L.J. 594, 595 (noting that parties, when drafting their agreements, rarely define “just cause”). Similar ambiguities exist concerning what constitutes “adequate cause” in higher education tenure cases, with one scholar emphasizing that the standards are “wholly within the prerogative of each university” unless the terms of a university’s rules or their application violate academic freedom or civil liberties. See William W. Van Alstyne, *Tenure: A Summary, Explanation, and ‘Defense,’* 57 AAUP BULL. 328, 328 (1971). In light of the distinct history and practices of collective bargaining in higher education, we have chosen not to explicitly explore the

consistency in how arbitrators define the scope of the contractual limitation of an employer's authority to discipline based on a just cause provision. In effect, the definitional omission empowers the selected arbitrator in a particular case to apply her or his notions about just cause.¹³⁶

In post-arbitration litigation, courts are not immune from redefining just cause, particularly in disciplinary cases involving difficult facts or in turbulent political times. For example, during the heyday of McCarthyism, the California Supreme Court refused to confirm a just cause arbitration award reinstating attorney Doris Brin Walker to her private sector laboratory position on the grounds that mere membership in the Communist Party and participation in its activities constitute just cause for her discharge as a matter of public policy.¹³⁷ An effective cure for that type of judicial activism is a clear codification of a definition of just cause through contract negotiations or legislation. In considering a cure, we must be mindful of the growing judicial activism reminiscent of the Gilded Age.¹³⁸

In 1966, Arbitrator Carroll R. Daugherty faced the familiar dilemma of arbitrators: being selected to determine a grievance asserting that a discharge violated a negotiated just cause provision without the parties' defining the applicable criteria to be applied.¹³⁹ Due to the lack of a contractual definition of just cause in the agreement at issue, Arbitrator Daugherty in *Enterprise Wire Co. v. Enterprise Independent Union*,¹⁴⁰ applied his seven test formulation originally articulated in *Grief Brothers Coopera*¹⁴¹ that some commentators have described as a "purely

specific elements of "adequate cause" and how it should be applied in tenure cases involving social networking by faculty members.

¹³⁶ Abrams & Nolan, *supra* note 135, at 595–96.

¹³⁷ Black v. Cutter Labs., 278 P.2d 905, 917 (Cal. 1955), *cert. granted*, 350 U.S. 816, *cert. dismissed*, 351 U.S. 292 (1956).

¹³⁸ See Harris v. Quinn, 134 S.Ct. 2618, 2638 (2014) (holding that an open shop is constitutionally mandated under the First Amendment for quasi-public employees in a collective bargaining unit).

¹³⁹ Enter. Wire Co. v. Enter. Indep. Union, 46 Lab. Arb. Rep. (BNA) 359, 360 (1966) (Daugherty, Arb.). Regarding discipline, Article VIII of the agreement stated:

Section 1. Proper Cause. No employee shall be discharged or otherwise disciplined except for proper cause.

Section 2. Discharge of Discipline Grievance. Any case of discharge or other discipline may be taken up through the grievance procedure, but any such grievance must be presented within three working days after the disciplinary action occurs.

Section 3. Notice to Union. The Union shall be notified within one working day of any disciplinary action taken against any employee covered by this Agreement.

Id.

¹⁴⁰ *Id.*

¹⁴¹ 42 Lab. Arb. Rep. (BNA) 555, 558–59 (1964) (Daugherty, Arb.).

procedural scheme for determining just cause.”¹⁴² While Daugherty’s seven tests for just cause¹⁴³ are the subject of a well-utilized treatise on the

¹⁴² Abrams & Nolan, *supra* note 135, at 599 n.30.

¹⁴³ The following is Arbitrator Daugherty’s commentary in *Grief Brothers Cooperage* about defining just cause and his seven-test formulation:

Few if any union-management agreements contain a definition of “just cause.” Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of “common law” definition thereof. This definition consists of a set of guide lines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A “no” answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such “no” means that the employer’s disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, and/or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines cannot be applied with slide-rule precision.

The Questions

1. Did the [c]ompany give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communications of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a “no” answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and the same need not have been negotiated with the union.

2. Was the company’s rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the [c]ompany’s business and (b) the performance that the company might properly expect of the employee?

Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This is the employee’s “day in court” principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made *before* its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions.

Note 3: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation he will be restored to his job with full pay for time lost.

4. Was the [c]ompany's investigation conducted fairly and objectively?

Note: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note: It is not required that the evidence "be preponderant, conclusive, or "beyond reasonable doubt." But the evidence must be truly substantial and no flimsy.

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Note 1: A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders, and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgment thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the proven offense for two or more employees, their respective records provide the only proper basis "for 'discriminating' among them" in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination. *Grief Bros.*, 42 Lab. Arb. Rep. (BNA) at 557-59 (emphasis in original).

To the last question, Arbitrator Daugherty added in *Enterprise Wire Co.*:

Note 4: Suppose that the record of the arbitration hearing establishes firm "Yes" to answers to all the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed

subject,¹⁴⁴ arbitrators continue to apply their own distinct standards and variations. Some arbitrators will infer a just cause limitation even when such a provision is not a part of the applicable contract.¹⁴⁵

Under Arbitrator Daugherty's seven tests, an employer must provide forewarning to the employee about the disciplinary consequences of the at-issue behavior in most cases.¹⁴⁶ It also requires that the work rule allegedly breached be reasonably related to the effective and efficient functioning of the enterprise and the employer have concluded that the employee engaged in misconduct following a fair investigation and before the imposition of discipline.¹⁴⁷ Lastly, the applicable rule must have been applied without discrimination and the penalty imposed or proposed must be reasonably related to the seriousness of the misconduct and the employee's employment record.¹⁴⁸

The elements of the seven tests overlap and supplement aspects of the procedural and substantive aspects of just cause dating back to the Gilded Age. Like the 19th Century civil service rules, the seven tests mandate notice and an opportunity to be heard and prohibit discrimination between employees.¹⁴⁹ The seven tests formulation, however, adds a number of important elements to the principles of workplace due process, which are central to the proper application of just cause to social networking: the development and distribution of lawful work rules that include notice of potential for discipline for violations of those rules, progressive discipline, and a fair employer investigation and fact-finder.¹⁵⁰ The seven tests have become less relevant today in most workplaces due to the current low level of union density. The low density rate has resulted in the consequential dissipation of what David Brody once termed workplace contractualism:

to substitute his judgment. In this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "trial judge," might have imposed a lesser penalty. Actually the arbitrator may be said in an important sense to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of company unreasonableness. *Enter. Wire Co.*, 46 Lab. Arb. Rep. (BNA) at 365.

¹⁴⁴ See ADOLPH M. KOVEN & SUSAN L. SMITH, *JUST CAUSE: THE SEVEN TESTS* (Kenneth May ed., 3d ed. 2006).

¹⁴⁵ Abrams & Nolan, *supra* note 135, at 594–95.

¹⁴⁶ See *Enter. Wire Co.*, 46 Lab. Arb. Rep. (BNA) at 363.

¹⁴⁷ *Id.* at 363–64.

¹⁴⁸ *Id.* at 364.

¹⁴⁹ See *supra* notes 87–88 and accompanying text.

¹⁵⁰ See *Enter. Wire Co.*, 46 Lab. Arb. Rep. (BNA) at 363–64.

enforcement of collective bargaining terms such as just cause, grievance and arbitration provisions.¹⁵¹

Before analyzing how just cause should be applied to social networking, we turn to a related but frequently overlooked body of law: legislatively mandated just cause. In the public sector, successful lobbying by public employee unions since the early 20th Century led to the adoption of state tenure and due process laws similar to the federal Lloyd-La Follette Act of 1912.¹⁵² Today, states such as Pennsylvania, Montana, South Dakota, North Carolina, and Nebraska have codified a just cause standard for public sector employees.¹⁵³

A comprehensive national survey of state statutes is unnecessary to reveal the wide variations in how states have defined just cause. Therefore, only a sampling is presented to highlight the definitional diversity. Some state laws define just cause as being nothing more than proof of employee misconduct or incompetence that justifies discipline.¹⁵⁴ Other statutes mandate procedural protections including notice and an opportunity to be heard,¹⁵⁵ while others include prohibitions against discrimination and retaliation for protected activities.¹⁵⁶ The statutes provide definitional standards—spanning from specifically enumerated examples of conduct that constitute just cause to broad generalizations requiring interpretation by those delegated to apply the law. As evidenced by the codified differences, there is no clear guidance concerning how just cause should be applied, and underscores the difficulty of defining just cause through the legislative process.

In Pennsylvania, the Civil Service Act limits the bases for discharging a non-probationary state employee by requiring just cause, without defining the phrase.¹⁵⁷ Pennsylvania courts have interpreted just cause to mean

¹⁵¹ DAVID BRODY, *WORKPLACE CONTRACTUALISM: A HISTORICAL/COMPARATIVE ANALYSIS* (1992), reprinted in *IN LABOR'S CAUSE: MAIN THEMES ON THE HISTORY OF THE AMERICAN WORKER* 221, 221 (1993).

¹⁵² Pub. L. No. 62-336, § 6, 37 Stat. 555 (1912) (codified at 5 U.S.C. § 7211 (2012)).

¹⁵³ See, e.g., MONT. ADMIN. R. 2.21.6506–.6507, .6509 (2015); NEB. REV. STAT. § 79-824 (2014); 25 N.C. ADMIN. CODE, 11.2301 (2013); 23 PA. STAT. AND CONS. STAT. ANN. § 1101.706 (West 2009); S.D. CODIFIED LAWS §13-43-6.1 (West Supp. 2013).

¹⁵⁴ E.g., NEB. REV. STAT. § 79-824(4).

¹⁵⁵ E.g., OHIO REV. CODE ANN. § 124.34 (West Supp. 2015); N.C. GEN. STAT. § 126-35 (2013). In the public sector, due process is constitutionally mandated when an employee has a protected property interest in continued employment emanating from statute or contract. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1980).

¹⁵⁶ E.g., OHIO REV. CODE ANN. § 4112.14; 71 PA. STAT. AND CONS. STAT. ANN. § 741.905a (West 2012).

¹⁵⁷ 71, § 741.807; see also *Szablowski v. State Civ. Serv. Comm'n*, 76 A.3d 590, 597 (Pa Commw. Ct. 2013) (reviewing case law defining “just cause” in the absence of a statutory definition).

“merit-related,” including an employee’s competency and ability to perform the position “in some rational and logical manner.”¹⁵⁸ Over time, the definition has evolved to include anti-discrimination principles stemming from another provision in that civil service law prohibiting discrimination based upon “political or religious opinions or affiliations because of labor union affiliations or because of race, national origin or other non-merit factors.”¹⁵⁹ Procedurally, the rules applicable to just cause in Pennsylvania are notice with a clear statement of the reasons for the discipline,¹⁶⁰ a formal hearing¹⁶¹ with the employer having the burden of proof,¹⁶² the availability of subpoenas, and the possibility of pre-hearing discovery.¹⁶³

Despite the controversial changes to tenure policies in Wisconsin, the Wisconsin Administrative Code still mandates just cause for the dismissal of a tenured University of Wisconsin faculty member.¹⁶⁴ Substantively, the regulation recognizes faculty retain all of the rights and privileges of a citizen and the protections afforded by academic freedom, which must be considered in determining whether just cause exists.¹⁶⁵ Defining just cause in this manner is particularly important because the contours of judicially recognized First Amendment protections for public employees are diminishing.¹⁶⁶ The regulations also mandate an evidentiary investigation prior to the issuance of charges¹⁶⁷ and require a number of due process guarantees including a formal statement of specific charges, a fair hearing

¹⁵⁸ *Galant v. Commonwealth, Dep’t of Envtl. Res.*, 626 A.2d 496, 497 n.2 (Pa.1993) (citing *Corder*, 279 A.2d at 371).

¹⁵⁹ 71, § 741.905a; *see also Corder v. State Civil Serv. Com’n*, 279 A.2d 368, 371 (Pa. Commw. Ct. 1971) (quoting § 741.905a).

¹⁶⁰ *See* 71, § 741.950.

¹⁶¹ *See id.* § 741.951.

¹⁶² *Mufson v. Commonwealth, Dep’t of Pub. Welfare*, 456 A.2d 736, 737 (Pa. Commw. Ct. 1983) (citing *Lewis v. Commonwealth, Dep’t of Health*, 437 A.2d 811 (Pa. Commw. Ct. 1981)).

¹⁶³ *See* 71, § 741.209 (“The commission shall have the power to secure by subpoena the attendance and testimony of witnesses and the production of books and papers.”); *see also E. Pa. Psychiatric Inst., Dep’t of Pub. Welfare v. Russell*, 465 A.2d 1313, 1319 (Pa. Commw. Ct. 1983) (ruling that only “some adequate form of discovery” is necessary to satisfy employee’s due process rights).

¹⁶⁴ WIS. ADMIN. CODE UWS § 4.01(1) (2015), http://docs.legis.wisconsin.gov/code/admin_code/uws/4. On February 15, 2016, the Wisconsin Board of Regents of the University of Wisconsin System promulgated proposed regulatory changes concerning the dismissal of faculty. *See* Notice of Submittal of Rule to Legislature, 2016 Wis. Admin. Reg. 722A3, CR 15-061 (Feb. 15, 2016), https://docs.legis.wisconsin.gov/code/chr/all/cr_15_061.

¹⁶⁵ *Id.* §4.01(2).

¹⁶⁶ *See Garcetti v. Ceballos*, 547 U.S. 410, 424–26 (2006) (establishing a *per se* constitutional rule that speech by a public employee pursuant to official duties is unprotected under the First Amendment but stating that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”).

¹⁶⁷ UWS §4.02(1).

with the burden of proof on the employer, a right to be heard, a right to counsel, an opportunity to cross-examine witnesses, and written findings of fact and recommendations.¹⁶⁸

South Dakota's definition provides examples rather than a general definition of just cause. In South Dakota, just cause for the discharge of teachers includes: "breach of contract, poor performance, incompetency, gross immorality, unprofessional conduct, insubordination, neglect of duty, or the violation of any policy or regulation of the school district."¹⁶⁹ Just cause termination for South Dakota state workers is defined through a list of twenty-six specifically identified employee actions or inactions.¹⁷⁰ At the same time, the at-will doctrine has been codified in that state,¹⁷¹ with a judicially recognized just cause exception based upon the terms of an employee handbook.¹⁷²

Montana's statute requiring just cause in the public sector provides a more balanced approach to defining the phrase. The law ensures that any formal disciplinary action requires "just cause, due process and documentation, or other evidence of the facts"¹⁷³ The statute defines just cause as:

[R]easonable, job-related grounds for taking a disciplinary action based on failure to satisfactorily perform job duties, or disruption of agency operations. Just cause may include, but is not limited to: an actual violation of an established agency standard, procedure, legitimate order, policy, or labor agreement; failure to meet applicable professional standards; criminal misconduct; wrongful discrimination; deliberate misconduct; negligence; deliberately providing false information on an employment application; willful damage to public or private property; workplace violence or intimidation; harassment; unprofessional or inappropriate behavior; or a series of lesser violations.¹⁷⁴

Procedurally, prior to imposing discipline, the employee must receive written notice of the factual basis for the discipline, expected improvements in behavior, if applicable, and the consequences if the employee fails to

¹⁶⁸ See *id.* §§4.02, .05-.06.

¹⁶⁹ S.D. CODIFIED LAWS § 13-43-6.1 (West Supp. 2013).

¹⁷⁰ S.D. ADMIN. R. 55:10:07:04 (2015), <http://www.legis.sd.gov/Rules/DisplayRule.aspx?Rule=55:10:07:04>.

¹⁷¹ See CODIFIED LAWS § 60-4-4.

¹⁷² See *Lesmeister v. Am. Colloid Co.*, 4 F.3d 631, 633 (8th Cir. 1993).

¹⁷³ MONT. ADMIN. R. 2.21.6509(1) (2015).

¹⁷⁴ *Id.* R. 2.21.6507(8); see also *Christie v. Dep't of Env'tl. Quality*, 2009 MT 364, ¶ 30, 353 Mont. 227, 235, 220 P.3d 405, 410 (falsification of time record constitutes just cause).

improve.¹⁷⁵ The employee is entitled to respond to the notice in writing or orally.¹⁷⁶

In contrast, Montana's wrongful discharge statute prohibits a post-probationary discharge that is retaliatory, violates an express provision of a written workplace policy, or is without "good cause."¹⁷⁷ The law defines "good cause" to mean "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."¹⁷⁸ Although the statute provides job protections well beyond most jurisdictions,¹⁷⁹ it was enacted to rein in the broad exception to the at-will employment doctrine created by the Montana Supreme Court, which held employers liable for terminations that would otherwise have been lawful.¹⁸⁰ By enacting the statute, the legislature capped back pay awards to four years and provided methods for the parties to recover attorneys' or arbitrators' fees.¹⁸¹

Unlike the state laws we have examined, Puerto Rico's labor and employment statute provides its employees with a large array of job protection rights.¹⁸² Law 80 of the Commonwealth of Puerto Rico ("Law 80")¹⁸³ mandates that employer must have just cause to discharge an employee without a fixed term of employment, and it imposes a

¹⁷⁵ R. 2.21.6509(3).

¹⁷⁶ *Id.* R. 2.21.6509(5).

¹⁷⁷ See MONT. CODE ANN. §39-2-904(1) (2015).

¹⁷⁸ *Id.* § 39-2-903(5). It excludes a termination "that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute" and an employee covered by a written collective bargaining agreement or individual written employment contract. MONT. CODE ANN. § 39-2-912.

¹⁷⁹ *The At-Will Presumption and Exceptions to the Rule*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> (last visited Oct. 12, 2015).

¹⁸⁰ See LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 108–09 (1990). Prior to its passage, the Montana Supreme Court issued a line of decisions that essentially rejected the at-will doctrine by applying a good faith and fair dealing analysis to the employment relationship. *Id.* at 96. Thereafter, the defense bar sought legislation to cap the back pay awards. See *id.* at 110–111 (1990); see also, Bradley T. Ewing et al., *The Employment Effects of a "Good Cause" Discharge in Montana*, 59 INDUS. & LAB. REL. REV. 17, 21 (2005) (reviewing Montana's unique employment legislation and observing that the good cause standard seems to "have increased the frequency of liability for wrongful discharge compared to the pre-1987 common law regime, but it also appears to have reduced the variance of damages awards—a tradeoff that would appeal to risk-averse employers.").

¹⁸¹ See §§ 39-2-905(1), -914(4), -915.

¹⁸² P.R. LAWS ANN. tit. 29, §§ 185a–185m (2009). Employees in Puerto Rico enjoy, with certain exceptions, mandatory holidays, see *id.* §302, annual (Christmas) bonuses, see *id.* §§ 501–507, a weekly day of rest, see *id.* §§ 295–299, and mandatory severance pay for termination without just cause, *id.* § 185a.

¹⁸³ *Id.* §§ 185a–185m.

compensatory penalty for a violation.¹⁸⁴ Local 80 conflates “just cause” with “good cause” and defines good cause through a litany of acceptable reasons for termination including a pattern of misconduct.¹⁸⁵ However, it also states that:

A discharge made by the mere whim of the employer or without cause relative to the proper and normal operation of the establishment shall not be considered as a discharge for good cause. Neither shall it be considered just cause for discharging an employee, his/her collaboration or expressions made by him/her pertaining to his/her employer's business before any administrative, judicial or legislative forum in Puerto Rico when said expressions are not of a defamatory character nor constitute disclosure of privileged information according to law. In this last case, in

¹⁸⁴ See *Alvarez-Fonseca v. Pepsi Cola of P.R. Bottling Co.*, 152 F.3d 17, 28 (1st Cir. 1998). Section 185a of Law 80 states:

Every employee in commerce, industry, or any other business or work place, designated hereinafter as the establishment, in which he/she works for compensation of any kind, contracted without a fixed term, who is discharged from his/her employment without just cause, shall be entitled to receive from his/her employer, in addition to the salary he/she may have earned:

(a) The salary corresponding to two (2) months, as indemnity, if discharged within the first five (5) years of service; the salary corresponding to three (3) months if discharged after five years (5) and up to fifteen (15) years of service; the salary corresponding to six (6) months if discharged after fifteen (15) years of service.

(b) An additional progressive compensation equal to one (1) week for each year of service, if discharged within the first five (5) years of service; to two (2) weeks for each year of service, if discharged after five (5) years and up to fifteen (15) years of service; to three (3) weeks for each year of service if discharged after fifteen (15) years of service.

The years of service shall be determined on the basis of all the preceding accrued periods of work during which the employee worked for the employer prior to his/her discharge, but excluding those which, because of a previous discharge or severance, have been compensated or have been subject to judicial adjudication.

Notwithstanding what is provided in the first paragraph of this section, the mere fact that an employee renders services under a fixed term contract, in itself, shall not have the automatic effect of depriving him/her of the protection of §§ 185a–185m of this title, if the practice and circumstances involved or other evidence in the contracting were of such a nature that they tend to indicate the creation of an expectation of continuity in employment, or appears to be a bona fide employment contract for an indefinite period of time. In these cases, the employees thus affected shall be deemed to have been contracted for an unspecific period of time. Except when it concerns employees contracted for a certain bona fide term, or for a certain bona fide project, every separation, termination or dismissal of employees contracted for a certain term, or a certain project or job, or the non-renewal of his/her contract, shall be presumed to constitute an unjust dismissal governed by §§ 185a–185m of this title.

§ 185a.

¹⁸⁵ See *id.* § 185b.

addition to any other corresponding adjudication, the employee thus discharged shall have the right to have an order issued for immediate restitution in his/her employment and to be compensated for an amount equal to the salaries and benefits not received from the date of discharge until a court orders reinstatement in his/hers employment.¹⁸⁶

The substantive and procedural differences in the statutory definitions reflect differing values about workplace fairness, which lies at the core of just cause. Laws that define just cause to include substantive and procedural protections require consideration of both employer and employee actions and inactions. Defining the phrase as prohibiting improperly motivated and discriminatory discipline is consistent with a key element of just cause dating back to the Gilded Age and current anti-discrimination laws. Finally, jurisdictions that treat the phrase as a mere synonym for employee misconduct or incompetence mirror Theodore Roosevelt's 1902 formulation that the phrase means "any cause" to promote workplace efficiency.

Next, we turn to the application of the principles of just cause discipline to social networking activities. In so doing, we postulate how those general principles should be refined for the Web 2.0 culture and consider arbitral just cause decisions involving social media.

IV. DEFINING JUST CAUSE FOR SOCIAL NETWORKING IN THE NEW GILDED AGE

In defining and applying just cause to social networking we must be mindful that social media can implicate employee speech, association and privacy interests as well as academic freedom in higher education. It is a vital communicative tool for associational and expressive activities in an age of increased workplace decentralization, fissured workplaces, and the irregularity of work. It has supplanted the home and other relatively intimate gathering spots for discussing workplace and other issues.

Social media also implicates employer interests. Those interests can vary depending on the post's content, the particular equipment used, and whether the communication took place off-duty or during work. As a result, the examination must explore precedent under the NLRA and other laws concerning the private sector, and the First Amendment and state laws with respect to the public sector.

¹⁸⁶ *Id.*

To properly apply just cause requires recognition of the seismic societal changes resulting from social media including its impact on the behavior of employees and employers. The scope of those changes reinforces the necessity that employers retain the burden of demonstrating just cause. At the same time, enforceable workplace due process does not require wholesale incorporation of constitutionally mandated criminal procedural rules into the workplace with discharge being hyperbolically analogized to capital punishment.

Rather than being a mere communicative instrument, the design of social media impacts how individuals and entities harness and react to the power of the technology.¹⁸⁷ In our age, the rapid societal changes and disruptions caused by social media demands greater consistency in just cause discipline.

The enforceability of just cause principles does not preclude termination for misconduct in cyberspace, as demonstrated by the arbitration decisions discussed below. They do, however, place important and needed legal restraints on the inherent power to overreact granted by the at-will doctrine.

A. Just Cause and the Digital Divide

In the New Gilded Age, the digital divide caused by income inequality needs to be considered when applying just cause to electronic misconduct. Economic disparities result in employees using different means for accessing the internet. It is far more probable that the working poor will engage in personal social networking using employer-owned workplace equipment, rendering them more vulnerable to allegations of workplace misconduct. According to a 2014 Pew Research Internet Project study, over 71% of adults who surf the internet use Facebook, with the highest percentage being among those with incomes below \$50,000.¹⁸⁸ Individuals with household incomes below \$50,000 are less likely to engage in social networking with a smartphone.¹⁸⁹ Statistics from the United States Census Bureau reveal that the working poor are far less likely to engage in social media at home: 45.3% of individuals with a household income of less than

¹⁸⁷ See NICHOLAS CARR, *THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS* 46–48 (2010) (summarizing the historic debate between instrumentalists and determinists when it comes to human interaction with technology).

¹⁸⁸ *Social Media Update 2013: Facebook Users*, PEW RES. CTR. (Jan 8, 2014), <http://www.pewinternet.org/2014/01/08/social-media-update-2013/facebook-users/>.

¹⁸⁹ *Social Networking Fact Sheet*, PEW RES. CTR., <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited Oct. 12, 2015).

\$25,000 access the internet at their dwelling and 62.3% of people with household incomes of between \$25,000–49,000 do the same.¹⁹⁰ In contrast, 89.5% of households with incomes of \$150,000.00 or more access the internet at home.¹⁹¹

These statistics illustrate how strict enforcement of a neutral policy prohibiting the use of workplace equipment for personal social networking will have a disparate impact on the working poor who have limited access to the internet outside of the workplace. Despite the existence of the digital divide, our research has not found precedent where a court or an arbitrator considered a claim that the neutral application of a work rule concerning social media had a disparate impact on low wage workers.

B. Notice Through Workplace Rules and Training

Two essential components of just cause when applied to social networking are lawful and reasonable employment rules and appropriate training. Contemporary market and cultural forces necessitate both policies and training. Unlike other consumer products, developers of social media and producers of laptops, tablets, and smartphones lack legal and market-based incentives to provide understandable consumer information despite the inherent dangers resulting from indiscriminate use. In fact, the software is designed to encourage automatic, rapid, and continuous use resulting in the maximization of data collection.

The ubiquity of personal devices, the prevalence of social networking, and the profits gained from the use of the accumulated data, demonstrate that the designers have succeeded in creating a cyber-universe that discourages moderation and discernment. As a result, clear, reasonable, and lawful workplace rules, along with related training, are necessary elements of just cause as applied to social networking. They are the most direct means for providing notice to employees of the potential for discipline for electronic communicative misconduct.

Historically, notice has always been a central element of just cause. At a minimum, it requires the employee be informed of the basis for the discipline along with an opportunity to respond.¹⁹² Those aspects of notice have been central to just cause since it was introduced by McKinley. Since the Gilded Age, just cause standards have evolved as reflected in the seven

¹⁹⁰ *Computer and Internet Use in the United States: Reported Internet Usage for Individuals 3 Years and Older, by Selected Characteristics: 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/computer/publications/2012.html> (last visited Oct. 12, 2015).

¹⁹¹ *Id.*

¹⁹² See FIFTEENTH ANNUAL REPORT, *supra* note 71, at 52.

tests.¹⁹³ Today, contractual just cause obligates an employer to inform employees of the potentiality of discipline for certain conduct, with the exception of offenses that a reasonable employee would understand constitutes misconduct such as theft and unlawfully motivated discrimination.¹⁹⁴

It should be self-evident that “employers with well-written comprehensive policies governing the nexus between social media and the workplace are more likely to prevail in discipline and discharge grievance arbitrations.”¹⁹⁵ In order to satisfy just cause, such rules must be clear and reasonably related to the employer’s operation or employee work performance.¹⁹⁶ As Ariana R. Levinson has written, “rules prohibiting personal use of company computers and other devices” are generally upheld in just cause cases.¹⁹⁷ Similarly, Heather A. Morgan and Felicia A. Davis have observed that “[c]ourts have had no difficulty concluding that an employer may discipline employees who use social media in violation of clearly stated policy use provisions, such as using social media during working hours.”¹⁹⁸

Drafting social media rules to satisfy just cause is admittedly difficult because social networking by its very nature can implicate protected concerted activities, and legally protected off-duty activities. Even without a specific social media policy, pre-existing work rules can form a legitimate basis for just cause discipline with social networking being the medium for the communicative misconduct.¹⁹⁹ Rules concerning social media can be imposed through a stand-alone policy, a supplement to an electronic-use policy concerning the employer’s equipment, or be included in a “bring your own device” (“BYOD”) policy.²⁰⁰

BYOD policies reflect the growing practice among some employers of permitting employees to utilize personal electronic equipment to access employer data and applications.²⁰¹ While a BYOD policy is usually

¹⁹³ See *supra* note 143 and accompanying text.

¹⁹⁴ Patrick R. Westerkamp & Rebecca Esmi, *Arbitrating Social Media Grievances*, N.J. LAW. APR. 2011, at 28, 30.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Ariana R. Levinson, *What Hath the Twenty First Century Wrought? Issues in the Workplace Arising from New Technologies and How Arbitrators Are Dealing with Them*, 11 TRANSACTIONS: TENN. J. BUS. L. 9, 13 (2010).

¹⁹⁸ Heather A. Morgan & Felicia A. Davis, *Social Media and Employment Law: Summary of Key Cases and Legal Issues*, ABA NAT’L SYMP. ON TECH. LAB. & EMP. L., May 2014, at 1, 20–22.

¹⁹⁹ See *id.*

²⁰⁰ See *id.* at 18.

²⁰¹ See *id.*

motivated by a desire to attract and retain digital natives, such policies highlight thorny issues caused by personal and workplace data being retained in one device. Among the issues that Morgan and Davis state should be addressed in a BYOD policy are: (1) the employee's privacy interests in using a personal device for business purposes; (2) the employer's right to delete data from the employee's device; (3) document or data retention after an employee leaves the firm; and (4) monitoring through a device's GPS tracking capability.²⁰²

In general, policies concerning the use of workplace equipment are incentivized by the law. Court decisions hold that an employer can avoid running afoul of employee privacy protections under the Electronic Communications Protection Act of 1986 ("ECPA")²⁰³ and the Fourth Amendment²⁰⁴ by simply unilaterally imposing a work rule that employees have no expectation of privacy when utilizing a piece of workplace computer equipment.²⁰⁵

Just cause principles teach, however, that mere promulgation of a rule is generally insufficient to provide necessary notice.²⁰⁶ Knowledge cannot be presumed based solely on the electronic distribution of a rule or by adding the rule to the intranet or a handbook. Direct interactions are far more likely to lead to effective communications. Training is essential for providing notice of the rules applicable to social networking.

Many employers already conduct training on a regular basis to supplement policies prohibiting sexual harassment, bullying, and workplace violence.²⁰⁷ The training on those subjects is due, in part, to the complexity of interactive human behavior, the need to encourage behavioral changes, and the importance of employees understanding the impact their conduct

²⁰² See *id.* at 18–19.

²⁰³ Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in 18 U.S.C. §§ 1367, 2510–2521, 2701–2711, 3117, 3121–3127).

²⁰⁴ U.S. CONST. amend. IV. (The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.").

²⁰⁵ See, e.g., *City of Ontario v. Quon*, 560 U.S. 746, 755–60 (2010); *O'Connor v. Ortega*, 480 U.S. 709, 714–19 (1987) (applying the operational workplace realities in determining whether a public employee had an expectation of privacy under the Fourth Amendment); see also, e.g., William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must Be Honest*, 12 EMP. RTS. & EMP. POL'Y J. 49, 61 n.68 (2008) (discussing the consent exceptions under the ECPA).

²⁰⁶ See *Grief Bros. Cooperage*, 42 Lab. Arb. Rep. (BNA) 555, 558–59 (1964) (Daugherty, Arb.).

²⁰⁷ See, e.g., *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). (recognizing an affirmative defense to certain hostile work environment sexual harassment claims based upon workplace policy and training concerning sexual harassment).

can have on others. Employers can supplement such training with explicit references to electronic forms of misconduct.²⁰⁸

The value of workplace training about social media is exemplified by employers being advised to “train their employees involved in the recruiting and hiring process to understand the risks associated with learning about an applicants’ personal information” through social media,²⁰⁹ and by at least one police department sending its supervisors to “twitter school.”²¹⁰ Training is particularly important because misinterpretation of electronic communications is more likely due to the lack of voice intonation and facial expression in electronic communications.²¹¹

Workplace training can provide reinforcement and clarification concerning social media rules as well as explain the benefits and pitfalls of social networking. As one arbitrator noted in a social media case:

We need to grant some slack to today’s young people which I define as those under 30 [W]e need to recognize that young people today need more time to grow up and become responsible members of society. This requires us to inform them of good as well as inappropriate forms of conduct.²¹²

Contrary to the arbitrator’s ageist assumptions, there is an equal need for workplace training for all those who are technologically unsophisticated and who embrace social media without understanding its power, benefits, and pitfalls.

The application of enforceable just cause standards has not impaired employers from successfully imposing discipline for social media misconduct under pre-existing policies.²¹³ As discussed below, other policies that can form the basis for just cause discipline for social networking including sexual harassment policies, conduct unbecoming or morality policies, and patient privacy policies.²¹⁴

²⁰⁸ See Jeffrey Englander, et al., *Social Media’s Impacts on the Employer-Employee Relationship*, Daily Lab. Rep. (BNA) No. 55, at I-1 (Mar. 21, 2014).

²⁰⁹ *Id.*

²¹⁰ Pervalz Shallwani, *Officers Train with NYPD’s Twitter Police*, WALL ST. J. (Sept. 17, 2014, 9:08 PM), <http://online.wsj.com/articles/officers-train-with-nypds-twitter-police-1411002492>.

²¹¹ See, e.g., Daniel Goleman, *Email Is Easy to Write (and to Misread)*, N.Y. TIMES (Oct. 7, 2007), http://www.nytimes.com/2007/10/07/jobs/07pre.html?_r=0.

²¹² Police Dep’t, Police Ass’n, and Emp’r, 2013 Lab. Arb. Supp. (BNA) 148178 (Sept. 23, 2013) (Visco, Arb.).

²¹³ See *infra* notes 230–33 and accompanying text.

²¹⁴ See *Am. Red Cross v. Teamsters, Local 507*, 125 Lab. Arb. Rep. (BNA) 1696, 1703 (2008) (Ruben, Arb.); *Hospital*, 2013 AAA LEXIS 116, at *10 (Mar. 12, 2013) (Bornstein, Arb.); *University*, 2008 AAA LEXIS 889, at *21 (Jan. 10, 2008) (Siegel, Arb.).

In one case, an arbitrator found that an airline policy prohibiting employees from making publicly abusive, unprofessional comments toward management was a basis for just cause discipline because an employee's abusive and threatening posts toward management were accessible to at least one of his coworkers.²¹⁵ An employer's internet policy prohibiting personal use of workplace computers was found to be a sufficient predicate for the just cause discipline of an employee for accessing a social media site during work hours.²¹⁶

A sexual harassment policy and training was found sufficient to satisfy just cause discipline for posting sexually harassing comments directed at a co-worker or arguably, that a fellow coworker could access.²¹⁷ Anti-violence and anti-discrimination policies can also form the basis for just cause termination for social media posts.²¹⁸ A discriminatory blog post about a supervisor was found to constitute just cause for a discharge because it constituted gross misconduct that violated the employer's anti-harassment policy.²¹⁹

One arbitrator found that just cause existed to discipline a correction officer for an off-duty post because it violated a work rule that prohibited the discrediting of the employer.²²⁰ Another arbitrator concluded a university had just cause to discipline two campus security police officers for separate posts under its conduct unbecoming policy.²²¹ In that case, one officer posted a picture of himself next to a security vehicle on a dating website along with his title and his sexual preferences.²²² The homophobic blog postings by a Michigan Assistant Attorney General targeted at a gay

²¹⁵ See *AirTran Airways, Inc. v. Council 57, Ass'n of Flight Attendants*, 131 Lab. Arb. Rep. (BNA) 254, 260–61 (2012) (Goldstein, Arb.).

²¹⁶ *University*, 2008 AAA LEXIS 558, *47 (July 2, 2008) (Henderson Ellis, Arb.).

²¹⁷ See *Am. Red Cross*, 125 Lab. Arb. Rep. (BNA) at 1703, 1714 (Employee electronically distributed a picture of a nude male with a tattoo of "Puff the Magic Dragon" on his genitalia, while his buttocks and thighs portrayed "demons and underworld creatures engaged in intercourse." The message was: "Ow, Ow, Ow . . . Wow! I wonder how long this took, and far under the influence you'd have to be????"). Even though the employee's conduct did not violate the employer's sexual harassment policy in that case, the arbitrator implied that violation of a sexual harassment policy could serve as a basis for just cause discipline. *Id.*

²¹⁸ See, e.g., *United Steelworkers of America, Local 9548 v. Tenaris Algoma Tubes Inc.*, 2014 CanLII 26445, at * 5 (ON LA) (Trachuk, Arb.), [http://www.canlii.org/en/on/onla/doc/2014/2014canlii26445.html](http://www.canlii.org/en/on/onla/doc/2014/2014canlii26445/2014canlii26445.html).

²¹⁹ *Baker Hughes, Inc. v. United Steelworkers Int'l Union Region VII, Local 13-391*, 128 Lab. Arb. Rep. (BNA) 37, 43 (2010) (Baroni, Arb.).

²²⁰ *Ohio Dep't of Rehab. & Corr. v. Ohio Civil Serv. Emps. Ass'n, Local 11, AFSCME*, Grievance No. 27-11-20111201-0010-01-03, at *8 (2013) (Pincus, Arb.), <http://www.lris.com/wp-content/uploads/2013/04/Ohio-DRC.pdf>.

²²¹ *University*, 2008 AAA LEXIS 889, at *21.

²²² *Id.* at *11.

college student leader was found to constitute just cause because it was conduct unbecoming of a state employee.²²³ Lastly, a nurse was disciplined under a patient privacy policy for taking a picture of a deceased patient and posting it with information about the patient's funeral.²²⁴

In determining whether a workplace social media rule is reasonable and a legitimate basis for discipline, its content and application must not violate laws that circumscribe restrictions on protected employee workplace-related civil liberties.²²⁵ As a result, the arbitration of just cause discipline can include disputes over whether the at-issue social media activity is legally protected,²²⁶ or whether the workplace rule violates federal or state law.

In the private sector, the implementation or maintenance of a social media policy can violate the NLRA if it is demonstrated that the policy was applied to discipline an employee for a protected concerted activity under Section 7 of the NLRA.²²⁷ The policy can also violate the NLRA if it can be reasonably interpreted to be coercive, prohibit concerted protected activity, or if it was implemented in response to union activity.²²⁸

Workplace policies that promote civility or courtesy,²²⁹ or prohibit such things as “negative comments” and “negativity” have been found to violate the NLRA because they can reasonably discourage employees from engaging in protected concerted activity.²³⁰

In the public sector, the First Amendment constrains the enforceable scope of workplace policies relating to the substance of employee social networking.²³¹ A public employer has a higher burden when seeking to defend the constitutional legitimacy of a policy that restricts employee expressive activities concerning issues of public concern that were not made pursuant to official duties than when defending a particular adverse

²²³ *Shirvell v. Dep't of Attorney Gen.*, 866 N.W.2d 478, 506 (Mich. Ct. App. 2015).

²²⁴ *Hospital*, 2013 AAA LEXIS 116, at *10 (Mar. 12, 2013) (Bornstein, Arb.).

²²⁵ *See Vista Nuevas Head Start, Local 1640 v. Michigan AFSCME Council 25, Local 1640*, 129 Lab. Arb. Rep. (BNA) 1519, 1525 (2011) (Van Dagens, Arb.).

²²⁶ *Id.* (rejecting union argument that social media posts constituted protected concerted activity).

²²⁷ *See Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. 646, 655 (2004).

²²⁸ *See id.*

²²⁹ *Karl Knauz Motors, Inc.*, 358 N.L.R.B. 164, 2012 N.L.R.B. LEXIS 679, at *2 (2012).

²³⁰ *Hills & Dales Gen. Hosp.*, 360 N.L.R.B. 70, 2014 N.L.R.B. LEXIS 236, at *20 (2014).

²³¹ *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465 (1995). The Court recognized that public sector employees “have not relinquished ‘the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.’” It went on to note that the employees’ status as public employees “has no more bearing on the quality . . . of their literary output” than it would on another citizen. *Id.* (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968)).

action.²³² When defending a policy restriction on free expression, a public employer “must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government.”²³³

In addition, policy restrictions on speech are subject to constitutional challenge as being overbroad and vague.²³⁴ The constitutional obstacles in drafting a lawful social media policy is reflected in a decision by the New York Court of Appeals, which struck down an anti-cyberbullying statute because it was facially overbroad and prohibited constitutionally protected speech.²³⁵ Concerns over policy vagueness are most acute in the field of higher education due to the impact a policy can have on academic freedom. The University of South Dakota’s conduct policy, however, was found not to be unconstitutionally vague based on a judicial determination that “[t]he outer contours of the civility clause [in the policy] perhaps are imprecise, but many instances of faculty misconduct would fall clearly within the clause’s proscriptions, thus precluding the conclusion that the policy is facially unconstitutional.”²³⁶ The at-issue university policy stated:

Faculty members are responsible for discharging their instructional, scholarly and service duties civilly, constructively and in an informed manner. They must treat their colleagues, staff, students and visitors with respect, and they must comport themselves at all times, even when expressing disagreement or when engaging in pedagogical exercises, in ways that will preserve and strengthen the willingness to cooperate and to give or to accept instruction, guidance or assistance.²³⁷

Another set of laws that limits the lawful scope of social media policies are state laws prohibiting discrimination with respect to employee off-duty conduct. States such as Colorado²³⁸ and New York²³⁹ have enacted laws to protect employees’ right to engage in off-duty lawful activities. While the specific scope of each state’s statute varies, they place limitations on an

²³² See *id.* at 468; *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006); *Lane v. Franks*, 134 S.Ct. 2369, 2381–82 (2014).

²³³ *Nat’l Treasury Emps. Union*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571).

²³⁴ See *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 609 (1967); *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1126 (3d Cir. 1992).

²³⁵ *People v. Marquan M.*, 19 N.E.3d 480, 488 (N.Y. 2014).

²³⁶ *Keating v. Univ. of S.D.*, 569 F. App’x 469, 471 (8th Cir. 2014).

²³⁷ *Id.* at 470.

²³⁸ COLO. REV. STAT. § 24-34-402.5 (2015).

²³⁹ N.Y. LAB. LAW §201-d(2)(b)–(c) (McKinney 2015).

employer's discretion in controlling off-duty activities that may include social networking.²⁴⁰ One commentator has argued that such laws are necessary due to the ability of an employer to monitor employee off-duty conduct by reviewing social media posts.²⁴¹

Colorado's lawful activities law prohibits an employer from:

[T]erminat[ing] the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours[,] unless [the] restriction . . . [r]elates to a bona fide occupational requirement, . . . is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer[,] or . . . [i]s necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest."²⁴²

On its face, the Colorado law does not bar a discharge for violating a workplace rule that prohibits social networking with the use of an employer's equipment, prohibits the use of social media for personal use during working hours, or bans posts found to be inconsistent with an employee's duties.²⁴³

New York's lawful activities statute protects off-duty political and recreational activities that take place outside work hours, off of the employer's premises and without use of the employer's equipment or other property.²⁴⁴ Political activities are defined in the statute to include, "(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party[,] or political advocacy group"²⁴⁵ What constitutes a recreational activity is statutorily defined as "leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and

²⁴⁰ *See id.*

²⁴¹ Jean M. Roche, *Why Can't We Be Friends?: Why California Needs a Lifestyle Discrimination Statute to Protect Employees from Employment Actions Based on Their Off-Duty Behavior*, 7 HASTINGS BUS. L.J. 187, 203 (2011).

²⁴² COLO. REV. STAT. § 24-34-402.5(1)(a)-(b); *see also* Ruiz v. Hope for Children, Inc., 352 P.3d 983, 985 (Colo. App. 2013) (quoting § 24-34-402.5(1)(a)-(b)) (holding that conflicts were not limited to financial conflicts of interest, and the employer was not required to show that the conflict of interest actually interfered with an employee's ability to perform job.).

²⁴³ *See* § 24-34-402.5.

²⁴⁴ N.Y. LAB. LAW § 201-d(2).

²⁴⁵ *Id.* § -d(1)(a).

similar material”²⁴⁶ New York’s law would clearly protect employee social networking tied to partisan political activity so long as the activity is not during work time or done with the employer’s equipment including employer issued smartphones.²⁴⁷ The larger unresolved issue is whether social networking constitutes a protected recreational activity equivalent to a game, hobby, reading or the viewing of television, movies and similar material. At present, the case law is limited on the question of what constitutes a protected recreational activity under New York’s law.²⁴⁸

C. Reasonableness and Fairness of the Employer’s Investigation

The reasonableness and fairness of an employer’s investigation are also essential for satisfying just cause. This is true because electronic data can be easily manipulated or misconstrued. Our contemporary culture provides strong incentives for over-reaction and under-investigation in the face of purported electronic misconduct. Reason and deliberation are often in short supply and counterintuitive in the hyper-kinetic electronic age. Precipitous disciplinary action is particularly tempting in the face of adverse publicity and political or economic pressure resulting from a posted picture, video, or comment that has gone viral.

No scenario better illustrates the importance of a fair and reasonable workplace investigation in the New Gilded Age than the circumstances surrounding the resignation of Shirley Sherrod from her position as Georgia State Director of Rural Development at the U.S. Department of Agriculture.²⁴⁹ Sherrod’s experience is a cautionary tale involving manipulated material that went viral resulting in an unjustifiable adverse employer action.²⁵⁰ It took only ten hours from the posting of the video excerpts of her speech until she was forced to resign by officials who did

²⁴⁶ *Id.* § -d(1)(b).

²⁴⁷ *See id.* § -d(2)(a).

²⁴⁸ *See* McCavitt v. Swiss Reinsurance Am. Corp., 89 F. Supp. 2d 495, 498 (S.D.N.Y. 2000), *aff’d* 237 F.3d 166 (2001); *State v. Wal-Mart Stores, Inc.*, 621 N.Y.S.2d 158, 159 (N.Y. App. Div. 1995) (asserting that romantic relationships and extra marital affairs are not protected recreational activities); *see also*, *Bilquin v. Roman Catholic Church, Diocese of Rockville Ctr.*, 729 N.Y.S.2d 519, 519 (N.Y. App. Div. 2001) (determining that employee’s cohabitation with a married man “did not constitute a recreational activity within” the statute); *Hudson v. Goldman Sachs & Co.*, 725 N.Y.S.2d 318, 319 (N.Y. App. Div. 2001) (holding that employee’s dismissal “for having an extramarital affair with a co-employee” was proper because “romantic relationships are not protected ‘recreational activities’ within” the statute).

²⁴⁹ Howard Kurtz, *Finger-pointing at Fox in Shirley Sherrod Firing*, WASH. POST (July 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR2010072201265.html?sid=ST2010072302060>.

²⁵⁰ *Id.*

not investigate the accuracy of the posted excerpt.²⁵¹ Moreover, she was compelled to resign without being given an opportunity to defend herself.²⁵² It was only later revealed that the video excerpts were substantively misleading.²⁵³ While her supervisors' need to respond to Sherrod's purported misconduct is understandable, it does not excuse them from forcing her to resign rather than placing her on administrative leave pending an investigation before making a final decision to discipline or to request her resignation.

A fair and reasonable investigation of Sherrod would have included a review of a video of the entire speech along with an investigatory interview aimed at determining the substance of her comments and her intended meaning. Following those steps, the investigation's focus would have turned to whether she violated agency policies and rules, whether there was any justification for those violations, and whether she was engaged in protected speech.²⁵⁴

The investigation regarding the homophobic blog postings by a Michigan Assistant Attorney is a strong counterexample to the Sherrod case. In the Michigan case, the investigation included interviews with forty individuals including the target of the posts prior to the attorney's discharge.²⁵⁵ The thoroughness of that investigation resulted in a record demonstrating just cause and provided relevant evidence for the employer's defense against a claim that the attorney's discipline constituted a violation of his First Amendment rights.²⁵⁶

The consequences that can result when an employer fails to conduct a thorough disciplinary investigation are exemplified by another well-publicized case involving a rapidly distributed video relating to misconduct: the arbitration decision and award setting aside the indefinite suspension of

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See *Waters v. Churchill*, 511 U.S. 661, 677 (1994) (Under the First Amendment, a government "employer decision making will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available—if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay." (emphasis in original)).

²⁵⁵ *Shirvell v. Dep't of Attorney Gen.*, 866 N.W.2d 478, 486 (Mich. Ct. App. 2015).

²⁵⁶ *Id.* at 505; see also *Connick v. Myers*, 461 U.S. 138, 152 (1983) (holding that under the First Amendment, the right of a public employee to speak on a matter of public concern is balanced against the employer's interest in avoiding disruptions in providing effective and efficient governmental services).

football player Ray Rice for the physical assault of his then-fiancé.²⁵⁷ Rice had originally been penalized by the NFL with a two-game suspension and an additional fine of one game's salary after admitting, during an investigatory meeting, that he hit his then fiancé in a hotel elevator that was corroborated by a surveillance video showing them leaving the elevator.²⁵⁸ Although the NFL had knowledge of a second video capturing the actual assault inside the elevator, it took no action to obtain and view it.²⁵⁹ Following the wide public broadcast and distribution of the second video and the resulting uproar, the NFL imposed a second more stringent penalty, which was vacated by the arbitrator on the grounds that Rice had already been penalized for the assault following the initial investigation and had not misled the NFL commissioner during the prior investigatory interview.²⁶⁰

The importance of prudent and thorough investigatory steps before imposing discipline is equally true when it comes to alleged employee electronic misconduct. Generally, employers discover inappropriate posts in three ways. The employee had befriended the employer or a manager thereby permitting access to the employee's posts. Even more commonly, the employer learns of an inappropriate post from a co-worker or another Facebook friend of the employee. A third, less frequent, means of discovery is through employer surveillance of employee social media pages.

The discovery of an inappropriate post should trigger the commencement, and not the conclusion, of an investigation. The conduct of the investigation should be assigned to a detached employer representative to follow where the probative evidence leads.²⁶¹ To determine whether the online activity violated an existing rule or policy, substantial evidence must be gathered regarding whether, when and how the employee accessed the social media page to make the post. A fact-based determination must be made to determine if the at-issue post was made by the subject employee and what was the employee's intent and purpose. For example, a forensic investigation of an employee's computer led one

²⁵⁷ Nat'l Football League v. Nat'l Football League Players Ass'n, 134 Lab. Arb. Rep. (BNA) 61 (2014) (Jones, Arb.), <http://www.nytimes.com/interactive/2014/11/28/sports/football/document-ray-rice-suspension-ruling.html>.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ See *City of North Bay Vill. v. Dade Cty. Police Benevolent Ass'n*, 131 Lab. Arb. Rep. (BNA) 275, 279 (2012) (Wood, Arb.) (finding the city conducted a fair investigation of a police officer in a small town who was alleged of making an election related post in violation of a municipal policy by employing a private investigator who conducted a forensic examination of employee's workplace computer.).

arbitrator to conclude the employer lacked just cause to terminate an employee because the downloading of the child pornography might have been inadvertent or done by another employee.²⁶² This is not to suggest that just cause requires a forensic examination as part of every investigation. By its very nature, social media posts are accessible without a forensic examination. A forensic examination becomes necessary only when a reasonable investigator recognizes that it is necessary in order to resolve a conflict or inconsistency in the evidence already gathered.

The post's content also must be examined within the larger context of the exchanges. Humor, facetiousness and sarcasm are easily misunderstood in cyberspace. In most cases, an employer cannot presume how a recipient or viewer of an employee's post interpreted or reacted to its content without gathering additional probative evidence.²⁶³ In addition, the investigation must consider whether the social networking constituted a protected activity under federal or state law.²⁶⁴

The potential for a post to be misattributed, manipulated, or misconstrued is even greater than a video, as in Sherrod's case.²⁶⁵ The internet permits individuals to post pseudonymously. Without an investigation, it is difficult to know with certainty the identity of the person who made the post. Social media accounts can be accessed by anyone who knows the username and password. An employee can still be subject to just cause discipline, however, if the investigation finds that inappropriate online content was posted by someone who had authorization to log-in and post on the employee's page.²⁶⁶

The interactive nature of social media posts can result in misinterpretations particularly when more than two individuals engage in an electronic dialogue. The ability to repost makes investigations more problematic. Without a technically skilled investigator it might be difficult to determine where a post originated. In some investigations it may matter whether the employee created the post, adopted it, or "liked" it.

²⁶² See *AK Steel—Butler Works v. United Auto Workers, Local 3303,125 Lab. Arb. Rep. 903, 905–09* (2008) (Dean, Arb.) (noting that a police forensic examination of the employee's computer found that the access to the child pornography "may have been" inadvertent or that someone else could have accessed the child pornography when the employee was away from his workstation).

²⁶³ *College*, 2010 AAA LEXIS 1210, at *50 (Dec. 15, 2010) (Markowitz, Arb.) (finding that a school district lacked just cause to discharge a teacher by failing to gather or present testimony from students supporting the district's belief that teacher's posts adversely affected the students' ability to learn).

²⁶⁴ See *Pier Sixty, LLC*, 362 N.L.R.B. 59, 2014 NLRB LEXIS 1013, at *117–18 (2014) (finding an employee's Facebook comments to be protected under the NLRA because it was part of an organized effort to protest a supervisor's mistreatment and in the context of a representation election).

²⁶⁵ Kurtz, *supra* note 278.

²⁶⁶ See *University*, 2008 AAA LEXIS 889, at *13–14 (Jan. 10, 2008) (Siegel, Arb.).

Lastly, state and federal laws circumscribe the tools an employer may use during an investigation into alleged misconduct related to social networking. By definition, these laws help define the contours of reasonableness when it comes to employer investigations. Over fifteen states have enacted social media laws prohibiting employers from requiring an employee to disclose a personal username and password.²⁶⁷ While the specific prohibitions and exceptions of the enacted legislation may differ, they reflect a growing national sentiment against an employer having unbridled access to an employee's social media activities. The federal Stored Communications Act ("SCA"),²⁶⁸ and similar state laws, also prohibits employers from accessing an employee's social media account with privacy settings without appropriate authorization.²⁶⁹ The use of subterfuge or coercion by employer to gain access to an employee's account will not be found to be a reasonable investigatory tool and might violate the SCA.²⁷⁰

D. Non-Discriminatory Application of Rules and Penalties

A central component of just cause since its introduction into American labor law in the 19th Century is the principle of non-discrimination.²⁷¹ Even before McKinley's amendment, federal Civil Service Rule II prohibited discharges motivated by partisanship or religion and mandated that "penalties like in character shall be imposed for like offenses."²⁷² The centrality of non-discrimination was reinforced by Theodore Roosevelt

²⁶⁷ See Robert Sprague, *No Surfing Allowed: A Review & Analysis of Legislation Prohibiting Employers from Demanding Access to Employees' & Job Applicants' Social Media Accounts*, 24 ALB. L.J. SCI. & TECH. 481, 485–88 (2014).

²⁶⁸ Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended at 18 U.S.C. §§ 2701–2711).

²⁶⁹ See *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 879 (9th Cir. 2001); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 971–72 (C.D. Cal. 2010); see also *Ehling v. Monmouth-Ocean Hosp. Serv.*, 961 F. Supp. 2d 659, 669–71 (D.N.J. 2013) (finding that employer did not violate the SCA when an employee had access to another employee's Facebook page and the first employee voluntarily provided the employer with screenshot copies of the other's Facebook posts).

²⁷⁰ See *Dep't of Homeland Sec. v. Am. Fed'n of Gov't Emps., Nat'l Border Patrol Council, Local 2595*, 132 Lab. Arb. Rep. (BNA) 161, 164–65 (2013) (Scholtz, Arb.) (excluding evidence of improper social media activities obtained by a supervisor who had created a fake Facebook account by using a phony female name, attached a female photo, and then became a "friend" of the employee at issue); see also *Pietryo v. Hillstone Rest. Grp.*, 29 I.E.R. Cas. (BNA) 1438, 1440–41, 2009 U.S. Dist. LEXIS 88702 (D.N.J.) (finding an employer's access to an employee's social media violated the SCA because it was based on a coerced authorization).

²⁷¹ See *Peters & Woolley*, *supra* note 68.

²⁷² *Id.*

when he chose to redefine just cause to mean any cause other than political or religious.²⁷³

The principle of non-discrimination mandates that an employer apply workplace rules and impose disciplinary penalties in an even-handed manner.²⁷⁴ Just cause, however, should not be conflated with an employer having a non-discriminatory reason for an adverse action under federal and state anti-discrimination laws. The elements of just cause obligate an employer to act in a manner that goes well beyond complying with employment discrimination laws.²⁷⁵ Improper disparate treatment under the just cause standard does not require proof of unlawful motivation. Nevertheless, an employer who satisfies the broader concept of non-discrimination under just cause will have a stronger defense against a claim of unlawful discrimination, which is frequently premised upon disparate treatment.²⁷⁶

To satisfy just cause in the age of social media, an employer must apply relevant workplace rules in a non-disparate manner, and impose equivalent penalties concerning the same or similar types of electronic misconduct. For example, an employer cannot discipline one nurse under a workplace policy for photographing a patient and posting it on Facebook but not discipline other nurses who had also violated the policy.²⁷⁷ Similarly, an employer cannot terminate one employee found with sexually explicit materials on his workplace computer but impose only a ten-day suspension on another employee for having similar content on his workplace computer.²⁷⁸ The requirement of evenhandedness, however, does not preclude an employer from treating employees differently based on the respective work history of each employee.

²⁷³ See EIGHTEENTH REPORT, *supra* note 108, at 308–09.

²⁷⁴ *E.g.*, 42 U.S.C. § 2000e-2(a) (2012) (making it unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”).

²⁷⁵ See *Kirst v. Grays Harbor Comty. Hosp.*, No. C14-5014 BHS, 2015 U.S. Dist. LEXIS 9355, at *11–12 (W.D. Wash. Jan. 27, 2014) (“While Kirst’s union agreement may have provided additional employee rights that the Hospital was required to meet before termination under the collective bargaining agreement, such as a finding of ‘just cause,’ the Hospital’s reason was far from ‘baseless,’ which is the standard under federal and state discrimination laws. In other words, even if an arbitrator later found that the Hospital did not have just cause to terminate Kirst, this possibility does not show that the Hospital’s legitimate non-discriminatory reason for terminating Kirst was pretextual.”).

²⁷⁶ *E.g.*, § 12113 (2012) (providing defenses against allegations of discriminatory employment decisions on the basis of disability).

²⁷⁷ *Hospital*, 2013 AAA LEXIS 116, at *38–39 (Mar. 12, 2013) (Bornstein, Arb.).

²⁷⁸ *University*, 2008 AAA LEXIS 558, at *62–63 (July 2, 2008) (Henderson Ellis, Arb.).

E. Progressive Discipline and the Severity of the Penalty

The doctrine of progressive discipline is another key element of just cause in the Web 2.0 era. The purpose of progressive discipline is to enhance workplace productivity and stability through counseling and graduated levels of penalties aimed at correcting employee misbehavior. If an employee's behavior remains unaltered it can result in termination.²⁷⁹

Progressive discipline is important because it encourages employer deliberativeness by utilizing disciplinary measures to correct employee misbehavior. When an employer fails to take sufficient corrective action toward an employee's misconduct, an arbitrator may find that the employer lacked just cause to discharge.²⁸⁰

Arbitrators are just beginning to apply progressive discipline to social media misconduct.²⁸¹ At present, it is difficult to discern a clear pattern concerning the application of progressive discipline involving employee social networking. The scope of an arbitrator's familiarity with social media may influence her or his approach. Some arbitrators are reluctant to impose discharge even when the at-issue posts are offensive, while others will sustain a discharge based on offensive posts that disparages the employer and demonstrates insolence toward supervisors.²⁸²

The most prominent exceptions to progressive discipline are extreme forms of misconduct or when a just cause provision is interpreted to not include progressive discipline.²⁸³ Progressive discipline has been found inapplicable when electronic misconduct involved threatening and extreme communications.²⁸⁴ For example, racist or sexist posts might not be found

²⁷⁹ Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 *FORDHAM L. REV.* 1517, 1562–63 (1999).

²⁸⁰ *Alberta Union of Provincial Emps. v. Alberta Health Servs.*, 2012 CanLII 12067, at *30–31 (ON LA) (Jan. 4, 2102) (Wallace, Arb.), <https://www.canlii.org/en/ab/abgaa/doc/2012/2012canlii12067/2012canlii12067.html?autocompleteStr=2012%20CanLII%2012067&autocompletePos=1>.

²⁸¹ *University*, 2008 AAA LEXIS 558, at *38–39 (July 2, 2008) (Henderson Ellis, Arb.).

²⁸² *Comm'n's, Energy & Paperworkers Union of Can., Local 64 v. Corner Brook Pulp and Paper Ltd.*, 2013 CanLII 87573, at *24 (ON LA) (Dec. 11, 2013) (Oakley, Arb.), <https://www.canlii.org/en/nl/nlla/doc/2013/2013canlii87573/2013canlii87573.html?autocompleteStr=2013%20CanLII%2087573&autocompletePos=1>.

²⁸³ *See Cty. Coll. of Morris Staff Ass'n v. Cty. Coll. of Morris*, 495 A.2d 865, 873 (N.J. 1985) (vacating an arbitration award on the ground that the arbitrator exceeded his authority by inferring a progressive discipline requirement in a just cause provision).

²⁸⁴ *United Steelworkers of Am., Local 9548 v. Tenaris Algoma Tubes Inc.*, 2014 CanLII 26445, at *17 (ON LA) (May 15, 2014) (Trachciruk, Arb.), <https://www.canlii.org/en/on/onla/doc/2014/2014canlii26445/2014canlii26445.html?searchUrlHash=AAAAAQARMjAxNCBDYW5MSUkgMjY0NDUAAA AAAQ&resultIndex=1>.

amenable to progressive discipline.²⁸⁵ One arbitrator rejected a progressive discipline argument in a social media case involving sexual harassment by stating:

Some offences are so serious that they warrant discharge. An employee does not necessarily get one free sexual harassment before he loses his job. . . . When men ‘joke’ about the sexual violence they should inflict on a woman she can reasonably be concerned that they may actually hurt her.²⁸⁶

Another arbitrator has emphasized that the:

[N]ature and frequency of the [Facebook postings] must be carefully considered to determine how insolent, insulting, insubordinate and/or damaging they were to the individual(s) or the company. In some cases, the issue is whether the comments were so damaging or have so poisoned the workplace that it would no longer be possible for the employee to work harmoniously and productively with the other employees or for the company.²⁸⁷

Like other types of misconduct cases, the appropriate degree of discipline in a social media case will depend on the content and context of the particular post and the employee’s work history. Other considerations include the particular position held by the employee, the post’s visibility, as well as an employee’s voluntary action of removing the post and apologizing.²⁸⁸ In one case, an arbitrator did not sustain the termination of a police officer for crude work-related postings because the officer mistakenly believed that the postings were private.²⁸⁹ Instead, the arbitrator ordered that the officer could not maintain a social media account unless he comported with workplace policies.²⁹⁰ In another case, a white officer

²⁸⁵ Police Dep’t, Police Ass’n, and Emp’r, 2013 Lab. Arb. Supp. (BNA) 148178 (Sept. 23, 2013) (Visco, Arb.).

²⁸⁶ Tenaris Algoma Tubes Inc., 2014 CanLII 26445, at *17.

²⁸⁷ Bell Tech. Sols. v. Commc’ns, Energy & Paperworkers Union of Can., 2012 CanLII 51468, at *29 (ON LA) (Aug. 31, 2012) (Chauvin, Arb.), <https://www.canlii.org/en/on/onla/doc/2012/2012canlii51468/2012canlii51468.html?autocompleteStr=2012%20CanLII%2051468&autocompletePos=1...>

²⁸⁸ See Corner Brook Pulp and Paper Ltd., 2013 CanLII 87573, at *19 (noting that employee did not apologize until the arbitration, one year after her offensive post); see also City of Toronto v. Toronto Prof’l Firefighters Ass’n, Local 3888, 2014 CanLII 62879, at *43–45 (ON LA) (Oct. 14, 2014) (Misra, Arb.), <https://www.canlii.org/en/on/onla/doc/2014/2014canlii62879/2014canlii62879.html?searchUrlHash=AAAAAQARMjAxNCBDYW5MSUkgNjI4NzkAAAAAAQ&resultIndex=1>.

²⁸⁹ Police Dep’t, Police Ass’n, and Emp’r, 2013 Lab. Arb. Supp. (BNA) 148178 (Sept. 23, 2013) (Visco, Arb.).

²⁹⁰ *Id.*

received a reduced disciplinary penalty for inadvertently forwarding a racist text message based on the officer's immediate and repeated apologies, the officer's exemplary work record, and because other employees were not discharged for similar misconduct.²⁹¹

V. CONCLUSION: A STEP FORWARD IN THE NEW GILDED AGE

It has been over a century since President William McKinley introduced just cause into American labor law during the first Gilded Age. Following McKinley's lead, just cause became central to industrial democracy and a cornerstone of workplace fairness.

Last year marked the centennial of the final report of the United States Commission on Industrial Relations, chaired by Frank P. Walsh, which concluded that "[p]olitical freedom can exist only where there is industrial freedom; political democracy only where there is industrial democracy."²⁹² The anniversary of that report went unnoticed like the anniversaries of so many other events in American labor history. Industrial democracy was once embraced "as a solution to the nation's social and economic ills."²⁹³

In the New Gilded Age, industrial democracy has vanished from our national lexicon. While enforceable just cause has survived, it is applicable to a relatively small percentage of workplaces that are subject to a negotiated just cause provision or statute. The expectation of workplace fairness remains high even though it is an unenforceable concept unless tightly tied to an allegation of unlawful discrimination or retaliation.

It is a testament to our contemporary culture that we read or hear about just cause primarily in the context of sports stories about the discipline of superstar professional athletes.²⁹⁴ Just cause discipline in that context is generally accepted. In contrast, just cause and tenure protections are the subject to sustained and coordinated attacks in other segments of the economy.²⁹⁵

²⁹¹ Wash. Metro. Transit Auth. v. Fraternal Order of Police/Metro. Transit Lab. Police Comm., Inc., 124 Lab. Arb. Rep. (BNA) 972, 978 (2007) (Evans, Arb.).

²⁹² See COMM. ON INDUSTRIAL RELATIONS, 64TH CONG., FINAL REPORT AND TESTIMONY, 18 (Comm. Print 1960), <https://archive.org/stream/industrialrelati01unitrich#page/n5/mode/2up>.

²⁹³ LICHTENSTEIN, *supra* note 27 at 52.

²⁹⁴ See Ross Newhan, *Howe is Given Permanent Ban by Commissioner*, L.A. TIMES (June. 25, 1992), http://articles.latimes.com/1992-06-25/sports/sp-1393_1_steve-howe (referencing arbitrator's just cause determination regarding pitcher Steve Howe); David Waldstein, *Arbitrator's Ruling on Rodriguez Gives Disciplinary 'Hammer'*, N.Y. TIMES (Jan. 16, 2014), at B17 (discussing Arbitrator Frederic R. Horowitz's award suspending Alex Rodriguez for a season); Mike Wise, *PRO BASKETBALL; N.B.A. Star Who Choked Coach Wins Reinstatement of Contract*, N.Y. TIMES (Mar. 5, 1998), at C8 (discussing arbitrator's just cause determination reinstating basketball player Latrell Sprewell).

²⁹⁵ See Edward M. Eveld, *JCCC Faculty Members Decry Proposal to Ease Firing Rules*, KAN. CITY

Like the treatment of sports, social networking is a cultural phenomenon reflective of the values and contradictions of our times. The rise of social media, along with the growth of fissured workplaces and job insecurity, has created a condition necessitating the reintroduction of enforceable just cause principles into more workplaces. Those principles are important, if not essential, because social networking has become central for communications involving work and work-related collective action.

As we have demonstrated in Part IV, *supra*, the reintroduction of just cause would not preclude the discharge of an employee for an extremely offensive or discriminatory posts. At the same time, just cause principles would encourage workplace stability, policies, and training that can lead to greater prudence and discernment concerning social media. Furthermore, enforceable just cause standards would diminish the likelihood of discrimination litigation, the primary legal vehicle that non-unionized employees have to challenge what they consider to be a miscarriage of workplace justice.

As Nelson Lichtenstein wrote at the turn of the 21st Century, “labor’s greatest deficit is of the ideas necessary to again insert working America into the heart of our national consciousness.”²⁹⁶ The creative deficit includes ways to respond to the growing insecurity of work. There have been few recent efforts to bring just cause principles back into national consciousness through legislation or referenda. One major exception to that deficit is the model just cause legislation supported by the State Innovation Exchange, which includes a definition for just cause.²⁹⁷

Enactment of broad just cause laws is unlikely in the near future. Nevertheless, targeted remedial legislation is possible in the New Gilded Age. Increasingly, employers are mandating that, as a condition of employment, employees waive their right to pursue statutory claims in court, and arbitrate them under pre-dispute mandatory arbitration provisions.²⁹⁸ While there is no definitive data of the number of employees subject to such agreements, “commentators estimate as much as a quarter or

STAR (Feb. 9, 2016), <http://www.kansascity.com/news/government-politics/article59389571.html> (describing the latest legislative proposal to end due process protections for faculty members); Anne Hendershott, *A Violation of Trust at Mount St. Mary’s*, THE CHRONICLE OF HIGHER EDUC. (Feb. 12, 2016), <http://chronicle.com/article/A-Violation-of-Trust-at-Mount/235312> (commenting on the firing of two professors by new college president who was a former private-equity manager).

²⁹⁶ LICHTENSTEIN, *supra* note 27 at 19.

²⁹⁷ See ALICE MODEL: JUST CAUSE FOR EMPLOYEE DISCHARGE OR SUSPENSION ACT, ALICELAW.ORG, at 1 (Apr. 2013), https://s3.amazonaws.com/stateinnovation-uploads/uploads/asset/asset_file/ALICE_Model_Just_Cause_-_7_22_13.pdf.

²⁹⁸ Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

more of all nonunion employees have signed arbitration clauses.”²⁹⁹ It is reasonable to expect that many of the arbitrated employment disputes under these contractual provisions involve social media.

By their very nature, pre-dispute agreements are contracts of adhesion. The requirement to arbitrate is imposed unilaterally prior to or during the employment relationship. Under current law, the obligation to arbitrate statutory workplace claims³⁰⁰ does not require the arbitration of the procedural and substantive fairness of the disciplinary action.³⁰¹

An important means for correcting that legal imbalance would be legislation requiring the arbitration of disciplinary disputes under a just cause standard when a pre-dispute agreement exists concerning an employee’s statutory claims.

Ideally, the remedial legislation would be an amendment to the Federal Arbitration Act (FAA).³⁰² The bill would enhance federal policy favoring arbitration of workplace disputes under the FAA.³⁰³ It would not end the arbitration of statutory claims under current law,³⁰⁴ nor would it eliminate the at-will doctrine generally, reforms that are not politically viable in the current era.³⁰⁵ Rather, the bill would be an incremental change to federal policy to ameliorate the imbalance caused by pre-dispute arbitration agreements, restrain employer arbitrariness, particularly as it relates to

²⁹⁹ Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 93 (2014).

³⁰⁰ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

³⁰¹ See Michael Gallagher, *Statutory Right and Predispute Agreements to Arbitrate in Contracts of Employment*, 66 ST. JOHN’S L. REV. 1067, 1071–73 (1993).

³⁰² 9 U.S.C. §§ 1–38 (2012); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–40 (2011) (concluding that state law conditioning enforcement of agreements to arbitrate without class wide procedures was preempted by the FAA); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 124 (2001) (holding that most pre-dispute employment arbitration agreements are enforceable under the FAA).

³⁰³ 9 U.S.C. §§ 1–38.

³⁰⁴ *Id.*

³⁰⁵ See Zev J. Eigen et al., *Shifting the Paradigm of the Debate: A Proposal to Eliminate At-Will Employment and Implement a “Mandatory Arbitration Act,”* 87 IND. L.J. 271, 273–74 (2012) (criticizing the proposed Arbitration Act of 2009 and proposing a “Mandatory Arbitration Act”); Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment Discrimination Claims*, 46 U. MICH. J. L. REFORM, 789, 791 (2013) (proposing procedural changes applicable to the arbitration of employment discrimination claims under mandatory arbitration agreements); see also Jessica Silver-Greenberg & Michael Corkery, *Bill Seeks to Limit Use of Arbitration to Avoid Courts*, N.Y. TIMES (Feb. 4, 2016), <http://www.nytimes.com/2016/02/05/business/dealbook/bill-seeks-to-limit-use-of-arbitration-to-avoid-courts.html> (discussing that a federal bill to prevent mandatory arbitration of employment cases is “likely to face intense opposition, in Congress and from the business lobby. Other bills, including one that aimed to protect exempt service members from arbitration, have met fierce resistance from banks and the U.S. Chamber of Commerce.”).

social networking, and reintroduce just cause and workplace fairness into our national dialogue.

Under the proposed FAA amendment, an employer would be obligated to arbitrate an employee's objection to disciplinary action under just cause principles whenever the employee is subject to an agreement of employment mandating the arbitration of statutory employment claims under the FAA.

The FAA amendment would define just cause as

“non-disparate and lawful disciplinary action based on job related grounds such as: deliberate work-related misconduct; insubordination; demonstrated incompetence; violations of known workplace rules and related training; workplace violence; discrimination; or unprofessional behavior,” which was “imposed following a reasonable employer investigation with the employee being afforded written notice of the allegations, a reasonable opportunity to respond to those allegations, and after full consideration of the employee's work record, and the at-issue behavior.”

Excluded from its coverage would be employment relationships subject to a written collective bargaining agreement.

The proposed definition would codify a uniform set of just cause principles based on those developed from the time of the Gilded Age. It would also provide employers with clear bases for taking disciplinary action, including adverse actions in response to improper employee behavior while social networking.

Under the proposal, discovery, the hearing, and the issues to be determined would be consolidated before a single arbitrator. The selected arbitrator would first hear and determine the employee's grievance that the discipline violated just cause under the FAA amendment, with the employer having the burden of proof. In many cases, an arbitrator's ruling on that issue would narrow, if not eliminate, the issues to be determined concerning the statutory claims. If the just cause decision does not lead to a voluntary resolution of the statutory claim, the arbitration would proceed on the statutory claim, with the employee having the burden of proof.

An alternative non-federal approach would be through changes in state laws and policies. As we have seen in Parts II and III, *infra*, the at-will doctrine stems from the common law, and states retain the authority to modify the master-servant relationship through legislation.

Applying its police powers, a state might enact a law to create an implied covenant in all individual employment agreements requiring the arbitration of statutory claims to permit an employee to arbitrate a claim

that a disciplinary penalty was imposed without just cause. To avoid probable federal preemption challenges, the state law would have to include a caveat that its application “shall not impair rights guaranteed by the Federal Arbitration Act.” For the same reason, the arbitration of just cause under the proposed state law would be legally and functionally distinct from the arbitration of a statutory claim unless the parties consent to consolidation or a joint arbitral hearing.

Another means for expanding the application of just cause principles would be to mandate the arbitration of just cause discipline by employees of governmental contractors. Historically, this contractual vehicle has been an effective tool by federal and state governments to meet public policy goals.

Our proposed legislation would be a step forward in labor and employment law in the New Gilded Age by expanding the application of enforceable just cause principles to a larger number of workplaces. The reintroduction of just cause through these changes might trigger the resumption of a societal dialogue about the value of job security and workplace fairness principles.

Successful just cause legislation or state referenda in the 21st Century would demonstrate that the law did not look the other way in the face of the growth of contingent employment and the impact of social networking

