

**SOCIAL ISOLATION AND AMERICAN WORKERS: EMPLOYEE
BLOGGING AND LEGAL REFORM**

*Rafael Gely and Leonard Bierman**

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I. INTRODUCTION

For many employees, blogs have become “virtual union halls” where employees can connect, building social ties and reducing the isolation inherent in present-day American life.¹ Employees, even extremely busy ones like investment bankers or attorneys,² can use off-duty blogging³ to easily communicate and connect with fellow employees. Blogs allow employees to discuss a broad range of topics, both work-related⁴ and personal, and create a sense of community

1. See Thomas A. Santora, *The Virtual Union Hall*, in *THE CYBERUNION HANDBOOK* 180, 181 (Arthur B. Shostak ed., 2002) (“Our virtual union hall is where we can simply ‘hang out’ with our colleagues in the struggle and ‘carry on’ about anything from world events to labor issues to home cooking recipes.”). As the name implies, the “union hall” is the office of a local union. There, the local union conducts its business, such as preparing for organizing campaigns or conducting membership meetings, and keeps its records. In some industries, the union hall historically served as a “hiring hall,” or a place where employers could recruit workers. TERRY L. LEAP, *COLLECTIVE BARGAINING AND LABOR RELATIONS* 231 (1995). Beyond these mechanics, the union hall also historically served a social function, as a place for workers to socialize outside of work. Cf. Ian Greer, Book Review, *The Last Good Job in America: Work and Education in the New Global Technoculture*, 56 *INDUS. & LAB. REL. REV.* 556, 557 (2003) (suggesting the union hall has recently become a place “in the suburbs where elected officials and staff identify ‘leverage points,’ administer benefits, and find ways to ‘deliver,’” as opposed to its earlier role as a “space accessible to working-class communities where members get together to eat and drink and socialize with union brothers and sisters”); *infra* note 118 (detailing legal protections offered to the union hall).

2. See Lisa Kassenaar & Courtney Dentch, *Bankers Go Blogging*, *BLOOMBERG MARKETS*, Aug. 2006, at 16.

3. While some employers may sanction or even encourage work-time blogging by employees, such employee blogging is beyond the scope of this Article, given employers’ traditionally unfettered rights to regulate on-duty employee activities. Our focus here is on the role off-duty employee blogging can play in ameliorating employee social isolation. See *infra* notes 292–296 and accompanying text.

4. Bloggers of this type can be found in a variety of professions. See, e.g., Legal Blogs, <http://law-library.rutgers.edu/resources/lawblogs.html> (last visited Apr. 17, 2007); Bean-counterblog.com, <http://beancounterblog.com/2005/09/30/accountants-who-blog/> (last visited Apr. 17, 2007); DB’s Medical Rants, <http://medrants.com/> (last visited Apr. 17, 2007); Construction Web Logs, <http://www.greatpossibilities.com/blogs/index.php> (last visited Apr. 17, 2007).

Employees might blog to keep their co-workers informed about issues of collective concern. For example, a group of scientists at the Los Alamos National Laboratory (“LANL”) created a blog in response to a decision by the Laboratory’s Director to shut down the operation due to concerns about security and safety violations. The blog was created in order to “provide an uncensored forum where those concerned about the future of LANL may express their views.” LANL: The Real Story, <http://www.parrot-farm.net/~roberts/lanl-the-real-story> (last visited Apr. 17, 2007). The blog became the focus of Congressional hearings, with various parties arguing about the propriety of the venture. See David Kestenbaum, National Public Radio, Los Alamos National Lab Blog Draws Ire on Hill, May 19, 2005, <http://www.npr.org/templates/story/story.php?storyId=4657337>.

with their co-workers.⁵ Therefore, we believe, off-duty employee bloggers deserve legal protections commensurate with their roles as builders of social communities.

American workers, and indeed Americans generally, are becoming increasingly socially isolated.⁶ A recent empirical study conducted by Professors Miller McPherson, Lynn Smith-Lovin, and Matthew Brashears found a precipitous decline over the past two decades in the number of confidants with whom Americans discuss important matters.⁷ The number of people saying there was no one with whom they discussed important matters more than doubled, and, increasingly, even those who had a confidant frequently had only one — their spouse.⁸

In 1985, about thirty percent of people had at least one confidant among their co-workers.⁹ That proportion fell to only eighteen percent in 2004.¹⁰ The McPherson study supports the notion that conversation in the workplace is more superficial than it once was.¹¹ Younger workers (aged eighteen to thirty-nine) are seeking a broader range of less intense relationships.¹² The McPherson study specifically points

5. See Haya El Nasser, *Beyond Kiwanis: Internet Builds New Communities*, USA TODAY, June 2, 2005, at A1. One example of this type of blogger is Heather B. Armstrong, who was fired from her web design job in 2002 for blogging about work and colleagues. See Dooce, About this Site, <http://dooce.com/about.html> (last visited Apr. 17, 2007). Armstrong was terminated about one year after she began blogging. In one of her earlier postings she lists the reasons she “should not be allowed to work from home.” The list includes:

Too many cushiony horizontal surfaces prime for nappage; 13 bowls of cereal today, all within a two hour period; Oprah; Total Request Live; Horizontal surfaces; Rabid Naked IMing; Shower? Why?; Porn; Have you seen my couch and it’s [sic] lovely horizontal surface?; That box of Wheaties is GONE; Passions; The nap after Passions; Too much time alone with two jars of Jif Peanut Butter; The nap to recover from all the naps; I can lie down underneath my desk and no one is going to know. No one. Justin Timberlake.

Posting of Heather B. Armstrong to Dooce, Reasons I Should Not Be Allowed to Work from Home, http://www.dooce.com/archives/daily/06_27_2001.html (June 27, 2001).

Perhaps the best-known blogger of this kind is Ellen Simonetti. Before her termination in October 2004, Ms. Simonetti presented a “semi-fictitious account of life as a flight attendant.” Posting of Ellen Simonetti to Diary of a Fired Flight Attendant, Queen of Sky Story Summary, <http://queenofsky.journalspace.com/?cmd=displaycomments&dcid=471&entryid=471> (Dec. 21, 2004). As with other employee bloggers, Ms. Simonetti’s blog blended work and private aspects of her life. In an article she wrote following her termination, Ms. Simonetti noted that she had started her blog “as a form of therapy. I had lost my mother in September 2003 to cancer and that hit me hard. It was much easier to write about my feelings than talk about them.” Ellen Simonetti, *I Was Fired for Blogging*, CNET NEWS.COM, Dec. 16, 2004, http://news.com.com/1+was+fired+for+blogging/2010-1030_3-5490836.html.

6. See Miller McPherson et al., *Social Isolation in America: Changes in Core Discussion Networks over Two Decades*, 71 AM. SOC. REV. 353, 373 (2006).

7. *Id.*

8. *Id.* at 359.

9. *Id.*

10. *Id.*

11. See *infra* Parts III.B–C.

12. See McPherson et al., *supra* note 6, at 371, 373.

to the role new technologies have played in changing the communication patterns of Americans, particularly the young.¹³ Such technologies “may foster a wider, less-localized array of weak ties, rather than the strong, tightly interconnected” ties traditionally observed.¹⁴ While this development may not be entirely negative, the study recommends further examination of the ways in which such technologies can foster stronger social connections.¹⁵

The McPherson study builds upon prior research in this area, especially the work of Professor Robert Putnam.¹⁶ Using descriptive statistics, Putnam argues that “social connectedness” in the United States has sharply declined in recent decades.¹⁷ Putnam points to an increase in the number of dual-career families,¹⁸ increased geographic mobility,¹⁹ long commutes to work,²⁰ and the near abolition of private sector unionization²¹ as evidence of this phenomenon.

Though Putnam’s work has been criticized,²² he was recently vindicated by similar findings in the comprehensive McPherson study. Putnam himself noted that the study reinforces much of what he previously reported, while leaving open the “interesting” question of how the Internet can be used “to strengthen and deepen relationships we have offline.”²³

The ability of blogs to serve such a community-building function has been called into question, as the rights of employees who blog outside of work have come under increased scrutiny. In recent years, various high-profile instances of employees being fired for material posted on their blogs have raised serious questions about the legal protections available to employees who blog.²⁴ Although it is not

13. *Id.* at 373.

14. *Id.*

15. *See id.*

16. *See generally* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

17. *Id.* at 277–84.

18. *Id.* at 194–203.

19. *Id.* at 204–15.

20. *See* Michelle Conlin et al., *Extreme Commuting*, *BUS. WEEK*, Feb. 21, 2005, at 80, 81 (quoting Professor Putnam).

21. PUTNAM, *supra* note 16, at 81; *see also* Press Release, U.S. Bureau of Labor Statistics, *Union Members in 2005* (Jan. 20, 2006), available at http://www.bls.gov/news.release/archives/union2_01202006.pdf (noting that the current level of U.S. private sector unionization is 7.8 percent).

22. *See, e.g.*, Claude S. Fischer, *Bowling Alone: What’s the Score?*, 27 *SOC. NETWORKS* 155 (2005); Pamela Paxton, *Is Social Capital Declining in the United States? A Multiple Indicator Assessment*, 105 *AM. J. OF SOC.* 88 (1999); Thomas Rotolo & John Wilson, *What Happened to the “Long Civic Generation”?: Explaining Cohort Differences in Volunteerism*, 82 *SOC. FORCES* 1091 (2004).

23. *See* Henry Fountain, *The Lonely American Just Got a Bit Lonelier*, *N.Y. TIMES*, July 2, 2006, § 4, at 12.

24. *See* Christine Negroni, *Fired Flight Attendant Finds Blogs Can Backfire*, *N.Y. TIMES*, Nov. 16, 2004, at C9; Krysten Crawford, *Have a Blog, Lose Your Job?*, *CNN/MONEY*, Feb. 15, 2005, <http://money.cnn.com/2005/02/14/news/economy/blogging>. A group of employ-

widely recognized,²⁵ most employees in the United States are “employees-at-will” — that is, they can be fired by their employers at any time for essentially any reason, or for no reason at all.²⁶ As a result, employers have generally been legally free to fire employees for even off-duty blogging.²⁷

The most comprehensive statutory protection currently afforded employee bloggers is provided by the 1935 National Labor Relations Act (“NLRA”), which gives workers the right to form private sector unions.²⁸ For a variety of reasons, however, the NLRA is proving ineffective in protecting the rights of employee bloggers.²⁹ This Article further demonstrates that state common law exceptions to the employment-at-will doctrine are not providing significant redress to employees fired or otherwise disciplined for blogging.³⁰ Despite the many possible social benefits of employee blogging, employees currently engage in such activity at their peril.

Part II of this Article presents a review of blogs and the blogging phenomenon. Part III examines the problems described in Professor Putnam’s work and the McPherson study, paying particular attention to the special place employment and the workplace have in the social connectedness story. Part IV analyzes the potential for blogs to address these problems within the employment context. Part V details the protections afforded to employee bloggers under the NLRA. Part VI then examines the issue of employee off-duty blogging in the context of both state common law and state statutory law.

Parts VII and VIII review various options for legal reform in this arena, and ultimately recommend specific state legislative action as the most effective solution. The template for such reform already exists. Over the past three decades, a majority of states have enacted statutes protecting a few specific employee off-duty activities.³¹ Among other things, this Article recommends that states should amend off-duty conduct statutes to provide explicit protection for off-duty employee blogging.³²

ees who were terminated started The Bloggers’ Rights Blog, which promotes employees’ “freedom to blog,” and threatens to blacklist “blogophobic” employers. Posting to The Bloggers’ Rights Blog, International Bloggers’ Bill of Rights <http://rights.journalspace.com/> (Jan. 4, 2005).

25. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997) (discussing the lack of knowledge individuals have regarding their rights or the absence of legal protections at work).

26. See *infra* notes 203–05 and accompanying text.

27. See *infra* notes 203–05 and accompanying text.

28. 29 U.S.C. §§ 151–69 (2000).

29. See *infra* Part V.

30. See *infra* Part VI.A.

31. See Jessica Jackson, *Colorado’s Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 U. COLO. L. REV. 143, 153–54 (1996).

32. See *infra* Part VII.D.

II. BLOGS: A PRIMER

*A BLOG, YOU SEE, IS A LITTLE FIRST AMENDMENT MACHINE.*³³

Blogs have become a very important part of American life and culture.³⁴ Millions of Americans have blogs, and that number continues to increase.³⁵ The Merriam-Webster Dictionary defines a blog as “a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.”³⁶ While not incorrect, this definition is by no means complete. In fact, the very incompleteness of the definition reflects the quickly changing nature of the blogosphere.

Not long ago, blogs were associated with personal online diaries “typically concerned with boyfriend problems or techie news.”³⁷ Writing about his early experiences in blogging, Andrew Sullivan noted that most blogs were “quirky, small, often solipsistic enterprises.”³⁸ He singled out the site of an early blog pioneer for discussing “among other things, his passion for sex and drugs,”³⁹ and summarized his early impressions of blogs by noting that “reading them is like reading someone else’s diary over their shoulder.”⁴⁰

At some point after September 11, 2001, however, some blogs became more than an “endless stream of blurts about the writer’s day.”⁴¹ According to Sullivan:

33. Posting of Jay Rosen to Pressthink, Bloggers vs. Journalists is Over, http://journalism.nyu.edu/pubzone/weblogs/pressthink/2005/01/21/berk_essay.html (Jan. 21, 2005, 17:43 EST).

34. See Memorandum from the Pew Internet & American Life Project on The State of Blogging (Jan. 2005), available at http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf. The impact that blogs are having on all aspects of our lives is beginning to catch the attention of leading legal scholars. See, e.g., Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation and Information Markets*, 80 N.Y.U. L. REV. 962, 1022–23 (2005) (describing the use of blogs for information sharing and information processing by groups); R. Polk Wagner, *On Software Regulation*, 78 S. CAL. L. REV. 457, 476 (2005) (describing the explosion of blogs and its effects on software regulation); Michael J. Gerhardt, Review Essay, *The First Amendment’s Biggest Threat*, 89 MINN. L. REV. 1798, 1819 (2005) (describing the impact of blogs on both First Amendment and copyright law); Richard A. Posner, Book Review, *Bad News*, N.Y. TIMES, July 31, 2005, § 7, at 1 (noting how blogs are challenging existing paradigms in American politics, journalism and culture).

35. See Carl Bialik, *Measuring the Impact of Blogs Requires More than Counting*, WALL ST. J. ONLINE, May 26, 2005, available at http://online.wsj.com/public/article/SB111685593903640572-13X13yRj8RM2EEiXToiG9FckZk_20071216.html.

36. MERRIAM-WEBSTER’S ONLINE DICTIONARY, <http://m-w.com/dictionary/blog> (last visited Apr. 17, 2007).

37. Meg Hourihan, *What We’re Doing When We Blog*, O’REILLY WEB DEVCENTER, June 13, 2002, <http://www.oreillynet.com/pub/a/javascript/2002/06/13/megnut.html> (discussing some of the common features among blogs).

38. Andrew Sullivan, *A Blogger Manifesto: Why Online Weblogs Are One Future for Journalism*, Feb. 24, 2002, <http://andrewsullivan.com/culture.php>.

39. *Id.*

40. *Id.*

41. See REBECCA BLOOD, *THE WEBLOG HANDBOOK 1* (2002).

[My] blog almost seemed designed for this moment. In an instant, during the crisis, the market for serious news commentary soared. But people were not just hungry for news, I realized. They were hungry for communication, for checking their gut against someone they had come to know, for emotional support and psychological bonding. In this world, the very personal nature of blogs had far more resonance than more impersonal corporate media products. Readers were more skeptical of anonymous news organizations anyway, and preferred to supplement them with individual writers they knew and liked.⁴²

This account suggests that the dramatic events of the first few years of this decade inspired a demand not only for information, but for a more interactive and personal way of communicating — one that generated trust. Blogs satisfied that demand.⁴³

At the same time, blogs gained social and political clout.⁴⁴ Between 2002 and 2004, this newfound power was illustrated by several important events. Blogs played a major role in the resignations of Trent Lott as United States Senate majority leader and Howell Raines as executive editor of *The New York Times*.⁴⁵ Law professor, political commentator, and blogger Hugh Hewitt refers to these events as “blog swarms,” noting: “When many blogs pick up a theme or begin to pursue a story, a blog swarm forms. A blog swarm is an early indicator of an opinion storm brewing, which, when it breaks, will fundamentally alter the general public’s understanding of a person, place, product, or phenomenon.”⁴⁶ Sensing blogs’ increasing importance, both major political parties made them important components of their 2004 presidential campaigns.⁴⁷

42. Sullivan, *supra* note 38.

43. According to Professor Hewitt, “most visitors to my site came because they believed I had something unique to offer them. They trusted me.” HUGH HEWITT, BLOG: UNDERSTANDING THE INFORMATION REFORMATION THAT’S CHANGING YOUR WORLD xv (2005).

44. Blogs have proliferated at an incredible rate. Toward the end of the 1990s there were perhaps two dozen blogs. *See id.*, at 70. The online blog-tracking service Technorati tracked more than seventy million blogs as of April 2007. Posting of Dave Sifry to Technorati Weblog, The State of the Live Web, April 2007, <http://technorati.com/weblog/2007/04/328.html> (April 5, 2007).

45. *See* Posner, *supra* note 34, at 10 (suggesting that blogs were a critical factor in Senator Lott’s resignation); HEWITT, *supra* note 43, at 17–27 (detailing blogs’ effect in forcing Mr. Raines to step down).

46. HEWITT, *supra* note 43, at 1.

47. ALEXIS RICE, CAMPAIGNSONLINE.ORG, JOHNS HOPKINS UNIVERSITY DEPARTMENT OF COMMUNICATION IN THE CONTEMPORARY SOCIETY, THE USE OF BLOGS IN THE 2004 PRESIDENTIAL ELECTION (Oct. 2003), <http://www.campaignsonline.org/reports/blog.pdf>.

What factors might explain the ability of blogs to inspire so much trust, thereby attracting the broad participation necessary to wield such power? Commentators have suggested that the answer lies not in the content of blogs, but in their format. In particular, three aspects of blog format have played an important role in blogs' fast-growing influence: reverse chronological order, transparency through direct links to source material, and interactivity.

Unlike most earlier bulletin boards and discussion groups, blogs usually arrange posts in reverse chronological order, with the most recent material at the top where the reader can view it most easily. By naturally drawing attention to new posts, this simple feature creates a reader expectation that a blog will be updated regularly, and that it should thus be visited frequently — potentially several times per day. Readers expect the newest posts on a blog to add value by being timely and topical, and will return repeatedly to blogs that fulfill this expectation.⁴⁸

The transparency generated by direct links to bloggers' sources is another important source of value in blogs, and represents one of their major contributions to Internet discourse. In the 1990s, as the Internet developed, the objective of commercial websites was to induce visitors to stay as long as possible, so they would view more advertisements.⁴⁹ This objective led to the development of comprehensive websites that attempted to include every possible type of information wanted by the reader. The goal of visitor retention was considered so important that operators of such websites commonly refused to use any external links.⁵⁰ Blogs are based on precisely the opposite model: they link to "anything and everything," almost always including many outside sources.⁵¹ Through outside linking, bloggers provide readers with a context for blog posts. By contextualizing information, links generate transparency and foster critical evaluation of bloggers' research, interpretation, and analyses, revealing bias or inaccuracy, and potentially enhancing their credibility.⁵² As counterintuitive as it may seem from an old-media perspective, "weblogs attract regular readers precisely because they regularly point readers away."⁵³

A blogger's selection of links also serves a filtering function. Blogs are extremely useful in solving one of today's key problems: the constant overflow of information. Bloggers help with the information glut by pointing out particular sources that enhance their readers' understanding and filtering the rest.⁵⁴ Because the reader eventually

48. See BLOOD, *supra* note 41, at 9.

49. *Id.*

50. *Id.*

51. *Id.* at 6.

52. *See id.*

53. *Id.* at 10.

54. *Id.* at 12.

develops trust in the blogger, and his or her point of view, the reader can delegate to the blogger the task of keeping the reader informed.⁵⁵

A third characteristic of blogs that is important to their considerable influence is their interactivity, facilitated by comment systems.⁵⁶ Comment systems, which appear in several forms, allow readers to comment on blog posts. The comments become part of the blog, and other readers, not just the blogger, may access them. Bloggers frequently invite their readers to comment, or to offer additional information on a particular issue.⁵⁷ Finally, commenters also increase blogs' accuracy and credibility, by quickly correcting mistakes and pointing out both flaws in a blogger's argument and potential solutions to those flaws.

Low barriers to entry constitute a final factor in the explosive growth of the blogosphere, and its resultant power. Creating a blog and getting it online are relatively easy and inexpensive.⁵⁸ Because bloggers can finance themselves, they completely control their blogs' content, tone, and direction. Unlike print media or websites based on the comprehensive model, the blog medium is not limited to corporate actors or individuals seeking only a small audience. The diversity of views available through blogs, attributable at least partly to blogging's low cost of entry, further adds to the blog medium's credibility.⁵⁹

55. *See id.*

56. *See id.* at 17–18.

57. Again, Andrew Sullivan's experience is instructive:

In October of 2000, I started my fledgling site, posting pieces I had written, and then writing my own blog, publishing small nuggets of opinion and observation at least twice a day about this, that and the other. I thought of it as a useful vanity site — and urged my friends and their friends to read it. But within a couple of weeks, something odd started happening. With only a few hundred readers, a few started writing back. They picked up on my interests, and sent me links, ideas and materials to add to the blog. Before long, around half the material on my site was suggested by readers. Sometimes, the readers knew far more about any subject than I could.

Sullivan, *supra* note 38.

58. Blog Tips, <http://blog.lifetips.com> (last visited Apr. 17, 2007), demonstrates the ease of starting a blog:

If you own a computer or have access to a computer (at your local library, for example) and have an Internet connection, then you pretty much know everything you need to know to start a personal blog. There are a ton of blog hosting services today, and each of them provides easy registration, templates, and online support to guide you through the process of setting up a personal blog. One of the most popular blog hosts is LiveJournal.com. LiveJournal offers users a simple-to-use, customizable blogging tool. Registration at the basic level is free, but you can upgrade for a fee and gain access to a wider selection of tools and features.

Id.

59. *See* Sullivan, *supra* note 38 (“[T]he universe of permissible opinions will expand, unconstrained by the prejudices, tastes or interests of the old media elite.”).

“Suddenly,” note David Kirkpatrick and Daniel Roth in *Fortune*, “everyone’s a publisher and everyone’s a critic.”⁶⁰

III. SOCIAL ISOLATION IN AMERICA

A. *The Decline in Interpersonal “Connectedness”*

The title of Professor Putnam’s book, *Bowling Alone*,⁶¹ evocatively illustrates the decline in interpersonal “connectedness” faced by many Americans today. The nature of current American life, with its dual-career families, moves to suburbia, and long, lonely commutes,⁶² is not one that easily fosters group activities or other forms of community interaction. Americans are increasingly on their own. Indeed, the McPherson study found that approximately one quarter of Americans had *zero* people with whom they felt comfortable discussing truly important matters, up from ten percent in 1985.⁶³ Moreover, an astonishing 53.4 percent of people had no one outside their families with whom they discussed such matters.⁶⁴ Putnam has summarized these trends as follows:

For the first two-thirds of the twentieth century a powerful tide bore Americans into ever deeper engagement in the life of their communities, but a few decades ago — silently, without warning — that tide reversed and we were overtaken by a treacherous rip current. Without at first noticing, we have been pulled apart from one another and from our communities over the last third of the century.⁶⁵

Clearly, in terms of interpersonal connectedness, America has changed markedly in the past fifty years.

While there might be some benefits to the social isolation prevalent in today’s American culture, these are outweighed by the costs of this cultural shift.⁶⁶ For example, related declines in trust and reciprocity have made it difficult to achieve the cooperation needed to re-

60. David Kirkpatrick & Daniel Roth, *Why There’s No Escaping the Blog*, *FORTUNE*, Jan. 10, 2005, at 44; see also HEWITT, *supra* note 43, at 154 (“Now that writers and reporters, pundits and everyone with a keyboard have access to publishing technology, there are no gates to keep, no power to say no to anyone.”).

61. PUTNAM, *supra* note 16.

62. *Id.* at 194–215.

63. McPherson et al., *supra* note 6, at 359.

64. *Id.* at 358.

65. PUTNAM, *supra* note 16, at 27.

66. See *infra* Part III.C.

solve collective action problems.⁶⁷ When “bonding” social networks become weaker, organizations often operate less efficiently.⁶⁸ Today, legal rules are encouraging the replacement of informal, trust-based contracts with formal written contracts, which have inherently higher transaction costs.⁶⁹ Furthermore, the “bridging” aspects of rich social networks no longer serve as effectively in job-seeking and other endeavors they have traditionally facilitated.⁷⁰

Today, there is a need for greater social connectedness, but both Putnam and the authors of the McPherson study seem to agree that such connectedness is more likely to come via the Internet than from chats with co-workers on the walk home from work.⁷¹ Although the interpersonal ties created through blogs and related mechanisms may not be as deep as those created through bowling league participation or nightly drinks with co-workers, such mechanisms do have the potential to connect individuals in real and important ways.⁷²

B. The Workplace as a Nexus of Interpersonal Connectivity

In theory, the workplace serves as an important focal point for interpersonal connectivity. Work provides many opportunities for social engagement, which may be scarce elsewhere in daily life. “Work itself,” notes Professor Cynthia Estlund, “involves intense social engagement, cooperation, and trust. . . . At the workplace, individuals . . . practice skills of communication, cooperation, compromise, and decision-making.”⁷³ Moreover, more Americans are participating in the labor force than ever before, and they are spending more time working.⁷⁴ As Professor Patrick Schlitz has noted in the context of large law firms, current work-hour requirements may result in employees having little time for anything other than work.⁷⁵ Espe-

67. See Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039, 1057 (1999); PUTNAM, *supra* note 16, at 140–41.

68. See PUTNAM, *supra* note 16, at 22–23.

69. See *id.* at 288, 325 (contrasting the advantages of informal dealings with the costs of formalizing market transactions); ROBERT D. PUTNAM ET AL., MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 171–76 (1993) (examining the social benefits of traditional informal arrangements in Italy); Robert A. Hillman, *The “New Conservatism” in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879 (1999); cf. Ronald McCallum & Andrew Stewart, *Employee Loyalty in Australia*, 20 COMP. LAB. L. & POL’Y J. 155, 156–61 (1999) (describing a similar trend in the employment context in Australia).

70. See PUTNAM, *supra* note 16, at 22–23; see also MARK S. GRANOVETTER, GETTING A JOB 12, 51–62 (1974) (discussing the benefits of such bridging networks in job-seeking).

71. See Fountain, *supra* note 23; McPherson et al., *supra* note 6, at 373.

72. See *supra* Part II.

73. CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 30 (2003).

74. See Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271, 276–77 (2002).

75. See Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888–95 (1999).

cially as Americans are marrying later, divorcing more often, and living alone more, work may be becoming the new center of American community, and we may be “transferr[ing] . . . our community ties from the front porch to the water cooler.”⁷⁶

As the recent McPherson study documents, however, we enjoy fewer deep and meaningful social interactions at work today than we did in the past.⁷⁷ We live in a “flat” world⁷⁸ of increasing global competition, where, for example, even jobs such as legal research are being outsourced to countries like India.⁷⁹ While companies like IBM Corporation once told employees that they were “member[s] of the corporate family for life,”⁸⁰ this is no longer the case. In today’s risky and uncertain workplace, employees are justifiably wary about becoming too open with co-workers or too loyal to their employers.⁸¹ Moreover, the tendency of many large corporations to fill increasing parts of their workforce with temporary or contingent workers or independent contractors reinforces these trends.⁸² Indeed, management researchers have recently found that the presence of employees with nonstandard work arrangements correlates with considerable resentment in the workplace.⁸³

American workers no longer expect to have one place of employment and one set of co-workers for life, in part because they expect to live in many different communities during their lifetimes.⁸⁴ As a result, they instinctively tend to “put [their] head[s] down” and concentrate more closely on their own work in their current jobs.⁸⁵ As one

76. PUTNAM, *supra* note 16, at 85; *see also* ESTLUND, *supra* note 73, at 7 (“The workplace is the single most important site of cooperative interaction and sociability among adult citizens outside the family.”).

77. McPherson et al., *supra* note 6, at 359.

78. *See* THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

79. Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. (forthcoming 2007).

80. PUTNAM, *supra* note 16, at 88.

81. *See* CHARLES HECKSCHER, *WHITE COLLAR BLUES: MANAGEMENT LOYALTIES IN AN AGE OF CORPORATE RESTRUCTURING* (1995) (describing the decrease in American managers’ job security and their resulting decrease in loyalty); PAUL OSTERMAN, *SECURING PROSPERITY: THE AMERICAN LABOR MARKET: HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT* (1999) (describing the changes in the employment relationship in the era of weakened job security); *cf.* Peter Capelli, *Rethinking Employment*, 33 BRIT. J. INDUS. REL. 563, 577–80 (1995) (describing American workers’ decreased job security and shorter job tenure).

82. *See* PUTNAM, *supra* note 16, at 90; Ken Hudson, *The Disposable Worker*, 52 MONTHLY REV. 43 (2001) (describing the recent rise in contingent and nonstandard workers); *cf.* Arne L. Kalleberg, *Nonstandard Employment Relations: Part-time, Temporary, and Contract Work*, 26 ANN. REV. SOC. 341 (2000) (describing the rise of nonstandard employment relationships).

83. *See* Joseph P. Broschak & Alison Davis-Blake, *Mixing Standard Work and Nonstandard Deals: The Consequences of Heterogeneity in Employment Arrangements*, 49 ACAD. MGMT. J. 371 (2006).

84. *See* PUTNAM, *supra* note 16, at 204.

85. HECKSCHER, *supra* note 81, at 6.

middle manager recently said of his own employment, “We’re all alone out here. It’s been very stressful.”⁸⁶

For these reasons, today’s American workplaces are increasingly fostering what Professor Mark Granovetter calls “weak ties,”⁸⁷ as opposed to the “strong ties” often created in American workplaces of the past. Our hope is that Internet technologies — and blogs in particular — can decrease social isolation in today’s workplaces by strengthening ties between co-workers.

C. The Law and Declining Workplace Connectivity

Employees need to be able to communicate with each other for workplace social engagement to flourish. But under current law, “[r]ights of free speech . . . are, to put it mildly, insecure in the workplace.”⁸⁸ The source of this insecurity is twofold.

First, monitoring and control of employee speech has increased considerably.⁸⁹ During the last century, labor unions provided employees a voice;⁹⁰ they were the principal means by which a large segment of the American labor force could influence the terms of their employment. Union organizing activities helped make employees aware of their rights under the NLRA⁹¹ to engage in “concerted activities,”⁹² including conversations about pay and working conditions. Upon winning National Labor Relations Board (“NLRB”) labor certification elections, unions engaged in collective bargaining with employers, a process that “institutionalize[d] communication between bosses and workers.”⁹³ Collective bargaining contracts acted as a

86. PUTNAM, *supra* note 16, at 88 (internal quotation marks omitted).

87. Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973); see ESTLUND, *supra* note 73, at 35–56. “The ‘bureaucratic’ models that prevailed during much of the last century within the primary sector — the large private enterprises that dominate leading sectors of the economy — were relatively hospitable to the development of strong and stable workplace bonds.” *Id.* at 35. Estlund also notes that, although some current workplace models such as sociability and collaboration are consistent with developing strong ties, current trends such as telecommuting generally make it harder for workers to develop strong social ties. *Id.*

88. PUTNAM, *supra* note 16, at 92.

89. *Id.* at 91–92.

90. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 7–11 (2000).

91. 29 U.S.C. §§ 151–69 (2000).

92. *Id.* § 157.

93. LEAP, *supra* note 1, at 10. Collective bargaining agreements between companies and unions tend to be comprehensive in nature, covering a wide range of workplace issues. These agreements generally provide employees broad opportunities to speak with each other and to speak out regarding working conditions. Indeed, virtually all collective bargaining agreements have formal employee grievance procedures that culminate in labor arbitration. In addition, nearly all collective bargaining agreements mandate that employers must show “just cause” before disciplining or firing an employee. See *id.*

check on unilateral employer action that might chill employee interaction and communication.⁹⁴

“[U]nions, like other voluntary associations . . . both created and depended upon . . . networks of reciprocity.”⁹⁵ However, at least for today’s private sector workers, the “solidarity of union halls” is virtually gone.⁹⁶ With the precipitous decline in private sector unionization,⁹⁷ traditional collective bargaining agreements providing that employees could be fired only for just cause have generally been replaced by individual employment-at-will arrangements.⁹⁸ Since private sector employers accordingly have broad rights to fire employees for almost any reason,⁹⁹ employees’ job security has declined in tandem with falling levels of unionization.¹⁰⁰

This period of declining unionization and rising at-will employment has also been characterized by unprecedented employment law intervention at the federal level, including Title VII of the Civil Rights Act of 1964,¹⁰¹ the Age Discrimination in Employment Act,¹⁰² and the American with Disabilities Act.¹⁰³ These laws, while aimed at preventing abuse and discrimination, have had the unintended effect of creating what Professor Vicki Schultz calls the “sanitized” workplace, where employers clamp down on worker conversations and interac-

94. For example, the U.S. Court of Appeals for the District of Columbia Circuit held that brewer Anheuser-Busch could not unilaterally install hidden surveillance cameras in employee break areas of a unionized plant. *Brewers and Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45 (D.C. Cir. 2005). The court held that such company monitoring was subject to collective bargaining. *Id.* However, workers in a non-unionized workplace are not protected either by this specific holding or by NLRB safeguards generally.

In addition, while the NLRA protects the right of both unionized and non-unionized workers to talk to co-workers about their pay, there is widespread ignorance of this right among non-unionized workers. See Rafael Gely & Leonard Bierman, *The Law and Economics of Employee Information Exchange in the Knowledge Economy*, 12 GEO. MASON L. REV. 651, 684–85 (2004).

95. PUTNAM, *supra* note 16, at 81.

96. *Id.*; see *supra* note 1.

97. PUTNAM, *supra* note 16, at 81; cf. U.S. Bureau of Labor Statistics, *supra* note 21 (noting that only 7.8 percent of the American labor force was unionized in 2005).

98. It should be noted that Montana has statutorily overruled the employment-at-will doctrine. MONT. CODE ANN. §§ 39-2-901 to 915 (2005); see also Leonard Bierman & Stuart A. Youngblood, *Interpreting Montana’s Pathbreaking Wrongful Discharge from Employment Act: A Preliminary Analysis*, 53 MONT. L. REV. 53 (1992).

99. In theory, the strongest exception to the employment-at-will doctrine is the public policy exception, which prevents employers from firing employees for engaging in activities that clearly promote public policy. See *Nees v. Hock*, 536 P.2d 512, 516 (Or. 1975) (awarding compensatory damages to employee discharged because of jury duty); Paul S. Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145, 161–64 (2003). The scope of this exception, however, has historically been rather limited.

100. Cf. Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002) (describing employees’ lack of knowledge about their rights under the employment-at-will doctrine); Gutman, *supra* note 99.

101. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

102. 29 U.S.C. §§ 621–34 (2000).

103. 42 U.S.C. §§ 12101–213.

tions.¹⁰⁴ Current harassment law, for example, creates incentives for employers to censor a wide range of speech and to limit social interactions among their employees via zero-tolerance and anti-fraternization policies.¹⁰⁵ The results of these policies can be detrimental:

Given all we have learned about the importance of workplace conversations in civic and social life, it is deeply troubling that the law encourages employers to be so censorious and so vigilant in policing co-worker conversations and interactions. It is no answer to say — as defenders of harassment law sometimes do — that “the workplace is for work.” As we have seen, the workplace is for much more than work, both in the lives of individual workers and in the society as a whole. The law should not adopt as its motto a proposition that would so impoverish social life.¹⁰⁶

In sum, the current legal environment has discouraged workplace social engagement, both by weakening the networks enabled by collective bargaining and by perpetuating the sanitized workplace.

IV. BLOGGING AS A GENERATOR OF EMPLOYEE CONNECTIVITY

Do employees whose speech at work has been chilled simply forget about their concerns? Does such employer chilling simply have no further consequences? As Professors George Akerlof and Rachel Kranton have argued, employees who lack expressive opportunities at work may become frustrated and seek alternative outlets for their expression.¹⁰⁷ We contend that the blogosphere has become a new space where the voices of employees can be heard at a very low cost, unimpeded by the hierarchical barriers present at work.

Given the current employment environment, it is unsurprising that employees are increasingly turning to the Internet, especially blogs, to talk about work.¹⁰⁸ A recent survey indicates that five percent of

104. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) (discussing the adverse effects of sexual harassment law on workplace relationships).

105. See ESTLUND, *supra* note 73, at 157. Indeed, the NLRB explicitly upheld an employer's anti-fraternization policy in *Guardmark LLC*, 344 N.L.R.B. 97 (2005).

106. ESTLUND, *supra* note 73, at 158 (footnote omitted).

107. George A. Akerlof & Rachel E. Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSP. 9, 20–21 (2005).

108. See Todd Wallack, *Beware if Your Blog Is Related to Work*, S.F. CHRON., Jan. 24, 2005, at C1 (noting that “blogging [is] going mainstream” and that “millions of Americans [are] logging details of their everyday lives, including work”).

American workers currently maintain blogs;¹⁰⁹ another study found that “up to 9 percent of people posted to blogs (either others [sic] or their own) to comment on or defend their employer.”¹¹⁰ Interestingly, employees’ blogging about their jobs, employers, and co-workers is generally positive.¹¹¹ This suggests that employees are increasingly looking to blogs to create a positive sense of social engagement and community in their work.

Indeed, employee blogs can create what Professor Paul Resnick has termed “cyberclubs,” or Internet-based communities of shared interests.¹¹² They also provide employees with low-cost opportunities to interact and communicate. Moreover, they allow employees to transcend the temporal and spatial boundaries of the physical workplace and to easily reach fellow employees, even those working on a part-time or contingent basis. Finally, and significantly, blogs of this kind provide any employee, including members of historically disadvantaged groups, with the same ability to communicate as those employees in positions of authority.¹¹³ Thus, employee blogs have the potential to promote inter-employee communication and social connectedness.

A recent report, *The Strength of Internet Ties*, concluded that the Internet builds social engagement by enabling individuals to expand and disperse their social networks.¹¹⁴ The resulting “transformation in community from densely knit villages and neighborhoods to more sparsely knit social networks”¹¹⁵ has also allowed Americans to use these dispersed networks to seek help in making important decisions.¹¹⁶

Employee blogs have become the new “virtual union hall — a safe space where strategies are developed, actions are debated, elections are conducted, and resolutions adopted. A place . . . where our

109. See EMPLOYMENT LAW ALLIANCE, BLOGGING AND THE AMERICAN WORKPLACE (2006), http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf.

110. EDELMAN AND INTELLISEEK, TALKING FROM THE INSIDE OUT: THE RISE OF EMPLOYEE BLOGGERS 6 (2005), <http://edelman.com/image/insights/content/Edelman-Intelliseek%20Employee%20Blogging%20White%20Paper.pdf>.

111. For example, the Edelman and Intelliseek survey finds that “the overall tone expressed in employee blogs is generally positive,” with the phrase “love my job” or derivatives outnumbering the phrase “hate work” or derivatives by a margin of two to one. *Id.* at 7. Similarly, the Employment Law Alliance Survey found that only sixteen percent of the surveyed individuals reported having “posted information that could be considered negative or critical regarding their employer, supervisors, co-workers, customers, or clients.” EMPLOYMENT LAW ALLIANCE, *supra* note 109.

112. See PUTNAM, *supra* note 16, at 178–79.

113. See *id.* at 172–74.

114. JEFFREY BOASE ET AL., PEW INTERNET AND AMERICAN LIFE PROJECT, THE STRENGTH OF INTERNET TIES (2005), http://www.pewinternet.org/pdfs/PIP_Internet_ties.pdf.

115. *Id.* at ii.

116. *Id.* at 26–30.

work schedule, even our time zone, becomes irrelevant.”¹¹⁷ Thus, like union hall activities of old,¹¹⁸ employee blogging deserves legal protection. Furthermore, protection for employee blogging is needed to reverse the precipitous decline in American social engagement.¹¹⁹ Unfortunately, while the NLRA provides nominal protection to employee bloggers, enforcement problems render this protection ineffective.

V. EMPLOYEE BLOGGING AND THE NATIONAL LABOR RELATIONS ACT

A. Overview

For over seventy years, the National Labor Relations Act has represented a major federal statutory exception to the common law “employment-at-will” doctrine. Not only does the NLRA sanction the existence of private-sector labor unions and collective bargaining contracts that generally contain “just cause” clauses and related employee protections, but the Act itself also directly protects employees against myriad adverse employment actions.¹²⁰ For example, employers cannot fire an employee for organizing union activities.¹²¹

Moreover, NLRA Section 7 provides the actions of private sector employees with some umbrella protections. Specifically, it states that employees have the right to engage in “concerted activity for the purpose of . . . mutual aid or protection.”¹²² Significantly, these rights apply to all private sector workers — unionized and non-unionized alike.¹²³ Consequently, the NLRA has been interpreted as prohibiting non-unionized employers from adopting so-called “pay secrecy” or “pay confidentiality” rules, which ban employees from talking to each other about their pay rates, since the NLRB and federal courts have

117. Santora, *supra* note 1, at 181; *see also supra* notes 1–5 and accompanying text.

118. The NLRB has described the union hall as “the inviolable forum for the union to assemble and address employees.” *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406 (1953). It is an unfair labor practice for the employer to engage in surveillance of the union hall. *See NLRB v. CWR of Maryland*, 127 F.3d 319, 325–27 (1997). The D.C. Circuit further noted that existing union halls have a right to offer assistance to newly organized local unions. *See Wackenhut v. NLRB*, 178 F.3d 543 (D.C. Cir. 1999).

119. *See supra* Parts III.A–B.

120. 29 U.S.C. §§ 157, 158(a) (2000).

121. *See* ROBERT A. GORMAN & MATTHEW W. FINKIN, *BASIC TEXT ON LABOR LAW* 149–54 (2004) (discussing the general contours of NLRA Section 8(a)(1)).

122. 29 U.S.C. § 157.

123. *See* Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1675–76 (1989).

uniformly interpreted such employee discussions as constituting protected “concerted activity.”¹²⁴

Thus, when employee blogging can be seen as “concerted activity [for] mutual aid or protection,”¹²⁵ it will be protected by the NLRA. As a result, we believe that when employees address blog postings to co-workers (concerted activity) about specific working conditions (mutual aid or protection), such blogging will be directly and broadly protected.

There are important problems with the NLRA’s protections in this context.¹²⁶ First, very few employees in non-unionized settings have any idea that they are afforded protections under the NLRA.¹²⁷ As Professor William Corbett recently put it, the application of the NLRA in non-union settings is “one of the best-kept secrets of labor law.”¹²⁸ Second, even those employees who know their rights under the NLRA have trouble obtaining effective enforcement,¹²⁹ and the Congress has fiercely resisted amending the law to ameliorate the situation.¹³⁰ Finally, even in a best-case scenario, the NLRA only protects employee blogging where such blogging involves discussions of working conditions or terms of employment. While the NLRB and courts have been fairly liberal in their interpretations of what constitutes working conditions,¹³¹ employee blogging about purely personal matters would likely fall outside NLRA protection. We believe, however, that all off-duty employee blogging — even about purely personal matters — positively contributes to the creation of social community and engagement, and hence deserves meaningful legal protection. Currently, the NLRA does not provide such protection.

124. See Leonard Bierman & Rafael Gely, “Love, Sex and Politics? Sure. Salary? No Way”: *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 188–89 (2004).

125. 29 U.S.C. § 157.

126. See *infra* Part VII.B.

127. See Morris, *supra* note 123, at 1675.

128. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 267 (2002).

129. See JOHN THOMAS DUNLOP, U.S. DEP’T OF LABOR, U.S. DEP’T OF COMMERCE, FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 73 (1994). (“The NLRA mode of dealing with employers or unions who violate the rights of workers under the Act is remedial or reparative. There are stiffer sanctions available to employees whose rights are violated under most federal and state employment laws.”)

130. See Elliot Bredhoff, *Labor Law Reform: A Labor Perspective*, 20 B.C. L. REV. 27, 53–59 (1978); Andrew Kramer, *Labor Law Reform: A Management Perspective*, 20 B.C. L. REV. 4, 22–26 (1978).

131. See *infra* Parts V.B–C.

B. Blogs as Concerted Activity

Concerted activities are activities undertaken together by two or more employees¹³² or by one employee on behalf of others.¹³³ When two or more employees together lodge a complaint about a supervisor, such an activity will meet the requirement of “concert” under Section 7.¹³⁴ On the other hand, when an employee in a non-unionized workplace lodges exactly the same complaint, acting alone without consulting with fellow employees, the concert requirement is not met and the employee can thus be terminated without violating the NLRA.¹³⁵

Under what conditions might blogging be found to be protected concerted activity under the NLRA? To answer this question, we must consider the nature of the activity subject to the protected concerted classification — here, an employee posting comments in a blog about the workplace.

132. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (finding concerted activity where seven employees walked off their jobs to protest cold temperatures on the shop floor).

133. See *Esco Elevators*, 276 N.L.R.B. 1245 (1985) (finding concerted activity where union officer raised safety complaint).

134. See *Atl.-Pac. Constr. Co. v. NLRB*, 52 F.3d 260 (9th Cir. 1995) (finding concerted activity where employees wrote a group letter protesting the selection of an unpopular co-worker as their new supervisor).

135. See *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949) (finding no concerted activity where a petition for a supervisor’s removal was circulated by an individual with a personal grudge, and the individual was not acting for mutual aid or protection).

There are some situations, however, in which an employee acting alone might meet the concerted activity requirement. The easier cases involve situations in which an individual employee claims a right under an existing collective bargaining agreement. The NLRB, with Supreme Court approval, has consistently held such activity to involve concerted action. See *NLRB v. City Disposal Sys.*, 465 U.S. 822 (1984). According to the NLRB, any action taken by an individual employee intended to implement the terms of a collective bargaining agreement is “but an extension of the concerted activity giving rise to that agreement.” See *Bunney Bros. Constr. Co.*, 139 N.L.R.B. 1516, 1518 (1962).

A second type of case involves those situations in which an individual employee claims an employment right under state or federal law. Initially, the NLRB treated these cases the same as those involving individuals invoking a collective bargaining right. The NLRB found the necessary link to other employees’ interests in the statutory mandate of the law that the individual employee was seeking to enforce. Accordingly, the NLRB held that “in the absence of any evidence that fellow employees disavow” the actions of the single employee, there was “implied consent.” *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1975). Years later, the NLRB reversed this broad interpretation. In a dispute involving an employee who refused to drive a truck after complaining to his employer and to a state transportation agency about a known defect with the truck, the NLRB held that concerted activity requires the individual employee to act “with or on the authority of” fellow workers, and not only on his or her own behalf. The NLRB distinguished cases involving the assertion of a statutory right from those involving the assertion of a right grounded in a collective bargaining agreement. Under this approach, employees acting alone will be deemed to have engaged in concerted activity only when trying to initiate group action or when acting for or on behalf of other workers after consulting with fellow workers. See *Meyers Indus. (Meyers I)*, 268 N.L.R.B. 493 (1984); *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882 (1986). The NLRB today thus generally refuses to find concerted activity where an individual employee acts solely on his own behalf to claim a federal or state statutory right.

Blogging can be analogized to a conversation. At first blush, a conversation appears to be concerted activity. By definition, a conversation involves at least two individuals — the speaker and the listener — and therefore should meet the concertedness requirement of Section 7. Indeed, the NLRB and various courts have long recognized that:

[A] conversation may constitute a concerted activity although it involves only a speaker and a listener, but . . . it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.¹³⁶

This requirement, that the objective of the activity is to initiate, induce, or prepare for group action, prevents the NLRA's protection from indiscriminately encompassing all employee conversations.¹³⁷

Applying the protected concerted activity doctrine to conversations has led to results that have been characterized as “other-worldly.”¹³⁸ Conversations are subject to the general requirement of group action, even though they involve two or more people by definition. This requirement can be hard to apply in some situations, particularly given that the NLRB has recognized that Section 7 protections “extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.”¹³⁹ Consequently, conversations may be concerted activity when they are intended to lead towards group action, even if group action does not immediately follow. But if the purpose of the conversation is merely to

advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and if it looks forward to no action at all, it is more than likely to be mere “griping.”¹⁴⁰

136. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964).

137. The NLRB has held that such overinclusion would be mistaken. *Id.* Although it preceded both *Meyers* opinions, this view of concerted activity was cited approvingly by the NLRB in *Meyers II*, 281 N.L.R.B. at 887.

138. GORMAN & FINKIN, *supra* note 121, at 401.

139. *Root-Carlin Inc.*, 92 N.L.R.B. 1313, 1314 (cited in *Meyers II*, 281 N.L.R.B. at 887).

140. *Mushroom Transp.*, 330 F.2d at 685.

The difficulties in applying these somewhat unclear standards are apparent. Consider the situation in *Adelphi Institute*, where an employee on probation approached a co-worker and “asked him if he had ever been on probation.”¹⁴¹ The employee argued that her resultant termination violated Section 8(a)(1), under the theory that her conversation with a co-worker was protected concerted activity. The NLRB held against the employee, finding instead that there had not been concerted activity. The majority ruled that nothing in the record supported the conclusion that the employee “was initiating, inducing, or preparing for group action when she asked [her co-worker] if he had ever been on probation.”¹⁴²

The dissent argued that concerted activity could be found by looking at the subject matter of the conversation, and further contended that the employee must have been seeking the aid of her co-worker in determining the impact of probation, indicating the concerted nature of her activity.¹⁴³ Rejecting these arguments, the majority reiterated that “subject matter alone . . . is not enough to find concert,” and that the record lacked indicia supporting the dissent’s contention about the purpose of the conversation.¹⁴⁴ According to the majority, while contacting this particular co-worker might have been an indication of a desire to engage in group action, it was also consistent with a uniquely personal motive, such as inquiring if the co-worker had anything to do with the disciplinary action.¹⁴⁵

Finally, the dissent and the majority differed as to whether the employer’s actions amounted to an unwritten rule banning any employee discussion relating to terms and conditions of employment. The dissent argued that the employer had “failed to show any legitimate and substantial business justification for” the rule.¹⁴⁶ The majority refused to consider this argument fully, because the parties did not address it.¹⁴⁷ It was unclear that the employer’s statement amounted to a rule, and, furthermore, “not every discussion of terms and conditions of employment constitutes protected concerted activity.”¹⁴⁸

In the context of electronic communications, however, the NLRB recently interpreted employee Section 7 rights more broadly than it had in *Adelphi Institute*. *Timekeeping Systems* involved an unfair labor practice charge by an employee terminated after sending a lengthy email message to all employees, in response to his employer’s mes-

141. *Adelphi Inst.*, 287 N.L.R.B. 1073, 1073 (1988).

142. *Id.*

143. *Id.* at 1075.

144. *Id.* at 1074.

145. *Id.*

146. *Id.* at 1075.

147. *Id.* at 1074.

148. *Id.*

sage regarding a proposed vacation policy change.¹⁴⁹ The email message by the employee, which contained “some flippant and rather grating language,”¹⁵⁰ sought to prove that the proposed change was not to the employees’ advantage. The employer’s written reasons for termination were “[f]ailure to treat others with courtesy and respect” and “[f]ailure to follow instructions or to perform assigned work.”¹⁵¹ The employer testified that “the ‘tone’ of [the employee]’s email, and the ramifications of that tone, . . . played a dominant role in the discharge.”¹⁵²

Finding for the employee, the NLRB first noted that the employee’s emails “clearly constituted ‘concerted’ activity.”¹⁵³ Although conceding that “mere talk” amounts to concerted activity “only when it is looking toward group action,”¹⁵⁴ the NLRB nonetheless held that “the object of inducing group action need not be express.”¹⁵⁵ According to the NLRB, the charging employee sent his email to help others understand the implications of the proposal.¹⁵⁶ This objective, while not express, was manifested in the record.

It is unclear how the NLRB would apply these rules to employee blogs. The common characteristics of blogs¹⁵⁷ render them sufficiently conversation-like that there is a strong argument that employees engaging in workplace blogging are engaged in protected concerted activity.¹⁵⁸

C. Blogs as Involving Mutual Aid or Protection

For an activity to be protected by the NLRA, it must not only be concerted, but must also be for the purpose of “mutual aid or protection.”¹⁵⁹ In deciding whether the concerted activity is for mutual aid or protection, courts have focused on the purpose of the employee’s action. The Supreme Court has recognized that “mutual aid or protection” is intended to include activities other than those associated with self-organization and collective bargaining (mentioned specifically in

149. Timekeeping Systems, 323 N.L.R.B. 244 (1997).

150. *Id.* at 246.

151. *Id.* at 247.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 248.

157. See *supra* notes 46–49 and accompanying text.

158. For example, consider the reverse chronological order and interactive nature of blogs. These two characteristics clearly define the blog as a two-way form of communication. Bloggers post their most recent comments first as an indication that they are seeking to keep the reader informed of recent or important developments, inviting the reader to visit frequently. Bloggers also expect readers to respond by commenting or otherwise contributing links and information on a particular subject.

159. 29 U.S.C. § 157 (2000).

Section 7).¹⁶⁰ For instance, the Court has held that Section 7 covers concerted activities by employees “in support of employees of employers other than their own,”¹⁶¹ as well as activities by employees whose objective is “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.”¹⁶² The Court has made clear that nonetheless there are limits to the “mutual aid or protection” language of Section 7: “[A]t some point the relationship [between the activity and the employees’ interests as employees] becomes so attenuated that an activity cannot fairly be deemed to come within the ‘mutual aid or protection’ clause.”¹⁶³ Mutual aid or protection thus requires that underlying activity be connected to terms and conditions of employment.

The NLRB, however, has been fairly liberal in construing mutual aid or protection.¹⁶⁴ For example, the NLRB has protected employees’ protests regarding the discharge or appointment of supervisory personnel.¹⁶⁵ The NLRB has found that where the decision regarding supervisory changes is likely to adversely affect employees’ working conditions, the employees’ protest is for mutual aid or protection.¹⁶⁶ Similarly, the NLRB held that a group of engineers, who wrote to several legislators expressing opposition to changes in immigration laws that could affect the domestic supply of engineers, were engaged in protected activity even though the employer did not have direct control over the employees’ concerns.¹⁶⁷

Whether an employee terminated for a blog posting will be able to establish that such activity was protected, then, appears to depend largely on the posting’s content. An employee like *Houston Chronicle* reporter Steve Olafson, who was fired from his job for blogging about local politicians he covered in print, would not be protected.¹⁶⁸ Mr. Olafson, who blogged as “Banjo Jones,” frequently ridiculed the sub-

160. *See Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (holding that Section 7 protects distribution of newsletter discussing right-to-work and minimum wage legislation).

161. *Id.* at 564.

162. *Id.* at 565.

163. *Id.* at 567–68. The Court left the task of delineating the extent of the “mutual aid or protection” clause to the NLRB. *Id.* at 568.

164. *See* PATRICK HARDIN & JOHN E. HIGGINS, JR., 1 *THE DEVELOPING LABOR LAW* 184–88 (4th ed. 2001).

165. *Bob Evans Farms v. NLRB*, 163 F.3d 1012, 1015 (7th Cir. 1998) (upholding employees’ rights to protest supervisory changes when the changes impact terms and conditions of employment, but finding that the particular means of protest used was “unreasonable”).

166. *Id.* at 1022.

167. *Kaiser Engineers*, 213 N.L.R.B. 752 (1974).

168. *See* Richard Connelly, *Banjo Blues: A Chronicle Writer Gets Canned for Running a Web Site*, HOUS. PRESS, Aug. 8, 2002, <http://www.houstonpress.com/2002-08-08/news/banjo-blues>.

jects of his *Chronicle* articles.¹⁶⁹ His comments appeared to be very tenuously related to the interests of other employees as employees and thus outside Section 7 protection.

D. Blogs as Abusive, Insubordinate, or Disloyal Conduct

The Board and courts interpreting the NLRA have also found that otherwise protected activity might lose its protection by being abusive, insubordinate, or disloyal. The leading case on this issue is *NLRB v. Local Union No. 1229 (Jefferson Standard)*.¹⁷⁰ In that case, the Supreme Court denied protection to employees who distributed a handbill criticizing an employer's product while negotiating the renewal of an arbitration provision. The Court found the employees' actions disloyal: since "insubordination, disobedience or disloyalty is adequate cause for discharge," the employer's decision to terminate the employees who had distributed the handbill was not a violation of the NLRA.¹⁷¹

Jefferson Standard has proven highly controversial. As Justice Frankfurter noted in dissent, most concerted activities could be considered evidence of "disloyalty."¹⁷² Accordingly, later cases have limited the potential applicability of *Jefferson Standard*. The Ninth Circuit's decision in *Sierra Publishing* is illustrative.¹⁷³ In ordering the reinstatement of a group of editorial employees fired for criticizing their newspaper's operations in a letter to its advertisers, the court noted:

[T]he disloyalty standard is at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand, suggestions that a company's treatment of its employees may have an effect upon the quality of the company's products, or may even affect the company's own viability are not likely to be unreasonable, particularly in cases when

169. In his blog, for example, he mocked "the state senator with the Hair Club for Men wig" and referred to a local council, which had problems complying with a public disclosure request, as a "Taliban-like Nest of Lawbreakers." *Id.*

170. *NLRB v. Local Union No. 1229*, 346 U.S. 464 (1953).

171. *Id.* at 475.

172. *Id.* at 480 (Frankfurter, J., dissenting).

173. *Sierra Publ'g Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989).

the addressees of the information are made aware of the fact that a labor dispute is in progress. Childish ridicule may be unreasonable, while heated rhetoric may be quite proper under the circumstances. Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints. The mere fact that economic pressure may be brought to bear on one side or the other is not determinative, even if some economic harm actually is suffered. The proper focus must be the manner by which that harm is brought about.¹⁷⁴

Disloyalty is not the only factor limiting Section 7 protections. The NLRB has held that some concerted activity can be sufficiently abusive or insubordinate to lose the protection of Section 7. While “unpleasantries uttered in the course of otherwise protected concerted activity do not [generally] strip away the Act’s protection,”¹⁷⁵ the NLRB has indicated that protection does not extend to concerted behavior that is truly insubordinate or disruptive of the work process.¹⁷⁶

We believe that questions of disloyalty and insubordination will be critical in applying NLRA protections to employee bloggers. The spontaneity inherent to blogs will doubtlessly elicit language and comments that push the envelope of appropriate workplace etiquette. Some early workplace bloggers were rather direct and blunt. One illustrative example is the commentary of Amy Norah Burch, a former administrator at Harvard University: “Work is aggravating me[.] I am one shade lighter than homicidal today. I am two snotty e-mails from

174. *Id.* at 220.

175. Timekeeping Systems, 323 N.L.R.B. 244, 249 (1997).

176. See *Will & Baumer Candle Co.*, 206 N.L.R.B. 772, 774 (1973) (discussing the level of conduct necessary to put concerted activity outside Section 7 protection). The Fifth Circuit provided additional guidance in *Reef Industries v. NLRB*, 952 F.2d 830, 837 (5th Cir. 1991), where an employee designed a T-shirt suggesting someone with low intelligence and sent the shirt to a manager as a protest against the manager’s alleged statement at an NLRB hearing. The Fifth Circuit found the employee’s behavior to be protected activity. The court agreed with the NLRB’s characterization of the employee’s action as a “mildly sarcastic response” to the manager’s statement. *Id.* According to the court, the employee’s statements were “not fraught with malice, obscene, violent, extreme or wholly unjustified.” *Id.* But cf. *New River Industries v. NLRB*, 945 F.2d 1290, 1295 (4th Cir. 1991), where the Fourth Circuit refused to find protected activity when two employees prepared a letter “mocking” free ice cream cones their employer provided to celebrate a new contract with a supplier. According to the court, although “criticisms of working conditions by satiric letters or other conduct can be protected activity,” the letter was not intended to “enlist the support and assistance of other employees for the purpose of correcting what the workers thought to be an inadequacy in working conditions.” *Id.* (quoting *Owens Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)). The court characterized the employees’ purpose as “belittling the company’s gesture” and not “[resolving] or call[ing] attention to conditions of employment.” *Id.*

professors away from bombing the entire Harvard campus.”¹⁷⁷ Burch exacerbated the abrasiveness of her comments by referring to her supervisors by first name and commenting on their “random freaking out” and “anal retentive control freakishness.”¹⁷⁸ Nevertheless, the threshold for losing Section 7 protections is rather high. The NLRB has refused to disqualify from protection language characterizing an acting supervisor as an “a-hole,”¹⁷⁹ a letter describing management with such words as “despotic” and “tyrannical,”¹⁸⁰ and even a statement to other employees describing the chief executive officer as a “son of a bitch.”¹⁸¹ Courts have recognized that “not every impropriety . . . places the employee beyond the shield” of Section 7,¹⁸² and thus protection will be lost only if the questioned activity is “of such serious character as to render the employee unfit for further service.”¹⁸³

E. Employers’ Interests Under the NLRA

If an employee’s blogging activities are clearly protected by the NLRA, then the issue becomes whether the employer can advance a legitimate and substantial business justification for disciplinary action.¹⁸⁴ In making this determination, the NLRB applies a balancing test to determine whether the employee’s Section 7 rights outweigh the employer’s business justification.¹⁸⁵ If employers are challenged under the NLRA for disciplining or terminating a blogger, or even for establishing a policy limiting the rights of employees to blog, they will likely raise at least two arguments in defense.

First, employers could argue that the employee has disclosed confidential information. The NLRB has held that a legitimate business justification exists in cases where employees have been disciplined for disclosing information that the employer deemed confidential. For example, in *International Business Machines Corp.*, the employer required all newly hired employees to sign an agreement not to disclose confidential information to anyone outside the company, or to

177. Leon Neyfakh, *Online Weblog Leads to Firing*, THE HARV. CRIMSON ONLINE EDITION, May 26, 2004, <http://www.thecrimson.com/prINTERfriendly.aspx?ref=502702>.

178. *Id.*

179. *Postal Service*, 241 N.L.R.B. 389, 389 (1979).

180. *Harris Corp.*, 269 N.L.R.B. 733, 739 (1984).

181. *Churchill’s Restaurant*, 276 N.L.R.B. 775, 789 (1985).

182. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

183. *NLRB v. Illinois Tool Works*, 153 F.2d 811, 816 (7th Cir. 1946).

184. *See id.*

185. *See Thor Power Tool*, 351 F.2d at 587 (“The employee’s right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to maintain order and respect. Initially, the responsibility to draw the line between these conflicting rights rests with the [NLRB].”).

use it in non-company business.¹⁸⁶ This rule prohibited the distribution of wage data that the employer had classified as confidential.¹⁸⁷ An employee was terminated after distributing salary information, which he had received in the course of his employment, to other employees.¹⁸⁸ In upholding the discharge, the NLRB noted that the employee knew the disclosed documents had been classified as confidential, and that he had no reason to believe that their dissemination was authorized.¹⁸⁹

Similarly, in *Super K-Mart*, the NLRB held that a rule in an employee handbook providing that company business and documents were confidential and prohibiting their disclosure did not constitute a violation of NLRA Section 8.¹⁹⁰ The NLRB rejected the argument that such a rule was likely to “chill” employees’ rights by requiring employees wishing to discuss information about employment terms and conditions to risk discipline, or, in the alternative, to forgo their Section 7 rights.¹⁹¹ Instead, the NLRB concluded that the rule “would be reasonably understood by employees not as restricting discussion of terms and conditions of employment but, rather, as intended to protect solely the legitimate confidentiality of the [employer’s] private business information.”¹⁹²

Second, employers might argue that a prohibition against blogging is justified to maintain order and discipline in the workplace. Courts have given employers some leeway “to maintain production, reduce employee dissension or distractions from work, or maintain employee safety and discipline,”¹⁹³ particularly in the context of issuing rules against solicitation in the workplace. Thus, for example, rules prohibiting solicitation during working hours have been held presumptively valid on the grounds that they are necessary to maintain safety and efficiency.¹⁹⁴ On similar reasoning, the NLRB has upheld company rules barring all distribution of literature in working areas.¹⁹⁵ According to the NLRB, a “no-distribution” rule is justified because the distribution of union literature in working areas could result in a littering hazard, which is likely to have a negative impact on productivity.¹⁹⁶

However, the leeway given to employers regarding no-solicitation and no-distribution rules is not absolute. For example, the NLRB and

186. *Int’l Bus. Machines Corp.*, 265 N.L.R.B. 638, 641 (1982).

187. *Id.*

188. *Id.*

189. *Id.* at 642.

190. *Super K-Mart*, 330 N.L.R.B. 263, 263 (1999).

191. *Id.*

192. *Id.* at 263–64.

193. *Meijer v. NLRB*, 130 F.3d 1209, 1217 (6th Cir. 1997).

194. *See Republic Aviation v. NLRB*, 324 U.S. 793, 803 (1945).

195. *See Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 620–21 (1962).

196. *Id.* at 621.

reviewing courts have refused to allow employers to ban employees from wearing union pins, buttons, and insignias while on the job.¹⁹⁷ The Supreme Court has held that employees have a presumptive right to wear union insignia, unless the employer is able to establish that a special circumstance justifies banning such insignia.¹⁹⁸ Such a special circumstance can be established by showing that the employer's restriction is necessary "to maintain production, reduce employee dissension or distractions from work, or maintain employee safety and discipline[, or where] the employer makes an affirmative showing that the union insignia that the employee seeks to wear will negatively impact a certain public image that the employer seeks to project."¹⁹⁹ An employer might use similar reasoning to argue that comments such as those posted by Rachel Mosteller, referring to "stupid little awards that are supposed to boost company morale,"²⁰⁰ are not constructive and could create tension between employees and supervisors, as well as among employees themselves, eventually creating the potential for severe employee conflict. Thus, to the extent employers can show that employee blogs might expose proprietary workplace information, or might threaten order and discipline in the workplace, they may be able to forbid what would otherwise be NLRA-protected employee blogging activity.

F. Summary

The NLRA does appear to offer considerable legal protection to employee bloggers whose blogging is of a work-related nature. Much of this blogging is likely to fall within the ambit of the NLRA's "concerted activity" and "mutual aid or protection" coverage. However, it is important to note that the Section 7 "concerted" requirement may not encompass employee blogging involving individual work-related complaints or claims.²⁰¹ Employer disciplinary interests may also

197. See *Republic Aviation*, 324 U.S. at 803–04.

198. *Id.*

199. *Meijer v. NLRB*, 130 F.3d 1209, 1217 (6th Cir. 1997).

200. Rachel Mosteller is a former reporter for the *Durham Herald-Sun*, a North Carolina newspaper, who alleges she was terminated for making this statement in her blog. See Amy Joyce, *Free Expression Can Be Costly When Bloggers Bad-Mouth Jobs*, WASH. POST, Feb. 11, 2005, at A1. In February 2004, Mosteller wrote in her blog:

I really hate my place of employment . . . They have these stupid little awards that are supposed to boost company morale. So you go and do something "spectacular" (most likely, you're doing your JOB) and then someone says "Why golly, that was spectacular," then they sign your name on some paper, they bring you chocolate and some balloons.

Id.

201. For a similar analysis regarding the application of the NLRA to employee blogging, see Marc Cote, Note, *Getting Dooced: Employee Blogs and Employer Blogging Policies under the National Labor Relations Act*, 82 WASH. L. REV. 121 (2007).

trump employee Section 7 protections where, for example, the employee's blog contains arguably confidential or proprietary information. Moreover, while the NLRA's protection of employee blogging covers both unionized and non-unionized workers, the latter group generally has little knowledge of that protection.²⁰² Furthermore, effective enforcement of NLRA protections has been problematic. Finally, and most significantly, the NLRA does not protect employees whose blogging is not work-related. Such employees, however, may be protected under state, rather than federal, law.

VI. STATE LAW PROTECTIONS FOR EMPLOYEE BLOGGERS

A. State Common Law

The basic common law rule governing employment in the United States today is the employment-at-will doctrine.²⁰³ As the Tennessee Supreme Court held in the classic case of *Payne v. Western & Atlantic Railroad Co.*, employers are free to "discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act."²⁰⁴ To date, only Montana has statutorily altered the at-will doctrine. The Montana Wrongful Discharge from Employment Act gives all employees in the state protection from discharge without "just cause."²⁰⁵

State courts in virtually every state have been actively creating judicial exceptions to the employment-at-will doctrine during the past three decades.²⁰⁶ Of particular relevance to employee bloggers are the "implied contract" and "public policy" exceptions.

Under the implied-contract exception, representations made by employers regarding job security, disciplinary procedures, and other employee privileges have been treated by state courts as enforceable,

202. See *supra* notes 127–28 and accompanying text.

203. See generally HENRY H. PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* 1–3 (5th ed. 2006).

204. *Payne v. Western & Atlantic R.R. Co.*, 81 Tenn. 507, 518 (1884). For a historical discussion of the doctrine's development, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. OF LEGAL HIST. 118 (1976).

205. MONT. CODE ANN. §§ 39-2-901 to -915 (2005). The statute provides that:

A discharge is wrongful only if: (a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or (c) the employer violated the express provisions of its own written personnel policy.

Id. at § 39-2-904(1).

206. Our treatment of the employment-at-will doctrine is limited to its application to employees who suffered adverse employment consequences specifically because of their blogging activities. The literature on the at-will doctrine is extensive and rich. For a doctrinal overview, see PERRITT, *supra* note 203.

even in the absence of an express employment contract.²⁰⁷ Employees invoking this exception have relied on employee manuals or handbooks and on oral statements by supervisory personnel as the contractual bases for an implied promise of some degree of job security.²⁰⁸ Thus, where employers have set forth general policies regarding employee blogging, whether in employee handbooks or other communications, state courts may find these policies binding on employers. With blogging still nascent, however, employer policies of this kind remain uncommon,²⁰⁹ minimizing the possible protection afforded employees by the implied-contract exception.

The public policy exception involves situations where termination of an employee contravenes some explicit and well-established public policy. Initially, the public policy exception focused on protecting employees fired for engaging in behavior which directly benefited the public welfare, such as serving on jury duty or refusing to commit an illegal act.²¹⁰

Recently, plaintiffs' lawyers have attempted to expand the reach of the public policy exception. In particular, they have argued that the public policy exception should apply not only in situations where an employee is fired for performing a civic duty, but also in cases where employers act in ways that encroach on employees' personal autonomy. This argument has proven especially relevant to employer efforts to limit employees' off-duty activities with regard to personal relationships²¹¹ and behavior or lifestyle outside of work.²¹² As the

207. See MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 671–94 (2d ed. 1999). The implied contract exception includes cases based on written or oral communications. See, e.g., *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1258, *modified*, 499 A.2d 515 (N.J. 1985) (“We hold that absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term”); *Chiodo v. Gen. Waterworks Corp.*, 413 P.2d 891 (Utah 1966) (finding that a contract for a specific time period included implied terms that employee would conform to the usual standards of performance). The exception can even cover the time period before employment begins. See, e.g., *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981) (holding that the doctrine of promissory estoppel allows a plaintiff to sue an employer who withdrew a job offer after the plaintiff had accepted, but before the plaintiff had begun work).

208. See, e.g., *Small v. Springs Indus., Inc.*, 357 S.E.2d 452, 454–55 (S.C. 1987) (noting that it would be unfair to allow employers to treat statements of this kind as gratuitous or nonbinding).

209. According to one survey, nearly seventy percent of companies have no policies regarding employee blogging. EDELMAN AND INTELLISEEK, *supra* note 110, at 12. Companies, however, are becoming increasingly aware of the importance of blogs. See Michael Barbaro, *Wal-Mart Enlists Bloggers in Its Public Relations Campaign*, N.Y. TIMES, Mar. 7, 2006, at C1 (describing Wal-Mart's efforts to enlist employees as bloggers in its aggressive public relations campaign).

210. See, e.g., *Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (finding a violation of public policy in a case involving an employee who was discharged for jury service).

211. E.g., *Rulon-Miller v. IBM Corp.*, 208 Cal. Rptr. 524 (Cal. Ct. App. 1984) (holding in favor of plaintiff who was fired for her off-duty dating activities).

cases below indicate, however, employees have been essentially unable to obtain any protection using this approach.

Consider, for example, cases involving employees' dating practices. In these cases, courts have generally sided with employers, especially where supervisor-subordinate relationships were involved, and have been wary of employee arguments that such terminations violate public policy. Thus, in a case involving the discharge of an employee for bringing a woman other than his wife to an employer banquet, a court explicitly rejected the employee's arguments regarding "freedom of association."²¹³ The court held that denial of the right to associate with a non-spouse at an employer banquet was not a threat to a recognized aspect of public policy of the kind that merited an exception to the traditional employment-at-will doctrine.²¹⁴ Similarly, an Illinois court refused to overturn an employer's decision to terminate an employee for marrying a co-worker, on the basis that the state's interest in promoting marriage created a "public policy" exception to the at-will doctrine.²¹⁵ Finally, in the case of *Patton v. J.C. Penney Co.*, the Supreme Court of Oregon held that the employment-at-will doctrine gave the retailer the right to fire an employee for dating a co-worker, and that any interference with the employee's personal lifestyle in this regard did not trigger the public policy exception.²¹⁶

Employees have been similarly unsuccessful when challenging adverse employment actions based on other aspects of their private life, such as their behavior and lifestyle. For example, in *Graebel v. American Dynatec Corp.*, the plaintiff was fired after a local newspaper's article "memorialized [the employee's] racially biased attitudes and opinions regarding the effect of the increased Asian immigration" in the local area.²¹⁷ The plaintiff argued that his termination "for speaking from the confines of his home on a matter of public concern unrelated to his employment constitute[d] a wrongful discharge in violation of the State Constitution and the common laws of the State."²¹⁸ In finding against the employee, the Wisconsin Court of

212. *E.g.*, *Brunner v. Al Attar*, 786 S.W.2d 784 (Tex. App. 1990) (upholding lower court decision against employee who was terminated for her off-duty volunteer work with an AIDS foundation).

213. *Staats v. Ohio Nat'l Life Ins. Co.*, 620 F. Supp. 118, 120 (W.D. Pa. 1985).

214. *Id.*

215. *McCluskey v. Clark Oil & Refining Corp.*, 498 N.E.2d 559 (Ill. App. Ct. 1986).

216. *Patton v. J.C. Penney Co.*, 719 P.2d 854 (Or. 1986). In one isolated but prominent case involving the IBM Corporation, however, a California court did overturn the discharge of an employee for having a romantic relationship with an employee at a rival office products firm. *Rulon-Miller*, 208 Cal. Rptr. 524. While acknowledging the traditional doctrine of employment-at-will, the court's decision, surprisingly, turned almost solely on two internal IBM policy documents. *Id.* at 530-32.

217. *Graebel v. American Dynatec Corp.*, No. 99-0410, 1999 WL 693460, at *1 (Wis. Ct. App. Sept. 8, 1999).

218. *Id.* at *1.

Appeals noted the very narrow nature of the public policy exception.²¹⁹ While recognizing the “importance of one’s free speech rights,”²²⁰ the court affirmed the dismissal of the plaintiff’s claim, noting “the [Wisconsin] [S]upreme [C]ourt’s unambiguous refusal to expand the public policy exception to wrongful discharge actions based on freedom of speech.”²²¹

The Idaho Supreme Court recently reached a similar result in *Edmondson v. Shearer Lumber Products*.²²² The plaintiff, an employee at a lumber mill, was terminated after publicly criticizing a proposal, submitted by his employer and a local civic group, to manage a local national forest.²²³ The plaintiff argued that he had been wrongfully terminated for exercising his constitutionally protected freedom of speech and association.²²⁴ The Idaho Supreme Court upheld summary judgment against the employee, holding that “an employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee’s constitutional right of free speech.”²²⁵

A few courts have at least entertained the argument that an employer action that limits employees’ freedom of speech and association might serve as the basis for a wrongful discharge claim, although this argument has not enjoyed significant success. In *Wiegand v. Motiva Enterprises, LLC*, the plaintiff was a Texaco gas station supervisor who operated a website selling neo-Nazi paraphernalia.²²⁶ Upon being hired in 1994, Wiegand received and signed an employee handbook that indicated his at-will employee status.²²⁷ In 1999, Wiegand informed his immediate supervisor that he sold non-mainstream CDs and flags, but the supervisor did not investigate further because Wiegand’s work was not affected.²²⁸ In addition, his supervisor claimed he “didn’t care about what [Wiegand] was doing in his free time.”²²⁹ Two years later, the website was exposed in two newspaper arti-

219. *Id.* at *5. In particular, the court noted that under Wisconsin law the exception is limited to cases covering “an employee’s refusal to obey his or her employer’s command to violate public policy as established by: (1) statutory or constitutional provision; (2) the spirit of a statutory provision; or (3) administrative rules.” *Id.*

220. *Id.* at *5.

221. *Id.* at *6.

222. *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733 (Idaho 2003).

223. *Id.* at 736.

224. *Id.* at 738.

225. *Id.* at 739.

226. *Wiegand v. Motiva Enters., LLC*, 295 F. Supp. 2d 465, 466 (D.N.J. 2003). Items sold on Wiegand’s website included “[u]nderground music and records’ that are ‘racist and/or offensive to some people,’ such as swastika flags, music advertised as ‘the most popular and funniest Nigger-hatin’ songs ever written’ and [T]-shirts with sayings like ‘Skinheads’ and ‘Blue-Eyed Devil.’” *Id.*

227. *Id.* at 467.

228. *Id.* at 468.

229. *Id.* (internal quotation marks omitted).

cles.²³⁰ Although the newspaper articles did not reveal where Wiegand worked,²³¹ he was soon terminated because Texaco deemed that his actions “violated the company’s ‘core value’ of ‘respect for all people.’”²³²

Wiegand challenged his termination, arguing that Texaco could not terminate him because of his right to free speech.²³³ Wiegand alleged:

an employee, whether public or private, should not have to be fearful about expressing his personal views in his own home, on his own time. He should not have to worry about losing his job because of his exercise of his [F]irst [A]mendment rights in such a private manner that does not affect his employer.²³⁴

The court noted that under New Jersey law, an at-will employee “may sustain a claim for wrongful termination if he shows that his discharge was ‘contrary to a clear mandate of public policy.’”²³⁵ The court also noted that “‘sources of public policy include the United States and [state] Constitutions; federal and state laws and administrative rules, regulations and decisions; the common law and specific judicial decisions; and in certain cases, professional codes of ethics.’”²³⁶

The court, however, found against the plaintiff. According to the court, Wiegand failed to establish that his termination was contrary to a clear mandate of public policy, since the First Amendment did not clearly protect the plaintiff’s speech because it was commercial hate speech.²³⁷

In sum, off-duty employee bloggers are likely to enjoy rather limited protection under the public policy exception to the employment-at-will doctrine. Historically, state courts have permitted this exception only where private sector employee speech clearly touches on matters of “public concern.”²³⁸ This, as Dean Stewart Schwab has noted, resulted in a rather narrow application of the public policy exception.²³⁹

230. *Id.*

231. *Id.* at 469.

232. *Id.* at 466.

233. *Id.* at 466–67.

234. *Id.* at 474 (internal quotation marks omitted).

235. *Id.* at 473 (quoting *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980)).

236. *Id.* at 473 (quoting *MacDougall v. Weichert*, 677 A.2d 162, 167 (N.J. 1996)).

237. *Id.* at 474–75.

238. See, e.g., *Nees v. Hocks*, 536 P.2d 512 (Or. 1975).

239. See Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1957–58 (1996).

B. State Statutory Protections

While state courts have hesitated to protect employees from adverse employment action taken in response to off-duty conduct, legislatures in various states have been more forceful. In the late 1980s, the tobacco industry began aggressively lobbying state legislatures to pass laws protecting the rights of current and prospective employees to smoke while off duty.²⁴⁰ Sharp opposition arose in some of these states to the narrow scope of the proposed legislation, which was designed only to protect the rights of smokers.²⁴¹

Consequently, in a number of states, the proposed legislation was broadened to protect employee use of legal products during non-work hours away from employer premises.²⁴² In such states, for example, an employer could not discharge an employee for consuming alcohol while on vacation. Moreover, the legislatures in four states — Colorado,²⁴³ New York,²⁴⁴ California,²⁴⁵ and North Dakota²⁴⁶ — have gone a step further, protecting not only off-duty use of lawful products (such as tobacco and alcohol), but also protecting against discharge for any lawful activities off the employer's premises during non-working hours. In total, over thirty states have passed legislation protecting the off-duty rights of employee smokers. Approximately one-fourth of these have extended that protection to off-duty use of all lawful products, while the aforementioned four states go further by protecting employees engaging in any off-duty lawful activity.²⁴⁷

Considerable differences exist among those state statutes that broadly protect all lawful employee off-duty conduct. The Colorado statute, for example, only protects actual employees from termina-

240. See Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct As the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 641 (2004); see also Jackson, *supra* note 31, at 145.

241. See Lewis L. Maltby & Bernard J. Dushman, *Whose Life Is It Anyway: Employer Control of Off-Duty Behavior*, 13 ST. LOUIS U. PUB. L. REV. 645, 652–53 (1994) (noting that groups such as Action on Smoking and Health and the American Lung Association opposed smokers' rights legislation, perhaps because they believed discrimination against smokers was justified by the harm caused by smoking).

242. See, e.g., Jackson, *supra* note 31, at 144–45 (describing the Colorado “lifestyle discrimination” statute).

243. COLO. REV. STAT. § 24-34-402.5 (1995).

244. N.Y. LAB. LAW § 201-d (2002).

245. CAL. LAB. CODE § 96(k) (2002). The California statute has been interpreted as allowing only assignment of preexisting off-duty conduct claims to the California Labor Commissioner. See *Grinzi v. San Diego Hospice Corp.*, 14 Cal. Rptr. 3d 893, 898–901 (Cal. Ct. App. 2004) (holding as to both § 96(k) and § 98.6); *Barbee v. Household Auto. Fin. Corp.*, 6 Cal. Rptr. 3d 406, 412–14 (Cal. Ct. App. 2000) (considering only § 96(k)); *Hartt v. Sony Elecs. Broad. & Prof'l Co.*, 69 Fed. Appx. 889, 890 (9th Cir. 2003).

246. N.D. CENT. CODE § 14-02.4-03 (2004).

247. See Terry Morehead Dworkin, *It's My Life — Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 51 (1997).

tion.²⁴⁸ On the other hand, the statutes in New York, California, and North Dakota protect both applicants and employees from any adverse or discriminatory employment action (e.g., demotion, transfer, or failure to hire or promote) arising from lawful off-duty conduct.²⁴⁹

In addition, provisions regarding “conflict of interest” exemptions from statutory coverage vary among these states. The North Dakota statute explicitly protects “lawful activity off the employer’s premises during nonworking hours” provided that such activity is “not in direct conflict with the essential business-related interests of the employer.”²⁵⁰ By contrast, the Colorado statute does not protect employees whose off-duty activities present even “the appearance of . . . a conflict of interest.”²⁵¹ Thus, employees blogging off-duty currently appear to enjoy broader protection in North Dakota than in Colorado.

Finally, the enforcement mechanisms underlying these statutes vary markedly. The Colorado statute specifically states that the “sole remedy” for aggrieved employees under its off-duty conduct provision is a civil suit in state court for lost wages and benefits, although the employee is explicitly required “to mitigate his damages.”²⁵² The relevant North Dakota statute, by contrast, is embedded in the state’s Human Rights Act, enforced by the Human Rights Division of the North Dakota Department of Labor.²⁵³ Available remedies under the North Dakota law appear to include wide-ranging equitable relief, including injunctions.²⁵⁴ Furthermore, the North Dakota Human Rights Division emphasizes alternative dispute resolution methods, especially mediation and conciliation, to resolve complaints under the Human Rights Act.²⁵⁵ New York takes yet another approach, embedding its off-duty activities statute in a law giving the state Labor

248. COLO. REV. STAT. § 24-34-402.5.

249. N.Y. LAB. LAW § 201-d; CAL. LAB. CODE § 96(k); N.D. CENT. CODE § 14-02.4-03.

250. N.D. CENT. CODE § 14-02.4-03.

251. COLO. REV. STAT. § 24-34-402.5(1)(b). The Colorado law also gives employers the right to restrict lawful employee activity if it relates to a bona fide occupational qualification, among other things. *See id.* § 24-34-402.5(1)(a).

252. *Id.* § 24-34-402.5(2)(a).

253. N.D. CENT. CODE § 14-02.4; *see also* N.D. DEP’T OF LABOR, HUMAN RIGHTS DIV., HOW TO FILE A DISCRIMINATION COMPLAINT IN NORTH DAKOTA (2005), *available at* <http://www.nd.gov/labor/publications/docs/brochures/010.pdf>.

254. N.D. CENT. CODE § 14-02.4-20; *see* N.D. DEP’T OF LABOR, *supra* note 253.

255. *See* N.D. DEP’T OF LABOR, *supra* note 253. This approach is similar to that taken by the United States Equal Employment Opportunity Commission (“EEOC”) in enforcing Title VII of the United States Civil Rights Act. According to the EEOC website:

Mediation is a *fair* and *efficient* process to help you resolve your employment disputes and reach an agreement. A neutral mediator assists you in reaching a voluntary, negotiated agreement. Choosing mediation to resolve employment discrimination disputes promotes a better work environment, reduces costs and works for the employer and the employee.

U.S. Equal Employment Opportunity Comm’n, Mediation, <http://www.eeoc.gov/mediate/index.html> (last visited April 17, 2007).

Commissioner the power to regulate workplace health and safety.²⁵⁶ Consequently, it appears the New York law is enforced in significant measure by having the Labor Commissioner impose monetary fines on employers for statutory violations.²⁵⁷ Finally, California's off-duty employee conduct law is part of that state's wage and hour laws. It empowers the California Labor Commissioner to help employees collect "loss of wages" resulting from adverse employer action for lawful off-duty conduct.²⁵⁸ Once an aggrieved employee files a complaint for lost wages with the California Department of Labor, the Labor Commissioner has statutory authority to investigate the complaint and hold a formal hearing on the matter if necessary.²⁵⁹ After the hearing, the Labor Commissioner can issue an enforceable order regarding the complaint, although the employer may appeal the Commissioner's order in state court.²⁶⁰

In sum, the majority of states currently have statutes protecting the off-duty activities of employees, at least to the extent that such activities involve the lawful usage of tobacco. A handful of states, including California and New York, have significantly expanded the off-duty tobacco usage template to protect all lawful off-duty employee conduct, albeit with various conflict of interest exceptions. There are very different schemes for enforcing these statutes, from state trial court remedies to elaborate administrative enforcement mechanisms. Lawfully blogging employees in California, New York, Colorado, and North Dakota thus appear to enjoy some legal protection, but the degree of protection and the ease and effectiveness of its enforcement vary substantially.

VII. POSSIBLE AVENUES FOR REFORM: THE APPEALING "BRIGHT LINES" OF STATE LEGISLATIVE ACTION

A. Overview

As we have seen, current law places employees who blog in a difficult position. First, under state common law rules, these employees have essentially no protection. Courts have been reluctant to expand existing exceptions to the at-will doctrine to cover off-duty employee activities, and blogging would not appear to fare any differently. Second, only a few states have enacted comprehensive statutes protecting lawful employee off-duty activities (such as blogging), and even those states that have enacted legislation have placed substantive and proce-

256. N.Y. LAB. LAW § 200 (2002).

257. *See id.* §§ 201-d, 211, 213.

258. CAL. LAB. CODE §§ 96, 98, 98.3, 98.6 (2006).

259. *Id.* § 98.

260. *Id.*

dural limits on the scope of that protection. Finally, under the NLRA, employees' blogging activity can be protected only if the blogging meets the requirements of concertedness and mutual aid or protection. However, this protection is likely to apply only in situations where the blog is focused primarily (if not exclusively) on terms and conditions of employment. Moreover, outside of unionized settings, employees are unlikely to know about their rights under the NLRA. Even where employees are aware of such rights, the NLRA often presents considerable enforcement challenges.²⁶¹ Thus, the safest approach for today's employees is probably, as a recent column in the *New York Times* suggested,²⁶² not to blog at all.

To the extent that blogging has considerable social value in terms of generating community engagement, however, not only does the individual employee suffer from the existing legal arrangement, but so does society at large. Thus, the question arises: can realistic legal rules be devised that will improve the current regime?

The answer is an equivocal "yes." There are three principal avenues for reform: (1) expand the protections of the NLRA; (2) expand the protections for employee bloggers under state common law, particularly under the public policy exception to the employment-at-will doctrine; and (3) expand state statutory protections for employee bloggers, most logically by using the existing template of protections for off-duty smokers. What follows is a brief review of these possible avenues for reform. Of the three, expanding statutory protections for employee bloggers appears to be the best option. In light of the millions of employee bloggers, and the rapid growth of employee blogging, targeted "bright line" standards of the kind afforded by amending existing state off-duty conduct statutes offer the most realistic legal solution.

B. NLRA Reform

As noted earlier, the NLRA provides fairly comprehensive protection for employee blogging about clearly work-related issues, at least where some connection or linkage ("concertedness") to other workers is reasonably clear. There is, however, a major "notice" problem under the NLRA; very few non-unionized employees have the slightest idea that the Act affords them any protection.²⁶³ Unlike other agencies enforcing employment statutes, the NLRB has no field inspection or enforcement staff; NLRB proceedings are initiated only when an aggrieved employee actively files a charge with the NLRB

261. See Bierman & Gely, *supra* note 124, at 189.

262. See Matt Villano, *Write All About It (At Your Own Risk)*, N.Y. TIMES, July 24, 2005, § 3, at 10.

263. See Bierman & Gely, *supra* note 124, at 188–89; *supra* Part V.A.

and asks the agency to get involved.²⁶⁴ Furthermore, the remedial provisions of the NLRA are weak,²⁶⁵ and it can take years for employees to obtain redress.²⁶⁶

Congress last considered reforms to address these issues about thirty years ago, during the debates concerning the Labor Law Reform Act of 1977–78.²⁶⁷ Despite the presence of a pro-union Democratic President supporting NLRA reform legislation and ostensibly pro-union Democratic majorities in both houses of Congress, the reform proposal was successfully filibustered in the Senate after passage by the House.²⁶⁸ In the current political environment, significant NLRA reform seems extremely unlikely, particularly because the AFL-CIO and labor unions generally are in a much weaker economic and political position today than they were in 1977.²⁶⁹

Indeed, even minor administrative reforms in this area appear improbable. This is illustrated by the NLRB's treatment of Professor Charles Morris's rulemaking petition, which would require all unionized and non-unionized private sector employers to display a poster in their workplaces describing employee and employer rights under the NLRA.²⁷⁰ The petition has been pending for the last decade, yet the NLRB has never acted on it.²⁷¹ In any case, it is unclear at best that displaying such posters would meaningfully increase awareness of, or willingness to exercise, NLRA rights among non-unionized workers.

Finally, it must be noted that the NLRA ultimately protects only work-related rights. Markedly improving notice, enforcement, and remedies supporting these rights, even if possible, would not address the NLRA's lack of protection for outside employee activities such as non-work-related blogging. While Congress hypothetically could ex-

264. *Id.* at 188.

265. *Id.* at 188–89.

266. See John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 LAB. LAW. 1, 2 (2000).

267. See Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755 (1979).

268. *Id.* at 755.

269. See *Signs of a Possible Power Shift in Congress Have Unions Going All Out to Reach Voters*, WALL ST. J., Aug. 28, 2006, at A2. The precarious situation faced by the AFL-CIO has become somewhat more pronounced recently, as the Change to Win Coalition, representing a coalition of seven unions that collectively provide twenty percent of the AFL-CIO's annual budget, has left the Federation. *Id.* Unions like the Service Employees International Union and UNITE-HERE, which represent workers in service industries, are dissatisfied with what they see as the AFL-CIO's lack of commitment toward organizing activities. Steven Greenhouse, *4 Major Unions Plan to Boycott A.F.L.-C.I.O. Event*, N.Y. TIMES, Jul. 25, 2005, at A1. They propose shifting organizing efforts to service sectors of the economy, citing large employers such as Wal-Mart and FedEx as opportunities for union growth. *Id.*

270. See Rulemaking Petition of Professor Charles J. Morris, Professor, Dedman School of Law, Southern Methodist University to the NLRB (Feb. 9, 2003) (on file with authors).

271. *Id.*

pand the NLRA into the non-work-related arena, such an expansion is extraordinarily unlikely,²⁷² partly because it would directly contradict the historical underpinnings of the NLRA.²⁷³ All told, the NLRA appears to be an unlikely avenue for the meaningful expansion of rights for employee bloggers.

C. State Common Law Reform

State courts have typically permitted a public policy exception to the employment-at-will doctrine only where private-sector speech clearly touches on matters of “public concern.”²⁷⁴ This narrow exception has left employee bloggers with little protection.

Dean Schwab has argued for a significant expansion of the public policy exception to broadly protect what he calls “third-party effects.”²⁷⁵ According to Dean Schwab, employment law needs to devote greater attention to the harms caused to third parties when employees are not adequately protected from adverse employment actions.²⁷⁶ For example, employees serving on jury duty create “public goods,”²⁷⁷ and absent common law doctrine protecting employees from being fired for jury service, these “public goods” will be underproduced and various third parties will be unduly harmed.²⁷⁸

If, as this Article strongly asserts, employee blogging helps create the “public good” of social engagement and community, then Dean Schwab’s analysis provides at least a theoretical basis for broad pro-

272. See *supra* notes 267–269 and accompanying text.

273. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

274. See *supra* notes 238–239 and accompanying text.

275. Schwab, *supra* note 239, at 1957–58.

276. *Id.* Schwab argues that the focus should be on the “third-party effect,” that is, the extent to which refusing to protect the employee against the adverse employment action is likely to result in some harm to third parties. The third-party effect is stronger, and thus it is appropriate for the court to allow a wrongful discharge claim, in cases where employees are terminated for “refusing to perform an illegal act, fulfilling a public duty, or acting as an external whistleblower.” *Id.* at 1945. On the other hand, where employees are fired for exercising a statutory right (such as filing a workers’ compensation claim), the third-party effect is lacking, and thus it is less appropriate for a court to find in the employee’s favor in a claim of wrongful discharge against public policy. *Id.* at 1955.

277. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971). Public goods are likely to be underproduced unless incentives are restructured. The wrongful discharge cause of action accomplishes this by protecting employees against termination, thus providing the necessary incentives for both employers and employees to take into account the third-party effects of their actions.

278. See Schwab, *supra* note 239, at 1951. The costs of an employer’s actions are borne not by the employer but by third parties and society at large. For instance, when an employer’s actions make it more difficult for employees to fulfill their civic duty and thus more difficult for the judicial system to empanel a jury, the employer is not seriously harmed by the result. In some cases, as where the employer asks the employee to commit an illegal act, not only does the employer bear no cost, but he or she actually obtains a benefit at the expense of the public. On the employee side, the incentive problem is that an employee will receive little benefit by confronting the employer or refusing to follow the employer’s orders.

tection for employee blogging under the public policy exception. Put another way, it is possible to see all employee blogging as involving matters of “public concern” deserving protection under the public policy exception.

Unfortunately, despite its theoretical appeal, judicial creation of such a broad public policy exception to the employment-at-will doctrine appears unlikely. It is one thing for state courts to say that employees cannot be fired for being on jury duty — virtually all do so²⁷⁹ — and quite another to say that employees cannot be fired for anything related to a very broadly construed notion of “public concern.” As we have seen in Montana,²⁸⁰ state legislatures are perfectly free, if they so desire, to statutorily overrule the employment-at-will doctrine. Expansion by courts of the public policy exception to the degree we might suggest, though, would come very close to wholesale judicial reversal of the at-will doctrine, arguably giving state judges an overly legislative role.²⁸¹

D. State Legislative Reform of Off-Duty Conduct Statutes

Given the problems outlined above, the most realistic approach to the expansion of rights for employee bloggers is through state legislative action. We should emphasize that to obtain meaningful reform in this area, state legislatures do not need to adopt Montana-style comprehensive legislation entirely overturning the employment-at-will doctrine. As discussed above, most states have already enacted targeted legislation to protect the rights of employee off-duty smokers.²⁸² Such legislation could easily be extended to protect the rights of employees who engage in off-duty blogging or other specified conduct.

To the extent that off-duty employee smoking statutes were designed to offset employers’ ability to regulate employees’ tobacco use during work hours,²⁸³ similar logic applies to employee blogging. For example, Mississippi,²⁸⁴ New Mexico,²⁸⁵ and Tennessee²⁸⁶ all have

279. See PERRITT, *supra* note 203, at 7-121 to 7-124.

280. See MONT. CODE ANN. §§ 39-2-901 to -914 (2005).

281. The New York Court of Appeals stated this argument eloquently:

[The] perception and declaration of relevant public policy . . . are best and more appropriately explored and resolved by the legislative branch of our government If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.

Murphy v. Am. Home Prods., 448 N.E.2d 86, 89–90 (N.Y. 1983).

282. See *supra* Part VI.B.

283. See Pagnattaro, *supra* note 240, at 642.

284. MISS. CODE ANN. § 71-7-33 (1999).

285. N.M. STAT. ANN. §§ 24-16-1 (2000), 50-11-3 (1997).

specific language in their off-duty tobacco use statutes referring to the need for employees to be able to smoke off-duty in return for their compliance with any employer rules prohibiting smoking while on the job. Likewise, regardless of the general social value of employee blogging, employers should have broad discretion to regulate employee computer usage during work hours.²⁸⁷ Therefore, it would make sense to grant legislative protection — analogous to that extended to off-duty tobacco use — to employees' off-duty use of their personal computers.

Moreover, without entering the debate regarding the pros and cons of tobacco usage, it is clear that the social value of off-duty employee blogging is at least equal to that of smoking. Thus, adding protection of this activity to extant state statutes protecting off-duty tobacco usage makes logical sense. Such legislative action would, like the original legislation protecting tobacco usage, address an important social concern in a limited and targeted manner. We recognize that some employer interests might be involved in the case of employee blogging that might not be implicated in the case of other off-duty employee activities such as smoking, and that any legal reform will need to take account of those interests. Existing “conflict of interest” and similar provisions in the off-duty tobacco statutes provide a starting point. We will provide additional suggestions in Part VIII.

One additional step, applicable beyond employee blogging, may be worthy of state legislative consideration. There is significant empirical evidence of the value of mediation and conciliation as a first step in resolving employee rights cases.²⁸⁸ Thus, adoption of the North Dakota model,²⁸⁹ to the extent it initially requires mediation and conciliation in order to resolve cases involving off-duty employee conduct, would seem to make logical sense and would be a simple addition to existing statutory language protecting off-duty activity.

In short, expansion of existing state statutes protecting off-duty employee tobacco usage appears to be a feasible avenue for reform. State legislation of this kind would be limited in nature and would involve easily administrable “bright line” rules. It would leave the role of modifying the employment-at-will doctrine where it belongs — in the hands of elected state representatives.²⁹⁰ Most significantly, such

286. TENN. CODE ANN. §§ 39-17-1604, 39-17-1551, 50-1-304 (2005).

287. See Michael Selmi, *Privacy for the Working Class*, 66 LA. L. REV. 1035 (2006) (arguing that employers should have broad control to monitor employees in the workplace).

288. See Leonard Bierman et al., *Making Disputes Over Dismissals ‘Win-Win’ Situations*, 63 HARV. BUS. REV. 160 (1985); Leonard Bierman & Stuart A. Youngblood, *Resolving Unjust Discharge Cases: A Mediatory Approach*, 40 ARB. J. 48 (1985); cf. Paul M. Igasaki, *Doing the Best with What We Had: Building a More Effective Equal Employment Opportunity Commission During the Clinton-Gore Administration*, 17 LAB. LAW. 261, 272 (2001) (noting the benefits mediation provides to both employers and charging parties).

289. See *supra* note 255.

290. See *supra* note 281.

legislation would protect *all* off-duty employee blogging, regardless of whether such blogging involves extensive discussion of the workplace. We believe legislation of this kind would clearly and directly recognize the important social value of employee blogging. Off-duty employee blogging, if given such strong legal protection, can play an important role in helping re-create a sense of American “community.”

VIII. JUSTIFYING THE PROTECTIONS AFFORDED TO EMPLOYEES WHO BLOG

Each of the various proposals introduced above represents potentially significant changes in the legal landscape. Employers are likely to argue that the proposals in this Article unduly limit their autonomy, producing a corresponding negative economic and business effect. What justification is there for imposing a limit on employers’ ability to fire at will? Additionally, are there types of speech that will not be protected under our proposals?²⁹¹

It is important to note that our interest in protecting speech in the form of off-duty employee blogging is directly related to its ability to build social community. This interest includes speech about employees’ jobs, including their work environment and working conditions.²⁹² Insofar as they create opportunities for social engagement and help develop trust and cooperation among employees, conversations about non-work-related matters should also be included.²⁹³

291. We are particularly indebted to Professor Eugene Volokh with respect to insights presented in this section of our Article.

292. Encompassed in this type of speech will be speech of the kind that currently falls under the protection for “concerted activities” of 29 U.S.C. § 157 (2000). However, the scope we intend to capture here is broader. The NLRA covers employees’ activities only if they are concerted and for mutual aid or protection. 29 U.S.C. § 157. The concerted nature of the activity has been narrowly defined by the NLRB as requiring a showing that the employee was trying to initiate group action, or acting for or on behalf of other workers after having discussed the matter with fellow workers. *See Meyers Indus. (Meyers I)*, 268 N.L.R.B. 493 (1984); *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882 (1986). We propose, however, that the NLRB return to its holding in *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1975). In that case, the NLRB found concerted activity to exist where, judging from the subject matter of the individual employee’s claim, it could reasonably be inferred that such a concern was shared by other employees.

293. The scope of this inclusion should be much broader than that of protections now available under the public policy exception to the employment-at-will doctrine. Under the current public policy exception, employees must not only identify a clearly defined policy supporting their claim, but also pass a balancing test pitting their claim against the employer’s interests. *See PERRITT, supra* note 203, at 7-22 to 25. Courts have been rather reluctant to find a specific policy favoring free speech at work or about work, and thus have consistently rejected employee challenges. *See Lisa B. Bingham, Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L. J. 341, 348-49 (1994). Even in those few cases where courts have favored some free speech protection for private sector employees on public policy grounds, that protection has been limited. *PERRITT, supra* note 203, at 7-145 to 46. When courts have

Our rationale for this broad scope is twofold. First, non-work-related speech serves to create opportunities for social engagement among employees — a particularly important antecedent in interpersonal community formation. The simple act of engaging in a conversation with co-workers is itself an opportunity for social engagement. Such opportunities do not arise only from employee discussion about work, but from any topic of conversation. In fact, opportunities for social engagement are probably more likely to occur when employees find out they have outside interests in common, and thus seek to establish relationships away from the workplace.²⁹⁴

Second, non-work-related speech can play a significant role in helping employees develop trust and promoting cooperation and compromise. Trust is related to a shared sense of community, and is arguably the “by-product of the embeddedness of individuals in a web of social relations such that values and expectations are commonly shared.”²⁹⁵ Employees often learn to trust each other in the context of their work activities; however, trust can also develop outside the workplace. When employees discover they share common interests, and pursue those interests outside of work, they are likely to develop trusting relationships that will carry over to all their interactions, work-related or not.²⁹⁶ These relationships promote cooperation and compromise, and thus serve the function of helping to form a cohesive social community.

The goal of creating greater social community justifies our admittedly broad conception of when to extend protection to workers’ speech. However, by focusing on speech that serves a social community formation function, we would exclude any speech that does not provide opportunities for social engagement, promote cooperation and compromise, or develop trust. For example, we do not argue that speech involving the disclosure of confidential information deserves protection. Although it might provide some opportunities for social engagement, such speech does not promote trust, compromise, or co-

balanced employees’ free speech interest against a broad set of employer interests, the employer interests have typically carried more weight. *See id.* at 7-148.

294. For example, Professor Estlund writes about how “a college-educated African American woman in her thirties” living in a nearly all-black neighborhood became close friends with “a white woman of Greek descent” living in a predominantly white neighborhood dozens of miles away. These two women met at work and subsequently developed an off-the-job friendship. Their friendship has survived time, a change in jobs, and even a cross-country move. ESTLUND, *supra* note 73, at 3.

295. Walter W. Powell, *Neither Market Nor Hierarchy: Network Forms of Organization*, 12 RES. IN ORG. BEHAV. 295 (1990).

296. Cf. Paul Bedard, *Up Politics Creek with a Paddle*, U.S. NEWS & WORLD REP., Aug. 28, 2006, at 24 (outlining how the shared interest in kayaking between Democratic Congressman Mark Udall and former Republican Congressman and Office of Management and Budget Director Rob Portman led Udall to trust Portman and assist him in passing President Bush’s budget).

operation at all. Generally, social community is not formed by speech that involves illegal conduct.

Similarly, harassing speech against a co-worker or supervisor will not serve a trust-building or compromise-seeking function, and thus falls outside the scope of our proposed protections. The function of social community formation is not usually well served by speech that “sacrific[es] competing social virtues of restraint, civility and connectedness.”²⁹⁷ Nor is it served when a speaker engages in speech that hurts the very enterprise on which the speaker’s livelihood and that of his or her co-workers depends.

It should not be difficult to establish more precisely which topics of off-duty blogging do not deserve legal protection. As part of its employee “concerted action” analysis, the NLRA already explicitly permits a “balancing” of employer interests and the exclusion of certain types of abusive speech.²⁹⁸ Similarly, should the issue be addressed via state common law in accordance with the “third-party effects” framework outlined by Dean Schwab, state judges will have considerable flexibility in holding that the public policy exception to the employment-at-will doctrine does not protect certain kinds of abusive blogging.²⁹⁹ Finally, extant state statutory provisions encompassing employee off-duty conduct typically include “conflict of interest” and similar exemptions.³⁰⁰ Indeed, the fact that such statutes explicitly protect employer interests further lends to their credibility as the most realistic avenue for reform.

IX. CONCLUSION

Times have changed. Americans, and particularly American workers, live in a much more socially isolated world than they did in the past. Union halls and employee group bowling are rare these days.

In some respects, the Internet and today’s “virtual world” have contributed to these developments. For example, when employees are telecommuting or working “virtually” off-site, developing a strong sense of community with their colleagues is far more difficult. But while the Internet may be part of the problem, it also has the potential to be part of the solution. As Professor Putnam asserted in commenting on the recent McPherson study, the truly interesting question for the future is to what extent the Internet can be used “to strengthen and deepen relationships we have offline.”³⁰¹

297. ESTLUND, *supra* note 73, at 123.

298. *See supra* Part V.D.

299. *See supra* Part VII.C.

300. *See supra* notes 250–51 and accompanying text.

301. Fountain, *supra* note 23 (quoting Professor Putnam; internal quotation marks omitted).

This Article has engaged that question in the context of off-duty employee blogging. It has asserted that current legal structures provide relatively little protection for employee bloggers, and that such structures need to be changed in order to promote the social benefits that derive from employee blogging. As employee blogs have in many respects become the new union hall, they deserve the same sort of comprehensive legal protection union halls received in days of old.