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Lucidity Sinks as These Twain Converge: Keeping Pickering Afloat Despite Locurto v. Giuliani and Melzer v. Board of Education

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COMMENT

LUCIDITY SINKS AS THESE TWAIN CONVERGE: KEEPING *PICKERING* AFLOAT DESPITE *LOCURTO V. GIULIANI* AND *MELZER V. BOARD OF EDUCATION*

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INTRODUCTION

Although the First Amendment's guarantee of free speech is a fundamental right granted to every citizen,[1] it is not free from limitations.[2] One such limitation has to do with the free speech rights of government employees.[3] When public employees

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[1] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech"). The First Amendment grants every citizen the right to speak publicly on controversial issues in order to furnish a public and open debate. *See* Stephen Allred, Note, Connick v. Myers*: Narrowing the Free Speech Right of Public Employees*, 33 CATH. U. L. REV. 429, 429 (1984) (emphasizing the danger that results from suppressing speech that should be heard). A citizen's right to criticize the government facilitates this type of debate. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (stating that the suppression of good faith criticism of the government is unconstitutional under the First Amendment).

[2] *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (holding that a person cannot be punished merely for advocating certain unpopular actions, but can be punished for acting unlawfully); Allred, *supra* note 1, at 429 (stating that the United States Supreme Court has held that the First Amendment's grant of free speech is not absolute). These limitations include those who knowingly or recklessly make false statements, publish obscenity, or make false advertising claims. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); Miller v. California, 413 U.S. 15, 23 (1973); *New York Times Co.*, 376 U.S. at 279–80; *see also* Allred, *supra* note 1, at 429. Justice Holmes recognized that the First Amendment does not protect one who falsely shouts fire in a crowded theater. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[3] *See* Allred, *supra* note 1, at 429–30 (stating that there are limitations imposed

express views that are detrimental to the community's safety,[4] they undermine the government's effectiveness in rendering services to society.[5] In turn, when the government cannot perform its tasks effectively due to an employee's speech, it has a right to terminate that employee.[6] With this in mind, courts must formulate a workable test to determine whether a government employee's speech is protected by the Constitution.[7]

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upon First Amendment rights of public employees, especially when that speech is critical of their employer); Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better Definition of the* Pickering/Connick *Threshold Test*, 50 VAND. L. REV. 993, 994–95 (1997) (discussing a public employee's "split personality" as a citizen of the United States and a government employee who does not have an absolute right of free speech); Victoria K. Johnson, Note, Ferrara v. Mills*: The A, B, C's of the Public Educator's Freedom of Expression*, 13 J. CONTEMP. L. 181, 181 (1987) (discussing the traditional limitations on a public educator's right to criticize her employers).

[4] *See* Rankin v. McPherson, 483 U.S. 378, 390–92 (1987) (stating that public officials who are responsible for actual law enforcement should be limited in their speech more than other public employees in certain situations); Pappas v. Giuliani, 290 F.3d 143, 146–47 (2d Cir. 2002) (holding that a police officer who disseminates racist views undermines community cooperation with law enforcement agencies); André G. Travieso, Note, *Employee Free Speech Rights in the Workplace: Balancing the First Amendment Against Racist Speech by Police Officers*, 51 RUTGERS L. REV. 1377, 1377–78 (1999) (discussing the dangerous effects of employing racist police officers).

[5] *See Pappas*, 290 F.3d at 146–47 (stating that governmental effectiveness is undermined when police departments' racist views cause communities to lose trust in them); *see also Rankin*, 483 U.S. at 388–89 (holding that if a member of a constable's office had spoken to the general public, his statements would undermine the effectiveness of that office). *Rankin* suggested that under a different factual setting, the case would have turned out very differently. It implicitly decided that the potential dangerous consequences resulting from an employee's speech is an important aspect of government effectiveness, especially in a department where the key objective is to protect the public. *See id.* at 390–92.

[6] *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (stating that when an employee's speech has a negative impact on the effectiveness of the government in performing its services, it has the right to terminate that employee). Many courts have applied the standard set forth in *Pickering* and have held that the government has the right to terminate employees in certain situations. *See, e.g.*, *Pappas*, 290 F.3d at 146–48; Porter v. Dawson Educ. Serv. Coop., 150 F.3d 887, 894–95 (8th Cir. 1998); Bryson v. Waycross, 888 F.2d 1562, 1563–64 (11th Cir. 1989); May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1108–09 (7th Cir. 1986); Anderson v. Evans, 660 F.2d 153, 158 (6th Cir. 1981).

[7] *See* Charles W. Hemingway, *A Closer Look at* Waters v. Churchill *and* United States v. National Treasury Employees Union*: Constitutional Tensions Between the Government as Employer and the Citizen as Federal Employee*, 44 AM. U. L. REV. 2231, 2236 (1995) (discussing the conflicting constitutional principles that come into play in public employment law); *see generally* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE. L.J. 877 (1962) (criticizing different tests in this area); Paul Ferris Solomon, Note, *The Public Employee's Right*

After much debate on this issue,[8] the Supreme Court set forth a balancing test in *Pickering v. Board of Education*.[9] Under the test, courts must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs . . . ."[10] The effect on government efficiency is determined by the possible disruption to the work environment.[11] This test, however, allows for unacceptable amounts of judicial discretion[12] and causes inconsistent results by focusing on the wrong factors for disruption. Two recent decisions in New York, applying the *Pickering* balancing test, illustrate these inconsistencies. In

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of Free Speech: A Proposal for a Fresh Start, 55 U. CIN. L. REV. 449 (1986) (discussing the possibility of using a new test for public employees and free speech rights).

[8] Government employees' rights in the area of free speech have expanded since the mid-twentieth century. *See* Solomon, *supra* note 7, at 449. Early on, citizens gave up their constitutional right to free speech once they became a government employee. As Justice Holmes recognized, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892). More recently, the Supreme Court has given government employees substantial First Amendment protection. *See* Stephen A. Newman, *The Teacher Who Advocated Pedophilia*, N.Y. L.J., Aug. 7, 2003, at 2 (stating that modern cases have granted more First Amendment protection to government employees).

[9] *See Pickering*, 391 U.S. at 568. The court set forth this test, but stated that it should be used on a case-by-case basis. *Id.* at 568–69. This test has also gone through certain important changes. *See* Connick v. Myers, 461 U.S. 138, 146 (1983). *Connick* stated that the primary question in the *Pickering* analysis should be whether the speech is on a matter of public concern. *Id.* at 149.

[10] *Pickering*, 391 U.S. at 568.

[11] *See id.* at 568–75. Under this test, it is sufficient that the government show a potential future disruption. *Id.* The government does not have to show that a disruption has already occurred. This is mainly because the court wants to make sure that the adverse action was taken against the employee due to a reasonable fear of disruption to the work environment and not in retaliation for the speech. *Id.*; *see also* Waters v. Churchill, 511 U.S. 661, 674–75 (1994).

[12] *See* Johnson, *supra* note 3, at 189 (discussing various scholars' recognition of the problems inherent in the balancing test). "Justice Black, the Supreme Court's most fervent opponent of balancing tests, contends that the defects of a balancing test in constitutional decision making are the potential for judicial abuse of discretion and the arbitrary fixing of burdens in order to dictate a particular result in a given case." *Id.* (citing Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 164 (1961) (Black, J., dissenting); Braden v. United States, 365 U.S. 431, 444–45 (1961); Barenblatt v. United States, 360 U.S. 109, 145 (1959)); *see also* Emerson, *supra* note 7, at 912 (discussing the inherent problems in an ad hoc balancing test for constitutional issues).

Melzer v. Board of Education,[13] the Second Circuit held that a school had the right to terminate a teacher who was a member of the North American Man Boy Love Association ("NAMBLA").[14] In doing so, it incorrectly denied a teacher's constitutionally protected right to speak on a matter of public concern. In contrast, a federal district court in *Locurto v. Giuliani*[15] reinstated members of the New York City Police and Fire Departments after they were fired for committing racially offensive acts on a parade float.[16] The court mistakenly decided that the speech was on a matter of public concern and that the employees were constitutionally protected in their actions. The *Pickering* balancing test caused these inconsistent results and, therefore, should be refined.

This Comment asserts that a disruption to the work environment occurs when the public employee's speech would diminish the government's reputation[17] and would be dangerous to those who are directly affected by the speech.[18] These factors must be analyzed in light of the position the employee holds in the workplace[19] and the services performed.[20] The content of the speech is important only to the extent that it poses a danger to those directly affected by the speech.[21]

Part I of this Comment discusses the *Pickering* balancing test's definition of disruption and how the courts applied it in *Melzer* and *Locurto*. Part II illustrates the problems caused by the disruption aspect of the test as revealed by the mistaken

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[13] 336 F.3d 185 (2d Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004).

[14] *See id.*

[15] 269 F. Supp. 2d 368 (S.D.N.Y. 2003).

[16] *See id.*

[17] *See Melzer*, 336 F.3d at 199 (stating that the fact that a school's reputation may be harmed by the speech is a factor that should be taken into account); *see also* Travieso, *supra* note 4, at 1402 (stating that a police officer's racist speech will cause the community to distrust the police department and harm its reputation).

[18] *See* Rankin v. McPherson, 483 U.S. 378, 388–92 (1987) (implying that a disruption might be caused by the employees' speech in situations where that employee is dangerous to the community as a result of that speech).

[19] *See id.* at 390–92 (stating that the speech may cause a disruption depending on the employee's position in the office).

[20] *See id.* (implying that an employee charged with protecting the community is more likely to cause a disruption in the work environment when speaking on matters of public concern).

[21] The Supreme Court has stated that the unpopular content of the speech should not be taken into account when balancing. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 569–70 (1968).

results in these two decisions. It then discusses how, even if the test is not changed, *Locurto* should be reversed in light of the decision in *Melzer*. Part III suggests factors that a court should consider when deciding whether a disruption will occur, in order to ensure consistent and fair results. It then applies these new factors to *Melzer* and *Locurto*. This Comment concludes with the proposition that the suggested factors will resolve any inconsistencies that have resulted from the haphazard application of the *Pickering* balancing test.

I. THE *PICKERING* BALANCING TEST IN PRACTICE

A. Pickering v. Board of Education: *Disruption Considered in Light of Government Effectiveness*

In *Pickering*, the appellant, a public schoolteacher, brought a suit pursuant to 42 U.S.C. § 1983,[22] claiming that his termination for criticizing school tax proposals in a newspaper infringed upon his right of free speech.[23] The Court held that his speech was on a matter of public concern[24] and did not cause a disruption to the school environment.[25] In doing so, it constructed a balancing test for questions concerning government employees' free speech rights.[26] The Court stated that this test should be applied on a case-by-case basis depending on the facts of each particular situation.[27]

The teacher's termination arose out of a letter he sent to a newspaper attacking the school board's handling of financial proposals.[28] The Court stated that there was no evidence that

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[22] 42 U.S.C. § 1983 (1994) (allowing citizens to bring an action against state or municipal officials who deprive them of their constitutional rights).

[23] *Pickering*, 391 U.S. at 564–67 (discussing the contents of the letter sent to the newspaper).

[24] *See id.* at 571–72 (stating that the question of whether a school requires additional funds is a matter of public concern because it is important to the interests of the community).

[25] *Id.* at 569–70.

[26] "The problem in any case is to arrive at a balance between the interests of the teacher, as citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

[27] *See id.* at 569 (stating that the Court did not purport to put down a standard for all statements but found it necessary to "indicate some of the general lines along which an analysis of the controlling interests should run").

[28] *Id.* (stating that the letter criticized the school board's handling of the

this letter disrupted the school system or the community as a whole.[29] It held that the speech was not directed at anyone the appellant would be in contact with and, therefore, would not cause a disruption to close working relationships.[30] The Court also stated that there was no evidence that the statements would impede his job performance.[31] Additionally, it recognized that teachers are educated about the school board's functions and, therefore, their speech should not be muzzled.[32] In balancing the interests of the two parties, the Court concluded that the teacher's right to speak on this matter of public concern outweighed the rights of the school board in maintaining an effective work environment because it was unreasonable to suspect a disruption would occur in response to the speech.[33] This landmark decision was the first to recognize a public employee's right to speak on matters of public concern.[34] It changed the way courts handled these situations and established the test used by courts today.[35]

B. Melzer v. Board of Education: *Analysis Under* Pickering

In *Melzer*,[36] the Second Circuit, applying the *Pickering* Balancing Test, upheld the New York State Board of Education's decision to terminate a schoolteacher who was a member of NAMBLA.[37] In doing so, the court misapplied the balancing

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allocation of funds between school programs).

[29] *See id.* at 570–71 (recognizing that the letter was considered to be false by everyone except the Board and therefore it was not detrimental to the school system).

[30] *Id.* at 569–70.

[31] *Id.* at 570, 572–73.

[32] *Id.* at 572 (discussing that teachers generally have knowledgeable insight into how to designate funds for school operations).

[33] *See id.* at 572–73.

[34] *See* Anthony F. Newton, Note, *Lessons Unlearned: The Supreme Court Expands the Definition of Public Employee in* Board of County Commissioners v. Umbehr, 35 HOUS. L. REV. 921, 933 (1998) (stating that *Pickering* is the "seminal Supreme Court case" in the area of free speech rights for public employees).

[35] *See Pickering*, 391 U.S. at 564–73; Newton, *supra* note 34, at 933–35 (explaining the test derived by the Supreme Court in this case).

[36] 336 F.3d 185 (2d Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004).

[37] *Id.* at 200. Melzer brought a § 1983 claim alleging that his termination violated his First Amendment right of free speech. *Id.* at 188–89. First, the court noted that *Pickering* was the correct test to determine whether the termination violated the First Amendment. *Id.* at 194. The court concluded that the government's right to keep the school free from disruption outweighed Melzer's right to speak on this matter of public concern. *Id.* at 197–99. The court also held

test's disruption factor by focusing on the reactions of the parents and not the students.[38]

Melzer had been a teacher at Bronx High School of Science for over thirty years and taught grades nine through twelve.[39] He was an exceptional teacher and mentor.[40] He had been a member of NAMBLA for about twenty years before his termination.[41] NAMBLA's goal is to change the laws governing the age of consent between men and boys and to abolish certain laws, such as those involving child pornography.[42] Melzer served in many capacities within the organization, including editor of NAMBLA's publication, the *NAMBLA Bulletin*.[43] There was no evidence that Melzer ever engaged in any illegal conduct.[44]

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that the termination was not in retaliation for Melzer's membership in the group. *Id.* at 199–200.

[38] *See id.* at 191–92. The court mostly discussed the parent's reactions to Melzer's membership in NAMBLA. *Id.* It devoted one paragraph to the student's reactions to the membership, noting that their views were on "both sides of the controversy." *Id.* at 191. However, the principal claimed that over ninety percent of the student body was unhappy with Melzer's membership. *Id.* The court took this contention as true without any further evaluation. In fact, the previous discussion of the students' reactions seemed to support the opposite conclusion. Further, disagreement over one's group membership does not necessarily lead to a disruption. Just because people disagree with something does not mean a disruption based on that disagreement must follow. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 605–10 (1967) (stating that members of the Communist party, who made their views clear to the public, could not be fired from a school just because people disagreed with their beliefs).

[39] *Melzer*, 336 F.3d at 189. Melzer taught from 1962 until the board suspended him in 1993, which led to his outright termination in 2000. *Id.*

[40] *Id.* Not only did Melzer teach in one of the best public high schools in New York, but the school awarded him with several commendations for his teaching ability and work with certain groups. *Id.*

[41] *Id.* He joined NAMBLA in 1979 or 1980 "to discuss with others his long-standing attraction to young boys." *Id.* The court described Melzer's membership as an "outlet" for his desires. *Id.*

[42] *See id.* The group seeks to establish these goals by educating the public on its activities and affiliating with other organizations supporting sexual liberation. *Id.*; *see also* Tom Perrotta, *Teacher Fired for Affiliation Loses Lawsuit*, N.Y. L.J., Feb. 27, 2002, at 1.

[43] *See Melzer*, 336 F.3d at 189. He also occasionally wrote articles for the publication including one discussing a police officer who posed as a member of the organization and arrested another member. Another article claimed that the same policeman mailed copies of the *Bulletin* to the Board of Education. *Id.* at 190. Other articles included Melzer's belief in NAMBLA's stated goals. *Id.* at 189–90.

[44] *Id.* at 189; *see* Newman, *supra* note 8, at 2 (stating that while Melzer's attraction to young boys made him a pedophile within the dictionary definition, he never did anything illegal during his thirty years of teaching).

When Melzer's membership in NAMBLA was brought to the Board's attention in 1984, no administrative action was taken.[45] An investigation took place nearly seven years later.[46] In 1993, a local television station in New York aired a segment illustrating Melzer's membership in NAMBLA.[47] After this dissemination, and while Melzer was on sabbatical,[48] teachers and school officials met to decide whether Melzer should be allowed to return to the school.[49] The court stated that some school officials expressed trepidation over his return.[50] However, it failed to quantify the number of faculty members expressing these concerns.[51] The court then discussed the Parents' Association's angry reactions to the news stories.[52] After these reactions, and after the students held an assembly expressing their views,[53] the principal decided to suspend Melzer.[54] Disciplinary hearings were held and Melzer was terminated.[55] Melzer then brought a §

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[45] *Melzer*, 336 F.3d at 190. An anonymous letter was sent to the school's principal in 1984 or 1985. *Id.* When the Board asked Melzer about his membership, he declined to comment. *Id.*

[46] *See id.* The investigation began again in 1992 by a newly created investigative body for the school district. *Id.*

[47] *Id.* at 190–91. The media aired the story during the investigation. *Id.* It was a three-part story discussing schoolteachers who were members of NAMBLA. Other television stations later aired the story. *See id.*; *see also* Perrotta, *supra* note 42, at 1 (stating that an NBC affiliate aired the story including a tape from a meeting).

[48] *See Melzer*, 336 F.3d at 191 (stating that Melzer was on sabbatical for the 1992-1993 school year).

[49] *Id.* (discussing the fact that the principal met with approximately one hundred teachers and school officials).

[50] *Id.* The concerns were mainly over whether Melzer should be allowed around the students and the news story's effect on future student recruitment. *Id.*

[51] *Id.*

[52] *Id.* (stating that approximately fifty or sixty parents were angered by Melzer's involvement in the association and threatened to remove their children and conduct strikes if the Board allowed Melzer to continue teaching there).

[53] *Id.* The court stated that a four hundred-person assembly was conducted, and of the thirty to forty students who spoke, a majority opposed plaintiff's involvement while only a few students advocated for his continued employment. *Id.*

[54] *Id.* The investigation report issued in support of this decision stated that disruption and loss of parental confidence in the school would follow, and expressed a concern of future sexual abuse against children. *Id.* The court did not agree with the concern for the possibility of future sexual abuse by Melzer. *See id.* at 198 (stating that since the organization was not acting illegally, an employee can not be punished for his association with it) (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

[55] *Id.* at 192. The hearings concluded that, as a result of the media attention, disruption would follow and undermine Melzer's ability as a teacher. *Id.*

1983 claim against the Board of Education and the district court held that Melzer's termination was constitutional.[56]

The Second Circuit affirmed, despite holding that the First Amendment protected Melzer's type of speech and association as a citizen[57] and that the issue of whether the speech was on a matter of public concern did not need to be decided for the purposes of the case.[58] Next, to decide whether the termination was unconstitutional, the court balanced the interests of the Board, as a government employer, in keeping its work environment free from disruption, and Melzer, as a private citizen and employee, in speaking on this issue.[59]

Melzer's activities, according to the court, needed to be viewed in light of his position at the school and his daily contact with students.[60] The court disregarded Melzer's claim that, because it did not show the number of students and teachers who were unhappy with his participation, the school failed to fulfill its burden of proving disruption.[61] Instead, the court concluded that because the parents and students had negative reactions to the speech, the Board's fear of disruption was reasonable.[62] It then decided that Melzer's continued employment at the school would negatively impact the learning

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[56] *See id.*

[57] *Id.* The court recognized that the First Amendment would protect the speech if a private citizen were involved; it then moved on to the *Pickering* analysis because Melzer was a government employee. *Id.*

[58] *Id.* at 192, 197–98 (stating that the second factor of the *Pickering* analysis was satisfied since a significant disruption would have followed from the speech, and therefore the threshold issue of public concern did not need to be determined). This Comment does not focus on this issue, but it is reasonable to conclude that lobbying for a change in the law is a matter of public concern. The determination of this issue would have been crucial had the court balanced the issues correctly and concluded that a disruption would follow. *See* Connick v. Myers, 461 U.S. 138, 146 (1983) (stating that the threshold issue of public concern must be met before performing the balancing portion of the *Pickering* test).

[59] *Melzer*, 336 F. 3d at 197.

[60] *Id.* at 198–99 (stating that the determination of whether his speech was protected would be conducted very differently had Melzer not been a teacher whose primary functions were to protect and educate children).

[61] *Id.* at 198 (stating that the quantity of school community members who disapproved of the speech was not relevant, and concluding that the Board's reasonable view that the majority of the school community was against Melzer's return was enough to satisfy the balancing test in favor of the government).

[62] *Id.* The court assumed that the negative reactions would result in disruption without a thorough analysis showing the probability of such an occurrence. *Id.* at 198–99.

environment because of "his effect on two critical constituencies—the students and the parents."[63] The court incorrectly stated that a disruption would follow.[64] These concerns were unfounded in light of the facts of the case. Melzer's teaching ability was never in question and the presence of a NAMBLA member in the school should not have led to the conclusion that the school's reputation would decrease.

C. Locurto v. Giuliani: *Decided in the Wake of* Pickering

In *Locurto v. Giuliani*,[65] the district court applied the *Pickering* balancing test[66] and reinstated members of the New York City Police and Fire Departments after their outrageous and racist actions on a parade float in Broad Channel, Queens.[67] The court held that the speech was protected under the First Amendment[68] and that the public employees' interests in speaking on this matter of public concern outweighed the interests of the government in maintaining an effective work environment free from disruption.[69] In fact, the court claimed that the Mayor and the Commissioners of the NYPD and FDNY terminated the employees because of the content of their speech and not because they feared a future disruption to the working

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[63] *Id.* at 198–99. The court only focused on the parents' concerns and incorrectly assumed that the speech would have a negative effect on the students. *Id.*

[64] *Id.* (stating that Melzer's return could cause parents to remove their children from the school, impair the school's reputation and the students' learning environment, and decrease cooperation between parents and teachers).

[65] 269 F. Supp. 2d 368 (S.D.N.Y. 2003).

[66] *See id.* at 383–402.

[67] *Id.* at 402.

[68] *Id.* at 401–02. This article does not contend that the speech would not be protected under the First Amendment had a private citizen, and not a public employee, participated in such actions. It should be noted that there is a difference between constitutionally protected speech and something that comes dangerously close to a hate crime. Racist conduct has historically caused disruption in work environments and organizations. Disruptions occur, not only in the form of lack of trust and respect for officials, but also in the form of violence. Defacing someone's property with vicious hate symbols is one instance where violence and outrage has followed. Yet, this type of symbolic speech has been held to be unacceptable. *See* Virginia v. Black, 538 U.S. 343, 347–48 (2003) (holding that Virginia's ban on cross burning with the intent to discriminate did not violate the First Amendment). So why was the speech protected in *Locurto*? While that speech was not in the form of defacing property, there is no difference in the prejudiced message sent to the public. Firing those who commit such acts is constitutional when they hold positions where violent situations are always a possibility and the protection of every citizen is the key objective.

[69] *Locurto*, 269 F. Supp. 2d at 398.

environment.[70] The court mistakenly held against the city and overlooked the importance of the community's possible reactions to the speech.[71]

Joseph Locurto, a New York City police officer, and Robert Steiner and Jonathan Walters, New York City firefighters, participated in a number of controversial floats in Broad Channel's annual Labor Day parades.[72] The float at issue in the instant case was entitled "Black to the Future: Broad Channel 2098,"[73] and displayed racially sensitive content, including wearing black-face and "Afro" wigs, engaging in chants that referred to historical civil rights rallies, eating large buckets of Kentucky Fried Chicken and watermelon, and dressing in a sloppy manner."[74]

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[70] *Id.* at 391–93. Although courts have continuously stated that the unpopular content of the speech should not be considered when deciding constitutional questions under the First Amendment, it does play a role in deciding whether the speech will cause a disruption in the working environment. It is necessary to take these opinions into account because some types of speech may cause a disruption in one working environment and not in another depending on the responsibilities of the job at issue.

[71] This contention focuses on all of the plaintiffs involved in the float and how their reinstatement could affect the community and the effectiveness of both departments. *Cf.* Travieso, *supra* note 4, at 1377–78.

[72] *Locurto*, 269 F. Supp. 2d at 373. In 1996, the plaintiffs participated in a float that was entitled "The Gooks of Hazard," which depicted many "disparaging Asian-American stereotypes," including intentions to mock the group's accent and "nearly-closed eyes." *Id.* at 373–74, 374 n.1. In 1997, the plaintiffs participated in a float entitled "Dysfunctional Family Feud," which depicted the rivalry between the Broad Channel Volunteer Fire Department and the Broad Channel Athletic Club. *Id.* at 374. The court noted that the media did not cover these two floats, and that the floats did not cause any disruption in the departments or the community. *Id.* However, the court failed to recognize that there was no disruption *because* there was no media coverage and, therefore, not many people were aware of the floats' existence. Prior to this, the members of the group had participated in many other discriminatory floats during the Labor Day parade and won prizes for "Funniest Float" nine years in a row. *Id.* The plaintiffs participated in the 1996 and 1997 floats, in addition to the float that brought about their termination. *Id.*

[73] *Id.* at 374. The float was intended to parody the popular 1985 film, *Back to the Future*, and depicted what it would be like in Broad Channel if African-Americans were to become the majority of those living in the community. *Id.* In the court's opinion, it also noted that Broad Channel is a predominantly white neighborhood. *Id.* at 385; Travieso, *supra* note 4, at 1380 (stating that only one percent of the community's residents were non white and there were no African Americans or Asian Americans listed on the 1990 census).

[74] *See Locurto*, 269 F. Supp. 2d at 374; *see also* Mark Hamblett, *Trial Opens on City Firings for Racist Float*, N.Y. L.J., Jan. 8, 2003, at 1 (discussing the opening of the trial and the contentions of both parties).

The most egregious act was plaintiff Walters' vivid depiction "of the dragging death of James Byrd, Jr. in Jasper, Texas, in 1998."[75] This act was repeated after the crowd and a cameraman urged Walters to do it again.[76] After the float was described as racist on the news and it was made known that city employees participated, Mayor Rudolph Giuliani publicly stated that any city employee involved in this type of racist action would be fired.[77] The respective departments suspended Locurto, Steiner, and Walters after they admitted to their participation in the float.[78] After their identities were revealed, Mayor Giuliani again stated that these men would never return to the NYPD or FDNY, even though at this point they were technically only suspended.[79] Disciplinary hearings took place charging the men with engaging in conduct that would interfere with the efficiency of the departments.[80] The policeman and firemen were terminated.[81] After their termination, all three brought suit pursuant to § 1983, claiming that they were terminated "in retaliation for engaging in offensive speech."[82]

Judge Sprizzo applied the *Pickering* balancing test[83] and decided that the speech was a matter of public concern because

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[75] *Locurto*, 269 F. Supp. 2d at 375; *see also* Hamblett, *supra* note 74, at 1 ("Mr. Walters allegedly grabbed the back of the truck and allowed himself to be dragged along in reference to the brutal dragging murder of James Byrd Jr. in Jasper, Texas."). Byrd, an African American man, was dragged behind a truck with a rope tied around his ankles by three white men. *Locurto*, 269 F. Supp. 2d at 375.

[76] *Id.*

[77] *Id.* at 376; David W. Chen, *Officers and Fireman Wore Blackface on Float, Officials Say*, N.Y. TIMES, Sept. 11, 1998, at B1 (discussing Mayor Giuliani's reactions and comments after he was informed about the participants of the float).

[78] *Locurto*, 269 F. Supp. 2d at 376.

[79] *Id.* at 377; *see also* Kit R. Roane, *Suspended Officer Apologizes, Calling Float 'a Big Mistake'*, N.Y. TIMES, September 13, 1998, at 51 (quoting Mayor Giuliani, who stated that "[t]he only way [Locurto] gets back on the police force is if the Supreme Court of the United States tells us to put him back").

[80] *Locurto*, 269 F. Supp. 2d at 378. The Deputy Commissioner for Trials for the NYPD, after hearing the evidence from both sides, recommended that Locurto be found guilty and Police Commissioner Safir agreed. *Id.* at 378. An Administrative Law Judge found Steiner and Walters guilty and recommended that they be fired, and Fire Commissioner Von Essen abided by this recommendation. *Id.* at 379.

[81] *Id.*

[82] *Id.*

[83] First, the court noted that before this case, *Pickering* had never been applied to a situation where the speech neither "took place in the workplace [n]or concerned a subject germane to workplace policy or functioning." *Id.* at 384 (observing that the speech in *Pickering* was aimed at the school and that subsequent cases did not take place outside the workplace and concluding that, therefore, Locurto was "outside the

one of the plaintiffs' goals was to comment on the future racial integration of their community.[84] The court proceeded to focus on the timing of the decision to terminate plaintiffs and whether Mayor Giuliani was primarily responsible for the actual decision.[85] The court concluded that the decision to fire plaintiffs was made before the disciplinary hearings were held[86] and that Mayor Giuliani had retaliatory motives for making the decision to terminate the plaintiffs.[87]

The court next considered whether the defendants' concern with regard to possible future disruption was reasonable, and if so, whether they in fact fired plaintiffs for this reason.[88] The

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paradigmatic fact pattern from which *Pickering* and its progeny were derived"). It decided that even though the context of the speech was different in *Locurto*, *Pickering* was still controlling and the "underlying constitutional principles [of *Pickering* were] still relevant." *Id.* at 385.

[84] *Id.* at 386 (stating that race and discrimination issues are inherently matters of public concern) (citing Connick v. Meyers, 461 U.S. 138, 148 n.8 (1983)).

[85] *Id.* at 388 (discussing the defendants' contention that the decision to terminate the plaintiffs was made after the disciplinary hearings by the Commissioners as well as the plaintiffs' opposing contention that the decision was made by Mayor Giuliani before the hearings). This, according to the court, was important in deciding whether the defendants' belief of a possible future disruption was the cause of the termination or whether the decision to fire the plaintiffs was in fact made in retaliation for their disparaging actions. *Id.* at 388–89 (stating that the defendants did not terminate plaintiffs because of the possibility of future disruption to the departments, but rather in retaliation for the speech, based on the date on which the decision to terminate was made).

[86] *Id.* at 388–389 ("Based on the strength of Mayor Giuliani's contemporaneous public comments, as well as his testimony at trial and that of the Commissioners, the Court finds, as a matter of fact, that Mayor Giuliani made a decision to terminate plaintiffs on or about September 10, 1998.").

[87] *Id.* at 392, 395. After determining that the defendants made the decision to fire the plaintiffs by September 10, 1998, the court turned to the question of the defendants' motivation for firing the plaintiffs. *Id.* at 391. In making its decision, the court relied heavily on Mayor Giuliani's statements and reaction to the speech as soon as he found out about the float. *Id.* at 391–92. The court also emphasized the fact that Giuliani did not know the identities of the participants and did not ask anyone in the minority community for possible reactions to the float when making these comments. *Id.* at 391. The court then decided that another motivating factor in firing the plaintiffs was the community's criticism of how Giuliani previously handled the Million Youth March and other racially motivated misconduct and controversies by police officers. *Id.* at 392–95. By taking these factors into account, the court held that the defendants fired the plaintiffs in retaliation for their actions and not because they feared a possible future disruption. *Id.* at 397 (stating that the court would find the termination was in response to the speech, even despite evidence offered regarding events after September 10, 1998). The court, however, as a result of these assertions, could have required the departments to hold new hearings, instead of relying on First Amendment principles.

[88] *Id.* at 395–98 ("Although substantial weight is given to the government

court found that the defendants could not demonstrate a reasonable fear of disruption, relying on its previous conclusion that the decision was made on September 10, 1998, before any disciplinary hearings or investigation took place.[89]

Next, the court stated that even if the defendants' belief of disruption was reasonable, it was not sufficient to outweigh the plaintiffs' interests in speaking on this matter.[90] The court decided that community outrage was not enough, as a matter of law, to tip the balance in favor of the defendants.[91] Rather, internal disruption was necessary to justify the defendants' actions, and the court concluded that no such disruption existed.[92] External disruption, however, including community reactions to the speech, was sufficient to cause internal disruption within the departments. Therefore, the court mistakenly applied the balancing test by looking only to internal disruption and not the community's reaction to the speech.

II. PROBLEMS WITH *PICKERING*'S DEFINITION OF DISRUPTION AS REVEALED BY *MELZER* AND *LOCURTO*

A. Misapplication of Disruption Factor in Melzer

In *Melzer*, the Second Circuit misapplied the *Pickering* balancing test by focusing on parental reactions to Melzer's

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employer's predictions of disruption . . . such predictions must be reasonable. To satisfy this burden, the government need only show potential interference, not actual disruption.") (citing Waters v. Churchill, 511 U.S. 661, 673 (1994)).

[89] *Id.* at 396 (stating that the defendants did not carry their burden of making a "substantial showing" that plaintiffs' speech would cause future disruption as of September 10, 1998).

[90] *Id.* at 397–98. The court concluded that even if the potential disruption was reasonably suspected, it was insufficient to hold in favor of the government. *Id.*

[91] *Id.* at 398–400. The court distinguished *Pappas v. Giuliani*, 290 F.3d 143, 154 (2d Cir. 2002), where it held that a police officer's firing was not in violation of the First Amendment because he disseminated racist flyers to certain members of the Nassau County Police Department, by claiming that, whereas the speech in *Pappas* was private, the speech in *Locurto* was "of far greater public concern." *Id.* at 400. The court held that because the speech was of far greater concern than the speech in *Pappas*, the interest of the plaintiff must therefore also be considered to a greater extent. *Locurto*, 269 F. Supp. 2d at 400 (citing Connick v. Myers, 461 U.S. 138, 152 (1983)). The court also stated that the claim of possible disruption by the community was insufficient, speculative and conclusory. *Id.* at 401.

[92] *Id.* at 398 (stating that the evidence did not show any actual disruption within the working environment, but to the contrary showed that three firefighters wanted the plaintiffs to return to the force, including one African American).

speech. In doing so, it failed to consider the students' and teachers' reactions at the school. When focusing on possible future disruption, a court must look at the several factors set forth in *Pickering* and the cases that followed.[93] In *Pickering*, the Court focused on the reactions of other teachers and administrators and determined that a disruption did not follow from the speech on that basis.[94] Therefore, the critical parties involved in *Melzer* should have similarly been the students and teachers, not the parents.[95] The students were most affected by the speech. If they were younger, parental concerns may have had more weight. These students, however, were in high school and were able to form their own opinions about Melzer's affiliation.[96] In fact, they even held an assembly to discuss how they felt about Melzer's continued employment.[97] Their discussion never once disrupted the school environment and, as the court noted, they expressed views on both sides of the controversy.[98] Consequently, when the court focused on the parents, it incorrectly dismissed the students' reactions.

When deciding whether certain speech is protected, the unpopular content of the speech should not be taken into account.[99] While the court claimed to recognize this rule,[100] the

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[93] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568–74 (1968) (describing certain factors that should be taken into account to decide whether a disruption may follow controversial speech by a government employee, none of which are alone sufficient to sanction termination); *see also* Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983). These factors included plaintiff's ineffectiveness as a teacher due to the speech, deterioration of the relationships between the plaintiffs and his coworkers and supervisors as well as the time, place, manner and context of the speech. *Pickering*, 391 U.S. at 565–67; *see also* John M. Ryan, *Teacher Free Speech in the Public Schools: Just When You Thought it was Safe to Talk . . .*, 67 NEB. L. REV. 695, 713 (1988).

[94] *See Pickering*, 391 U.S. at 570–71 (holding that there was no reasonable fear of disruption based on the plaintiff's statements and that it would not affect relationships with coworkers or with administrators at the school).

[95] *See id.*

[96] *See generally* Nancy Tenney, Note, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1624–27 (1995) (discussing students' first amendment rights to receive information on controversial issues); YOUR SCHOOL AND THE LAW, July 7, 2000, Vol. 30, No. 13 (discussing parental challenges to a school board's policy to allow students to learn about evolution by explaining to them that they should form their own opinions about their biblical beliefs).

[97] *See* Melzer v. Bd. of Educ., 336 F.3d 185, 191 (2d Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004).

[98] *Id.*

[99] *See* Rankin v. McPherson, 483 U.S. 378, 384 (1987); *Melzer*, 336 F.3d at 193;

sole basis for its decision was the unpopularity of the speech at issue. Parental reactions to the speech were in fact brought about by their disagreement with the group's agenda.[101] This is unfair to a plaintiff like Melzer who, although a member of NAMBLA, has never been accused of any crime.[102] Melzer was punished for advocating his opinion simply because it was one with which the majority of the community disagreed.[103]

Another basis for the court's opinion, although only alluded to in parts of its holding, was the recent controversies involving illegal pedophile behavior within the school system and the Catholic Church.[104] It was unfair to Melzer that these controversies influenced the court's decision, because he was not alleged to have been involved in any such controversy.

Additionally, there was no evidence that Melzer's teaching abilities were impaired due to his personal life or the speech.[105] To the contrary, the facts indicate that Melzer was an excellent teacher at the school for many years and even received awards in

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Locurto v. Giuliani, 269 F. Supp. 2d 368, 401 (S.D.N.Y. 2003); *see also* Connick v. Meyers, 461 U.S. 138, 169 (1983) (Brennan, J., dissenting) (stating that an employer cannot fire an employee merely because that employee is expressing an unpopular viewpoint).

[100] *Melzer*, 336 F.3d at 193.

[101] *Id.* at 191. Parental concern was not over whether Melzer would be able to teach effectively, but rather over fear as to whether Melzer would subject students to his views or subject them to illegal conduct. *Id.* at 189, 191. These possibilities were unfounded and not sufficient to establish a disruption.

[102] *Id.* at 189.

[103] *See id.* at 199; *see also* Newman, *supra* note 8, at 2 (stating that parents should be risk averse when it comes to the safety of their children). Although parents' concerns are understandable, a person cannot be fired simply because his views are unpopular.

[104] Newman, *supra* note 8, at 2 (stating that the basis for parents' mistrust is not a disagreement with pedophilia in general, but a legitimate fear that their children will become victims, partly due to many recent cases involving pedophiles with no self restraint); *see also* Jeffrey Kluger, *The Molesters' Mindset: Why Do They Target Kids?*, TIME, Apr. 1, 2002, at 37 (discussing the thought processes of pedophiles); Danielle N. Rodier, *Diocese, Bishop Are on The Hook in Suit Over Priest's Molestation of Boy in Motel*, THE LEGAL INTELLIGENCER, Nov. 30, 1999, at 1 (discussing a case where the Court held that the diocese of Altoona and St. Theresa's Church could be held responsible for a priest's molestation of a young boy in a hotel room). Because of the recent myriad news reports regarding pedophilia in the Catholic Church, it can be assumed that this factor played a role, not only in the decision, but also in parental reactions to Melzer's affiliation.

[105] *See Melzer*, 336 F.3d at 189. At the time of his termination, Melzer had been a member of NAMBLA for twenty years and his teaching ability had never once been in question. *See id.*

recognition of his ability.[106] Moreover, his relationships with other faculty members would not have been compromised due to the speech.[107] Teachers expressed their concerns, but concerns are not sufficient to establish a disruption.[108] In *Pickering,* teachers and administrators expressed concerns about the plaintiff's continued employment, yet the court held that the fear of disruption was unreasonable.[109] The sole purpose of this balancing test is to protect government employees who are advocating unpopular opinions, so long as those views do not create a disruption within the work environment. If Melzer's speech were uncontroversial, termination would never have been an issue. This is why the fear must be reasonable. Although it is reasonable to believe that parents would be unhappy with Melzer's continued employment, it is unreasonable to believe that a disruption impacting the effectiveness of the school would result.[110] Therefore, the court erroneously held in favor of the Board of Education.

B. The Mistaken Rationale in Locurto

The court in *Locurto* mistakenly concluded that the termination was in retaliation for the speech and not based on future disruption. Judge Sprizzo based his erroneous decision on the fact that Mayor Giuliani terminated the plaintiffs.[111] The identity of the person who ultimately makes the decision to

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[106] *Id.*

[107] *Id.* at 198–99.

[108] *Cf.* Anderson v. Evans, 660 F.2d 153, 159 (6th Cir. 1981) (stating that the nature of plaintiff's remarks created tension between her and the principal, thereby making "a normal relationship difficult in a situation where cooperation is necessary"). In *Evans*, the teacher's statements were made against African Americans when the majority of those with whom she worked were minorities, including the teacher's aide, the principal and students. *See id.* at 155–57. In addition, she received unsatisfactory evaluations. *Id.* at 156. These facts are very distinguishable from those in *Melzer*, where there was no evidence that, in the ten years that the school knew of Melzer's affiliation, his relationships with supervisors or other teachers were affected. *See Melzer*, 336 F.3d at 190–91.

[109] Pickering v. Bd. of Educ., 391 U.S. 563, 566, 572–73 (1968). Though in *Pickering* the speech criticized the employer and other employees, it was found to not affect working relationships. Since concerns over the continued employment in *Pickering* were not enough to establish a disruption, it is logical that they are likewise insufficient in *Melzer.*

[110] *See* Ryan, *supra* note 93, at 715, 717 (stating that the current test employed by courts impedes criticism and improvement of educational institutions and serves to fire the most bright and innovative educators).

[111] Locurto v. Giuliani, 269 F. Supp. 2d 368, 388–92 (S.D.N.Y. 2003).

terminate an employee is unimportant when determining whether the employers were motivated by the possibility that a disruption would occur if employment continued. Irrespective of whether the Commissioners or Mayor Giuliani made the decision to terminate the plaintiffs, the decision was based on the fear of possible future disruption to the effectiveness of both the NYPD and FDNY.[112] Instead, if the dismissals were in fact retaliatory, the court could have ordered new hearings to be conducted. The court erroneously stopped short its analysis.[113]

Moreover, the plaintiffs in *Locurto* contended that the decision to terminate them was motivated by Giuliani's desire to gain a better reputation in the eyes of the public.[114] This contention was based on the fact that there was friction between the Mayor and certain minority groups after he made several controversial decisions involving incidents between police officers and minorities.[115] This was the wrong focus in deciding whether the fear of disruption was reasonable.[116] Rather, the reactions of the departments' members and the citizens of the neighborhoods where the plaintiffs worked should have been considered. A reasonable fear of disruption is apparent based on those interests.

Focusing on the specific jobs at issue, a police officer and firefighter's sole objective is to protect the community to which

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[112] *See id.* at 399–400 (discussing the application of the *Pickering* test in this particular case as related to *Pappas*).

[113] *See* Supplemental Brief in Support of Plaintiff-Appellee's Motion to Dismiss Appeal for Lack of Jurisdiction at 6–8, Locurto v. Giuliani, 269 F. Supp. 2d 368 (S.D.N.Y. 2003) (No. 00-7628).

[114] *Locurto*, 269 F. Supp. 2d at 392 (quoting *Strong of Heart*, the autobiography of Commissioner Thomas Von Essen, which stated that the Mayor did not like any incidents that made New York look bad and that he was sensitive to certain views that Von Essen and members of the police department were racist).

[115] *Id.* at 392–95 (discussing the disruption that occurred over the continued employment of police officers involved in the shooting death of Amadou Diallo in 1999 and the manner in which the Mayor handled the Million Youth March, which occurred only a few weeks before the float incident).

[116] *See* Pappas v. Giuliani, 290 F.3d 143, 144–45, 151 (2d Cir. 2002) (holding that there was a reasonable suspicion of disruption on the part of the government after a member of the NYPD sent racist and anti-Semitic pamphlets to members of the Nassau County police department and therefore the terminated employee's First Amendment rights were not violated); *see also* Rankin v. McPherson, 483 U.S. 378, 389–92 (1987). In *Rankin*, the Court held that the plaintiff's speech against President Reagan was protected because she was not a police officer, did not carry a weapon, and it was unreasonable to assume a disruption would occur when her statements were made in private. *Id.*

they are assigned.[117] It is reasonable to believe that, because the plaintiffs worked in racially diverse neighborhoods where many African Americans lived,[118] those citizens would not feel safe if the plaintiffs continued to work there since the plaintiffs demonstrated their lack of respect and racist views towards African Americans.[119] This display of hate would have therefore caused a disruption within the work environment.[120] In the past few years, the reputation of police officers, especially in the eyes of minorities, has come into question.[121] With these perceptions in mind, Locurto's actions were likely to have a further negative

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[117] *See Pappas*, 290 F.3d at 146–47 (stating that police effectiveness is undermined by racist speech and that when this happens the department is no longer seen as a protector of the community's interests); *see also Rankin*, 483 U.S. at 380 (stating that the plaintiff was not a peace officer and thereby suggesting that if she were, her speech may not have been protected); Travieso, *supra* note 4, at 1392–93 (stating that when a police officer's behavior is "racist and prejudiced against those constituents they are assigned to serve and protect" the officers should not be afforded protection under the First Amendment). *But see* Berger v. Battaglia, 779 F.2d 992, 1002 (4th Cir. 1985) (holding that an officer's performance in blackface was constitutionally protected). *Berger*, however, can be distinguished from *Locurto* in that the officer performing in blackface was not performing to mock African Americans and "made no derogatory or inflammatory remarks." *Id.* at 993. His performance was merely an impersonation of singer Al Jolson who historically performed in blackface. *Id.*

[118] *See Locurto*, 269 F. Supp. 2d at 375 (stating that the precinct where Locurto worked was racially diverse and that Walters and Steiner worked in predominantly African American neighborhoods).

[119] *See Pappas*, 290 F.3d at 146–47 (stating that the police department must treat all members of the community with respect because otherwise the community will view it as "oppressor rather than protector" which decreases the ability of the police to do their job due to a lack of trust between citizens and police); *see also* Travieso, *supra* note 4, at 1395–97.

[120] *See Pappas*, 290 F.3d at 146–47. Further, the community's respect and trust for the police force impacts the effectiveness of that department and could cause the type of professional disruption analyzed in the *Pickering* test.

> If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, . . . respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection.

Id.; *see also* McMullen v. Carson, 754 F.2d 936, 940 (11th Cir. 1985) (holding that a sheriff had a constitutionally protected right to fire an employee who was a member of the Ku Klux Klan when it became known to the public, because of the group's violent acts against the community); Travieso, *supra* note 4, at 1395–97.

[121] *See* Roger Parloff, *Conduct Unbecoming*, 4 AM. LAW. 88 (May 1999) (stating that Locurto acted "in a city where minority mistrust of the predominantly white police department is the hottest of hot-button issues").

impact on the reputation of New York City police officers.[122] The same is true for the fire department.[123] In assessing disruption, a negative effect on reputation is an important factor, especially with respect to the NYPD and FDNY.[124] If those officials are not respected, there will be a negative impact on recruitment efforts and the possibility of civil unrest.[125]

In addition, plaintiffs made their racist views towards African American officers clear through their actions on the float.[126] It is not unreasonable to believe that tensions would arise between African American employees and plaintiffs as a result of their speech.[127] Allowing Locurto to continue working

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[122] *See Pappas*, 290 F.3d at 146–47; *see also* Travieso, *supra* note 4, at 1396–98.

[123] The plaintiffs' actions affected the reputation of both the police and fire departments and the same disruption factors should be considered for both departments. *See* Patricia Hurtado, *Judge: No Choice But To Reinstate; May Order City to Give Jobs Back to Broad Channel 3*, NEWSDAY, July 3, 2003, at A08.

[124] *See* Melzer v. Bd. of Educ., 336 F.3d 185, 199 (2d Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004) (stating that the fact that a school's reputation may suffer is a factor to be considered in the analysis of disruption); *see also Pappas*, 290 F.3d at 148–50 (discussing the reputation of the police department throughout its analysis of disruption).

[125] *See Pappas*, 290 F.3d at 148–150 (describing possible negative impacts on the department).

[126] Locurto v. Giuliani, 269 F. Supp. 2d 368, 374–75 (S.D.N.Y. 2003). The court assumed that all African-Americans with whom the plaintiffs worked would support their reinstatement by noting that one African-American firefighter claimed that the speech did not bother him. *Id.* It is unreasonable to make a generalization that every other African-American firefighter has this same opinion.

[127] *See* Hurtado, *supra* note 123 (discussing the reaction of Michael Marshall, the first vice president of the Vulcan Society, an association that represents black firefighters).

> To make fun of anyone who died in that brutal way is outrageous. . . . The bottom line is they serve the people of the city of New York, which is predominantly minority. . . . I don't see that you could portray someone in such a manner and then cross the border to Brooklyn and suddenly change your attitude.

See id. (quoting Michael Marshall); *see also* Ron Howell, *FDNY Urged: No Rehire*, N.Y. NEWSDAY, June 26, 2003, at A05.

> Paul Washington, president of the Vulcan Society [and fire captain] said . . . that the fired white firefighters could not be relied on to serve black New Yorkers. "These guys clearly showed that they shouldn't be working in black communities when they think it's funny to parody the death of a black man at the hands of some racists". . . . Washington said that, for him, the decision was like adding insult to injury. . . . "The possibility that Walters or Steiner might become firefighters again is especially upsetting because the number of black firefighters [in the city] is so low . . . . blacks make up less than 3 percent of the roughly 11,500 city firefighters."

Id. (quoting Paul Washington).

as a policeman and Walters and Steiner as firemen is not only dangerous to the community, but also to other employees who work with the plaintiffs in dangerous situations. Additionally, the court claimed that the disciplinary hearings were different from those employed against other police officers involved in racially motivated misconduct in the past.[128] It held that this fact undermined the contention that the defendants' decisions to terminate the plaintiffs were motivated by disruption.[129] The court then recognized that in instances of misconduct and racial controversy, disruption actually did occur.[130] Therefore, the disruption was not only reasonable, but also probable based on these past situations.

The NYPD and FDNY both have an interest in keeping their internal working environment free from disruption.[131] Both also have interests in keeping the neighborhoods of New York City safe from harm.[132] Allowing racist members to work in these departments undermines both of these interests. Plaintiffs were officers and representatives of the city, wore uniforms, and Locurto was permitted to make arrests and carry a gun.[133] Although their statements were made away from the workplace,[134] they interfered with plaintiffs' possible job performance and relationships among members of their departments.[135] Plaintiffs also made these racist statements in front of a large group of people[136] and the public became aware,

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[128] *See Locurto*, 269 F. Supp. 2d at 392–93 (discussing the hearings of the NYPD in past situations of racially motivated misconduct).

[129] *Id.*

[130] *Id.* at 392–94 (discussing the disruption that occurred after the shooting death of Amadou Diallo when the police officers were reinstated, and the disruption after the Million Youth March).

[131] *See* Travieso, *supra* note 4, at 1393 (recognizing that "the unique position that police officers occupy in the community requires that police officers enjoy a lower level of free speech protection than other state employees such as teachers, postal workers, and toll booth collectors"). Disruption in a police department not only causes an annoyance for the employer, it also causes a possibility of serious danger to the community. This affects internal operations because the police will no longer be able to perform their job effectively.

[132] *See supra* note 117 and accompanying text.

[133] The Court has held that these factors should be taken into account when the speech of an employee of a law enforcement agency is in question. Rankin v. McPherson, 483 U.S. 378, 390–92 (1987).

[134] *Locurto*, 269 F. Supp. 2d at 374.

[135] *See supra* note 127 and accompanying text.

[136] Not only did plaintiffs perform in front of a large crowd at a parade, but they also performed for video cameras that broadcasted their actions the following day

very quickly, that they were public servants.[137] When police officers and firefighters disseminate racist views, it "tends to promote the view among New York's citizenry that those are [also] the opinions of [all of] New York's police officers"[138] and firemen. The court should have realized that community reactions would cause internal disruption. These reactions, even though external in nature, also affect the internal operation of the enterprise.

The court made a comparison to a situation where policemen and firemen attend religious functions that people disagree with.[139] However, a police officer with a certain religious background is different from one who purposefully speaks out and offends people. This is true because those practicing a certain religion are not directly insulting members of the community; they are merely lawfully exercising their freedom of religion. The court also mistakenly made an analogy to a case where the Supreme Court held for a black student who was advocating against segregation at a time when most found this speech to be offensive,[140] even though in that case, hate speech was not the issue and neither a policeman nor a fireman was involved.[141]

Moreover, the court focused on Mayor Giuliani's reactions to the speech throughout its opinion.[142] By continuously referring to the way he handled situations in the past and how he terminated plaintiffs to further his political reputation and that

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all over the country. *See* Parloff, *supra* note 121, at 88.

[137] *See id.*; *see also Locurto*, 269 F. Supp. 2d at 376.

[138] *See* Pappas v. Giuliani, 290 F.3d 143, 146–47 (2d Cir. 2002) (stating that racist views by police officers diminish their capacity to effectively perform their duties, which results in the community's disrespect for those officers).

[139] *See Locurto*, 269 F. Supp. 2d at 400 (citing Flanagan v. Munger, 890 F.2d 1557, 1567 (10th Cir. 1989)).

[140] *See id.* at 401 (citing Cox v. Louisiana, 379 U.S. 536, 552 (1965)).

[141] *See id.* at 401–02. Where hate speech is involved a different standard should be invoked. While free speech is a fundamental right that all citizens enjoy, racially offensive speech by members of law enforcement agencies can in no way be compared to a black student advocating equal rights at a time when injustice was prevalent. In addition, a different standard is invoked when a government employee is at issue. Therefore, this analogy cannot be made based on constitutional principles alone.

[142] *See id.* at 376–77. Mayor Giuliani's statements were understandable after he discovered the horrible racist actions of his employees. Regardless of this fact, those comments should not have been the basis of the court's opinion. The court should have focused on the actual speech and its effect on the working environment and neighborhoods, not Giuliani's reactions.

of the NYPD and FDNY,[143] the court appeared to be criticizing Mayor Giuliani's political agenda.[144] This led to the wrong conclusion. Instead of holding against the defendants because it believed the hearings were a sham, the court could have simply ordered the departments to hold new hearings against the plaintiffs. It then could have decided the First Amendment issue under the balancing test.

C. Basis for Locurto*'s Reversal:* Melzer*'s Mistaken Result*

Although both cases ended in the incorrect conclusion, *Melzer*'s mistaken application can be used as a basis for *Locurto*'s reversal. First, *Melzer*'s consideration of the parents' reactions is relevant with respect to *Locurto*.[145] Parental reactions were taken into account due to their participation in the school community.[146] In *Locurto*, the reactions of the members of the community should, therefore, also have been important considerations.

In addition, the Second Circuit held that the Board's decision needed to be viewed in light of Melzer's position at the school and his daily contact with children.[147] In *Locurto*, therefore, the plaintiffs' positions as public servants and protectors, and their daily contact with the community, also needed to be considered. This, in fact, was a major consideration in *Melzer* because the parents were worried that a teacher with

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[143] *See id.* at 391–95. Mayor Giuliani's concerns about the reputation of the Departments were reasonable and therefore whether he was also worried about his own reputation was not an issue. The reputations of the departments would have been affected by the speech and that is what substantiates a finding of disruption. *See* Melzer v. Bd. of Educ., 336 F.3d 185, 199 (2d Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004) (stating that reputation should be taken into account when deciding disruption).

[144] *See Locurto*, 269 F. Supp. 2d at 391–95 (discussing how Giuliani handled situations in the past and how after those situations he was not respected by some people in the community).

[145] *See Melzer*, 336 F.3d at 191. While taking the parental reactions into consideration was incorrect in *Melzer*, the court's rationale for doing so may at least be beneficial to bring about the correct result in *Locurto*.

[146] *Id.* (discussing the school community's reactions to the speech and how that would affect the working environment). The disruption caused by the parents' reactions in *Melzer*, if they in fact caused a disruption, was external in nature because the parents were not directly involved with the school. Therefore, the court's decision to only consider internal disruption in *Locurto* can no longer be sustained if *Melzer* is to be considered good law.

[147] *See id.* at 198.

unpopular beliefs would be a threat to the students.[148] The plaintiffs in *Locurto* were also a threat to the community and were placed in dangerous situations on a daily basis by virtue of being police and fire personnel.

Moreover, the *Melzer* court found that the number of teachers who opposed Melzer's continued employment was irrelevant.[149] Therefore, in *Locurto*, the fact that two African-American firemen did not oppose plaintiffs' continued employment is also irrelevant for two reasons. First, only two African American firemen gave their opinions.[150] Second, in *Melzer*, the court simply accepted the government's estimation of the number of people in the school community who were concerned over Melzer's affiliation.[151] Therefore, the *Locurto* court could also have accepted Mayor Giuliani's concerns, as well as the Commissioners' statements. They knew how the community reacted to racial misconduct in the past and, therefore, could assess how those parties would react as a result of plaintiffs' speech.[152]

Additionally, in *Melzer* the court stated that the reputation of the school was a factor in its decision—therefore, reputation should also play a role in *Locurto*.[153] There is no doubt that the reputation of the police and fire departments would be harmed due to the racist speech involved in *Locurto*. The people of the community will continue to believe that those are the views of the entire NYPD and FDNY.

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[148] *Id.* at 199 (stating that a disruption could occur from the simple act of impressing controversial views upon young children).

[149] *Id.* at 191. The court concluded that many teachers expressed concerns about Melzer's speech. It did not say how many opposed his continued employment and just assumed that a disruption would occur from those concerns. *Id.*

[150] Locurto v. Giuliani, 269 F. Supp. 2d 368, 378–79 (S.D.N.Y. 2003). The firemen stated that they would not have a problem with Walters and Steiner returning to the fire department. *Id. But see supra* note 127.

[151] *Melzer*, 336 F.3d at 191. The court accepted the principal's assumption that a majority of the school community would be concerned over the speech and therefore a disruption would follow. *Id.*

[152] The mayor was well aware of the tensions between the police department and the community. These tensions had caused a disruption in the work environment in the past. *See supra* notes 114–15 and accompanying text.

[153] *Melzer*, 336 F.3d at 199. The court concluded that reputation is a factor to be considered. It stated that, although it is not a deciding factor, it should be considered in light of all other circumstances. *Id.* If this is true, then the court in *Locurto* mistakenly held that Giuliani was wrong for being conscientious about the decline in reputation of the police and fire departments.

In addition, the court's conclusion in *Melzer*, that simple concerns over the speech would cause a disruption, supports a reversal of *Locurto*.[154] In *Locurto*, many people in the community stated their concerns over whether these men would be fit for duty.[155] Also, if Melzer's teaching ability would suffer as a result of his speech because he could have impressed his views upon the children,[156] plaintiffs' speech in *Locurto* also affected their ability as members of the NYPD and FDNY because they could have inflicted their racist views on other members of the departments.

In conclusion, if Melzer's speech was not protected, the speech in *Locurto* certainly serves as a basis for plaintiffs' termination. Moreover, *Locurto* should be reversed either by applying *Pickering* correctly or by using *Melzer*'s mistaken application.

III. RECONFIGURING DISRUPTION UNDER THE *PICKERING* BALANCING TEST

As illustrated by *Melzer* and *Locurto*, the *Pickering* Balancing Test, when deciding whether certain speech by government employees is protected under the First Amendment, leaves room for judicial discretion.[157] Unfortunately, when this

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[154] *Id.* at 191. The court's emphasis on the "concerns" of the parents and teachers at the school was enough to substantiate a finding of disruption. If this is so, then the court in *Locurto* should not have concluded that the concerns of the Commissioners and members of the community were not enough to establish disruption.

[155] *See* Travieso, *supra* note 4, at 1381, 1399–1400.

[156] *Melzer*, 336 F.3d at 199 (stating that "it is perfectly reasonable to predict that parents will fear [Melzer's] influence and predilections").

[157] *See generally Melzer*, 336 F.3d 185 (granting a government employer the right to fire a teacher who was a member of NAMBLA because parents did not agree with the organization's views); Locurto v. Giuliani, 269 F. Supp. 2d 368 (S.D.N.Y. 2003) (applying the *Pickering* test to grant First Amendment freedom to those in a public servant capacity who make racist statements against citizens they are hired to protect). In *Ferrara v. Mills*, the court held that a teacher who criticized a school's use of certain types of registration and teaching assignments was not protected under the First Amendment. 781 F.2d 1508, 1515–16 (11th Cir. 1986). "The public educator's . . . lesson from the *Ferrara* decision is that the court has great latitude in applying a balancing test to determine the educator's first amendment interests." Johnson, *supra* note 3, at 188. Although the Court in *Pickering* attempted to limit the applicability of the test by stating that the court did not purport to set down a general rule by which all statements should be judged, many cases with a variety of fact situations used the test, resulting in conflicting opinions limiting government employees' First Amendment rights. *Id.* at 188–89 (citing Pickering v. Bd. of Educ.,

type of issue is involved, political opinions take precedence in judicial decision-making and can unfairly shape the outcome of an opinion.[158] This leaves room for ambiguity and inconsistent results,[159] to the point where government employees may no longer feel safe speaking publicly about controversial issues, fearful that it will ultimately result in their termination.[160]

This type of decision-making, under the veil of the First Amendment, is a flagrant departure from constitutional principles of fairness and freedom.[161] There are some instances where government employees must be cautious of what they say, as in *Locurto*, and others where employees need to speak on matters that, although controversial, furnish an open debate.[162] The *Pickering* balancing test purports to guide judges in making this decision.[163] It has failed in this task[164] and must be refined.

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391 U.S. 563, 569 (1968)).

158 *See Melzer*, 336 F.3d at 191 (focusing on how parents would handle Melzer's reinstatement); *Locurto*, 269 F. Supp. 2d at 391–95 (criticizing Mayor Giuliani's political agenda and using this criticism to justify reinstatement of police and fire department members; *see also* Shahar v. Bowers, 836 F. Supp. 859, 864–66 (N.D. Ga. 1993) (holding against a lesbian who told co-workers that she was getting married to her girlfriend, concluding that the speech was not on a matter of public concern and that, even if it were, it would not be protected because the interests of the employer in advocating against gay marriage outweighed plaintiff's interest in speaking as private citizen); *Ferrara*, 781 F.2d at 1515–16 (deciding that a teacher's comments on registration policies within the school were nothing but gripes against administrators and therefore were not protected under the First Amendment).

159 *See* Johnson, *supra* note 3, at 188–89 (stating that the *Ferrara* decision was an example of the "unpredictable manner in which the balancing test is applied to first amendment claims"); *see also* Emerson, *supra* note 7, at 914 (stating that "when examined in the light of . . . elements essential to a system of freedom of expression [an] ad hoc balancing test is, as a legal theory of reconciliation, illusory").

160 *See generally* Solomon, *supra* note 7 (discussing the inconsistencies caused by the balancing test and attributing its unpredictability to the lower federal courts' difficulties in applying the test). "[T]he decisions in this area are often times irreconcilable." *Id.* at 449.

161 *See* Emerson, *supra* note 7, at 912 (stating that the balancing test frames issues in "such a broad and undefined way . . . that it can hardly be described as a rule of law at all").

162 *See* Allred, *supra* note 1, at 429 ("The Court has . . . recognized that each instance of restricting free speech is necessarily a question of degree, ever mindful of the danger of suppressing speech that should be heard.") (footnotes omitted).

163 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968) (stating that their opinion needs to be viewed in light of the fact that the freedom to speak on controversial issues is important to facilitate public debate).

164 *See supra* note 12 and accompanying text.

The test's main defect is in the factors it uses to determine whether a disruption may occur.[165] Generally, every time a balancing test is used, judges are inevitably given the power to decide whose interests have more weight.[166] Where the factors involved are ambiguous and arbitrarily set,[167] inconsistent results become probable.[168] In light of these inconsistencies, the test must be refined in the area of disruption. By refining the factors currently used by the test in order to reach a new definition of disruption, these conflicting results will be minimized.

A. Factors That Should be Considered Under the Test

Certain factors should be considered when deciding whether a disruption will occur as a result of an employee's speech. A decline in reputation can cause a disruption in certain contexts, and therefore the first factor considers the effect the speech will have on the credibility of the employer.[169] The second factor targets the parties who are directly affected by the speech and then considers their reactions. The third and fourth factors are those already considered within the balancing test: whether the speech will affect working relationships;[170] and the context, form

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[165] Solomon, *supra* note 7, at 459–69 (stating that even though *Connick* purported to fix the test, it in fact did nothing to clear up its ambiguities).

[166] *See id.* at 464–69 (arguing that the balancing test used in *Connick* will lead to inconsistent results). In all cases using the *Pickering* Balancing Test, courts must decide which interests are more important. This is why set factors need to be incorporated in order to move toward uniformity and lessen the possibility of judicial abuse of discretion.

[167] *See* Johnson, *supra* note 3, at 189 (stating that Justice Black contends that when a balancing test is used, the inevitable result is that judges will arbitrarily fix borders in order to ultimately end with a particular result).

[168] *See supra* notes 157–60 and accompanying text.

[169] *See* Rankin v. McPherson, 483 U.S. 378, 389 (1987); *Melzer*, 336 F.3d at 199 (including in its application the effect the speech may have on the ranking of the school as compared to other competitive schools in the area); Pappas v. Giuliani, 290 F.3d 143, 146–47 (2d Cir. 2002) (discussing the effect that reputation has on the effectiveness of the city's police department—especially in the eyes of the citizens of the neighborhoods it protects). The reputation factor must be viewed in the context of the type of services the office or department provides. In some instances, reputation may have no impact on the effectiveness of the work environment depending on its interaction with the community. It also must be viewed in light of the type of work the employee provides. A clerical worker employed by the NYPD who expresses racist views does not interact with the community and therefore will not affect the reputation of the police department. *See Rankin*, 483 U.S. at 390–92.

[170] The working relationships under the original test have to be considered "close." A disruption will only occur if the employees are working together on a

and manner of the speech.[171] The fifth factor is whether there is actual evidence to show a decrease in the effectiveness of the employee's performance.[172] The final and most important factor considers whether the employee will be dangerous to those directly affected by the speech, because fear of that danger will cause a disruption in the work environment.[173]

B. The Correct Result in Both Cases if Disruption Had Been Reformulated According to the Proposed Analysis

1. Application to *Melzer*

When applying this refined test to *Melzer*, the correct decision becomes apparent. The impact of the first factor, whether Melzer's affiliation and speech will affect the reputation of the school, seems obvious. Melzer was an excellent teacher. He received commendations for his work. Disciplinary action was never taken against him with regard to his work ethic or work product. The school itself is one of the best public schools in the city.[174] It is unreasonable to conclude that recruitment efforts based on one teacher's affiliation with a lobbying group would decrease. A school's reputation is based on the caliber of its students and teachers.[175] Melzer's speech did not affect his

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consistent basis. If they are only working together sporadically, a decline in work product will not be an issue and therefore effectiveness will not be harmed. *See* Anderson v. Evans, 660 F.2d 153, 159 (6th Cir. 1981) (stating that because the teacher and her African American principal were in a close working relationship, her racist statements affected their relationship and therefore contributed to the ineffectiveness of the working environment).

[171] *See* Connick v. Myers, 461 U.S. 138, 147–48 (1983) (stating that the context, manner and form of the speech are important when balancing the interests of the parties).

[172] *See Evans*, 660 F.2d at 159 (using poor evaluations and her inability to work with a teacher's aide as evidence that plaintiff's effectiveness as a teacher decreased); *see also Pappas*, 290 F.3d at 146–47 (stating that police officers' effectiveness at their job will decrease because of their racist actions); *cf. Rankin*, 483 U.S. at 390–92 (stating that because plaintiff was just a clerical worker who did not interact with the community her effectiveness at the job did not decrease).

[173] *See Rankin*, 483 U.S. at 389.

[174] *See* Advocates for Children, *School Profile: H.S. 445 Bronx High School of Science* (stating that the Bronx High School of Science is "one of the most celebrated schools in the nation" and has won many awards for its accomplishments), *at* http://www.insideschools.org/fs/school_profile.php?id=1001 (last visited Feb. 15, 2005).

[175] *See id.*

ability as a teacher or the way the students would perform. Therefore, the reputation of the school was not in jeopardy.

The second factor focuses on the relevant parties affected by the speech. Only those who are directly affected by the speech are important when analyzing this factor. Here, that party was the students. Their reactions to the speech, if negative, would cause a disruption within the school. They are in fact the recipients of Melzer's teaching ability. They expressed their views in an assembly where they came out on "both sides of the controversy."[176] The principal claimed that over ninety percent of the student body expressed concerns, but concerns do not necessarily cause a disruption. A disruption would be caused by outright student opposition based on concerns about the effectiveness of their learning environment. There was no evidence that this was the case.[177] Moreover, reactions by other teachers may also be considered, but secondarily to those of the students. The reactions by other teachers should be considered only to the extent that they felt his continued employment would be detrimental to their ability as teachers or to the students' performance at the school. Outside parties who are not directly affected by the speech are of no concern, and thus parental reactions should not be taken into account.[178] Therefore, this factor did not establish a sufficient disruption in *Melzer*.

The third and fourth factors were considered in the opinion, but were misapplied.[179] The speech did not affect working relationships between the plaintiff and other faculty members because the speech was not directed at them.[180] The teachers' disagreement with the speech is also irrelevant because it was based on the speech's unpopular context, and therefore has no effect on disruption.

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[176] *Melzer*, 336 F.3d at 191.

[177] *See id.*

[178] In *Melzer*, the parents were not directly affected by the speech, but the students were. In *Locurto*, the community was directly affected by the speech. These differences explain why the parents' reactions in *Melzer* should not be taken into account, but the neighborhood reactions in *Locurto* should be considered. *But see id.* at 199.

[179] *See id.* at 197–98.

[180] A work relationship between teachers will be affected to the extent that the speech was directed at those teachers. *See* Anderson v. Evans, 660 F.2d 153, 159 (6th Cir. 1981) (stating that because the speech was directed at the principal and other teachers, work relationships were negatively affected).

Additionally, based on the context, time and manner of the speech, it would not have caused a disruption. Melzer expressed his views away from the school in private meetings held by a group he was affiliated with.[181] Therefore, this factor is not sufficient to hold that a disruption would occur.

In addition, there was no evidence that Melzer's teaching ability would have been affected. He was a member of NAMBLA for twenty years while working at the school and received commendations for his work.[182] He never attempted to impress his opinions upon students.[183] He taught in one of the best high schools in the city.[184] His qualifications were obviously impeccable.

Moreover, he posed no danger to those for whom or with whom he worked.[185] His views may have been controversial, but there were never any allegations of illegal conduct.[186] This, considered with all of the other factors, proves that Melzer's continued employment would not cause a disruption at the school sufficient to justify infringing upon his First Amendment rights.

2. Application to *Locurto*

In *Locurto*, the credibility of the NYPD and FDNY was diminished because of the hateful speech and actions at issue. The speech was directed at members of the neighborhood that the plaintiffs were employed to protect. The citizens' negative opinions about the departments seriously undermine the effectiveness of the NYPD and FDNY in performing their job.[187] The communities' trust in the members of the police and fire departments is essential to the performance of their duties as protectors. If the community does not trust them, their effectiveness declines because they are unable to perform their

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[181] *Melzer*, 336 F.3d at 194.

[182] *Id.* at 189.

[183] *See infra* note 185 and accompanying text.

[184] *See supra* note 174.

[185] *See Weighing a Teacher's Rights*, N.Y. TIMES, Oct. 9, 1993, at 22 (stating that although a parent may not want a person like Melzer working in a school, "there is a big problem with current efforts to remove Mr. Melzer" because "[t]here is no evidence whatever that he poses any danger, sexual or otherwise, to his students").

[186] *See id.* (stating that Melzer was never charged with violating the law).

[187] *See supra* notes 119–20 and accompanying text.

duties as public servants.[188] This decline in effectiveness, in turn, causes a disruption in their work environment.

The relevant parties to be considered are the residents of the neighborhoods where the plaintiffs worked and the other members of the police and fire departments. Trust is again an essential element of working relationships. The speech was directed at the members of the community, as well as other African-American members of the police and fire departments. If these groups do not trust those who are employed to protect them, then the relationship will not operate effectively.

The third and fourth factors were again misapplied in the *Locurto* decision. Working relationships are especially important here.[189] In professions such as these, where dangerous situations are inevitably present, trust and respect are essential. Members must work together in order to effectively ensure the safety of those communities. In both departments, it is impossible to assume that other officers and firemen will be able to work closely with the plaintiffs after knowing their viewpoints.[190] This allows for dangerous situations to become even more prevalent.

Furthermore, the plaintiffs sought to make their views known to the public by performing these acts on a parade float. Even though this performance was conducted away from the work environment, the manner and time in which it was performed was horrific. The context of their speech was not only controversial, but also racist and hateful.

In addition, the plaintiffs' speech dangerously affected members of the community.[191] Locurto wore a uniform, carried a gun, and was in daily contact with people whom he apparently hated and disrespected. The two firemen also wore uniforms, were in daily contact with the community, and were in charge of protecting people's lives.[192] Their views were dangerous to the

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[188] *See id.*

[189] *See supra* notes 131–38 and accompanying text.

[190] *See supra* notes 126–27. It may be argued that members of the department would be able to ignore this speech to serve the public good. However, this is not only unlikely, it is also unreasonable because of the situations they are placed in on a daily basis. It is probable that officers would be worried about how their "partner" will react to these situations based on his or her beliefs.

[191] *See supra* notes 4–5, 18 and accompanying text.

[192] These factors have been deemed relevant when the speech of a law enforcement agency employee is at issue. *See* Rankin v. McPherson, 483 U.S. 378,

communities and to the officers they worked with. There is a difference between free speech and something that comes dangerously close to a hate crime, such as the defacing of a synagogue with a swastika or cross burning. There is no difference, however, between the plaintiffs' speech and hate crimes. Both are forms of hate speech and place the public in danger. If viewed in this light, it is impossible to say that a disruption would not occur, especially because in these instances disruption occurs in the form of violence. These factors taken together would cause a disruption sufficient to conclude that the First Amendment did not protect the plaintiffs' speech.

CONCLUSION

Until the Supreme Court refines the disruption factor of the *Pickering* Balancing Test, courts will continue to produce inconsistent results in free speech cases involving government employees. The haphazard application of this test in *Melzer* and *Locurto* substantiates this finding. Moreover, regardless of whether the Court decides to revamp this test, *Locurto* must be reversed on appeal in light of *Melzer*.

While it seems unacceptable to allow a member of an organization that advocates sex with young boys to be a schoolteacher, firing him for this reason goes against constitutional principles of fairness and freedom. And, although this same standard applies to members of the police and fire departments, it does not pertain to officers who place their communities and coworkers in serious danger. For a government employee, there is a difference between constitutionally protected speech and speech that is hateful and dangerous. Therefore, the courts desperately need to produce a workable test for questions of free speech and government effectiveness that takes these types of situations into account. This Comment aspires to provide a framework for developing such a test.

380, 390–91 (1987).