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CRUSHING THE BANDWAGON: THE MILLENNIAL PARADOX OF EMPLOYMENT OPPORTUNITY AND SOCIAL MEDIA

“Tell a joke that upsets the kids, and the next morning the student-activities director is going to be on the phone: to your agent, to NACA [National Association for Campus Activities], and—more crucially—to his or her co-equals at the other four colleges in the region that you booked.”¹

INTRODUCTION

Highlighting the challenges comedians face in the wake of a generation that has apparently lost the ability to take a joke, author Caitlin Flanagan touched on a frightening reality that virtually all individuals face, no matter their employment status.² We now live in a world where one inappropriate or misconstrued online statement can subject an individual to something far worse than the momentary embarrassment of being “heckled off stage.”³ If an individual writes a seemingly offensive social media post, they can essentially be heckled out of employment and potentially out of employability. The heckling audience, made up of thousands of Facebook and Twitter users, perceives itself as having a complete understanding of the intentions of the offender, and use social media as a weapon.⁴ At all times, this overzealous group is ready to ban together to: (1) tell you what a horrible person you are; (2) pressure your employer to fire you; or (3) use your employer to place pressure on you so you ultimately choose to quit.⁵

1. See generally Caitlin Flanagan, *That's Not Funny! Today's College Students Can't Seem to Take a Joke*, ATLANTIC (Sept. 2015), <http://www.theatlantic.com/magazine/archive/2015/09/thats-not-funny/399335/> (discussing the challenges comedians face while performing for college audiences that strive to promote inclusiveness and political correctness).

2. See generally *id.*

3. The traditional understanding of “heckler’s veto” in comparison to modern times: Traditionally, the ‘heckler’s veto’ arises when authorities use breach of peace laws to stop or punish a speaker because a hostile crowd may or has become unruly. In the modern era, the audience is online or tuned in (not gathered around), and the hostile audience reaction is not disorder or violence, but rather threats of economic or political retaliation against employers or others who do not take action against the speaker.

Richard E. Levy, *The Tweet Hereafter: Social Media and the Free Speech Rights of Kansas Public University Employees*, 24 KAN. J.L. & PUB. POL’Y 78, 80–81 (2014).

4. See Flanagan, *supra* note 1.

5. See generally Michael C. Schmidt, *Trick or Tweet: The Perils of Punishing Employee Posts*, LAW360 (Apr. 2, 2015, 11:01 AM) (describing the knee-jerk reaction on social media to an inappropriate tweet resulting in a sequence of events: vulgar reply tweets, public backlash from the

Public shaming on social media is undoubtedly the new social norm.⁶ It is comparable to Internet flogging, in which a slight lapse in judgment results in damage to one's reputation.⁷ As social conventions change and adapt to new technologies, our legal system must adapt with it.

The Millennial generation, born roughly between 1980 and 1999, has an unprecedented level of reach when it comes to free speech; our off-hand remarks, social commentary, and general opinions and ideas go far wider than the town square or the water cooler.⁸ Comments, videos, and photos posted on social media have the ability to "go viral" and spread across the Internet, reaching millions instantly.⁹ With this heightened reach, public shaming has the potential to move from the scope of an individual's immediate circle to the far reaches of the Internet.¹⁰ Statements made on social media are persistent—what an individual says or writes can be re-posted, forwarded, and copied by others unknown to her, thereby becoming public to any individual with Internet access.¹¹

Public shaming does have a useful role in our society: it is an effective tool for governing public behavior and ensuring that residents adhere to accepted social norms.¹² In the age of social media, however,

people who consume your company's goods or services, and then employment-related action based on the offending employee's tweet).

6. See JON RONSON, *SO YOU'VE BEEN PUBLICLY SHAMED* 68–79 (2015) (discussing the disproportionate punishment of public shaming victims, and the role society has created for itself as a "weird surveillance" since the advent of social media).

7. See *id.*

8. See Philip Bump, *There Are Already More #Millennials Than Boomers—Depending on How You Define 'Millennial'*, WASH. POST: THE FIX (Jan. 20, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/01/20/there-are-already-more-millennials-than-boomers-depending-on-how-you-define-millennial/>; Rachael E. Lusk, Comment, *Facebook's Newest Friend—Employers: Use of Social Networking in Hiring Challenges U.S. Privacy Constructs*, 42 CAP. U. L. REV. 709, 709 n.1 (2014) (citing *Social Networking, the "Third Place," and the Evolution of Communication*, NEW MEDIA CONSORTIUM 1, 2 (2007), <http://www.nmc.org/pdf/Evolution-of-Communication.pdf> (describing how social networking sites are useful tools of communication; however, these sites expose users to endless unintended audiences)).

9. The term "going viral" is commonly understood to refer to when an individual has an emotional response to a post or video, which then incites the viewer to share it among his or her friends so that they can discuss it. This exchange of emotions, sharing, and discussing happens over and over again within a very short timeframe across the Internet. See Elise Moreau, *What Does It Mean to Go Viral Online?*, LIFEWIRE (Oct. 5, 2016), <https://www.lifewire.com/what-does-it-mean-to-go-viral-3486225>.

10. See *id.*

11. Levy, *supra* note 3, at 80 (describing the non-private nature of statements made using social media).

12. See Lauren M. Goldman, *Trending Now: The Use of Social Media Websites in Public Shaming Punishments*, 52 AM. CRIM. L. REV. 415, 419 (2015) (arguing that modern day online social media public shaming punishments are still as effective as they were in colonial times).

public shaming has morphed from a system of checks-and-balances into a bandwagon mentality.¹³ The latest trending topic is the driving force behind such a bandwagon, surviving only until the next trend emerges, whether that is in several days or merely a few hours. Furthermore, the immediacy of people's reactions is based on an emotional response to a fragment of the full story.¹⁴ As thousands of individuals are able to instantly jump on the bandwagon, simultaneously attacking the comments of an individual, companies often react just as swiftly by cutting all ties and terminating the person's employment.¹⁵ While some high-profile and wealthy victims have the means to fight back (either in court or through the media), most workers do not.¹⁶ Reputations and careers have been ruined due to this viral effect.¹⁷ An unsuspecting person posts an inappropriate or misunderstood comment online and is fired or prevented from obtaining employment as a consequence—for reasons that have nothing to do with their competency in job-related duties.¹⁸ When public shaming results in the loss of or prohibition from employment, society is enforcing economic restraints that reduce the employment pool. To ensure that all individuals are afforded equal protection in employment,

13. Alina Selyukh, 'Twitter's Dying' Puts Spotlight on the Line Between Abuse and Voice, NPR (Oct. 20, 2015, 11:11 AM), <http://www.npr.org/sections/alltechconsidered/2015/10/20/449977694/twitters-dying-puts-spotlight-on-the-line-between-abuse-and-voice>. Twitter was once considered the town square of online communities where the exchange of ideas flowed freely and without judgment from other users:

We once glorified Twitter as a great global town square, . . . [b]ut I've never been to a town square where people can shove, push, taunt, bully, shout, harass, threaten, stalk, creep, and mob you . . . for eavesdropping on a conversation that they weren't a part of . . . to alleviate their own existential rage . . . at their shattered dreams . . . and *you can't even call a cop.*"

Umair Haque, *Why Twitter's Dying (And What You Learn from It)*, MEDIUM (Oct. 13, 2015), <https://medium.com/bad-words/why-twitter-s-dying-and-what-you-can-learn-from-it-9ed233e37974#21coi4755>.

14. See, e.g., RONSON, *supra* note 6, at 76–77; Steven Salaita, *U. of I. Destroyed my Career*, CHI. TRIB. (Sept. 29, 2014, 6:36 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-steven-salaita-tenure-jews-twitter-tweets-unive-20140929-story.html>.

15. See, e.g., RONSON, *supra* note 6, at 68–70; Schmidt, *supra* note 5.

16. *But see* Jean Scheid, *Lost an Employee Lawsuit? Join the Club*, BRIGHT HUB (Aug. 15, 2011), <http://www.brighthouse.com/office/human-resources/articles/123234.aspx>; Jane Mundy, *Wrongful Termination Lawsuits on the Rise*, BRIGHT HUB (Jan. 5, 2011, 3:30 PM), <https://www.lawyersandsettlements.com/articles/wrongful-termination/wrongful-termination-law-11-15747.html>.

17. See generally RONSON, *supra* note 6 (discussing various cases of public shaming victims and their careers).

18. See, e.g., Salaita, *supra* note 14 (discussing how his career as a tenured Professor for the University of Illinois at Urbana-Champaign was destroyed after a political blogger took a few tweets from hundreds to create a false impression that he was anti-Semitic); see also RONSON, *supra* note 6, at 68–70 (discussing the tweet that led to Justine Sacco's sudden and immediate firing when an unsuspecting person re-tweeted a joke she made in poor taste).

the legal system must catch up to these technological changes in how we communicate.

First, this Comment argues that “culturally sensitive” young people and the resurgence of public shaming are connected.¹⁹ Second, this Comment contends that public shaming on social media operates as a restrictive covenant in the area of employment law, and absent a legal remedy, qualified workers will be hurled out of the workforce with limited prospect of re-entry.²⁰ Third, this Comment draws comparisons between restrictive covenants in the area of employment law, and collateral consequences similar to those imposed on ex-offenders in the area of criminal law.²¹ Significantly, the lack of employment opportunity for these individuals shows that extreme interpretations of deterrence principles have historically proven to be more harmful than beneficial to both the individual and society as a whole. Ultimately, this Comment contends that a “culturally sensitive” generation is creating collateral consequences that will lead to devastating social and economic costs if ignored. This Comment proposes that society can minimize these collateral consequences by providing an independent review board that would allow an employer to acknowledge the public outcry but retain their business interests, namely the employee;²² or in the alternative, encouraging employers to implement anonymous hiring procedures that would maximize their employment pool and promote equal employment opportunity.²³

Part II provides an overview of the social and economic framework that shapes this Comment. Specifically, Part II addresses: (1) the role of public shaming in our society from both a historical and modern perspective;²⁴ (2) the hypersensitive nature of the Millennial generation as it relates to intolerance for opposing viewpoints;²⁵ (3) the theoretical basis for the employment at-will doctrine and restrictive covenants;²⁶ and (4) the employment obstacles that background checks have imposed on individuals with criminal records, and how some states have enacted laws to alleviate this burden on ex-offenders, thereby reducing the collateral consequence on the individual and society.²⁷

19. See *infra* notes 147–71 and accompanying text.

20. See *infra* notes 172–205 and accompanying text.

21. See *infra* notes 206–24 and accompanying text.

22. See *infra* notes 180–205 and accompanying text.

23. See *infra* notes 205–24 and accompanying text.

24. See *infra* notes 34–70 and accompanying text.

25. See *infra* notes 71–87 and accompanying text.

26. See *infra* notes 88–129 and accompanying text.

27. See *infra* notes 130–41 and accompanying text.

Part III contends that individuals of the Millennial generation do not use social media as a platform to punish those blatantly out of step with societal norms; rather, they target individuals who make ill-advised but largely non-malicious remarks.²⁸ After examining public policy reasons against restrictive covenants, Part III analyzes how the misuse of public shaming through social media removes individuals from the employment pool and restricts economic mobility, similar to the obstacles faced by ex-offenders who are barred from employment as a collateral consequence of their criminal records.²⁹ This Part concludes by proposing a modified resume collection procedure similar to those implemented by states now modifying their labor laws to allow ex-offenders a fair opportunity at gaining and retaining employment.³⁰

Part IV explores policy implications of public shaming on social media and explains that without remedy, public shaming will continue to have negative consequences on both the economy and social norms.³¹ The threat posed by public shaming, namely public humiliation and the loss of employment, has the dangerous potential of encouraging self-censorship. Part IV argues further that academia lies at the nexus of these economic and social arguments, as the free exchange of ideas is essential to a healthy economy, and university professors bear a special responsibility to promote ideas.³² Allowing a mob mentality to define the parameters of public discourse will erode the foundation of our economic stability and freedom of expression.³³

Part V concludes with the proposition that the negative impacts of public shaming outweigh the possibility of achieving any progress toward the public good.

II. BACKGROUND

To understand the impact of social media on employment opportunity, it is important to place social media use in the context of historical and modern public shaming, and to examine the arguments for and against the employment at-will doctrine and criminal background checks. This Part considers public shaming from the colonial era to the present; the sensitivities of the Millennial generation, which pro-

28. See *infra* notes 147–71 and accompanying text.

29. See *infra* notes 172–224 and accompanying text.

30. See *infra* notes 225–40 and accompanying text.

31. See *infra* notes 241–72 and accompanying text.

32. See *infra* notes 274–94 and accompanying text.

33. See generally Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> (discussing the psychological and societal impact of allowing people to avoid the things that make them uncomfortable).

voke responses to certain social media posts; the theoretical foundation for the employment at-will doctrine; and the effects of criminal background checks on employment opportunity.

A. *Public Shaming in a Historical Context*

Public shaming has been utilized as a method of social control since the American Colonial Era.³⁴ Broadly speaking, the practice involves the public humiliation of an individual as punishment for violating accepted social norms or criminal laws of society.³⁵ In the Colonial Era, public shaming was an officially sanctioned form of punishment for both criminal behavior and moral transgressions.³⁶ Offenders sentenced to public shaming were commonly imprisoned in stocks, with their hands and feet bound, in a highly visible section of the village such as the town square.³⁷ More odious crimes were punished with a mixture of public shaming and physical pain, which included being whipped and branded in front of a crowd of onlookers.³⁸ Public shaming was considered effective in the Colonial Era, in large part, because communities were small and close-knit.³⁹ Individuals sentenced to public shaming in the stocks knew the faces in the jeering crowd and had a personal stake in how their community perceived them.⁴⁰ The early American colonies were also predominantly homogenous in religious and moral interpretation, and criminal offenses were often defined in religious terms.⁴¹ Thus, communities used public shaming to express moral outrage over deviations from accepted social norms, to

34. See Goldman, *supra* note 12, 418–20 (describing public shaming in early America as a method of punishment for criminals).

35. *Id.*

36. *Id.*

37. *Id.* (citing ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 5 (1992)) (noting that humiliation experienced by offenders sentenced to public shaming was largely due to the fact that offenders knew the people in the crowd watching).

38. *Id.* at 418 (citing LAWRENCE M FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 40 (1993)) (describing how flogging and branding was used as a severe form of punishment to alert the community of the offender).

39. *Id.* at 419–20 (citing MICHAEL STEPHEN HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA 1767–1878*, at 100–01 (1980)) (describing the effectiveness of public shaming during the colonial era because communities were small and everyone knew each other).

40. Goldman, *supra* note 12, at 419–20 (citing Phaedra Athena O'Hara Kelly, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 805 (1998)) (noting that the effectiveness of public shaming only worked if the offender actually cared about what others thought of him).

41. *Id.* at 420.

punish criminal behavior, and to coerce individuals into realigning their behavior with accepted community standards.⁴²

Officially sanctioned public shaming as punishment for criminal offenses became unacceptable after the American Revolution, as local norms gave way to structured penal codes.⁴³ Urbanization in the latter nineteenth century led to denser populations and higher rates of migration between cities and villages, which decreased the close bonds between community members as was seen in colonial America.⁴⁴ Thus, the anonymity brought about by urbanization decreased the effectiveness of public shaming.⁴⁵ By the late-1700s, the use of public shaming as an accepted form of official punishment for criminal activity was largely wiped out in the United States.⁴⁶ However, as a form of social control, public shaming has persisted into the modern era.

B. *Modern Public Shaming and Social Media*

Public shaming has never completely left American culture. Individuals value their reputation and, for the most part, the threat of humiliation or becoming a social outcast keeps them from stepping too far outside acceptable social norms. Public shaming on social media occurs when an individual makes offensive comments—or comments that are taken out of context—on a platform such as Twitter, and in turn, receives significant backlash for the comments.⁴⁷ In most cases, this backlash takes the form of further social media posts in which other individuals express their anger and judgment toward “the offender” online.⁴⁸ Other differences between Colonial Era public shaming and modern public shaming through social media also include the short time frame in which the Internet community typically moves on from one topic to the next and the inconsistent degree to which individuals are shamed for their social media posts. Similar to

42. *Id.* at 419.

43. *Id.* at 421–22.

44. *Id.* at 421.

45. *Id.*

46. See RONSON, *supra* note 6, at 55.

47. See, e.g., *id.* at 68–81.

48. This Comment specifically discusses public shaming, and is not intended to address the practice known as “trolling.” While there are many similarities between public shaming on social media and trolling, there are key differences between the two. Trolling is posting comments online with the express intention of creating controversy, inciting anger, and causing disruption to other users of the website. See Daniel W. Drezner, *How Trolling Could Become the New International Language of Diplomacy*, WASH. POST (May 15, 2015), https://www.washingtonpost.com/opinions/how-trolling-could-become-the-new-international-language-of-diplomacy/2015/05/15/5b092014-f9a0-11e4-a13c-193b1241d51a_story.html.

public shaming of a bygone era, however, individuals who are publicly shamed online are still at risk of having their reputations damaged.⁴⁹

One recent incident of public shaming helps to illuminate the issue. Justine Sacco became a victim of public shaming after sending a tweet just before boarding a plane to South Africa in December 2013.⁵⁰ Her tweet read: “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!”⁵¹ Sacco’s Twitter account had only 170 followers, but her tweet was picked up by Sam Biddle, an employee of the website *Gawker*, who then shared her original message to his 15,000 followers.⁵² By the time she landed in Cape Town, after an eleven-hour flight, Sacco’s tweet had become a world-wide “trending” topic, with millions of Twitter users condemning her as a racist.⁵³ The company Sacco worked for, IAC, issued a statement calling her tweet an “outrageous, offensive comment.”⁵⁴ In the ten days that followed, Sacco’s name was searched on Google 1,220,000 times.⁵⁵ Within three weeks of her tweet, Sacco was fired from what she would later describe as her “dream job.”⁵⁶

The Justine Sacco incident highlights the primary difference between Colonial Era public shaming and public shaming through social media: the far reach of the Internet allows the community of onlookers to grow at a break-neck speed.⁵⁷ Sacco had the added misfortune of being on an airplane and unable to reply, or even read responses to her post, when her tweet went viral.⁵⁸ In a subsequent interview with author Jon Ronson, Sacco explained that her comment was intended as a satirical commentary on the “bubble” in which privileged white Westerners live, seemingly immune from the devastating problems that face Third World nations.⁵⁹ “I was making fun of that bubble,” Sacco stated.⁶⁰ However, Sacco never had the opportunity to explain her intentions or defend her character.⁶¹ The Internet, and the nature of Twitter itself, enabled her tweet to be shared, out of context, mil-

49. Lukianoff & Haidt, *supra* note 33.

50. See RONSON, *supra* note 6, at 68–70.

51. *Id.* at 68.

52. See *id.* at 78.

53. *Id.* at 69–70.

54. *Id.* at 69.

55. *Id.* at 71.

56. See RONSON, *supra* note 6, at 68–69.

57. See *id.* at 78–79.

58. *Id.* at 68–69.

59. *Id.* at 73.

60. *Id.*

61. *Id.*

lions of times by individuals who had never met or spoken to her.⁶² Before Sacco knew that anyone had even noticed her tweet, her comment had reached an anonymous audience hundreds of times larger than the few dozens of friends whom she likely expected to see it.⁶³ Even if Sacco had tried to defend herself upon landing, it would have been her word against millions of Twitter users who had already determined for themselves that Justine Sacco was a racist—an accusation so vile, regardless of whether or not it had any merit, that IAC was quick to distance itself and remove her from the company.⁶⁴

The social media era of public shaming is on a much larger scale than the Colonial Era flogging in the town square.⁶⁵ The crowd of onlookers is online, hidden behind made-up screen names and the anonymity of the Internet.⁶⁶ Generally, neither the individual being shamed nor the crowd doing the shaming knows each other personally.⁶⁷ In the Colonial Era, the fact that individuals were enacting punishment on their fellow neighbors served to reign in overly harsh punishments; the crowd of onlookers had to face the shamed individual just as the individual had to face his or her attackers.⁶⁸ By contrast, the anonymity of the Internet makes it impossible to hold people accountable.⁶⁹ Without being held accountable for the consequences of their actions, it becomes easier for the crowd of onlookers to justify escalating their attacks on others—especially others who are perceived to act outside the crowd's specific, accepted social norms.⁷⁰ Among the Millennial generation, the realm of accepted social norms has become defined by cultural hypersensitivity.

C. *No Room for Debate: Hypersensitivity as a Cultural Phenomenon*

The Millennial generation has become increasingly known for cultural hypersensitivity, for better or for worse.⁷¹ Millennials as a whole are more likely than older generations to hold liberal viewpoints, to be racially and ethnically diverse, and to be tolerant toward social is-

62. See RONSON, *supra* note 6, at 75.

63. See *id.* at 68–69, 78.

64. *Id.* at 69.

65. See Goldman, *supra* note 12, at 418.

66. *Id.* at 432.

67. *Id.* at 421.

68. *Id.* at 420.

69. See David Davenport, *Anonymity on the Internet: Why the Price May Be Too High*, COMM'N ACM, Apr. 2002, at 33.

70. See *id.* See generally Lukianoff & Haidt, *supra* note 33.

71. See Lukianoff & Haidt, *supra* note 33.

sues such as same-sex marriage.⁷² Millennials are now associated with the “PC [politically correct] culture,” which is defined as “inclusive” and attempting to eliminate “any language that is ‘discriminatory or culturally insensitive.’”⁷³ Scholars, journalists, and even comedians, however, have begun to wonder if Millennials’ political correctness has gone too far.⁷⁴ While ideals such as inclusivity and cultural sensitivity are admirable, academics have expressed concern that Millennials are using the guise of cultural sensitivity to resist discussing or acknowledging viewpoints they disagree with.⁷⁵ A dramatic version of this cultural hypersensitivity has been observed on university campuses and on social media, in which notions of political correctness and cultural sensitivity are invoked to shut down any viewpoints that might be deemed offensive to anyone, rather than inviting an open discussion on opposing viewpoints.⁷⁶ On university campuses, hypersensitivity has been demonstrated by student protests against guest lecturers or commencement speakers who hold controversial views; in response, some universities have chosen to rescind their invitations to speakers rather than insist that students intellectually engage with opposing viewpoints.⁷⁷

Furthermore, the mask of cultural sensitivity has also been used to enforce a hypersensitive worldview on public spaces, such as entertainment venues or university campuses.⁷⁸ Student-led organizations, such as the National Association for Campus Activities (NACA), have exerted strict standards for visiting performers, requiring comedians to perform material that is “100 percent risk-free, com-

72. *Millennials in Adulthood: Detached from Institutions, Networked with Friends*, PEW RES. CTR. (Mar. 7 2014), <http://www.pewsocialtrends.org/2014/03/07/millennials-in-adulthood/>.

73. See Flanagan, *supra* note 1.

74. *Id.*; see also Lukianoff & Haidt, *supra* note 33; Salaita, *supra* note 14.

75. See Julie Lythcott-Haims, *Millennials Will Soon Define ‘America,’ and That’s a Problem for Ideas*, N.Y. TIMES: ROOM FOR DEBATE (Dec. 21, 2015, 2:50 PM), <http://www.nytimes.com/roomfordebate/2015/11/02/when-a-generation-becomes-less-tolerant-of-free-speech/millennials-will-soon-define-america-and-thats-a-problem-for-ideas>.

76. See generally Judith Shulevitz, *In College and Hiding from Scary Ideas*, N.Y. TIMES: SUNDAY REV. (Mar. 21, 2015), http://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html?_r=0.

77. See *id.* The importance of engaging with opposing viewpoints, however, does not equate to a free-for-all, wherein hate speech is accepted or legitimized. To illustrate, Rev. Dennis H. Holtschneider, president of DePaul University, allowed Breitbart News editor Milo Yiannopoulos—known for making racist, misogynistic comments for the sake of provocation—to speak on campus, which ignited widespread condemnation and protests. See Eugene Volokh, *Speech by Conservative Speaker Milo Yiannopoulos Shut Down by Protesters at DePaul—Police and Security Don’t Intervene*, WASH. POST: VOLOKH CONSPIRACY (May 25, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/25/speech-by-conservative-speaker-milo-yiannopoulos-shut-down-by-protesters-at-depaul-police-and-security-dont-intervene/>.

78. See Flanagan, *supra* note 1.

edy that could not trigger or upset or mildly trouble a single student.”⁷⁹ Universities have responded to this focus on political correctness and student demands for sensitivity by implementing “speech codes” to broadly define language that might be considered offensive⁸⁰ and “trigger warnings” to warn students that material discussed in class may be upsetting.⁸¹ Julie Lythcott-Haims, author and former Dean of Freshman at Stanford University, explains the potential danger of this generational hypersensitivity: “It’s not the students who need to be kept safe from ideas—it’s the very ideal of ideas that needs to be kept safe from fragile young adults with their fingers in their ears, for the sake of that young adult and for the sake of us all.”⁸²

Paradoxically, culturally sensitive Millennials are also the generation that has grown up with social media and are accustomed to publicly sharing every thought, GIF,⁸³ photo of an appetizer, or six-second video they find interesting.⁸⁴ As of 2015, ninety percent of Millennials

79. *Id.*

80. Eugene Volokh, *The Administration Says Universities Must Implement Broad Speech Codes*, VOLOKH CONSPIRACY (May 13, 2013, 1:40 PM), <http://volokh.com/2013/05/13/the-administration-says-universities-must-implement-broad-speech-codes-2/>. Prohibited speech under the speech codes includes:

1. saying “unwelcome” “sexual or dirty jokes”
2. spreading “unwelcome” “sexual rumors” (without any limitation to false rumors)
3. engaging in “unwelcome” “circulating or showing e-mails of Web sites of a sexual nature”
4. engaging in “unwelcome” “display[] or distribut[ion of] sexually explicit drawings, pictures, or written materials,”
5. making “unwelcome sexual invitations.

Id. (alterations in original).

81. Lukianoff & Haidt, *supra* note 33 (describing the professors experience with students and trigger warnings in the classroom, “Jeannie Suk wrote in an online article for the *The New Yorker* about law students asking her fellow professors at Harvard not to teach rape law—or, in one case, even use the word *violate* (as in ‘that violates the law’) lest it cause students distress”). Trigger warnings are alerts that professors are expected to issue if something in a course might cause a strong emotional response. *Id.*; see also Shulevitz, *supra* note 76.

82. Lythcott-Haims, *supra* note 75.

83. See Charlie Wells, *GIF Named Word of the Year*, N.Y. DAILY NEWS (Nov. 13, 2012, 7:24 PM), <http://www.nydailynews.com/news/national/gif-named-word-year-article-1.1201544> (defining GIF as “[s]omething between an emoticon and a video clip, a GIF, whose name is an acronym coined in 1987 to stand for ‘graphic interchange format,’ looks like a short, slightly grainy video file that plays over and over again”).

84. See *Social Networking Fact Sheet*, PEW RES. CTR. (Dec. 27, 2013), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (reporting that Internet users between 18 and 29 years of age had the highest rate of social media users at 89% and internet users over the age of 65 had the lowest rate of social media users at 49%); see also Geoffrey A. Fowler, *Facebook: One Billion and Counting*, WALL ST. J. (Oct. 4, 2012), <https://www.wsj.com/articles/SB10000872396390443635404578036164027386112> (reporting that Facebook officially surpassed one billion monthly active members on September 14, 2012); David Miller, *Legislating Our Reasonable Expectations: Making the Case for a Statutory Framework to Protect Workplace Privacy in the Age of Social Media*, 22 U. MIAMI BUS. L. REV. 49, 49 (2014).

use social media.⁸⁵ While there is no hard data regarding the age range of people who are publicly shamed on social media, or who are doing the shaming, it would stand to reason that Millennials make up a sizeable portion of both sides of the equation.⁸⁶ These Millennials, prone to both over-sharing and over-sensitivity, are entering a workforce that is largely dominated by at-will employment.⁸⁷ While at-will employment may afford employees the flexibility to switch jobs to suit their needs, public shaming on social media may actually hamper an employee's ability to move from one job to another.

D. *Employment At-Will: Economic Theory and Public Policy Exceptions*

The employment at-will doctrine is commonly understood to mean that employees are hired at the will of the employer, and may be fired at the will of the employer for any reason—good, bad, or none—without any legal ramifications, short of violating any state or federal law.⁸⁸ An employee may likewise terminate his employment for any reason under this doctrine.⁸⁹ Employment at-will is limited to private sector employees⁹⁰ who are not covered by a collective bargaining agreement or other contract that requires an employer to show cause for termination.⁹¹ Termination, however, must be for a lawful reason.⁹²

The employment at-will doctrine is rooted in the long-held concept of “economic autonomy,” meaning people should have the ability to come and go as they please without interference or consequence of those decisions.⁹³ Likewise, under this commonly understood con-

85. Andrew Perrin, *Social Media Usage: 2005–2015*, PEW RES. CTR. (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>.

86. See Lukianoff & Haidt *supra* note 33 (“These first true ‘social-media’ natives may be different from members of previous generations in how they go about sharing their moral judgments and supporting one another in moral campaigns and conflicts.”).

87. See *At-Will Employment*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/at-will-employment> (last visited Aug. 10, 2016).

88. See *id.*; see also Paulina G. Ardelean et al., *The Development of Employment Rights and Responsibilities from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. L. 449, 450 (2010).

89. *Id.*

90. *Id.*

91. *Id.*

92. See Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment At Will*, 67 U. PITT. L. REV. 295, 302, 307 (2005). Examples of unlawful termination include: discharge in violation of public policy such as firing whistle blowers; refusing to participate in workplace safety violations, such as refusing to drive without a required license; refusing to violate a doctor's orders by returning to work too soon after hospitalization; and, termination based on discriminatory motives. *Id.* at 307.

93. *Id.* at 300.

cept, an employee is not obligated to provide any particular reason for terminating his own employment.⁹⁴ A free market economy is an essential principle of employment at-will and “‘serves the interests of employees as well as employers’ by maximizing the freedom of both. . . . [It] inhibits judicial ‘second-guessing’ of discharge decisions—even those that are unfair, unfortunate, or harsh.”⁹⁵ The doctrine also posits that employers need freedom to make business judgments without interference from the courts.⁹⁶

Historically, employers have sought to avoid judicial interference.⁹⁷ During the 1950s–1970s, the employment at-will doctrine was skewed to the benefit of the employer rather than operating as a mutually beneficial system.⁹⁸ The generation of this era, commonly referred to as Baby Boomers⁹⁹, had “‘much lower mobility rates and tended to stay with a single employer for as long as possible, with many leaving only when they retired, were forced out, or both.’”¹⁰⁰ Consequently, states began to enact tort remedies for abusive discharges of employees, thereby creating exceptions to the employment at-will doctrine.¹⁰¹ Such exceptions are based on the notion that a justifiable termination should not leave a person unable to work for no reason; therefore, the employer’s power to terminate at-will should not be expanded so far as to cause a negative societal impact.¹⁰² Thus, judicial interference in the form of tort remedies served as a mechanism for employees to protect themselves from employers’ unreasonable attempts to interfere with their ability to work.¹⁰³

In modern times, employees are more likely to be mobile than in previous generations.¹⁰⁴ This increased employee mobility is largely

94. See Ardelean, *supra* note 88, at 450.

95. *Bammert v. Don’s Super Valu, Inc.*, 646 N.W.2d 365, 369–70 (Wis. 2002) (citations omitted).

96. See *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 717 (Tenn. 1997) (citation omitted).

97. *Id.*

98. See Ardelean, *supra* note 88, at 450–51 (highlighting the historical lack of limitations on employer termination rights); Lusk, *supra* note 8, at 709 n.1 (citing *Social Networking, the “Third Place,” and the Evolution of Communication*, NEW MEDIA CONSORTIUM 1, 2 (2007), <http://www.nmc.org/pdf/Evolution-of-Communication.pdf>) (describing how social networking sites are useful tools of communication, but also expose users to endless unintended audiences).

99. See *Boomer on Board*, Editorial, N.Y. TIMES (Oct. 22, 2011), <http://www.nytimes.com/2011/10/23/opinion/sunday/boomer-on-board.html> (stating “baby boomers” are Americans born between 1946 and 1964).

100. See Ardelean, *supra* note 88, at 457.

101. *Id.* at 451–52.

102. *Id.*

103. *Id.*

104. See Dan Schawbel, *The 2015 Millennial Majority Workforce Study*, MILLENNIAL BRANDING (Oct. 29, 2014), <http://www.elance-odesk.com/millennial-majority-workforce> (“The majority

due to technological developments, globalization of business practices, and the shift to service-sector jobs from manufacturing.¹⁰⁵ The employment at-will doctrine can benefit employees who change jobs many times in their life for reasons ranging from “better pay, better benefits, or simply a change of pace.”¹⁰⁶ However, this benefit presupposes that an employee is able to retain their current job or obtain a new job on the basis of their qualifications and reputation.¹⁰⁷

The societal interest of protecting against negative externalities also justifies the exceptions to the employment at-will doctrine.¹⁰⁸ To illustrate, suppose a person is unjustifiably fired from her job for reasons unrelated to her work performance. After being terminated, she seeks other employment but is prevented from re-entering the job market because she is unable to overcome suspicions raised by her unjustified termination. The employee, now unable to provide for herself, turns to government assistance. In this situation, the negative externality is the cost society pays through tax revenue to support a person who is unable to work, not because of her lack of skill or physical ability, but because her unjustified termination essentially acted as a restraint on her economic mobility.¹⁰⁹ Relatedly, most states generally disfavor barriers to market participation because they act as restraints on trade:¹¹⁰ Unjustifiable restraints on employment are

(53%) of hiring managers report difficulty finding and retaining millennial talent The study also found that 58% of millennials expect to stay in their jobs fewer than three years.”).

105. See generally Anthony P. Carnevale et al., *America's Divided Recovery: College Have and Have-Nots*, GEO. U. CTR. EDUC. (June 30, 2016), <https://cew.georgetown.edu/wp-content/uploads/Americas-Divided-Recovery-web.pdf>.

106. See Ardelean *supra* note 88, at 457.

107. See Brenda Salinas, *Blind Auditions Could Give Employers a Better Hiring Sense*, NPR (May 28, 2015, 5:23 PM), <http://www.npr.org/sections/alltechconsidered/2015/05/28/410264592/blind-auditions-could-give-employers-a-better-hiring-sense> (showing that typical hiring processes can result in denial of qualified candidates); see also Claire Cain Miller, *Is Blind Hiring the Best Hiring?*, N.Y. TIMES (Feb. 25, 2016), <http://www.nytimes.com/2016/02/28/magazine/is-blind-hiring-the-best-hiring.html> (arguing that the current focus on résumés, rather than skills, results in denial of otherwise qualified candidates).

108. See ANNE C. STEINEMANN, MICROECONOMICS FOR PUBLIC DECISIONS 191 (2005) (“Negative externalities occur when actions of consumers or producers impose harm or costs upon others [i.e., effects on third parties], without compensation to those others.”); Moss, *supra* note 92, at 303.

109. See Michael Carlin & Ellen Frick, *Criminal Records, Collateral Consequences, and Employment: The FCRA and Title VII in Discrimination Against Persons with Criminal Records*, 12 SEATTLE J. SOC. JUST. 109, 113–14 (2013) (showing how denial of candidates with criminal records has a negative economic impact).

110. Terry Smith, *If Michael Brown Were Alive, Would He Be Employable?*, in FERGUSON'S FAULT LINES: THE RACE QUAKE THAT ROCKED A NATION 121, 133–34 (Kimberly Jade Norwood ed., 2016) (arguing that criminal records act as a form of trade restraints in reducing economic mobility of ex-cons); David R. Trossen, *Edwards and Covenants Not to Compete in California: Leave Well Enough Alone*, 24 BERKELEY TECH. L.J. 539, 540 (2009) (noting that state

contrary to public policy because they restrict the employee's mobility.¹¹¹

E. *Effects of Restrictive Covenants to the Economy*

Generally, restrictive covenants aim to limit an employee's ability to compete with their former employer's market upon her departure from the business.¹¹² Non-compete agreements are a unique type of promise, usually seen in employment contracts and partnership agreements, where one party promises not to engage in the same type of business—independently or with another—for a specific duration of time.¹¹³ Enforcement of these agreements varies between states, but most courts refuse to uphold “unreasonable” restrictive covenants because of the potential harm to the interests of the parties involved.¹¹⁴ For example, a restrictive covenant with a broad geographic restriction, even with a very short temporal duration, would be considered unreasonable.¹¹⁵ However, potential harm to interested parties is not limited to the contracting parties.¹¹⁶ Interested parties may also encompass those not privy to the contract.¹¹⁷

laws on non-compete agreements in employment range from tolerating restrictive covenants only if “reasonable,” to declaring it void all together). This article refers to “restrictive covenants” or “non-compete agreements” interchangeably as a restriction on an employee's ability to compete in the market economy. A “noncompetition agreement” is:

A promise, usu[ally] in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer. . . . [T]hey are disfavored as restraints of trade. Courts generally enforce them for the duration of the relationship, but provisions that extend beyond that relationship must be reasonable in scope, time, and territory.

Covenant Not to Compete, BLACK'S LAW DICTIONARY (10th ed. 2014); see Griffin Toronjo Pivateau, *Enforcement of Noncompetition Agreements: Protecting Public Interest Through an Entrepreneurial Approach*, 46 ST. MARY'S L.J. 483, 485–86 (2015) (arguing that restrictive covenants negatively impact the society at large by limiting employees to lower paying jobs).

111. See Pivateau, *supra* note 110, at 485.

112. *Id.*

113. *Id.* at 487.

114. *Id.* at 497. The reasonableness requirement seeks to “balance the interests of all parties impacted by the noncompetition agreement: the employer, the employee, and society as a whole. Each entity has an interest to be protected.” *Id.* at 496–97. The employee's interest is in protecting his economic mobility; the employer, on the other hand, has an interest in protecting itself from unfair competition related to the employee's mobility. *Id.* Lastly, society has an interest in the development and training of employees so that their skills translate to income by way of employment and are expressed in public benefits such as tax revenue. *Id.* Reasonable restrictive covenants will satisfy all three objectives. *Id.*

115. See, e.g., *Whiting Milk Cos. v. O'Connell*, 179 N.E. 169, 170 (Mass. 1931) (refusing to permit a broader than necessary geographic restriction during a short period on the ground that while the temporal restriction runs the geographical restriction is unreasonable).

116. See *id.*; see also *Marsh USA, Inc. v. Cook*, 354 S.W.3d 764, 769 (Tex. 2011).

117. See *Whiting Milk Cos.*, 179 N.E. at 770 (noting that restrictive covenants can have negative effects ancillary to those of the contract).

In *Marsh USA, Inc. v. Cook*,¹¹⁸ an employer filed suit against a former employee and his new employer, alleging breach of a non-compete agreement.¹¹⁹ The agreement generally prohibited the employee from soliciting or accepting clients of, or business similar to, the former employer.¹²⁰ In a concurring opinion, Justice Willet of the Texas Supreme Court recognized that non-compete agreements have the potential to place a burden on the general public by obstructing competition, thus limiting the mobility of skilled and specialized employees and depriving the public of their talents.¹²¹ Justice Willet stated, “[W]hile Texas law allows limited noncompetes, it does not allow protectionism to trump individual or societal interest in a dynamic marketplace. And even assuming a company is trying to guard a bona fide business interest, Texas courts must strike down restrictions that are unreasonable or more severe than necessary.”¹²² In these circumstances, the impact of the restrictive covenant falls on the general public as well as on the employee, adding another link to the chain of interested parties impacted by the economic restraint.¹²³

When enforced, a restrictive covenant will undoubtedly have some degree of negative impact on society as a whole.¹²⁴ Enforced restrictive covenants have the ability to limit an individual’s mobility, subsequently depriving society of the economic and social contributions of the person contractually prohibited from working.¹²⁵ Restrictive covenants have similar public policy considerations as the employment at-will doctrine.¹²⁶ The negative consequences suffered by the contractually restrained employee is similar to that of the employee at-will who is restrained by his employer’s unjustifiable termination: no job, lower paying job, and in the worst-case scenario—welfare.¹²⁷ In turn, society loses all the benefits derived from the skilled individual, including tax revenue, services he can provide, and consumer spending

118. 354 S.W.3d 764.

119. *Id.* at 767.

120. *Id.*

121. According to Justice Willett, “Economic dynamism in the 21st century requires speed, knowledge, and innovation—imperatives that must inform judicial review of efforts to sideline skilled talent. Courts must critically examine noncompetes in light of our contemporary, knowledge-based economy that prizes ingenuity and intellectual talent.” *Id.* at 780–81 (Willett, J., concurring).

122. *Id.* at 783.

123. *Id.* at 782 (“The Act’s paramount purpose ‘is to maintain and promote economic competition in trade and commerce . . . and to provide the benefits of that competition to consumers in the state.’” (alteration in original) (quoting TEX. BUS. & COM. CODE § 15.04 (2016))).

124. See Pivateau, *supra* note 110, at 485–86.

125. See *id.*

126. See Moss, *supra* note 92, at 300.

127. See Pivateau, *supra* note 110, at 486.

power.¹²⁸ Unable to fully participate in the market economy or completely barred from doing so, the contractually restrained employee unnecessarily becomes a negative externality.¹²⁹

F. Collateral Consequences: Employment & The American Criminal Justice System

Collateral consequences are the negative effects indirectly imposed on individuals as a result of a crime, and can function as a restriction on employment opportunities comparable to a restrictive covenant.¹³⁰ However, unlike restrictive covenants, collateral consequences do not have a stated expiration date.¹³¹ The social and economic losses suffered by the individual and the public is immense.¹³² Access to hous-

128. See STEINEMANN, *supra* note 108, at 191 (explaining the economic theory of externalities as the “spillover effect” in which those not privy to the market transaction are nonetheless subjected to costs and benefits).

129. *Id.*

Negative externalities occur when the private cost of an activity does not fully account for the social costs. In this context, the term private refers to an individual consumer or producer, or an individual group or consumers or producers—a singular entity rather than all of society. It does not necessarily imply “private sector” as contrasted with public sector. Thus, private can refer to public agencies, private firms, groups of people, or an individual person.

Id.

130. This Comment uses the term “collateral consequences” expansively to describe the negative economic effects, or “invisible punishments” experienced by individuals subjected to public shaming as it relates to employment. Similarly, in the context of the criminal justice system, the term “collateral consequences” describes the destructive effects of convictions on the ex-offender, his family, and society. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) (describing collateral sanctions as “harsh,” “practically inevitable,” and an “integral part of the penalty”); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002); *ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS* 15–16 (3d ed. 2003) (“Collateral sanctions are those penalties that automatically become effective upon conviction even though not included in the court’s judgment or identified on the record.”). See generally *Collateral Costs: Incarceration’s Effect on Economic Mobility*, PEW CHARITABLE TRUSTS (2010) [hereinafter *Collateral Costs*], http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf (discussing how incarceration can have collateral costs similar to those of restrictive covenants).

131. See Carlin & Frick, *supra* note 109, at 113 (citing *Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, SOC’Y FOR HUM. RES. MGMT. (July 19, 2012), <http://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx>).

132. See *Collateral Costs*, *supra* note 130, at 12 (citing *One in 100: Behind Bars in America 2008*, PEW CTR. STS. (2008), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf) (finding that a person who has been incarcerated through the peak of their earning years has an expected earning loss of nearly \$179,000 through the age of 48).

ing, education, voting, and—most significantly—employment are each collateral consequences imposed on an ex-offender.¹³³

Criminal records create numerous barriers for ex-offenders to reintegrate themselves back into society.¹³⁴ A longtime practice that required mandatory disclosure of criminal records in job applications created a pool of negative externalities, in which individuals were unable to obtain employment because employers reject their applications on the basis of previous criminal convictions, rather than on the basis of qualifications.¹³⁵ As a result, the federal government implemented statutory measures aimed at reconciling an indoctrinated preference for extreme interpretations of deterrence principals.¹³⁶ Legislation such as Title VII and the Fair Credit Reporting Act (FCRA) now seek to correct the misuse of criminal records in hiring practices by making it more difficult for employers to use a past criminal conviction against a potential applicant.¹³⁷

In an effort to assist ex-offenders in obtaining employment, a movement called “Ban the Box” has recently grown in popularity.¹³⁸ Several states—including Hawaii, Massachusetts, Minnesota, and Rhode Island—have enacted or proposed legislation prohibiting employers from asking job applicants if they have a criminal record.¹³⁹ State laws that protect ex-offenders from loss of employment generally reduce unemployment and benefit the public by preventing otherwise qualified applicants from requiring public assistance.¹⁴⁰ Without such laws, the collateral consequences of criminal records produce similar effects as restrictive covenants, restricting mobility and shrinking the employment pool.¹⁴¹

The Millennial generation is facing a new form of restrictive covenant. When public shaming ruins reputations, victims lose economic

133. See Carlin & Frick, *supra* note 109, at 112.

134. See *id.*

135. See Smith, *supra* note 110, at 132–37; see also Carlin & Frick *supra* note 109, at 112 & n.20 (“As of late 2012, the American Bar Association has catalogued over 38,000 statutes that impose collateral consequences on people convicted of crimes.”). “The most current data shows that, while there are many barriers people face as a result of their records, 84 percent of those are job-related.” *Id.* at 112 n.20.

136. See Carlin & Frick, *supra* note 109, at 120–21.

137. *Id.*

138. See Pam Fessler, *How Banning One Question Could Help Ex-Offenders Land a Job*, NPR (July 14, 2014, 3:28 AM), <http://www.npr.org/2014/07/14/330731820/how-banning-one-question-could-help-ex-offenders-land-a-job> (discussing the movement called Ban the Box which calls for legislative action prohibiting an employer from asking job applicants if they have a criminal record).

139. See *id.*

140. See Carlin & Frick, *supra* note 109, at 112–14, 117.

141. See Piveteau, *supra* note 110, at 489.

mobility and the ability to compete in the job market as collateral consequences. Public shaming on social media thus creates unprecedented economic and legal challenges, fueled by a hypersensitive generation that is quick to attack and slow to analyze.

III. ANALYSIS

This Part argues that individuals are subjected to draconian public shaming for ill-advised but largely non-malicious statements on social media. Whereas public shaming in the Colonial Era was used to bring offenders in line with accepted social norms, modern public shaming on social media is used to ostracize anyone who appears to momentarily make a culturally insensitive comment.¹⁴² Furthermore, this Part maintains that public shaming acts as a restrictive covenant and interferes with the victim's ability to keep or obtain employment.¹⁴³ When an employee loses a job due to public shaming, a damaged reputation may prevent the individual from obtaining employment elsewhere. This Part argues that, as a result, those who engage in public shaming to remove economically productive workers from employment create an economic cost that must be absorbed by society.

This Part proposes that employers and employees should have some recourse to protect their economic interests by appealing to a neutral and independent review board when public outcry demands an employee's termination.¹⁴⁴ It further argues that job applicants should be protected through more progressive hiring practices. This Part goes on to assert that victims of public shaming who lose their jobs also suffer from decreased economic mobility and, over time, the collateral consequences of public shaming have a negative and cumulative effect on the economy.¹⁴⁵ Finally, this Part draws from proposed reforms related to the hiring of ex-criminal offenders to suggest the institution of additional legislative remedies to safeguard victims of public shaming, and the Millennial generation generally, from employment discrimination.¹⁴⁶

142. See Goldman, *supra* note 12, at 418–20. In contrast, some culturally insensitive comments are more than momentary, and require scrutiny. See John Halstead, *The Real Reason White People Say 'All Lives Matter,'* HUFFINGTON POST (July 28, 2016), http://www.huffingtonpost.com/john-halstead/dear-fellow-white-people-_b_11109842.html (discussing the cultural insensitivity of #AllLivesMatter).

143. See *infra* notes 172–79 and accompanying text.

144. See *infra* notes 180–205 and accompanying text.

145. See *infra* notes 206–24 and accompanying text.

146. See *infra* notes 225–40 and accompanying text.

A. *The Dogma of the Millennials: Exclusive Tolerance*

Under the guise of an “inclusive” and “tolerant” objective, lies a less tolerant generation that prefers ostracism over tempered and sound judgment.¹⁴⁷ The structure of social media sites encourages users to post comments that will garner the most attention in the shortest amount of time, increasing the possibility that a single post may be taken out of context.¹⁴⁸ The immediacy and ease of social media coupled with the heightened cultural sensitivity among the Millennial generation is a recipe for hasty, self-righteous indignation that indiscriminately targets individuals who make careless remarks and those who truly intend to be offensive.¹⁴⁹ Furthermore, by combining anonymity with a wide-ranging public platform, “[s]ocial media makes it extraordinarily easy to join crusades, express solidarity and outrage, and shun traitors.”¹⁵⁰ The inherent lack of accountability within anonymity thus fosters an abuse of power that social media users can wield over an individual’s reputation.¹⁵¹ This power, however, is not exercised equally over all social media “offenders.” The following example of Anthony Cumia serves to illustrate this point.

Anthony Cumia is a “shock jock” and former co-host of *The Opie and Anthony Show*.¹⁵² In July 2014, Cumia posted a series of tweets after an alleged altercation with an African American woman.¹⁵³ According to Cumia’s posts, the woman physically attacked him after he captured her photograph as he was taking pictures on a public street.¹⁵⁴ Using a private Twitter account that was not associated with his professional job, Cumia described the incident to his Twitter followers over the course of several hours, calling the woman a “c-word” and a “lucky savage,” referring to African Americans generally as “savage violent animal[s]” who “prey on white people,” and stating “I hope she gets killed.”¹⁵⁵ SiriusXM Radio, the company that broadcast *The Opie and Anthony Show*, quickly moved to distance itself from

147. See generally RONSON, *supra* note 6.

148. See, e.g., Salaita, *supra* note 14.

149. See RONSON, *supra* note 6, at 68–81; Lukianoff & Haidt, *supra* note 33; see also Alexander Chan, *Sirius XM Host Claims “Cuntrag” Assaulted Him in a Racist Twitter Rant* (July 2, 2014, 10:43 PM) <http://gawker.com/siriusxm-host-claims-cuntrag-assaulted-him-in-racist-1599491744>.

150. Lukianoff & Haidt, *supra* note 33.

151. See Davenport, *supra* note 69.

152. See Eric Deggans, *Social Media Meltdowns Highlight the Power of the Audience*, NPR (July 9, 2014, 12:57 PM), <http://www.npr.org/sections/monkeysee/2014/07/09/329892340/social-media-meltdowns-highlight-the-power-of-the-audience>.

153. *Id.*

154. See Chan, *supra* note 149.

155. *Id.*

Cumia's comments, rather than risk the wrath of the public.¹⁵⁶ In this instance, SiriusXM moved to fire Cumia before a firestorm of public backlash even got started; the mere possibility of a public shaming campaign targeting the radio station was threat enough.¹⁵⁷ The company released a statement that read, "[T]hose remarks and postings are abhorrent to SiriusXM, and [Cumia's] behavior is wholly inconsistent with what SiriusXM represents."¹⁵⁸ Cumia was fired from his job within twenty-four hours of his social media posts.¹⁵⁹

The contrasting cases of Justine Sacco, discussed in Part II, and Anthony Cumia demonstrate the willingness of social media users, largely Millennials,¹⁶⁰ to join an attack on perceived political incorrectness, but also the uneven manner in which public shaming punishments are doled out. Both Sacco and Cumia were using Twitter accounts that were not associated with their professional jobs.¹⁶¹ Although Cumia is a celebrity figure with a public persona, he was not making these controversial statements on his radio show.¹⁶² Similarly, the individuals' employers, IAC and SiriusXM, issued public statements denouncing the posts made by Sacco and Cumia, respectively, and fired them from their jobs.¹⁶³

Other than these similarities, the circumstances of Sacco's and Cumia's public postings were completely different. Cumia's posts were made over an extended period of time and Cumia had every opportunity to explain exactly what he meant in his tweets.¹⁶⁴ His tweets were not taken out of context or misconstrued.¹⁶⁵ What he said was genuinely offensive, and it was intended to be so.¹⁶⁶ Furthermore, as a celebrity, Cumia had numerous fans that came to his defense after SiriusXM fired him.¹⁶⁷ An online petition to have Cumia reinstated had over 21,000 signatures less than one week after SiriusXM made its

156. See Polly Mosendz, *Opie and Anthony No More: Inside the Nasty Breakup of Radio's Most Notorious Shock Jocks*, NEWSWEEK (Apr. 9 2015, 4:00 PM), <http://www.newsweek.com/opie-and-anthony-no-more-inside-nasty-break-radios-most-notorious-shock-jocks-321186>.

157. *Id.*

158. *Id.*

159. See Miriam Coleman, '*Opie & Anthony*' Host Anthony Cumia Fired After Racist Twitter Tirade, ROLLING STONE (July 6, 2014), <http://www.rollingstone.com/culture/news/opie-anthony-host-anthony-cumia-fired-after-racist-twitter-tirade-20140706>.

160. See *supra* note 84 and accompanying text.

161. See RONSON, *supra* note 6, at 78; Deggans, *supra* note 152.

162. See Deggans, *supra* note 152.

163. See RONSON, *supra* note 6, at 69; Coleman, *supra* note 159.

164. See Deggans *supra* note 152.

165. *Id.*

166. *Id.*

167. *Id.*

announcement.¹⁶⁸ On the other hand, Sacco became a well-known name *because* of her public shaming; the misconstrued tweet came to define her public persona.¹⁶⁹ Celebrity status also afforded Cumia the financial means to economically bounce back on his own terms; in the same summer that SiriusXM fired Cumia, he launched a new show on his own online network.¹⁷⁰ Secured by his celebrity status, legions of fans, and financial resources, Cumia had no need to hide from this public shaming episode. According to author Jon Ronson, who interviewed Sacco several times throughout her ordeal, Sacco spent several months unemployed, volunteering for a non-governmental organization, and floating between jobs before landing a current position in communications—a position that she refuses to reveal to media for fear that her public shaming will come back to haunt her.¹⁷¹

The majority of social media users are not well-known celebrities; they are just like Justine Sacco—young, accustomed to over sharing, and without recourse if suddenly faced with the loss of livelihood and reputation. Lacking any legal protection from the online mob that called for her downfall, Sacco became a negative externality upon society, restricted from full economic participation by her damaged online reputation.

B. The Social Media Bandwagon: A Modern Form of Restrictive Covenant

The social media heckler's primary objective in riding the bandwagon is to shut down or restrict an offender's voice by drowning out his comments, like an audience heckling a comedian off the stage.¹⁷² Like a heckler restricting an offender's influence, restrictive covenants prevent an employee from competing with her employer by stripping her of bargaining power through contractual methods such as non-compete agreements.¹⁷³ An employer may look to the courts to enforce the non-compete agreement and will generally have greater monetary means to litigate, thereby strengthening the employer's bargaining power over a single employee.¹⁷⁴ In the context of hypersensi-

168. *Id.*

169. See RONSON, *supra* note 6, at 77–79.

170. See *Anthony Cumia Show*, COMPOUND MEDIA, <https://www.anthonycumia.com/> (last visited Aug. 10, 2016).

171. Jon Ronson, *How One Stupid Tweet Blew Up Justine Sacco's Life*, N.Y. TIMES MAG. (Feb. 12, 2015), <http://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html>.

172. See, e.g., Flanagan, *supra* note 1; Levy, *supra* note 3, at 80.

173. See Pivateau, *supra* note 110, at 491–42.

174. See *id.* at 492–93.

tive social media users, bargaining power derives from a rapidly growing and hostile audience.¹⁷⁵ The mob enforcing the public shaming has greater power through sheer force of numbers than the single offender.¹⁷⁶ The disproportionate bargaining power between employers and employees is but one reason that has lead courts to generally disfavor restrictive covenants.¹⁷⁷ Essentially, the bandwagon of public shamers on social media acts as a restrictive covenant on the victim, effectively restricting her from competing on her merits in the marketplace.

Proponents of social media shaming believe it is justified because a person who publically makes offensive comments does so at her own expense. However, these proponents fail to account for the social costs of their own actions.¹⁷⁸ Economists refer to the act of accounting for the negative by-products of a transaction as “cost internalization.”¹⁷⁹ For example, when social media users band together to pressure an employer to fire the offender, they are not considering the costs of the unemployed individual to society through lost income taxes and diminished market participation. If they did consider the social and economic costs of putting someone out of work, the social media users might hold back from demanding that the employer fire the person making offensive comments. By failing to consider this cost, social media users force that cost onto society. Proponents of social media shaming must justify the position that the benefit derived from “heckling” an offender out of employment outweighs the cost society absorbs by losing an otherwise competent contributor to the national economy.

The practice of publically shaming offensive commentators out of employment one at a time overlooks the cumulative impact of social

175. See Deggans, *supra* note 152.

The audience has more control than anyone realizes. When you think about how social media works, this makes perfect sense. Online platforms such as Twitter, Facebook and Instagram take authority from the gatekeepers of media, which once controlled access to large audiences—newspapers, TV networks, cable channels and radio stations. Instead that power is handed to anyone who can create compelling content.

Id.

176. See Perrin, *supra* note 85 (noting that in 2015, ninety percent of adults age 18–29 years old use social media); Selyukh, *supra* note 13 (“[Twitter’s] worldwide base of monthly active users grew to 304 million at the end of June, from 302 million at the end of March and 288 million at the end of 2014.”).

177. Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKLEY J. EMP. & LAB. L. 287, 311–12 (2006).

178. See STEINEMANN, *supra* note 108, at 191 (discussing the consequences of an individual’s actions and the costs that accrue to other members of society as negative externalities).

179. See *id.* at 191–92.

media heckling campaigns. Independently, the act of pressuring an employer to fire an offender-employee may seem inconsequential, but taken collectively these campaigns are significant. For example, one person who loses her job because of an inappropriate or misunderstood comment on social media may not significantly impact the national economy. However, from a forward-looking perspective, thousands of individuals ousted from employment over inappropriate comments will threaten the economic mobility of a generation.

To combat the negative economic and social impacts resulting from the abuse of “hecklers veto” in the area of employment law, state governments should implement independent review boards within the state’s department of labor to provide neutral recommendations as to termination when the public demands it.

1. Inadequate Remedies Under Tort Law: Social Media Users, Employers and Liability

An employer and employee are engaged in a business relationship.¹⁸⁰ Regardless of the nature or terms of the business relationship, whether it is at-will or contractual, the underlying objective binding both parties is economic.¹⁸¹ While courts have recognized that parties outside the business relationship—namely, the general public—can be impacted by it, the law does not provide a remedy for employees who lose their job due to public shaming campaigns.¹⁸² To date, the only avenue of relief for the shamed employee is to file a lawsuit after the fact.

A recent public shaming incident illustrates how filing a lawsuit over a termination can be problematic. Wendy Bell was a news anchor for WTAE TV, located in Pittsburgh, Pennsylvania.¹⁸³ In March of 2016, she wrote a Facebook post about a shooting that had recently occurred, saying,

You needn’t be a criminal profiler to draw a mental sketch of the killers who broke so many hearts. They are young black men, likely in their teens or in their early 20s. . . . These boys have been in the

180. See Orrin K. Ames, III, *Tortious Interference with Business Relationships: The Challenging Contours of this Commercial Tort*, 35 CUMB. L. REV. 317, 332, 334 (2005).

181. *Id.* at 332–34.

182. See, e.g., *Marsh USA, Inc. v. Cook*, 354 S.W.3d 764, 783 (Tex. 2011) (acknowledging that the public has a societal interest in business relationships).

183. See *Former News Anchor Sues WTAE for Firing Based on Race*, AOL NEWS (June 21, 2016, 8:46 AM), <http://www.aol.com/article/2016/06/21/former-news-anchor-sues-wtae-for-firing-her-based-on-race/21399245/>.

system before. They've grown up there. They know the police. They've been arrested.¹⁸⁴

The post drew controversy, and Bell apologized for the comment and deleted it from her account; yet, she still was fired.¹⁸⁵ Bell felt that her firing was unjustified and filed a suit in the U.S. District Court for the Western District of Pennsylvania, claiming that she would not have been fired if she were not white and that her termination amounted to racial discrimination.¹⁸⁶ Furthermore, Bell asked that the court order WTAE TV to reinstate her to her former position as an anchor.¹⁸⁷ Ms. Bell was fortunate in that she was a fairly well-known local personality with the financial means to bring a lawsuit, which many people are not able to do.¹⁸⁸ However, even if Ms. Bell wins the right to her job back, the fact remains that she was fired, lost wages, and her professional relationships were interrupted.

A shamed employee should not have to simply accept their plight and reenter the job market with the dark cloud of a shameful termination hanging over them. While the shamed, former employee can file a tort claim against their former employer, filing a lawsuit after the fact does not address the economic and social problems associated with forcing a productive member of the economy out of the job market. Furthermore, relying on employees to file suit to correct the situation after they have been terminated puts individuals at the lower end of the income spectrum at a disadvantage; not everyone can afford to hire an attorney to litigate a lawsuit. In cases where it is ambiguous as to whether or not there is a legitimate reason for firing an employee due to the demand of the public, the employer should have some recourse to make an informed business decision, removed from the pandemonium of the online mob.

An independent review board under the state labor department could review potential terminations before the employee has been severed in cases where there is reason to believe that the impetus for termination is without cause, such as outside pressure from a social media campaign. The review board should be situated within the state's department of labor, and not within the company, as an inter-

184. *Id.* (quoting Wendy Bell).

185. *Id.*

186. Civil Complaint at 5, *Bell O'Toole v. Hearst Stations, Inc.*, No. 16-cv-00879-TFM, 2016 WL 3457946, at *5 (W.D. Pa. June 20, 2016).

187. *Id.*

188. See *Wendy Bell Sues TV Station, Says Firing Was 'Because of Her Race,'* NBC News (June 21, 2016, 8:21 AM), <http://www.nbcnews.com/news/us-news/wendy-bell-sues-tv-station-says-firing-was-because-her-n596076> ("Bell joined WTAE in 1998 and has won 21 Emmy Awards.").

nal review board would be subject to the same pressure from social media as the employer. To avoid government overreach into private business operations, the review board's opinion should not be binding, but simply advisory. Therefore, the employer could still choose to capitulate to the online mob and fire the employee; however, the employee would be able to invoke the board's opinion to give weight to any civil suit for wrongful termination and demand compensation.

Initially, the onus should be on the employer to submit a potential termination decision to the board for review, but the existence of such a third-party, non-binding board would provide ample incentive for the employer to seek its guidance. Terminating an employee who has performed their job satisfactorily is a financial burden to any employer; however, public shaming campaigns on social media may give employers reason to believe that their business will suffer by keeping a shamed employee on the payroll.¹⁸⁹ The review board should further provide an objective opinion on the merits of a potential termination; the employer should then use the board's impartial reasoning to reject the online mob's call to fire the employee. Thus the employer would avoid the cost of paying severance, losing a productive member of the workforce and hiring and training a new employee.¹⁹⁰ Society, in general, also avoids the costs associated with turning an employee into a negative externality.¹⁹¹ Furthermore, giving weight to an independent review board's recommendation could shield the company from costly litigation. If the company chose to terminate an employee without seeking the board's opinion, or despite the board's recommendation that termination was unjustified, the company could be exposed to litigation and possibly liable for an expensive payout to the employee.

In addition to offering an impartial perspective, the review board could provide the employer an avenue to show that the employer is responsive to the public outcry; in submitting a potential termination to the board for review, the employer demonstrates that the company takes the social media outrage seriously, and that the company is taking responsible steps to address the matter—without rashly terminating an employee for a non-performance related issue.

189. See Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, *CTR. AM. PROGRESS* (Nov. 16, 2012), <https://www.americanprogress.org/issues/labor/report/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/>.

190. *Id.*

191. See *supra* notes 8–17 and accompanying text.

The review process would likely take weeks or even months, which could provide clarity to the situation.¹⁹² Rather than quickly submitting to the knee-jerk reactions of the online mob, the company would be afforded a chance to see whether or not the public shaming campaign actually affected their business operations, thereby justifying termination of the employee. Consider two scenarios in which the review board finds that terminating a publicly shamed employee would be unjustified and in no way related to job performance. The employer, fearing negative backlash against their company, chooses to fire the employee anyway. The employee then sues for wrongful termination. In the first scenario, the social media campaign against the employee has subsided over the course of the review period, and the shamed employee is no longer a trending topic online. The public shaming on social media did not last long enough to impact the company's bottom line, and the employee can thus demonstrate that the termination was unjustified and not related to any legitimate business interests. In the second scenario, the public shaming campaign on social media has continued throughout the review period, and has even intensified. The company has suffered a loss financially and/or in reputation. The company can then use this loss to defend the decision to fire the employee.

State laws should allow for tort remedies against the employer, such that the burden of proof is placed on the employer to demonstrate that firing the employee was based on a fair and legitimate business interest,¹⁹³ or in the alternative, that the pressure exerted by the third parties was based on a legitimate societal interest.¹⁹⁴ An independent review board could accomplish this by forcing the employer to demonstrate that it had a legitimate reason to disregard the board's recommendation should the employee choose to bring a lawsuit against the employer for wrongful termination.

In the context of public shaming on social media, anyone can join the bandwagon and add their voice to the chorus calling for an employee to be fired.¹⁹⁵ An independent review could provide a path to reconciliation that does not resort to termination. However, in cases where an employer chooses to move forward with a termination, despite ambiguous reasoning, it is arguable that the courtroom—free of

192. *Employment Litigation and Dispute Resolution*, U.S. DEP'T LAB., https://www.dol.gov/_sec/media/reports/dunlop/section4.htm (last visited Aug. 11, 2016) ("Overburdened federal and state judicial dockets mean that years often pass before an aggrieved employee is able to present his or her claim in court.").

193. See Ames, *supra* note 180, at 331–38, 378–79.

194. See *id.* at 366–80.

195. See RONSON, *supra* note 6, at 68–81; Selyukh, *supra* note 13.

distractions plaguing the Millennial generation, such as iPhones, Facebook, Twitter, Snapchat, etc.—is the fairest setting in which a terminated employee has a fighting chance against the bandwagon.¹⁹⁶

In the social media “jury box,” there are thousands, if not millions, of other jurors whose homogenous attitudes and uninformed opinions drown out the small fraction of people who withhold judgment until all sides of an issue have been explained.¹⁹⁷ By contrast, the real courtroom jury box only has a limited number of seats.¹⁹⁸ In the courtroom, there is no tolerance for interruptive shouts of “Racist!” “Homophobic!” or “Anti-feminist!”¹⁹⁹ Here, jurors have no choice other than to sit for hours and thoughtfully listen to the entire story, not just a glimpse of the person’s viewpoints through one social media post.²⁰⁰ Placed in an environment conducive to the exercise of tempered and sound judgment—controlled, undistracted, and most significant, engaged with a blend of community members ranging from the hypersensitive-Facebook addict to the retiree—jurors are the true triers of facts.²⁰¹ Jurors have the benefit of receiving information presented by both parties who have equal opportunity to argue their case.²⁰² Therefore, the employee is given the opportunity to argue their case to members of their community, presumed to be reasonable and selected through a process of compromise.²⁰³

Although it is arguable that judicial economy may be threatened by increased litigation that will plague courtroom dockets, it is also true that the American justice system is predicated on the notion that both sides to every issue deserve to be heard, and that individuals are innocent until proven guilty.²⁰⁴ Judicial economy does not outweigh justice.²⁰⁵ The public shaming bandwagon currently acts as judge, jury,

196. See Selyukh, *supra* note 13 (discussing Twitter’s potential to serve as a “town square” but is instead a forum for alleviating “existential rage” with no ability to “call a cop”).

197. See Lukianoff & Haidt, *supra* note 33 (analogizing the ability of a small group of students to understand statements made in jest).

198. Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 662 (2002).

199. *Id.* at 675 (noting that most prospective jurors are willing to admit in a public setting that they cannot be impartial).

200. See *id.* at 705.

201. See *id.* at 659–60.

202. See *id.* at 674–75.

203. See *id.* at 675–76.

204. See Roger Bernstein, *Judicial Economy and Class Actions*, 7 J. LEGAL STUD. 349, 352 (1978).

205. See *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989) (holding that it is a principle of American jurisprudence that everyone be afforded his day in court), *superseded by statute*, 42 U.S.C. § 1981 (2012), *as recognized in Landgraf v. USI Film Prod.*, 511 U.S. 244, 251 (1994) (explaining that § 108 responds to *Martin v. Wilks* by prohibiting certain challenges to employment practices implementing consent decrees).

and executioner in the court of public opinion. Perhaps the courtroom is the last stop for the bandwagon and everyone riding in it.

C. Collateral Consequences: Ex-Offenders, Economic Mobility & Employment

Economic mobility,²⁰⁶ which is the ability to move up the income ladder over one's lifetime and across generations, is essential to a viable economy.²⁰⁷ When public shaming results in an unjustifiable termination, society bears the costs of that individual's economic immobility through negative externalities.²⁰⁸ Now faced with the challenge of obtaining new employment while simultaneously saddled with a tarnished employment record—for reasons unrelated to job performance—the offender may be forced to seek employment in a field unfamiliar to her.²⁰⁹ In an attempt to circumvent challenges associated with her firing, the social media offender may settle for a lower salary incompatible with her education or skill level.²¹⁰ Counter-intuitive to the concept of economic mobility is “climbing down” the income ladder.²¹¹

In the United States, about 70 million people have been arrested or convicted of a crime.²¹² Arrests and criminal convictions produce barriers that can follow a person long after she has paid fines, served jail time, or completed a rehabilitation program.²¹³ The use of criminal background checks in the hiring process has prevented many ex-offenders from receiving a fair chance at obtaining a job, and has imposed an additional sentence that amounts to a “civil death.”²¹⁴ Incapable of finding or maintaining work due to their criminal back-

206. See *Collateral Costs*, *supra* note 130, at 3; see also Pivateau, *supra* note 110, at 485–86 (explaining that restrictive covenants, such as non-competition agreements, restrict employees' mobility).

207. See *Collateral Costs*, *supra* note 130, at 3, 12, 22.

208. See Pivateau, *supra* note 110, at 485–86 (explaining that because restrictive covenants restrict employee mobility, society loses the benefit of the individual who seeks to work but is contractually prevented from doing so, which may cause a drain on the public's resources); see also STEINEMANN, *supra* note 108, at 191 (discussing externalities).

209. See, e.g., Ronson, *supra* note 171 (describing the fate of social media shaming victims, Jon Ronson states, “[t]he people I met were mostly unemployed, fired for their transgressions”).

210. Pivateau, *supra* note 110, at 485–86 (explaining that restrictive covenants, such as non-compete agreements, may force in the restrained employee to work in lower paying jobs with few benefits).

211. See *Collateral Costs*, *supra* note 130, at 3, 16 (discussing research that formerly incarcerated men tend to stay at the bottom of the earnings ladder with “particularly low” odds of moving up).

212. Fessler, *supra* note 138.

213. See Carlin & Frick, *supra* note 109, at 109; see also Smith, *supra* note 110, at 135.

214. Smith, *supra* note 110, at 135–36.

ground, ex-offenders remain in an irreversible vegetative economic state, unable to fully participate in mainstream life.²¹⁵ To a large extent, criminal background checks function in the same manner as a restrictive covenant: both prohibit an individual from freely exercising economic mobility.²¹⁶ However, the magnitude imposed by these restrictions is incomparable. For the employee with a non-compete agreement, the restriction is generally limited to a specific type of employment and comes with an expiration date.²¹⁷ In contrast, for the ex-offender, criminal background checks are indiscriminate as to the type of employment sought and do not come with an expiration date.²¹⁸

Advocates for “Ban the Box” laws argue that prohibiting employers from asking the question “Have you ever been convicted of a crime?” on job application forms will help alleviate the collateral consequence of criminal convictions by opening up employment opportunities for millions of Americans.²¹⁹ Comparatively, banning application forms from asking “Have you ever been terminated from a job?” would protect individuals who have lost a job as a result of public shaming on social media and are now faced with collateral consequences similar to ex-offenders in obtaining employment. As is true for the question about criminal convictions, generally, the form only provides enough space to check “Yes” or “No,” without inquiring as to whether the termination resulted from a job-related performance issue.²²⁰ Thus, one may infer that the answers to these questions are added for the purpose of automatic elimination.²²¹ Furthermore, neither the question regarding past criminal convictions nor past terminations specify a date range after which the answer is no longer relevant. Therefore, these questions will act as a restrictive covenant indefinitely. Banning both boxes can protect the economic mobility of all ex-offenders, criminal and social.

In many instances, however, banning the box is not enough. A recent study conducted by Amanda Agan of Princeton University and Sonja Starr of the University of Michigan found that “Ban the Box”

215. See *Collateral Costs*, *supra* note 130, at 3, 16.

216. See Smith, *supra* note 110, at 135–36.

217. See Pivateau, *supra* note 110, at 489.

218. See Fessler, *supra* note 138.

219. See *id.*; see also Smith, *supra* note 110, at 136–37.

220. See Smith, *supra* note 110, at 135.

221. See, e.g., Fessler, *supra* note 138.

laws have the potential to increase racial disparities in hiring.²²² The researchers sent out a sample of fictitious resumes with equivalent qualifications, with either stereotypically white names or African American names.²²³ They found that, without any indication as to whether the applicant had a criminal background, employers were more likely to make negative assumptions about applicants with African American-sounding names and less likely to call an applicant for an interview.²²⁴ Thus, an ex-offender with a stereotypically African American name may not receive adequate employment opportunity from “Ban the Box” laws. Similarly, a public shaming victim may still face employment discrimination even if the employer is banned from asking, “Have you ever been terminated from a job?” An employer can easily perform an online search for the applicant’s name, and the public shaming will resurface. For both ex-criminal and ex-social media offenders, the most egalitarian hiring practice is the blind audition.

D. *The Role of Hiring Practices in Eliminating Collateral Consequences*

It is estimated that over half of all employers now conduct online research on applicants’ social media accounts in consideration for employment.²²⁵ In the unlikely event that the application of the individual who checked “Yes” to the “Have you ever been fired?” question has not been placed in the trash, the next hurdle arises during the social media inquiry.²²⁶ An idea has been proposed that blind auditions—wherein employers judge applicants based on their performance in a job-related task, rather than a traditional resume—could give employers a better hiring sense because it allows an employer to spend more time finding candidates with particular skills, as opposed to the traditional resume-based application process.²²⁷ Likewise, the blind audition approach would allow an ex-social media offender to

222. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment 4* (Univ. Mich. Law & Econ. Research Paper Series, Paper No. 16-012, 2016).

223. *Id.* at 31–40.

224. *Id.*

225. See Yuki Noguchi, *Can’t Ask That? Some Job Interviewers Go to Social Media Instead*, NPR (Apr. 11, 2014, 4:06 PM), <http://www.npr.org/sections/alltechconsidered/2014/04/11/301791749/cant-ask-that-some-job-interviewers-go-to-social-media-instead>.

226. *Id.*

227. Brenda Salinas, *Blind Auditions Could Give Employers a Better Hiring Sense*, NPR (May 28, 5:23 PM), <http://www.npr.org/sections/alltechconsidered/2015/05/28/410264592/blind-auditions-could-give-employers-a-better-hiring-sense>; see also Claire C. Miller, *Is Blind Hiring the Best Hiring?* N.Y. TIMES MAG. (Feb. 25, 2016), <http://www.nytimes.com/2016/02/28/magazine/is-blind-hiring-the-best-hiring.html>.

advance in the application process, rather than being weeded out on the basis of their social media notoriety.²²⁸ Most noteworthy about the blind audition approach is that it allows qualified candidates with nontraditional backgrounds, such as self-taught candidates without a college degree, who are nonetheless qualified for the position, to compete for jobs based on their capabilities, not their records.²²⁹

Job searching is a difficult task even for qualified individuals unburdened by criminal records, but for ex-criminal offenders—and relatedly, ex-social media offenders—the job seeking process can be daunting.²³⁰ To counteract the collateral consequences attached to prior criminal convictions, or prior social media convictions, states could implement laws governing the hiring practices of employers that mirror the blind audition system. To illustrate, suppose a state mandated that employers incorporate a hiring procedure that allowed job applicants to obtain an interview based on demonstrating relevant skills. At this stage, the employer has not yet seen a resume, or had the opportunity to search the Internet for information on the applicant. To apply for the job, the applicant would complete a challenge under an anonymous identifying number.²³¹ Once the applicant has demonstrated her abilities, the employer has the option to reject or hire the candidate.²³² Resumes, or “paper qualifications,” are taken into consideration only after the applicant has auditioned for the position.²³³

Some employers may fear that changing the laws to prohibit questions regarding past employment would compromise their ability to hire quality applicants; however, this concern is unfounded.²³⁴ Under a blind audition system, an employer could still retain their ability to hire qualified applicants based on qualifications essential to the job duty.²³⁵ For example, a blind resume collection assigns a number in place of an applicant’s name, thereby removing potential biases associated with names, gender and race, and would prohibit an employer

228. See Lusk, *supra* note 8, at 734 & n.204.

229. See, e.g., Salaita, *supra* note 14.

230. See, e.g., *id.*

231. See MILLER, *supra* note 227, at 4.

232. See *id.*

233. See *id.*

234. Carlin & Frick, *supra* note 109, at 115 (discussing an employment study that found those with criminal records had higher retention rates than those without a record).

235. See MILLER, *supra* note 227, at 4.

from looking up applicants on social media.²³⁶ The applicant would be judged solely on their qualifications.²³⁷

Private-sector employers do not need to wait for the state to enforce blind audition hiring practices. In the fast-changing economy of our modern era, it is detrimental for employers to dismiss otherwise qualified candidates on the basis of prior offenses that are irrelevant to the candidate's abilities.²³⁸ Employers have a personal stake in removing barriers to finding the most skilled, qualified workers.²³⁹ Eliminating collateral consequences increases economic mobility for ex-offenders and, in turn, benefits society at large.²⁴⁰

Public shaming campaigns on social media, spurred by the anonymity of an online mob, have pushed qualified, productive people out of the employment pool, leaving negative externalities and ruined lives in their wake. Beyond the serious economic dangers, however, public shaming threatens the bedrock of a modern, progressive society—the ability to critically examine ideas and freely express oneself, whether in the public realm of the Internet or the halls of academia.

IV. IMPACT

When individuals are removed from or barred from employment, society loses a productive member of the national economy.²⁴¹ Instead of contributing to the economy, the individual becomes a negative externality, imposing the cost of caring for their needs on to the rest of society.²⁴² On a social level, the knee-jerk reaction inherent in social media allows people to feel as though they have made a difference and contributed to a cause, without critically analyzing or participating in substantial, long-term work to address the underlying issue.²⁴³ Furthermore, this snap-judgment mentality breeds a new

236. *See id.* (explaining that researchers at MIT and the University of Chicago found that applicants with “white” names received fifty percent more callbacks than those with “black” names, and how the founders of GapJumpers, a technology platform for employers to conduct blind auditions, have attempted to remove this apparent bias based on a person's name).

237. *Id.* (describing how GapJumpers creates a test based on a set of skills dictated by an employer, who then select candidates to interview based solely on those test results).

238. *See* Carlin & Frick, *supra* note 109, at 116–17.

239. *See* Moss, *supra* note 92, at 347 (“Employers that reject good employees for personal reasons (e.g., discrimination or personal animosity) are sacrificing valuable productivity and thereby placing themselves at a competitive disadvantage.”).

240. *See* Carlin & Frick, *supra* note 109, at 111–12, 119–20.

241. *See* Pivateau, *supra* note 110, at 486.

242. *Id.*

243. *See* Lukianoff & Haidt, *supra* note 33. Students today may be more inclined towards desiring protection, yet more hostile toward ideological opponents than prior generations:

This hostility, and the self-righteousness fueled by strong partisan emotions, can be expected to add force to any moral crusade. . . . Part of what we do when we make

kind of closed-mindedness in which individuals are opposed to hearing anything unpleasant and believe that they have made a positive contribution by silencing the “offending” viewpoint.²⁴⁴ Ultimately, public shaming may cause individuals to self-censor.²⁴⁵ At the crux of the economic and social impacts of public shaming lies academia.²⁴⁶ Public shaming has not only resulted in the termination of professors, but it also has denied students the very benefits of going to college—the ability to analyze and engage with opposing ideas, and ultimately reach maximum earning potential.²⁴⁷

The issue of public shaming and employment has the potential to adversely impact the Millennial generation on both an economic and social level.²⁴⁸ Millennials, by and large, have come of age in the era of Twitter, Facebook, Snapchat, and Instagram.²⁴⁹ Sharing personal details about their lives and providing running commentary on various subjects on social media has become the norm.²⁵⁰ Paradoxically, this generation, which so readily avails itself to public commentary, is also hypersensitive to perceived cultural insensitivities, making any single social media post fair game for misinterpretation and attack.²⁵¹ The notion that an innocuous social media post may have dire conse-

moral judgments is express allegiance to a team. But that can interfere with our ability to think critically. Acknowledging that the other side’s viewpoint has any merit is risky—your teammates may see you as a traitor. . . . Social media makes it extraordinarily easy to join crusades, express solidarity and outrage, and shun traitors.

Id.

244. *Id.*

245. See Lukianoff & Haidt, *supra* note 33.

246. See Levy, *supra* note 3, at 81, 125–28.

247. See Salaita, *supra* note 14; see also Flanagan, *supra* note 1; Lukianoff & Haidt, *supra* note 33.

248. See Lukianoff & Haidt, *supra* note 33.

Attempts to shield students from words, ideas, and people that might cause them emotional discomfort are bad for the students. They are bad for the workplace, which will be mired in unending litigation if student expectations of safety are carried forward. And they are bad for American democracy, which is already paralyzed by worsening partisanship. When the ideas, values, and speech of the other side are seen not just as wrong but as willfully aggressive toward innocent victims, it is hard to imagine the kind of mutual respect, negotiation, and compromise that are needed to make politics a positive-sum game.

Id.

249. *How Millennials Use and Control Social Media*, AM. PRESS INST. (Mar. 16, 2015, 12:01 AM), <https://www.americanpressinstitute.org/publications/reports/survey-research/millennials-social-media/>.

250. See *supra* note 84 and accompanying text.

251. See, e.g., Salaita, *supra* note 14 (describing how Steven Salaita’s tenured faculty position at the University of Illinois was rescinded after he posted a tweet about the Israel/Gaza conflict, which was, according to Salaita, mischaracterized by the University’s administration).

quences has also been well publicized.²⁵² Headlines in the media warn young people against becoming the next victim of a public shaming campaign, with titles such as *Fired Over Facebook*, *How Using Social Media Can Get You Fired*, and *The Social Media Gaffes That'll Get You Fired*.²⁵³ However, fostering a climate in which individuals may be fired, or prevented from obtaining employment, over a social media post poses an even greater threat than economic hardship. In addition to risking employability, Millennials face the danger of becoming a self-censored generation.

Self-censorship is the exercising of control over what ones says and does—especially to avoid castigation—without officially being told that such control is necessary.²⁵⁴ Self-censorship is a grave threat to active and meaningful participation in the “marketplace of ideas.”²⁵⁵ A special area of concern is the possibility that hypersensitive social media users will cause a chilling effect²⁵⁶ in society; people who have a right to speak, and should, will self-censor because the economic risk is too great.²⁵⁷ Free speech, as opposed to self-censored speech, is essential to democracy and economic viability because “self-governance requires informed citizens.”²⁵⁸ In turn, informed citizens are better equipped to contribute to the “market place of ideas.”²⁵⁹

In modern times, the heckler’s veto is used to silence opposing viewpoints through threats of economic or political retaliation against employers who do not punish the speaker.²⁶⁰ However, an atmosphere of free inquiry and open debate is critical to effectively addressing sensitive issues such race, economic inequality, gun regulation, education, state policing, the environment, and health.²⁶¹ Further-

252. See generally HUFFINGTON POST: FACEBOOK, <http://www.huffingtonpost.com/topic/facebook> (last visited Aug. 12, 2016) (featuring a compilation of articles about social media, including people who have been fired because of their posts).

253. *Id.*; Anna Davies, *The Social Media Gaffes That'll Get You Fired*, N.Y. POST (Nov. 23, 2015, 7:00 AM), <http://nypost.com/2015/11/23/the-social-media-gaffes-thatll-get-you-fired/>; Stacy Rapacon, *How Using Social Media Can Get You Fired*, CNBC (Feb. 5, 2016, 10:00 AM), <http://www.cnbc.com/2016/02/05/how-using-social-media-can-get-you-fired.html>.

254. *Self-censorship*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english/self-censorship> (last visited Aug. 10, 2015).

255. See Levy, *supra* note 3, at 85–86.

256. *Id.* at 90.

257. *Id.* at 80–81.

258. *Id.* at 86.

259. See *id.*

260. See *id.* at 80–81.

261. Levy, *supra* note 3, at 85–86; see, e.g., Nick Blumberg, *Uproar After DePaul University Bans Conservative Speaker*, WTTW CHI. TONIGHT (Aug. 3, 2016, 3:33 PM), <http://chicagotonight.wttw.com/2016/08/03/uproar-after-depaul-university-bans-conservative-speaker>. DePaul University received significant backlash when it refused to let conservative guest lecturer Ben Shapiro speak on campus, in what was considered to be a reaction to the controversy that followed

more, self-censorship bears the risk of softening the harsh realities that impact individuals who are largely relegated to the sidelines of society. For example, opening a dialogue about the connections between systemic racism and police brutality is likely to make some people uncomfortable;²⁶² however, it is a conversation that must be had, and it must include multiple perspectives from different levels of society to fully address the root causes. An evolving American social fabric requires that people are free to criticize, discuss, and question.²⁶³ History has demonstrated that bad ideas and proscribable speech²⁶⁴ prove to be useless to the advancement of culture, science, and economics, whereas good ideas tend to stick around.²⁶⁵ Social media is thus a double-edged sword with the ability to both spread harmful attacks and serve as a platform for robust discussion of useful ideas.

A. *Social Media Can Have a Constructive Role in Society*

In the example of Justine Sacco, her attackers were purportedly angered by her “racist” comments, but there was no coordinated effort to genuinely discuss racism, or to do anything constructive that would address complex issues of racism and rates of HIV infection in South Africa.²⁶⁶ Instead, the crowd banded together purely to attack and destroy Sacco.²⁶⁷ As soon as she was fired, the crowd moved on, content in accomplishing that goal. By contrast, Black Lives Matter (BLM) activists have made use of both social media²⁶⁸ and more traditional protest tactics toward concrete, stated goals with the express purpose of addressing racial injustice.²⁶⁹ Furthermore, the BLM movement has made use of social media conventions, such as Twitter hashtags, to keep their message alive, rather than being a one-issue

allowing conservative provocateur Milo Yiannopoulos to speak in May. *See id.* DePaul Democrats and DePaul Young Americans for Freedom, a conservative student group, agreed that Shapiro’s invitation was not controversial as compared to Yiannopoulos, who intended to provoke and not to educate. *See id.* Both student groups expressed dismay at the university’s decision, and the DePaul College Democrats issued a statement saying, “While we would be hard pressed to find common ground with Mr. Shapiro, our democracy demands that we listen to what he has to say.” *Id.* (quoting DePaul College Democrats).

262. *See Levy, supra* note 3, at 127–32 (noting that certain ideas can invoke disruption).

263. *See id.* at 86. *See generally* Lukianoff & Haidt, *supra* note 33.

264. *See supra* note 301 and accompanying text.

265. *See Levy, supra* note 3, at 81.

266. Ronson, *supra* note 171.

267. *Id.*

268. *See generally* Black Lives Matter (@Blklivesmatter), TWITTER, https://twitter.com/blk_livesmatter?lang=EN (last visited Aug. 10, 2016).

269. *See Find and Submit Events*, BLACK LIVES MATTER, <http://blacklivesmatter.com/find-and-submit-events/> (last visited Aug. 10, 2016).

campaign that quickly disbands after attacking a single person.²⁷⁰ BLM is an example of addressing sensitive issues without resorting to a mob mentality or hypersensitive arena, which distracts from the core discussion and consequently disengages voices that are necessary to the conversation.²⁷¹

Going to extremes in either direction is unnecessary. Disagreeing with the hypersensitive, “politically correct” mentality does not mean one must engage in overtly racist hate speech.²⁷² Likewise, just because one is opposed to hate speech, does not mean that one must become overly sensitive to everything—not all jokes or comments involving race come from a place of ignorance or insensitivity.²⁷³ Nowhere is a balanced approach to social media more critical than in academia, where we rely on the ability to freely examine and dissect new ideas.

B. Public Shaming Is a Threat to Academia & the Market Place of Ideas

Upon the founding of the University of Virginia, Thomas Jefferson articulated the crucial role that academia plays in safeguarding freedom of thought, stating: “This institution will be based on the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.”²⁷⁴ Professor Steven Salaita, a unique victim of public shaming, whose controversial tweets cost him a tenured position at the University of Illinois at Urbana-Champaign in 2014, illustrates Jefferson’s point.²⁷⁵ Professor Salaita, whose scholarship

270. See Black Lives Matter, *supra* note 268.

271. See Selyukh, *supra* note 13 (describing how Twitter’s public nature, in contrast to Facebook’s “friend” based networking has “amplified diverse voices in transformative ways” including “[t]he powerful Black Twitter keeping a spotlight on police misconduct” and “*The New York Times* putting the #IfTheyGunnedMeDown story on the front page”).

272. Compare Press Release, Office of the Press Sec’y, Remarks by the President at Memorial Service for Fallen Dallas Police Officers (July 12, 2016, 1:46 PM), <https://www.whitehouse.gov/the-press-office/2016/07/12/remarks-president-memorial-service-fallen-dallas-police-officers> (“With an open heart, we can abandon the overheated rhetoric and the oversimplification that reduces whole categories of our fellow Americans not just to opponents, but to enemies.”), with Ashley Parker et al., *Voices from Donald Trump’s Rallies, Unsensored*, N.Y. TIMES (Aug. 3, 2016), http://www.nytimes.com/2016/08/04/us/politics/donald-trump-supporters.html?_r=0 (“But what struck us was the frequency with which some Trump supporters use coarse, vitriolic, even violent language—in the epithets they shout and chant, the signs they carry, the T-shirts they wear—a pattern not seen in connection with any other recent political candidate, in any party.”).

273. See generally Flanagan, *supra* note 1 (describing how college students have become too sensitive to stand-up comics’ jokes concerning certain subjects, such as rape, sex, and race).

274. See Lukianoff & Haidt, *supra* note 33.

275. See Salaita, *supra* note 14.

focuses on colonialism, indigenous peoples, and Palestine, was offered and accepted a tenured position in the American Indian studies program at the University of Illinois.²⁷⁶ In the weeks leading up to the beginning of classes, political conflict between Israel and Palestine escalated.²⁷⁷ During Israel's bombing campaign of the Gaza Strip, the United Nations reported that over 2,000 people were killed; seventy percent of those deaths were civilians.²⁷⁸ Like so many others, Professor Salaita took to his personal Twitter account and posted tweets critical of Israel's actions.²⁷⁹ On July 20, 2014, he tweeted, "Fuck you #Israel. And while I'm at it, fuck you, too, PA, Sisi, Arab monarchs, Obama, UK, EU, Canada, US Senate, corporate media, and ISIS."²⁸⁰ Those tweets drew the attention of Eric Owens, the education editor of Daily Caller—a partisan political blog—who published a post on the conservative website under the headline "America 2014: University of Illinois Professor Blames Jews for Anti-Semitism."²⁸¹ Owens characterized Professor Salaita's challenges to Israeli government action as anti-Semitic.²⁸² Within days after Owens' post on the conservative website, the University of Illinois rescinded its offer to Professor Salaita.²⁸³ Publically disclosed documents revealed that a few wealthy donors critical of Salaita's views of Israeli policy, banned together and demanded that the university fire him or they would withhold money.²⁸⁴ Professor Salaita's academic career was destroyed over gross mischaracterization of a few words.²⁸⁵

Most significant, Professor Salaita is qualified to offer his commentary on the subject of Israeli–Palestinian relations, and he should be free to do so.²⁸⁶ Yet, his accomplishments and qualifications meant nothing to the bandwagon because it was easier to silence an opposing

276. See Deanna Isaacs, *Did Controversial Tweets Cost Steven Salaita His U. of I. Professorship?*, CHI. READER (Aug. 12, 2014), <http://www.chicagoreader.com/chicago/university-illinois-urbana-champaign-stevesalaita-twitter-hiring/Content?oid=14592000>.

277. See Salaita, *supra* note 14.

278. See *id.*; see also *As Civilian Casualties Rise in Gaza, UN Rights Council Agrees Probe into Alleged 'War Crimes,'* UN NEWS CTR. (July 23, 2014), www.un.org/apps/news/story.asp?NewsID=48330; *World Report 2015: Israel/Palestine Events of 2014*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2015/country-chapters/israel/Palestine>.

279. See Salaita, *supra* note 14; Emily Shire, *Is Twitter Trolling Making the Israel-Palestine Conflict Worse?*, DAILY BEAST (July 22, 2014, 4:45 AM), <http://www.thedailybeast.com/articles/2014/07/22/is-twitter-trolling-making-the-israel-palestine-conflict-worse.html>.

280. See Isaacs, *supra* note 276.

281. See *id.*

282. See *id.*

283. *Id.*

284. *Id.*; see also Salaita, *supra* note 14.

285. Isaacs, *supra* note 276.

286. See *id.*

viewpoint by economic threats, rather than engage in respectful debate.²⁸⁷ In this context, the bandwagon was used to stifle an individual whose very role is to advance society by teaching others to engage in critical thinking and voice educated opinions.²⁸⁸ Thus, the bandwagon is not restricted to silencing misconstrued jokes or self-aggrandizing celebrities.²⁸⁹ The public relies on the opinions of people like Professor Salaita, a scholar with a Twitter account, whose job is to educate by critical thought²⁹⁰—criticism is thus an essential element of the market place of ideas.²⁹¹ If public shaming is allowed to remove all uncomfortable or otherwise disagreeable ideas from the public, the market place will no longer contain anyone to exchange ideas with, and the search for truth will come to an unfortunate end.²⁹² Professor Salaita states, “Narratives never encompass the totality of the stories they attempt to tell. . . . Any time we tell a story, we omit what we consider unimportant, and in worse moments, we ignore information that contradicts a predetermined conclusion.”²⁹³ Self-censorship threatens the market place of ideas, the economy, and ultimately democracy.²⁹⁴

C. *The Socio-Economic Interest of Defending Economic Mobility from The Bandwagon*

The concept of Due Process can serve as a model for businesses crafting their social media polices.²⁹⁵ Providing fair notice regarding what qualifies as permissible or prohibited speech places the burden on the employee to be cognizant of specific types of speech subject to

287. *Id.*; see Levy, *supra* note 3, at 81 (“[W]hen faculty members say outrageous things, the public response may have very real consequences for a university, including the possibility that classes will be disrupted, legislators will retaliate, or fundraising efforts will be damaged.”).

288. See Lukianoff & Haidt, *supra* note 33 (describing the apprehension of professors, “social media has also fundamentally shifted the balance of power in relationships between students and faculty; the latter increasingly fear what students might do to their reputations and careers by stirring up online mobs against them”).

289. See, e.g., RONSON *supra* note 6, at 77–79; Coleman, *supra* note 159.

290. See Lukianoff & Haidt, *supra* note 33.

There’s a saying common in education circles: Don’t teach students *what* to think; teach them *how* to think. The idea goes back at least as far as Socrates. Today, what we call the Socratic method is a way of teaching that fosters critical thinking, in part by encouraging students to question their own unexamined beliefs, as well as the received wisdom of those around them. Such questioning sometimes leads to discomfort, and even anger, on the way to understanding.

Id.

291. See Levy, *supra* note 3, at 85.

292. See Lukianoff & Haidt, *supra* note 33.

293. Salaita, *supra* note 14.

294. See Lukianoff & Haidt, *supra* note 33; see also Levy, *supra* note 3, at 85–86.

295. See Levy, *supra* note 3, at 91–92.

termination.²⁹⁶ By defining the scope of social media policies, employers and employees will be in a better position to protect their interests.²⁹⁷

Overly broad social media policies have the potential to “chill” speech and further reinforce self-censorship.²⁹⁸ Whereas, narrowly tailored social media policies protect individuals from arbitrary, wrongful termination because they are afforded fair notice as to the type of speech they will be held accountable for.²⁹⁹ Employers should also be required to demonstrate that retaining the employee would result in a significant negative impact to the business’s stated mission, or that the employee is unable to continue performing their duties effectively.³⁰⁰ Rather than leaving it up to the employee to guess if the content of their speech will be considered “proscribable,” that is, not protected under the First Amendment,³⁰¹ employers have three choices: (1) write their social media policies more explicitly;³⁰² (2) bear the burden of proof that the employee has caused significant negative impact to the business;³⁰³ and/or (3) demonstrate that the employee is no longer able to perform his job duties effectively.³⁰⁴

Furthermore, explicit policies give employers an offensive and defensive advantage.³⁰⁵ On one hand, the employer eliminates the impulse to police their employees’ speech, while also protecting its economic interest of retaining qualified employees³⁰⁶ by essentially writing the rules of the game. On the other hand, the employer is positioned to defend itself from third-party bandwagon interference³⁰⁷

296. See *Davis v. Monroe Cty. Bd. of Educ.*, 120 F.3d 1390, 1414, 1418 (11th Cir. 1997) (defining the type of behavior that rises to the level of “harassment,” the Supreme Court, under the *Davis* standard, held that a single comment or thoughtless remark by a student does not equate to harassment, but a pattern of objectively offensive behavior that interferes with another student’s access to education may qualify).

297. See *Levy*, *supra* note 3, at 91–92.

298. See *id.* at 91.

299. See *id.* at 86, 92.

300. *Ames*, *supra* note 180, at 367.

301. *Levy*, *supra* note 3, at 84, 88.

302. See *id.* at 83.

303. See *id.* at 94 (noting that the University of Kansas and the Kansas Board of Regents, in its case against a professor who penned a controversial tweet, could bear the requisite burden of proof because the University could likely show a significant negative impact on the University as a result of the tweet).

304. See *id.* at 132.

305. See *id.* at 119 (noting that one of the benefits of having an explicit policy is that the employer has the ability to justifiably take action against employees when they violate the policy).

306. See *id.* 101–02.

307. See *Levy*, *supra* note 3, at 118 (stating that a facial challenge on vagueness grounds to a social media policy is unlikely to be successful).

by pointing to unambiguous language in its business policies, dismissing any complaint against one of its employees that does not rise to the level of a “fireable offense” contained in the social media policy.³⁰⁸

Finally, employers should of course be free to raise concerns about an employee’s speech on social media, or to look unfavorably at the employee’s actions.³⁰⁹ However, disliking a part of an employee’s record should not disqualify them from employment. Qualified individuals should not become negative externalities due to missteps on social media, or the expression of an unpopular opinion. If the Millennial generation’s tendency to ostracize those who do not share their viewpoints continues to force its way into the economic sector, then concrete measures such as assigning non-personally identifiable codes to resumes should be implemented. Such blind selection would prevent the employer from ruling out an applicant for personal reasons that do not involve qualifications. In order to combat the damage caused by the anonymous online mob, job applicants must also be afforded a degree of anonymity in their job search.

V. CONCLUSION

America’s culturally hypersensitive generation has turned social media into a dangerous tool through the use of public shaming. Individuals whose reputations are damaged by public shaming are at risk of losing employment and ultimately becoming unemployable. Absent a legal remedy, these social media offenders face a civil death—the loss of their ability to compete in the marketplace and participate in mainstream society. The collateral consequences of removing otherwise capable people from the employment pool will have long lasting economic and social costs. To stem this tide, and safeguard the principle of free speech, employers must assume a modified resume collection procedure, similar to procedures that provide ex-criminal offenders a fair opportunity at gaining and retaining employment.

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308. *See id.* at 117–25 (noting that “improper use” is very vague and that making policies more explicit will make them easier to implement).

309. Christina Jaremus, *#FiredForFacebook: The Case for Greater Management Discretion in Discipline or Discharge for Social Media Activity*, 42 RUTGERS L. REC. 1, 6 (2014).

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