4-1-2001

Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)

Michael Wells
University of Georgia School of Law, mwells@uga.edu

ARTICLE

SECTION 1983, THE FIRST AMENDMENT, AND PUBLIC EMPLOYEE SPEECH: SHAPING THE RIGHT TO FIT THE REMEDY (AND VICE VERSA)

*Michael L. Wells**

Constitutional rights do not exist in a vacuum, hermetically sealed from the rest of the legal universe. Their value depends in large measure on the remedial vehicles available for redressing violations.[1] Yet the Supreme Court has interpreted 42 U.S.C. § 1983,[2] the chief source of remedies for constitutional violations, in isolation from the substantive rights the statute is used to enforce.[3]

---

* J. Alton Hosch Professor of Law, University of Georgia School of Law. The author thanks Dan T. Coenen, Thomas A. Eaton, Amy Gellins, Richard A. Nagareda, and Rebecca H. White for comments on a draft, and Candice Decaire and Paige Younkins for research assistance.

[1] *See, e.g.*, Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 735-36 (1992) (focusing on realist insight that meaningful discussion of constitutional rights must address available remedies); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 262 (1988) (questioning whether system of remedies is adequate to enforce federal norms).

[2] 42 U.S.C. § 1983 (1994) provides, in relevant part:

> Every person who, under color of [state law] . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[3] *See* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 259 (2000) (describing Court's doctrine as "one-size-fits-all" approach).

By failing to integrate substantive and remedial law, the Court may unintentionally thwart the constitutional values it aims to advance.

This Article examines one doctrinal context in which this theme is especially troublesome—the substantive and remedial law bearing on the First Amendment rights of public employees.[4] Beginning with *Pickering v. Board of Education*,[5] the Court has viewed this subject as a special problem in free speech law, where the task is to balance the value of freedom of speech against the government's special interest as an employer in an efficient workplace.[6] Assuming

---

[4] A § 1983 suit is not the only recourse for employees. The federal government and many state governments have enacted "whistleblower" statutes to shield employees who expose misfeasance. *See, e.g.*, Texas Whistleblower Act, TEX. GOV'T. CODE ANN. § 554.002 (West Supp. 1996); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1660-62 (1996) (explaining function and scope of whistleblower statutes); Charles W. Hemingway, *A Closer Look at* Waters v. Churchill *and* United States v. Nat'l Treasury Employees Union*: Constitutional Tension Between the Government as Employer and the Citizen as Federal Employee*, 44 AM. U. L. REV. 2231, 2247-55 (1995) (describing legislative expansion of federal employee procedural protection and legislative restriction of federal employee rights). Empirical evidence suggests, however, that the federal statute may not be very effective. *See* Estlund, *supra*, at 1672 n.61 (stating that difficulty of proving reprisal has greatly limited impact of federal statute). Common-law tort actions are sometimes available to employees, *see* Mark P. Gergen, *A Grudging Defense of the Role of Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693 (1996), and public employee unions typically negotiate rights not to be fired without just cause, which in turn place limits on the authority of government agencies to fire workers who speak out.

[5] 391 U.S. 563 (1968).

[6] *Id.* at 568; *see also* United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) (holding that prohibition on receipt of honoraria by government employees abridged their free speech under First Amendment); Waters v. Churchill, 511 U.S. 661 (1994) (stating that before government employer can discharge employee for unprotected speech, it must undertake reasonable investigation to determine what speech actually was); Rankin v. McPherson, 483 U.S. 378 (1987) (stating that determination of whether public employer has properly dismissed employee for engaging in speech requires balancing of employee's interests as citizen with employer's role as provider of public services operating under First Amendment); Connick v. Myers, 461 U.S. 138 (1983) (stating that to determine public employee's right to free speech, Court must balance employee's interest in commenting on matters of public concern with employer's interest in efficiency); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979) (holding that public employee does not lose constitutional right to free speech because he arranges to communicate privately with employer rather than publicly); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (holding that fact that constitutionally protected conduct plays role in decision not to rehire public employee does not necessarily amount to constitutional violation); *cf.* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996) (holding independent contractors are protected from retaliatory termination for free speech by First Amendment).

A related line of cases addresses the permissibility of conditioning government jobs on political affiliation. *See, e.g.*, Branti v. Finkel, 445 U.S. 507 (1980) (holding that First and Fourteenth Amendments protected public defenders from discharge solely based on political

the employee's speech—or, more precisely, the employer's reasonable understanding of what was said[7]—has the potential to cause disruption of the government's work,[8] the employee can win only by showing that the speech addressed a matter of public concern.[9] If he meets this burden, the court must then engage in "particularized balancing" of the value of the speech against the potential disruption.[10] Applying these principles, *Pickering* upheld the free speech claim of a teacher who wrote a letter to the editor criticizing school finance policies.[11] By contrast, *Connick v. Myers*[12] allowed the New Orleans district attorney to fire a staff attorney who distributed at the workplace a critical questionnaire related mainly to the internal operations of the office. A fair summary of the public employee speech doctrine and its aims is that, unlike the areas of obscenity or criminal prosecution of non-inciting political speech, the Court has been reluctant to state a general rule favoring either the state or the individual in this area. The Court instead considers the interests on both sides of this issue worthy of respect and has devised standards

---

beliefs); Elrod v. Burns, 427 U.S. 347 (1976) (holding that sheriff's employees fired or threatened with dismissal based on political affiliation stated valid claim for deprivation of constitutional rights under First and Fourteenth Amendments); *cf.* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) (holding that protection of public employees from dismissal based on political affiliation extends to independent contractors). Though some of the reasoning in these cases is relevant here, the distinctive issues raised in these cases concern whether a given employee holds a politically sensitive post and are not the focus of this Article.

[7] *Waters*, 511 U.S. at 677 (plurality opinion) (holding that employer's action is to be judged by "the facts as the employer *reasonably* found them to be"); *cf.* Wasson v. Sonoma County Junior Coll., 203 F.3d 659, 662-63 (9th Cir. 2000) (finding no free speech violation when plaintiff is victim of mistake in identifying speaker).

[8] Speech that presents no such danger is evidently protected. *See* Nat'l Treasury Employees Union, 513 U.S. at 465-70 (holding that employee's right to free speech must be balanced against employer's interest in promoting efficient public services).

[9] *Connick*, 461 U.S. at 145-46. Speech by public employees on private matters is not "totally beyond the protection of the First Amendment." *Id.* at 147. It enjoys the same level of protection against general government regulation as anyone else's speech. *Id.* But when the speech is "upon matters only of personal interest," and the issue is whether someone may be dismissed from a government job, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision." *Id.*

Here and throughout this Article, references to the "employee" are intended to include former government employees who have brought suit claiming they were dismissed in retaliation for exercising First Amendment rights.

[10] *Id.* at 150.

[11] 391 U.S. 563, 568 (1968).

[12] 461 U.S. 138 (1983).

for determining which is stronger by carefully examining the facts on a case-by-case basis.

Critics of public employee speech doctrine direct their fire at the value choices underlying it. Most critics think the Court gives too little respect to free speech.[13] This is a persistent theme in U.S. Supreme Court dissenting opinions[14] as well as in pro-speech scholarship. Cynthia Estlund argues that "the public concern test . . . inevitably undermines the protection of speech that is important to public discourse."[15] Toni Massaro "criticizes the Court's deference to a public employer's mere anticipation of disruption as grounds for employee discipline."[16] Stanley Ingber takes issue with the Court's concern for efficiency in the public workplace, maintaining that "[w]e will not be worthy of respect as a people if we foster only the virtue of obedience."[17] On the other hand, Lawrence Rosenthal believes the efficiency goal is underserved by current law, and argues that "regulations should be considered constitutionally unobjectionable when they require an employee to do her job consistent with office policies."[18] Under Rosenthal's proposal, so long as the government's aim is not to enforce ideological conformity, "the scope of legitimate managerial prerogatives should allow public employers to regulate the speech of public employees if the regulations are reasonably calculated to

---

[13] In this they are typical of free speech scholarship. *See* Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853, 863 (1992) (surveying ten years of free speech scholarship and finding that "ninety-five percent of the prescriptions are in the direction of urging on courts or legislatures greater protection of the free speech or free press interests than the objects of the prescription currently recognize").

[14] *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 697 (1994) (Stevens, J., dissenting) (arguing that rule that public employers may act based on their reasonable belief goes too far in protecting government's interest); *Connick*, 461 U.S. at 163 (Brennan, J., dissenting) (disagreeing with majority's "far narrower conception of what subjects are of public concern").

[15] Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 3 (1990).

[16] Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 4 (1987).

[17] Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 65 (1990); *see also* Kermit Roosevelt, Note, *The Costs of Agencies:* Waters v. Churchill *and the First Amendment in the Administrative State*, 106 YALE L.J. 1233, 1234 (1997) ("[T]he Court's attempt to promote efficiency by deferring to managerial judgment is theoretically misguided.").

[18] Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 532 (1998).

further a managerial objective that is itself within the constitutional power of the government."[19] For example, officials could forbid "racist, sexist, or otherwise offensive and inappropriate speech by . . . employees," for the sake of "maintaining a harmonious and efficient workplace."[20]

This Article is not about theories of free speech and how they bear on the public employment context, nor does it contribute to the academic debate over what the aims of public employee speech law ought to be. I take the Court at its word when it says that its aim is to give substantial weight to both the value of speech and the government's interest as an employer. Unlike Massaro and Ingber, I take it as a given that the government may insist on hierarchy and obedience to authority in the workplace. Unlike Rosenthal, I begin from the Court's premise that speech may deserve constitutional protection even if the government's desire to suppress it is based on a legitimate managerial objective.[21]

This Article argues that the Court has paid too little attention to the relationship between rights and remedies. It begins with the distinction between raising the Constitution defensively, as a "shield" against criminal prosecutions or other enforcement actions, and using the Constitution as a "sword" to obtain relief against government misconduct.[22] When the government acts outside the judicial process, as in firing an employee, "shield-like" remedies are unavailing. As a practical matter, the free speech rights of public

---

[19] *Id.* at 573. This test is adapted from the Supreme Court's rule in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), which governs restrictions on symbolic expression (draft card burning in that case). Rosenthal acknowledges that the test in *O'Brien*, in its proper context, is content-neutral, while his proposal would allow restrictions on the content of employee speech. Rosenthal, *supra* note 18, at 575.

[20] Rosenthal, *supra* note 18, at 581.

[21] For a defense of the view that free speech in government enterprises ought to be treated as a special domain, free of principled consistency with the general body of free speech doctrine, see Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998). Schauer's article touches only briefly on public employee speech. *See id.* at 101 & n.82. Its focus is two recent cases, *Arkansas Educational Television v. Forbes*, 523 U.S. 666 (1998) (holding that public television station may exclude candidates from debate), and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (holding that NEA may use "decency" as standard for deciding what to subsidize).

[22] *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) (drawing conclusions about Congress's and Court's role in creating and restricting remedies effectuating constitutional guarantees).

employees exist only to the extent a "sword-like" or "offensive" remedy—in the form of damages or injunctive relief or both—is available under § 1983.[23] From a remedial perspective, the problem with public employee speech doctrine is that the Court has chosen to use fact-sensitive standards as a means of accommodating the competing interests. These standards are ill-suited to the remedial context in which public employees seek to vindicate their rights. We need a body of hard-edged rules that identify as specifically as possible what employee speech is and is not protected.

While the Court was making public employee speech doctrine in *Pickering* and its progeny, it was developing § 1983 law in an entirely separate set of cases, beginning with *Monroe v. Pape*.[24] The general aim of constitutional tort law is to vindicate constitutional rights and deter violations through suits brought by injured persons to stop government illegality and to obtain damages for injuries already suffered. In developing § 1983 doctrine on such matters as damages and causation, the Supreme Court has not distinguished among rights. The Court takes a "one size fits all" approach, setting forth general principles for the whole range of constitutional violations and taking no account of the special features of the public employee speech context.[25]

If retaliation law is to achieve the substantive aims of the free speech clause and the remedial aims of § 1983, the free speech doctrine and the § 1983 doctrine will have to converge, in the sense that the Court must consider the remedial context as it formulates constitutional doctrine, and keep the free speech context in mind as it decides § 1983 issues. Part I describes the current doctrine bearing on the First Amendment rights of public employees. Part II discusses the § 1983 remedy available for violation of those rights

---

[23] Federal government employees ordinarily may not sue under § 1983, as it applies only to actions taken "under color of" state law. 42 U.S.C. § 1983 (1994). In *Bush v. Lucas*, 462 U.S. 367, 378 & n.14 (1983), the Supreme Court refused to imply a cause of action for retaliation directly from the First Amendment, reasoning that administrative remedies available within the civil service system were adequate to protect the employee's free speech rights.

[24] 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Soc. Serv., 436 U.S. 658 (1978).

[25] *See* Jeffries, *supra* note 3, at 259 (criticizing Court's "one-size-fits-all" approach in favor of "adapt[ing] remedies to specific rights").

and shows how the intersection of free speech doctrine and remedial principles thwarts the aims of both the First Amendment and § 1983. Part III identifies ways in which the fit between right and remedy could be improved by abandoning the current, highly fact-sensitive, First Amendment doctrine in favor of rules that require little inquiry into the facts. Part IV proposes changes in the remedial law on causation and damages developed under § 1983. Adopting these reforms would better achieve the objectives of both the substantive law of free speech and the remedial law of § 1983.

I. PUBLIC EMPLOYEE SPEECH IN THE SUPREME COURT

Courts used to begin and end their analysis of public employee speech issues by treating the government like a private firm, free to set whatever restrictions it pleased on employee speech. The leading case is *McAuliffe v. Mayor of New Bedford*,[26] in which the town fired a policeman after he publicly criticized the management of the police department.[27] He sued to get his job back, relying on the free speech clause of the state constitution.[28] In an opinion by Oliver Wendell Holmes, the Massachusetts Supreme Judicial Court quickly disposed of the officer's free speech objection:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.[29]

---

[26] 29 N.E. 517 (Mass. 1892).
[27] *Id.*
[28] *Id.*
[29] *Id.* at 517-18.

Holmes's reasoning "was widely quoted and relied upon by other courts, including the Supreme Court, between 1892 and 1954."[30] Starting from this premise, no employee discharged or disciplined for speaking out ever won a case by asserting a constitutional claim. Since "the legal frame of reference . . . [under *McAuliffe* was] ordinary contract law,"[31] everything turned on the terms of the employment relationship.

McAuliffe, however, antedated the Supreme Court's work with First Amendment law. Until subversive speech cases arose during World War I, the Supreme Court had rarely addressed free speech in any context,[32] and hardly ever found in favor of the speaker.[33] Once the Court began to develop speech-protective theories and doctrines, the sweeping rule of *McAuliffe* was bound to run into trouble–and, in fact, it did. Although earlier cases called the rule into question, *Pickering v. Board of Education* banished it altogether.[34] Pickering was a school teacher who wrote a letter to the local paper, criticizing the Board of Education for its handling of school finance issues.[35] As a result of the letter, the Board fired Pickering.[36] In an opinion that laid the groundwork for modern public employee speech doctrine, the Court overturned the dismissal.[37] It "unequivocally rejected" the premise "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."[38]

---

[30] WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT 334 (2d ed. 1995); *see* Connick v. Myers, 461 U.S. 138, 144 (1983).

[31] VAN ALSTYNE, *supra* note 30, at 335.

[32] *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 4 (1999).

[33] *See* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 520 (1981) (stating that pre-World War I Supreme Court cases, with one minor exception, uniformly went against free speech claimants).

[34] 391 U.S. 563 (1968).

[35] *Id.* at 564.

[36] *Id.* at 564-65.

[37] *Id.* at 574-75.

[38] *Id.* In a larger context, *Pickering* was an important step in a general movement by the Warren Court to dismantle the old "right/privilege" distinction, a regime in which the Supreme Court had more generally rejected constitutional claims asserted by persons who received benefits from the government. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 617 (13th ed. 1997) (stating that modern cases make it clear that, even

A. FIRST AMENDMENT THEORY AND PUBLIC EMPLOYEE SPEECH

Having rejected *McAuliffe*, one approach to public employee speech would have been to apply general First Amendment principles to the area. But *Pickering* recognized that the issue could not be resolved so easily, for public employee speech presents a distinctively complex problem for First Amendment theory. Three values are at stake, two of which favor the heightened protection of First Amendment rights, and the third of which supports greater deference to government than is appropriate in most contexts. The problem is to determine how these values interact with respect to any given instance of public employee speech.

1. Self-Government. On the one hand, "the public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment."[39] In offering this observation, the Court was expressing the "self-government" rationale for free speech, which links free speech to democratic theory and popular sovereignty.[40] Self-government demands the free exchange of information, including information that may cause harm of one kind or another. Recognizing this fact, the Court in *New York Times v. Sullivan*[41] stressed a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[42] in ruling that

---

though person may not have right to public job, "he or she is protected by constitutional guarantees when government seeks to terminate the relationship"); William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (arguing that concept of privilege is no longer viable and that size and scope of governmental activity mandates "substantive due process control" of full spectrum of state activities).

[39] *Pickering*, 391 U.S. at 573. In working with *Pickering* and other Supreme Court cases, lower courts have recognized that public employee speech serves the public interest. *See, e.g.*, Grigley v. City of Atlanta, 136 F.3d 752, 755 (11th Cir. 1998) (identifying discussion of "matters of public concern" as "central value of the First Amendment" and holding that "a public employee's claim of retaliation in violation of the First Amendment right to petition is subject to the public concern requirement"); Cromer v. Brown, 88 F.3d 1315, 1326-29 (4th Cir. 1996) (stressing community's interest in public employee speech).

[40] For a discussion of the "self-government" rationale for free speech, see, for example, GUNTHER & SULLIVAN, *supra* note 38, at 1027, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), and Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

[41] 376 U.S. 254 (1964).

[42] *Id.* at 270.

public officials may not recover damages for false and defamatory statements unless they can show that the speaker acted with reckless disregard for the truth. When speech bears on a matter of public concern, even ordinary citizens are constitutionally required to show fault in order to recover for defamation.[43] While this self-government policy in favor of protecting speech has been articulated most clearly in defamation cases, its force is hardly limited to that setting.

The application of the self-government rationale to the facts of *Pickering* was straightforward, as the Court readily recognized:

> [T]he question whether a school system requires additional funds is a matter of legitimate public concern, on which . . . free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions [on these issues]. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[44]

While *Pickering* focused on teachers, the distinctive contribution public employees can make to debate on matters of public concern is hardly limited to educators and schools. Throughout the range of government activities, the best sources of information and knowledgeable criticism about the operation of public agencies often are public employees. In *Waters v. Churchill*,[45] Justice O'Connor's plurality opinion stated the point in general terms, noting that "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."[46] In short, the self-government

---

[43] Milkovich v. Lorain Journal Co., 497 U.S. 1, 15-16 (1990); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986).

[44] 391 U.S. at 571-72.

[45] 511 U.S. 661 (1994).

[46] *Id.* at 674; *see also* Cromer v. Brown, 88 F.3d 1315, 1327 (4th Cir. 1996) (stating that African American police officers' group perceptions of discrimination are relevant to public debate due to community interest in effective law enforcement organizations free of discrimination); Moore v. City of Wynnewood, 57 F.3d 924, 932 (10th Cir. 1995) (stating that

rationale should and does inform public employee speech law. This rationale focuses on the good of the broader community. It treats the right accorded the individual not as an end in itself, but as a means toward the social goal of better informed and more soundly reasoned democratic decisionmaking.

2. The Government as Employer. Having decided that the First Amendment does restrict governments in their dealings with public employees, the Court next had to undertake the more complex task of determining just what public employee speech deserves constitutional protection. A simple solution would be to treat public employees like everybody else, and to forbid the government from imposing any limits on their speech that it could not validly apply across the board. *Pickering* spotted the problem with such sweeping protection. The Court recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[47] In particular, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."[48] To that end, the government employer has a legitimate and important interest in maintaining a well-ordered and well-functioning public workplace, so as to accomplish the jobs

---

employee's opinions regarding police department and its relations with community "provide[] the public with a useful perspective").

[47] 391 U.S. at 568.

> The government's interest in controlling employees' speech extends not merely to avoidance of damage caused by the particular speech regulated, but also to the integrity of the authority structure by which the speech is regulated. If insubordinate speech is constitutionally protected, the government will suffer not only the impact of the speech itself, but also a corresponding impairment of its authority, which may well have implications for its ability to manage other kinds of speech and conduct.

Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 198.

The government's interest as an employer is, of course, not limited to current employees, but also includes prospective employees. *See* Bonds v. Milwaukee County, 207 F.3d 969, 983 (7th Cir. 2000) ("Courts should give substantial deference to government predictions of harm from employee speech.").

[48] *Waters*, 511 U.S. at 675 (1994) (plurality opinion).

government is asked to do.[49] For this reason, public employees' speech can be restricted in ways that would be unacceptable if applied to the general population.[50]

3. Self-Realization. Regulating public employee speech, however, is not simply a matter of balancing the government's efficiency interest against the value of the speech to democratic decisionmaking. Quite apart from whether speech contributes to discussion of matters of public concern, the First Amendment protects "individual liberty and the value of personal self-expression."[51] In *Pickering* the Court relied on a broader ground for protecting speech, and one that focuses on the speaker rather than on social goals. The Court distinguished between two parts of the life of a person who works for the government. As an employee, he is subject to the state's interest as his employer, while "as a citizen" he should have broader rights.[52] Though the government as employer has strong interests in regulation of employee speech, government employees may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens."[53] Accordingly, when "the fact of employment is only tangentially and insubstantially involved in the subject matter of the [speech], . . . it is necessary to regard the teacher as the member of the general public he seeks to be."[54]

When the Supreme Court, in *United States v. National Treasury Employees Union (NTEU)*,[55] struck down a federal law that prohibited federal workers from accepting money for speeches and writings, it relied on this distinction. While "Congress may impose

---

[49] Similar considerations apply to the government's dealings with independent contractors. *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) ("The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption.").

[50] *See Waters*, 511 U.S. at 672 (plurality opinion) ("[E]ven many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees.").

[51] JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 81 (2d ed. 1996).

[52] 391 U.S. at 568.

[53] *Id.*

[54] *Id.* at 574.

[55] 513 U.S. 454 (1995).

restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large,"[56] the burden is heavier when, as in *NTEU*, the plaintiffs' "speeches and articles . . . were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment."[57] *Rankin v. McPherson*,[58] in which the speech was unrelated to work activities but occurred in the workplace, presented a harder case. After hearing news of the attempted assassination of President Reagan, a clerk at the county constable's office said privately to a co-worker who happened to be her boyfriend, "If they go for him again, I hope they get him."[59] In deeming this speech to be protected, the Supreme Court noted that "the state interest element of the [balancing] test focuses on the effective functioning of the public employer's enterprise."[60] Though the statement was made at the workplace, there was "no evidence that it interfered with the efficient functioning of the office."[61]

B. THE *PICKERING-CONNICK* TEST

Starting from these premises, the difficulty for the Court has been to devise standards for determining which instances of public employee speech deserve protection and which do not. Because both the employee's interest in speaking and the public employer's interest in a well-ordered workplace deserve respect,[62] and because there is an "enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal,"[63] the Court has rejected "general standard[s]"[64] in favor of a "fact-sensitive"[65]

---

[56] *Id.* at 465.
[57] *Id.* at 466.
[58] 483 U.S. 378 (1987).
[59] *Id.* at 381.
[60] *Id.* at 388.
[61] *Id.* at 389; *see id.* at 393 (Powell, J., concurring) (focusing more pointedly on private, individually expressive aspect of employee's comment).
[62] *Id.* at 384.
[63] Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).
[64] *Id.*
[65] Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 677 (1996).

and "nuanced"[66] case-by-case inquiry.[67] The goal "in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[68] Building on *Pickering*, the Court in *Connick v. Myers*[69] forged a three-part test for sifting through the fact patterns. The first question is whether the speech deals with a matter of "public concern."[70] If it does, the next inquiry is whether it may cause disruption of the public workplace.[71] If there is potential for disruption, the court must compare the threatened harm against the value of the speech in order to "reach the most appropriate possible balance of the competing interests."[72]

1. Matters of Public Concern. Pickering offers little guidance as to what subject matter falls within the public concern category. The Court merely declared, without any amplification, that the letter about school finance addressed a matter of public concern.[73] *Connick* is more helpful. In *Connick*, the plaintiff, Sheila Myers, asked a number of questions to her colleagues, all of which related to the management of the district attorney's office.[74] The Court

---

[66] *Id.* at 678.

[67] The Court recently extended its preference for case-by-case adjudication beyond the employment context to include other relationships between governments and individuals. For example, in *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), the Court spurned the parties' proposals that it draw a sharp distinction between independent contractors and employees. In the Court's view, "proper application of the *Pickering* balancing test . . . which recognizes the variety of interests that may arise in independent contractor cases, is superior to a bright-line rule distinguishing independent contractors from employees." *Id.* at 678.

Umbehr casts doubt on *Andersen v. McCotter*, 100 F.3d 723 (10th Cir. 1996), in which the issue was whether a part-time worker was covered by *Pickering*. While the court found that she was, it began from the premise that "[w]hether [plaintiff] was a public employee or volunteer for purposes of applying the First Amendment is a matter of state law." *Id.* at 726. *Umbehr* rejected the use of state law categories for the purpose of deciding whether independent contractors were covered. *Umbehr*, 518 U.S. at 678-79.

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

[69] 461 U.S. 138 (1983).

[70] *Id.* at 146.

[71] *Id.* at 150.

[72] *Id.*

[73] 391 U.S. at 570. For a discussion of the facts in *Pickering*, see *id.* at 565-67.

[74] *See* 461 U.S. at 141 (stating contents of questionnaire as pertaining to "office transfer policy, office morale, the need for a grievance committee, the level of confidence in

distinguished among the questions, ruling that "questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee [were] mere extensions of Myers' dispute over her transfer. . . ."[75] On the other hand, a question about pressure to work in political campaigns involved a matter of public concern because "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service."[76]

Following *Connick*, lower courts have looked to a variety of factors in determining whether speech addresses a matter of public concern. When the employee's speech is about narrow issues relating to the internal management of the agency, lower courts tend to characterize it as a personal grievance or as part of performing the job itself, rather than as involving a matter of public concern.[77] For example, when a county administrator was fired on account of his manner of disciplining subordinates, his First Amendment claim failed because "[s]uch internal personnel matters are not likely to arouse the public's interest and do not become matters of public concern merely because they occur in a public agency."[78] A high school football coach's "self-serving" comments about his supervisors's treatment of him were deemed "of a personal nature,"[79] as was a professor's complaint of discriminatory treat-

---

supervisors, and whether employees felt pressured to work in political campaign").

[75] *Id.*

[76] *Id.* at 149.

[77] *See, e.g.*, Holbrook v. City of Alpharetta, 112 F.3d 1522, 1530 (11th Cir. 1997) (holding that complaint of personal discrimination by agency was not "public concern"); Roe v. City & County of San Francisco, 109 F.3d 578, 585 (9th Cir. 1997) (noting that "if the communication is essentially self-interested . . . then it is not of public concern"); Bernheim v. Litt, 79 F.3d 318, 324-25 (2d Cir. 1996) (holding employee's speech related to employment conditions not public concern); Workman v. Jordan, 32 F.3d 475, 483 (10th Cir. 1994) (holding testimony related to termination grievance not public concern); Huang v. Bd. of Governors, 902 F.2d 1134, 1140 (4th Cir. 1990) (noting "it is settled that a public employee's expression of grievances concerning his own employment is not of public concern").

[78] Holland v. Rimmer, 25 F.3d 1251, 1255 (4th Cir. 1994).

[79] Lancaster v. Indep. Sch. Dist. No. 5, 149 F.3d 1228, 1234 (10th Cir. 1998); *see also* Bradshaw v. Pittsburgh Indep. Sch. Dist., 207 F.3d 814, 816-18 (5th Cir. 2000) (stating that high school principal's memoranda regarding buy-out of her contract were not on matter of public concern); DeGrassi v. City of Glendora, 207 F.3d 636, 647 (9th Cir. 2000) (recognizing that city council member's self-interested comments dealing with defense of lawsuit were not on matter of public concern).

ment in setting his salary,[80] and a school psychologist's criticism of the management of the school.[81] On the other hand, courts have found that opposing gun control legislation,[82] giving lessons on how to use a gun,[83] accusing a hospital administrator of unethical and illegal conduct,[84] putting up a yard sign opposing the recall of city council members,[85] speaking out about corruption and lack of security at a prison,[86] and charging that other officers are withholding exculpatory evidence in a murder case,[87] are matters of public concern.

2. Balancing the Competing Interests. In *Pickering* the Court acknowledged that the state has distinctive interests as an employer, but decided that those interests were not strong in the

---

[80] Ayoub v. Tex. A & M Univ., 927 F.2d 834, 837 (5th Cir. 1991).

[81] Khuans v. Sch. Dist. 110, 123 F.3d 1010, 1016-17 (7th Cir. 1997). *But cf.* Wytrwal v. Saco Sch. Bd., 70 F.3d 165, 168-70 (1st Cir. 1995) (holding that criticism of special education department and suggestion that school is violating special education laws is public concern speech). Other cases reject the employee's claim. *See, e.g.*, Taylor v. FDIC, 132 F.3d 753, 769 (D.C. Cir. 1997) (noting that motion filed in lawsuit, "purpose [of which] was to avoid personal sanctions, not to expose wrongdoing" does not address matter of public concern); Valot v. Southeast Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1226 (6th Cir. 1997) (stating that part-time bus drivers' request for unemployment benefits "during the summer months while they were unemployed is far more a matter of private interest than public concern"); Withiam v. Baptist Health Care of Okla., 98 F.3d 581, 583 (10th Cir. 1996) (recognizing that "bald, unadorned and nonspecific endorsement" of current managers of hospital "offered nothing at all to inform the public about the management of the hospital" and, thus, "did not involve a matter of public concern"); Bunger v. Univ. of Okla. Bd. of Regents, 95 F.3d 987, 991-92 (10th Cir. 1996) (noting that speech on composition of university governing body is not public concern speech because "[t]he question of whether an administrative council in a university is limited to tenured faculty or opened to untenured faculty is a matter of internal structure and governance"); Hanton v. Gilbert, 36 F.3d 4, 7 (4th Cir. 1994) (stating that complaints about one's job duties and about new policy of charging user fee for use of university microscope do not address issues of public concern); Smith v. Fruin, 28 F.3d 646, 653 (7th Cir. 1994) (holding that complaint about second-hand smoke in office is not public concern speech); White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1060 (2d Cir. 1993) (recognizing that "demands and complaints seeking an increase in towing referrals" is not public concern speech); Swank v. Smart, 898 F.2d 1247, 1250-51 (7th Cir. 1990) (noting that private conversation between plaintiff and associate was not public concern speech).

[82] Thomas v. Whalen, 51 F.3d 1285, 1290 (6th Cir. 1995); *see also* Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994) (stating that criticism of national drug policy implicates matters of public concern).

[83] Edwards v. City of Goldsboro, 178 F.3d 231, 247 (4th Cir. 1999).

[84] Paradis v. Montrose Mem'l Hosp., 157 F.3d 815, 818 (10th Cir. 1998).

[85] Cragg v. City of Osawatomie, 143 F.3d 1343, 1345-46 (10th Cir. 1998).

[86] Campbell v. Ark. Dep't of Corr., 155 F.3d 950, 958-59 (8th Cir. 1998).

[87] Dill v. City of Edmond, 155 F.3d 1193, 1202 (10th Cir. 1998).

circumstances of that case.[88] The Court recognized that there was no reason to fear any adverse impact on the work of government because "[t]he statements [were] in no way directed towards any person with whom [Pickering] would normally be in contact in the course of his daily work as a teacher,"[89] and because his own work was "only tangentially and insubstantially involved in the subject matter of the . . . communication."[90] By contrast, in *Connick*, the government employer was justified in firing Sheila Myers even though the question on the questionnaire about pressure to support incumbents was on a matter of public concern.[91] Though Myers' questionnaire did not "impede[] [her] ability to perform her responsibilities," it "was an act of insubordination which interfered with working relationships."[92] The Court noted the fact that "the questionnaire was prepared and distributed at the office . . . supports Connick's fears that the functioning of his office was endangered."[93] That the questionnaire "followed upon the heels of the transfer notice" mattered as well, since this supported "the supervisor's view that the employee ha[d] threatened the authority of the employer to run the office."[94]

Other than pointing out that a stronger showing of disruption would have been necessary if the speech had "more substantially involved matters of public concern,"[95] the Court in *Connick* gave no guidance as to how lower courts are supposed to carry out the "particularized balancing"[96] the *Connick* holding demands. In *Rankin v. McPherson*,[97] however, the Supreme Court listed a number of factors that bear on the strength of the state's interest. These factors include "the manner, time, and place of the employee's expression," whether the speech interfered "with work, personnel

---

[88] 391 U.S. 563 (1968).
[89] *Id.* at 569-70.
[90] *Id.* at 574.
[91] 461 U.S. 138, 154 (1983). For a discussion of the facts in *Connick*, see *id.* at 144.
[92] 461 U.S. at 151. For a recent illustration of this theme, see *Klug v. Chi. Sch. Reform Bd. of Trustees*, 197 F.3d 853, 859 (7th Cir. 1999).
[93] 461 U.S. at 153.
[94] *Id.*
[95] *Id.* at 152.
[96] *Id.* at 150.
[97] 483 U.S. 378, 388-89 (1987).

relationships, or the speaker's job performance," and "the responsibilities of the employee within the agency."[98] Echoing *Rankin*, lower court rulings on the costs of speech have adverted to a variety of circumstances, including whether the speech affected relationships between the plaintiff's agency and other organizations,[99] whether the job was one that required "loyalty and confidence,"[100] whether the employee occupies a high-level job,[101] and whether the plaintiff's job is one that requires special "discipline and harmony among co-workers."[102] Sometimes the content of the speech reveals attitudes that are at odds with the mission of the governmental employer, as in a recent Eighth Circuit case in which a junior high school teacher was fired after declaring that he thought it would be acceptable for someone in his position to have a sexual relationship with a minor.[103]

---

[98] *Id.* at 390.

[99] *See, e.g.*, Tedder v. Norman, 167 F.3d 1213, 1215 (8th Cir. 1999) (recognizing that speech caused actual disruption by upsetting business relationships with other organizations); Porter v. Dawson Educ. Coop., 150 F.3d 887, 893-95 (8th Cir. 1998) (noting that employer had legitimate interest in employee's compliance with release of requested information to other organizations where employee's speech could undermine employer's authority and disrupt operations); *cf.* Orange v. District of Columbia, 59 F.3d 1267, 1273 (D.C. Cir. 1995) (noting that plaintiff had "interjected himself into an ongoing city-wide investigation").

[100] *See, e.g.*, Andersen v. McCotter, 205 F.3d 1214, 1218 (10th Cir. 2000) (stating therapist's premature disclosure of changes in program were especially harmful because "inmates have an irrational fear of any changes in their treatment regimen," and "expressed deep resentment and anger over her statement"); Rendish v. City of Tacoma, 123 F.3d 1216, 1225 (9th Cir. 1997) (holding assistant city attorney, who was fired for suing city, loses balance because "loyalty and confidentiality are essential to the effective performance of the City Attorney's office").

[101] *E.g.*, Bonds v. Milwaukee County, 207 F.3d 969, 981 (7th Cir. 2000); Klunk v. County of St. Joseph, 170 F.3d 772, 776 (7th Cir. 1999); Lewis v. Cowen, 165 F.3d 154, 162 (2d Cir. 1999), *cert. denied*, 528 U.S. 823 (1999); Curtis v. Okla. City Pub. Sch. Bd. of Educ., 147 F.3d 1200, 1214 (10th Cir. 1998); Weisbuch v. County of Los Angeles, 119 F.3d 778, 784 (9th Cir. 1997).

[102] *See* Dill v. City of Edmond, 155 F.3d 1193, 1203 (10th Cir. 1998) (noting government's strong interest in maintaining discipline and harmony among co-workers . . . is "particularly acute in the context of law enforcement, where there is a 'heightened interest . . . in maintaining discipline and harmony among employees' "); *see also* Tyler v. City of Mountain Home, 72 F.3d 568, 570 (8th Cir. 1995) (holding that police officer's letter caused disharmony in workplace and jeopardized department's working relationship with another enforcement agency).

[103] Padilla v. South Harrison R-II Sch. Dist., 181 F.3d 992, 995-97 (8th Cir.), *reh'g denied*, 192 F.3d 805 (1999). The observation was made in the course of compelled testimony in a criminal proceeding brought against Padilla for sexual misconduct. After his acquittal, he was fired. He then brought a § 1983 suit for retaliation. The court held that the speech failed

II. BRINGING RETALIATION SUITS UNDER § 1983: THE AWKWARD FIT BETWEEN RIGHT AND REMEDY

My objection to the Court's public employee speech cases is that the substantive rights and the remedies available for their violation are misaligned in a way that thwarts the Court's avowed aims. The root of the problem is that the employee must pursue a sword-like "offensive" remedy rather than a shield-like "defensive" one. Sometimes the right to free speech may be raised defensively, as a shield against an enforcement proceeding seeking to impose criminal prosecution or civil liability upon the speaker.[104] When someone is prosecuted for subversive speech or distributing obscene materials, or sued for defamation or invasion of privacy, the First Amendment may be interposed as a defense in this way.[105] But a defensive remedy is not always feasible. In the context of public employee speech, there will typically be no such opportunity, for the government acts against the speaker by firing or demoting him, and does not try to use the judicial process to enforce its prohibition. The speaker must go on the offense to get what was wrongfully taken from him. He must become a plaintiff and sue for damages or prospective relief.

The statutory vehicle for bringing such suits against state officers is 42 U.S.C. § 1983, which provides that "[e]very person who, under color of any [state law] subjects, or causes to be subjected, any [person] to the deprivation of any [constitutional rights] shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[106] A crucial difference between a defensive and an offensive remedy is that the latter is a more complex legal artifact. One can successfully defend a suit on First Amendment grounds merely by showing that the relief sought by the state (or the defamation plaintiff) would violate one's First

---

to meet the "public concern" test. *Id.* at 997. In my view, the testimony did address a matter of public concern, yet Padilla should still lose. A more persuasive response to his claim is that the potential disruption of allowing someone with his views to teach junior high school students outweighs any value the speech may have.

[104] *See supra* note 22 and accompanying text.

[105] *See supra* note 22 and accompanying text.

[106] 42 U.S.C. § 1983 (1994). As for federal officers, see *supra* note 23.

Amendment rights. Establishing a constitutional violation is only the first of several requirements the plaintiff must meet in order to win a § 1983 suit. The vast majority of these suits are brought after the employee has suffered some punishment for speaking. In a § 1983 suit for damages, the plaintiff must show that he has suffered an "adverse employment action" at the hands of the defendant official or government,[107] that the adverse action was taken in retaliation for protected speech,[108] that the retaliation resulted in damages, and that the damages were in the claimed amount.[109]

Even if these requirements are met, an official may escape liability on the ground of official immunity unless his actions violated "clearly established" law.[110] Local governments may not assert immunity, yet they may only be sued in the event the official's act represents an official "policy" or "custom" of the municipality.[111] A plaintiff who overcomes these hurdles may obtain compensatory damages,[112] and, if the official's conduct is bad enough, punitive damages.[113] But punitive damages are not available against governments.[114] Plaintiffs in these damage suits sometimes seek prospective relief in the form of reinstatement to their former employment position.[115] Traditional notions of equitable discretion give the judge latitude to decide whether such a remedy is appropriate.[116]

Occasionally, public employees challenge government regulations involving speech before the rules have been applied.[117] Whether a court will hear such a case depends on whether it is "ripe."[118] To

---

[107] *See infra* text accompanying notes 187-97.

[108] *See infra* text accompanying notes 179-86.

[109] *See infra* text accompanying notes 199-207.

[110] *See infra* text accompanying notes 208-29.

[111] *See infra* text accompanying notes 230-58. State governments are not "persons" subject to suit under § 1983. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (barring state court suits); Quern v. Jordan, 440 U.S. 332, 340 (1979) (barring federal court suits).

[112] *See infra* text accompanying notes 199-207.

[113] *See* Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 864-72 (1996) (arguing that punitive damages are appropriate for deterrence purposes).

[114] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-71 (1981).

[115] *E.g.*, Graves v. Ark. Dep't of Fin. and Admin., 229 F.3d 721, 722 (8th Cir. 2000).

[116] *See infra* text accompanying notes 261-73.

[117] *See infra* text accompanying notes 259-64.

[118] RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE

meet this requirement, the plaintiff must show there is a present need to decide the merits and that the controversy is sufficiently concrete to permit effective adjudication at this time.[119]

These are the standard requirements for suing under § 1983 for damages or injunctive relief. When coupled with the Court's fact-sensitive substantive test for protected speech,[120] these remedies yield too little protection for public employee speech because the general fragility of First Amendment rights is exacerbated in this obstacle-laden remedial scheme. At the same time, the combined operation of fact-intensive constitutional norms and complex remedial doctrines may undermine the government's interest in an efficient workplace. The problem is that the dismissed employee has every incentive to sue. The officials who run the agency must either refrain from discipline or else undertake expensive, time-consuming, and potentially hazardous litigation in order to determine what speech is protected. However well-intentioned, a regime that routinely requires a careful sifting of the facts of each case in order to make particularized judgment calls subtly undermines both the value of free speech and the government's interest as an employer.

The Court's gravitation toward case-by-case adjudication is understandable, given the difficulty of drawing lines in this area. Nonetheless, the costs are simply too great to justify the benefits. A better approach would be to make rules that identify with as much precision as possible the circumstances in which employee speech is and is not protected. Rules have costs, too. Although rules may produce arbitrary distinctions, the gain in terms of predictability is worth that disadvantage in a world where a multitude of statements and writings made every day by millions of public employees renders each of them a prospective First Amendment plaintiff on a routine basis. This Part of the article develops in greater detail the arguments against the Court's case-by-case approach, while Part III proposes a responsive regime of more manageable rules.

FEDERAL SYSTEM 242-70 (4th ed. 1996).

[119] *See* FALLON, JR. ET AL., *supra* note 118.

[120] *See supra* text accompanying notes 62-103.

A. THE FRAGILITY OF FREE SPEECH

A central theme of First Amendment law is that freedom of speech is a "delicate and vulnerable"[121] right. The reason lies in the social conditions under which speech usually takes place. Potential speakers, whether they are public employees or not, generally obtain no material benefit from speech.[122] Yet one rarely engages in speech without first having made a deliberate choice to do so. To the extent speech can bring with it trouble from the government, or even criticism from acquaintances, many people will pause to ask whether the benefits of speech are worth the potential costs. Even where there is only a small chance of incurring some cost, prudent people may keep quiet instead of taking a risk. Public employee speech is a particularly vulnerable form of commentary, for in this context the risk is not merely public disapproval, but the loss of one's livelihood. Compared with the citizenry in general, the public employee has an incentive to keep quiet that is especially strong. At the same time, many of the benefits of speech, and of a public employee's speech in particular, are not reaped by the employee. The benefits are "captured" by the public at large, in the form of contributions to better understanding of public policy and the operation of government.[123] Thus, the public employee faces the possibility of a significant penalty if she speaks, and cannot reap many of the benefits of speech for herself. Her incentives are skewed in favor of silence, even where the speech would produce more benefits than costs.

The *Pickering/Connick* fact-sensitive test makes this problem far worse, because one can rarely be sure before speaking—even after getting the aid of a bevy of lawyers—that a given instance of speech is protected.[124] A problem with such tests is that they put consider-

---

[121] NAACP v. Button, 371 U.S. 415, 433 (1963).

[122] When they do, as is the case with regard to advertising, the fragility concern is weak or absent and the rules governing such speech reflect that difference. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 380-81 (1977); Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 771-72 n.24 (1976).

[123] *See supra* text accompanying notes 39-46.

[124] This point has been made many times before. *See, e.g.*, Wales v. Bd. of Educ., 120 F.3d 82, 85 (7th Cir. 1997) ("[O]pen-ended balancing approaches . . . create unavoidable risks and costs for well-intentioned public employers . . . ."); Peterson v. Atlanta Hous. Auth., 998 F.2d

able discretion in the hands of the lower court judges who apply them. Unsurprisingly, the results are often hard to square with each other. For example, courts differ on such basic issues as the definition of "public concern" speech. *Witham v. Baptist Health Care, Inc.*[125] states that "general public interest" in a topic is not enough to make it a matter of public concern, while *Dishnow v. School Dist.*[126] states that "matters in which the public might be interested" are protected.

Three doctrinal themes illustrate the extraordinary importance of factual nuance and judicial discretion in public employee speech cases. Two of these themes–one of which emphasizes the distinction between speech about the internal operations of an agency and speech about "external" matters, and the other of which concerns speaker motive—go to the "public concern" issue. The third theme relates to assessing the costs generated by a plaintiff's speech as part of the particularized balancing process.

1. Internal vs. External Speech. One main component of current "public concern" doctrine is the notion that speech about the "internal" operations of the agency is less likely than other speech to be constitutionally protected. For example, the Supreme Court in *Connick* distinguished among the questions the plaintiff Myers put to her colleagues.[127] "[Q]uestions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee [were] mere extensions of Myers' dispute over her transfer. . . ."[128] On the other hand, the question asking about pressure to work in political

---

904, 916 (11th Cir. 1993) (noting that factual issues in free speech cases may often be fairly interpreted in more than one way); MARCY EDWARDS ET AL., FREEDOM OF SPEECH IN THE PUBLIC WORKPLACE 43 (1998) (noting courts frequently arrive at different results); Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 75 (1988) (arguing unbridled discretion leads to confusing results); Estlund, *supra* note 15, at 43-46; Roosevelt, *supra* note 17, at 1248 n.84 ("The precise scope of 'public concern' remains mysterious."); Rosenthal, *supra* note 18, at 551 & n.114; Rodric Schoen, Pickering *Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH L. REV. 5, 29-31 (1999); Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better Definition of the* Pickering/Connick *Threshold Test*, 50 VAND. L. REV. 993, 1008 (1997).

[125] 98 F.3d 581, 583 (10th Cir. 1996).

[126] 77 F.3d 194, 197 (7th Cir. 1996).

[127] 461 U.S. 138, 148-49 (1983).

[128] *Id.* at 148.

campaigns was a matter of public concern because "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service."[129] The coherence of this distinction is doubtful because it does not explain why a citizen interested in the proper functioning of the district attorney's office would be more concerned about patronage practices than about basic "office morale" and "the confidence and trust that Myers' co-workers possess in various supervisors."[130]

Coherent or not, some lower courts have latched onto the internal-external distinction. When the employee's speech is about the management of the agency, they tend to characterize it as a personal grievance or as part of the job itself, rather than as a matter of public concern.[131] A high school football coach's "self-serving" comments about his supervisors' alleged mistreatment of him were deemed "of a personal nature,"[132] as was a professor's complaint of discriminatory treatment in setting his salary,[133] and a school psychologist's criticism of the management of the school.[134] But strong adherence to the internal-external distinction is hardly a universal practice; in fact courts often brush the distinction aside. Courts have found, for example, that a hospital worker's charge of unethical and illegal conduct by the facility's administrator,[135] speech by a warden about corruption and lack of security at a prison,[136] the claim that an officer's co-workers are withholding

---

[129] *Id.* at 149.

[130] *See* Estlund, *supra* note 15, at 37-38. The author states:

> Much political and social activism is spawned not through a deductive process of evaluating competing world views and concluding that reform is necessary; it arises out of passions aroused and knowledge gained through an experience with a labor strike or a crooked housing contractor, exposure to toxic emissions, a death caused by a drunk driver or a defective product, or sexual harassment by a supervisor.

Id.

[131] For cases making the internal-external distinction, see *supra* note 77.

[132] Lancaster v. Indep. Sch. Dist. No. 5, 149 F.3d 1228, 1234 (10th Cir. 1998).

[133] Ayoub v. Tex. A & M Univ., 927 F.2d 834, 837 (5th Cir. 1991).

[134] *See supra* note 81 (describing cases turning on issue of whether speech was of "public concern").

[135] Paradis v. Montrose Mem'l Hosp., 157 F.3d 815, 818 (10th Cir. 1998).

[136] Campbell v. Ark. Dep't of Corr., 155 F.3d 950, 958-59 (8th Cir. 1998).

exculpatory evidence in a murder case,[137] and criticism by a teacher of a school's child abuse policy are all matters of public concern.[138]

One reason outcomes diverge is that other factual nuances may strengthen or weaken the plaintiff's case. In particular, public concern is less likely to be found where the focus of the speech is the plaintiff's personal situation. Thus, complaints about sexual harassment or discrimination are less likely to receive First Amendment protection when the plaintiff's charges focus on her own predicament than when the comments are framed in a more general way.[139] Nor can one attribute divergent outcomes solely to the

---

[137] Dill v. City of Edmond, 155 F.3d 1193, 1202 (10th Cir. 1998).

[138] *See* Calvit v. Minneapolis Pub. Sch., 122 F.3d 1112, 1117 (8th Cir. 1997). The court stated:

> Calvit's criticism of Four Winds' child abuse policy was on a matter of public concern, either if characterized simply as criticism of a child abuse policy or of a school policy based on race. Both the proper approach to the problem of child abuse and the merits of using racial classification in developing public policy are subjects in which citizens have a demonstrated interest.

Id.; *see also* Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 221-23 (5th Cir. 1999) (describing how teachers criticized principal's administration of school), *cert. denied*, 528 U.S. 1022 (1999); O'Donnell v. Barry, 148 F.3d 1126, 1133 (D.C. Cir. 1998) (holding that police officer's memos to superiors on "how to rank the Department's law-enforcement priorities, and how to reform the operations of the Property Division" were on matters of public concern, as they concerned "important issues of Police Department policy"); Lickiss v. Drexler, 141 F.3d 1220, 1222 (7th Cir. 1998) (raising questions about internal investigation of another deputy is matter of public concern); Gardetto v. Mason, 100 F.3d 803, 814 (10th Cir. 1996) (describing how college administrator publicly opposed president's reduction-in-force plan); Forsyth v. City of Dallas, 91 F.3d 769, 773 (5th Cir. 1996) (describing how police officers spoke out about corruption); Wytrwal v. Saco Sch. Bd., 70 F.3d 165, 168-70 (1st Cir. 1995) (holding criticism of special education department and charge that school violated special education laws is public concern speech).

[139] *See, e.g.*, Childress v. City of Richmond, 134 F.3d 1205, 1207 (4th Cir. 1998) (en banc) (holding white male officer had no claim based on his speech regarding women and black officers); Holbrook v. City of Alpharetta, 112 F.3d 1522, 1530 (11th Cir. 1997) (holding officer's statements alleging discrimination did not constitute protected speech); David v. City and County of Denver, 101 F.3d 1344, 1356 (10th Cir. 1996) (holding officer's statements did not involve matters of public concern because she spoke primarily in role as employee rather than citizen); Johnson v. Univ. of Wis.-Eau Claire, 70 F.3d 469, 482-83 (7th Cir. 1995) (holding employee's attempt to raise salary to level she believed she deserved was not matter of public concern); Saulpaugh v. Monroe Cmty. Hosp., 4 F.3d 134, 143 (2d Cir. 1993) (noting employee's complaints would have involved matters of public concern if they had implicated system-wide discrimination). *Contra* Azzaro v. Allegheny County, 110 F.3d 968, 980 (3d Cir. 1997) (holding former employee's reports of sexual harassment are related to matter of public concern); Rosenthal, *supra* note 18, at 549-50 (discussing Court's shift in treatment of sexual harassment and discrimination cases due to public concern about issues).

sensed reality that some judges, but not others, buy into the internal-external distinction. In one case, for example, the same circuit court panel found that a school psychologist's "statements about [an administrator's] failure to follow IDEA mandates" were protected, while her complaints about "the special education staff's general 'difficulties' " with the administrator were not.[140]

2. The Speaker's Motive. Closely linked to the "internal-external" distinction is the recurring effort of courts, in addressing the "public concern" issue, to determine and give weight to the speaker's *motive*. This highly case-specific mode of analysis originated in *Connick*, when the Court bolstered its ruling by pointing out that the "focus of Myers' questions [was] not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors."[141] Rather than "seek[ing] to bring to light actual or potential wrongdoing or breach of public trust," Myers' "questions reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre."[142] Following *Connick*, many lower courts have deemed the employee's motive for speaking to be determinative of whether the speech is on a topic of "public concern."[143] As stated by the Court, "an employee who expresses himself on a subject that may well be of concern to the public, but does so for the sole purpose of bolstering his own position in a personnel dispute . . . generally fails to satisfy our threshold inquiry under *Connick*."[144]

---

[140] Khuans v. Sch. Dist. 110, 123 F.3d 1010, 1016-17 (7th Cir. 1997).

[141] 461 U.S. 138, 148 (1983).

[142] *Id.*

[143] *See, e.g.*, Gonzalez v. Lee County Hous. Auth., 161 F.3d 1290, 1297 (11th Cir. 1998) (holding part of letter written by employee was not of concern because of purpose in writing that part of letter); Button v. Kibby-Brown, 146 F.3d 526, 529 (7th Cir. 1998) (stating interest in plaintiff's speech must be addressed to determine if it is matter of public concern); *Gardetto*, 100 F.3d at 812 ("[W]e must evaluate whether Gardetto spoke out on the same motivations that would move the public to speak out."); *Forsyth*, 91 F.3d at 773; Johnson v. Multnomah County, 48 F.3d 420, 425 (9th Cir. 1995) ("[E]mployee's motivation . . . [is] among the many factors to be considered in light of the public's interest in the subject matter of the speech."). *Contra* Denton v. Morgan, 136 F.3d 1038, 1043 (5th Cir. 1998) ("Neither the accuracy of the speech, nor the motivation of the speaker, plays a role in determining whether the expression involves a matter of public concern."); Chappel v. Montgomery County Fire Prot. Dist. No. 1, 131 F.3d 564, 574-75 (6th Cir. 1997) (minimizing significance of motive).

[144] Campbell v. Towse, 99 F.3d 820, 828 (7th Cir. 1996); *see also* Holbrook v. City of Alpharetta, 112 F.3d 1522, 1530 (11th Cir. 1997) (holding handicapped police detective's

Determining the "central point"[145] of the speech inevitably demands a careful factual analysis of the circumstances in which the speech occurred. For example, in *Davis v. Ector County*,[146] the plaintiff and his wife had both worked for the county until the wife charged her supervisors with sexual harassment, and the husband, despite orders from above, wrote a letter to the Ector County Commissioners' Court, in which he detailed the allegations.[147] This led to his dismissal.[148] He sued, and the issue before the court was whether his motive was to speak on public issues or to "enmesh[ ] [his agency] in the private affairs of his wife."[149] In protecting the letter, the Fifth Circuit found it significant that the plaintiff had signed the letter without identifying himself as a public employee.[150] In *Forsyth v. City of Dallas*,[151] police officers who spoke out about corruption in their department received First Amendment protection because, having already been exonerated themselves, they were not "primarily motivated by personal . . . concerns in publicizing their allegations."[152] By contrast, in *Gillum v. City of Kerrville*,[153] the Fifth Circuit ruled against a policeman who spoke about the misconduct of a superior officer, stating that his reason was not to expose "corruption in [the] internal affairs department," but was instead "his wish to continue his investigation."[154]

Gardetto v. Mason[155] brings home the point that courts sometimes draw rather subtle distinctions. A college administrator claimed that she was demoted because of her criticism of the college

---

complaint of discriminatory treatment is merely personal grievance and not matter of public concern, because "it does not refer to any practice or course of conduct by the police department against disabled individuals beyond Holbrook and does not seek redress beyond improving Holbrook's personal employment situation").

[145] *Campbell*, 99 F.3d at 828.

[146] 40 F.3d 777 (5th Cir. 1994).

[147] *Id.* at 780.

[148] *Id.*

[149] *Id.* at 781.

[150] *Id.* at 783 & n.23.

[151] 91 F.3d 769 (5th Cir. 1996).

[152] *Id.* at 773.

[153] 3 F.3d 117 (5th Cir. 1993).

[154] *Id.* at 121. The officer had conducted an investigation of the police chief outside official channels after being told not to do so. *Id.* at 119.

[155] 100 F.3d 803 (10th Cir. 1996).

president.[156] The college administrator had criticized the president's reduction-in-force plan and had expressed her opposition to the elimination of another staffer's position.[157] The Court concluded that both statements made by Gardetto were motivated "in part [by] her concern about the deterioration of various public services provided to adults by the college" and in part "by her personal interest in maintaining her position and responsibility."[158] Confronted with this complication, the Court put Gardetto's criticism of the reduction-in-force plan in the public concern hopper, noting that she "was one of a handful of other faculty members who expressed concern," that she "previously served on a committee responsible for determining the college's reduction-in-force procedures," that "she and other faculty members made their statements at a board of trustees meeting open to the public," and that she "made her criticisms nearly a month before she learned that her office would be affected."[159] For these reasons, the court concluded, "the record reveals that she was primarily motivated" by public-spiritedness in opposing the reduction-in-force plan rather than a self-centered "desire to keep her job or her staff."[160] By contrast, Gardetto's criticism of the elimination of a staff position in her own office was on "a matter of internal administration and not a matter of public concern," partly because the court was convinced that "Gardetto, in opposing this decision, was primarily motivated by her personal interest in maintaining her staff . . . and her relationship with [the fired staffer]."[161]

---

[156] *Id.* at 808.
[157] *Id.* at 813.
[158] *Id.*
[159] *Id.* at 814.
[160] *Id.*
[161] *Id.*; *see also* Robinson v. Balog, 160 F.3d 183, 189 (4th Cir. 1998) (holding plaintiffs' speech was "involuntary" since it consisted of testimony before Board of Estimate delivered at request of Board, and "this context [made] clear that plaintiffs did not cunningly transform a simple employment grievance into a public spectacle"); Martinez v. Hooper, 148 F.3d 856, 859 (7th Cir. 1998) (holding public employee who "chose a forum from which she could obtain no personal benefit" states claim for relief); Button v. Kirby-Brown, 146 F.3d 526, 530-31 (7th Cir. 1998) (holding no public concern speech even though speech addressed legal liability, in part, because employee's recollection of conversation "does not include any mention of liability" and "one can reasonably assume that if Button's motivation was more than just airing a personal disagreement with the decision of a superior he would have mentioned his greater concerns"); Campbell v. Towse, 99 F.3d 820, 828 (7th Cir. 1996) (holding that

3. Disruption. If the plaintiff gets past the "public concern" hurdle, the next question is whether the value of the speech is outweighed by the risk that it will unduly disrupt the workplace. Judges exercise substantial, if not unfettered, discretion in deciding this question, based on an individualized evaluation of both the quantity and quality of disruption. Sometimes evidence of actual disruption will carry the day for the defendant,[162] and sometimes it will not.[163] *Waters v. Churchill* made it clear that only "reasonable predictions of disruption" are required,[164] but left it to lower courts to decide how much weight to accord those predictions. The result is that a court may give the government's interest whatever force it pleases. For some courts the government's assertion is enough to tip the balance against the speaker.[165] Others, upon finding no evidence of actual disruption, hold for the plaintiff,[166] often without so much as a bow to *Waters*.[167] There seem to be more cases finding

---

willingness to give up recent promotion supports inference that "central point of [plaintiff's] speech was aimed at a matter of public rather than private concern within the meaning of *Connick* and *Pickering*").

[162] *See, e.g.*, Curtis v. Okla. City Pub. Sch. Bd. of Educ., 147 F.3d 1200, 1214 (10th Cir. 1998) (concluding disruptions not type which could be reasonably contemplated by defendants); Voigt v. Savell, 70 F.3d 1552, 1561 (9th Cir. 1995) (noting defendants not required to tolerate actions reasonably believed to cause disruption); Versarge v. Township of Clinton, 984 F.2d 1359, 1366-67 (3d Cir. 1993) (finding that undisputed evidence revealed plaintiff's speech disruptive).

[163] *See, e.g.*, Feldman v. Phila. Hous. Auth., 43 F.3d 823, 830 (3d Cir. 1994) (holding plaintiff's disruption not dispositive element for defendant's position).

[164] 511 U.S. 661, 673 (1994) (plurality opinion).

[165] *See, e.g.*, Weicherding v. Riegel, 160 F.3d 1139, 1142-44 (7th Cir. 1998) (concluding absence of actual disruption does not render prediction of disruption unreasonable); Wales v. Bd. of Educ., 120 F.3d 82, 85 (7th Cir. 1997) (finding for government in close case); Shahar v. Bowers, 114 F.3d 1097, 1109-10 (11th Cir. 1997) (giving government latitude to predict public perception of same-sex marriage of government employee); Jefferson v. Ambroz, 90 F.3d 1291, 1297 (7th Cir. 1996) (finding it was reasonable for defendants to believe statements would cause problems); Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995) (holding potential disruptiveness enough to outweigh First Amendment value of speech).

[166] *E.g.*, Sexton v. Martin, 210 F.3d 905, 912-13 (8th Cir. 2000) (concluding defendants did not demonstrate that speech created disharmony and that substantial showing of disruption must be made); Burnham v. Ianni, 119 F.3d 668, 679-80 (8th Cir. 1997) (noting that some deference has been given to employee's prediction of workplace disruption; however, deference is never granted to supervisor's "bald assertions of harm").

[167] *See, e.g.*, Nunez v. Davis, 169 F.3d 1222, 1229 (9th Cir. 1999) (finding for plaintiff because defendant did not meet burden of proving disruption); Robinson v. Balog, 160 F.3d 183, 189 (4th Cir. 1998) (same); Lickiss v. Drexler, 141 F.3d 1220, 1222-23 (7th Cir. 1998) (same); Azzaro v. County of Allegheny, 110 F.3d 968, 980 (3d Cir. 1997) (same); Gardetto v. Mason, 100 F.3d 803, 815-16 (10th Cir. 1996) (same); Fikes v. City of Daphne, 79 F.3d 1079,

that the balance favors the plaintiff than the defendant. This pattern may exist, however, only because courts that want to rule for the government generally prefer to avoid contextualized balancing altogether, deciding instead that the speech does not address a matter of public concern in the first place.

Similar fact patterns sometimes receive strikingly different treatment. One Tenth Circuit panel held that a police officer could be forbidden to display a sign in his yard favoring a candidate in a local election due to the danger that the public could come to doubt the impartiality of the police.[168] A different Tenth Circuit panel, finding little chance of disruption and ignoring the "public confidence" argument, held that a similar yard sign was protected.[169] *Harris v. Victoria Independent School District*[170] protected a teacher's speech that challenged the principal's administration of the school,[171] while *Khuans v. School District 110*[172] held against a teacher who criticized her supervisor.[173] If the cases may be reconciled, the reason is that in the latter one the court found more evidence of disruption than in the former. Even if this distinction reflects a real difference between *Harris* and *Khuans*, however, it obviously is of little use in predicting how a case will come out before one makes a decision whether to speak.

Some courts bent on finding for the plaintiff seem not to take the disruption issue seriously. In *Campbell v. Arkansas Department of Correction*,[174] a plaintiff who spoke out on corruption and lack of security at a prison won his case even though he seemed to have two strikes against him. First, he addressed most of his comments to other government officials rather than the public at large,[175] a circumstance that often leads courts to conclude that the speech is

---

1084 (11th Cir. 1996) (same); Tindal v. Montgomery County Comm'n, 32 F.3d 1535, 1540 (11th Cir. 1994) (same).

[168] Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265, 1272-74 (10th Cir. 1998).

[169] Cragg v. City of Osawatomie, 143 F.3d 1343, 1346-47 (10th Cir. 1998).

[170] 168 F.3d 216 (5th Cir. 1999).

[171] *Id.* at 221-23.

[172] 123 F.3d 1010 (7th Cir. 1997).

[173] *Id.* at 1018.

[174] 155 F.3d 950 (8th Cir. 1998).

[175] *Id.* at 959; *see also* Paradis v. Montrose Mem'l Hosp., 157 F.3d 815, 818 (10th Cir. 1998) (rejecting contention that public employee must speak publicly to have First Amendment protection for speaking on matter of public concern).

unprotected because it is "internal."[176] Second, the plaintiff was the warden of the prison under discussion, and courts are often receptive to government arguments that provocative speech by high ranking employees carries with it a distinctively heavy disruption cost.[177] Even so, the court held in the plaintiff's favor without recognizing any possible risk of disruption at the prison, much less balancing that risk against the value of his speech.[178]

B. SUING UNDER SECTION 1983: TORT LAW ISSUES

In much the same fashion as cryptic criminal prohibitions, the unpredictable *Pickering/Connick* approach has an inevitably chilling effect on the exercise of First Amendment rights. Moreover, that chill is significantly accentuated by another feature of the law: The intricacies of § 1983 litigation make pursuit of an after-the-fact damages remedy a hazardous enterprise for any employee contemplating whether to risk demotion or dismissal by engaging in controversial speech.

1. Causation. Establishing that speech is constitutionally protected does not shield the employee who uttered it from even the most severe forms of adverse employment action. The plaintiff cannot win a First Amendment retaliation suit unless he can prove that the employer in fact retaliated–that is, the employee loses unless he proves that there is a causal connection between the

---

[176] *See, e.g.*, Buazard v. Meridith, 172 F.3d 546, 549 (8th Cir. 1999) (ruling that internal nature of speech is factor to consider in determining that speech was not matter of public concern); Wales v. Bd. of Educ., 120 F.3d 82, 84 (7th Cir. 1997) (same); Roe v. City and County of San Francisco, 109 F.3d 578, 585 (9th Cir. 1997) (same). These cases give a narrow reading to *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), where the Supreme Court held that the fact that speech is delivered in private does not necessarily mean that it does not address a matter of public concern.

[177] *See supra* note 101 and accompanying text (discussing significance of high level job factor).

[178] *See also* Denton v. Morgan, 136 F.3d 1038, 1043 (5th Cir. 1998) (ignoring, evidently, balancing issue); Pro v. Donatucci, 81 F.3d 1283, 1291 (3d Cir. 1996) (finding "no legitimate [state] interest" in regulating employee's speech, where speech was testimony in divorce case); Beckwith v. City of Daytona Beach Shores, 58 F.3d 1554, 1564 (11th Cir. 1995) (protecting fire chief's speech about fire and rescue services and dismissing government's interest as employer with observation that "[i]t is hard to imagine any combination of government interests sufficient to outweigh [Beckwith's] strong interest in informing the public about policies he believed were dangerous to the City's citizens").

protected speech and the firing, the demotion, or the like. The employer remains entitled to fire the speaker for any reason other than the protected speech, including not only for such reasons as a diminished need for the employee's services, but also for the reason that the employee's work is substandard. One problem here is that the employer may have mixed motives, and the employee may lose under the Court's mixed-motives case law even if protected speech was one reason for the dismissal. In *Mount Healthy City School District Board of Education v. Doyle*[179] the Supreme Court held that a form of the tort law "but-for" test applies to such cases. Upon a showing that protected speech factored into an adverse employment action, the burden shifts to the government which may still win if it can prove, by a preponderance of the evidence, that it would have dismissed the plaintiff anyway for other reasons.[180] Unlike the issue of whether speech is protected by the First Amendment, which is a question of law for the court,[181] the causation issue is for the jury, subject to the customary judicial oversight for reasonableness.[182]

---

[179] 429 U.S. 274, 287 (1977). According to some recent cases, a plaintiff who denies having engaged in the activity that led to the dismissal simply has no free speech claim, because the plaintiff does not even claim to have been disadvantaged on account of protected speech. These courts reason that a "First Amendment retaliation claim . . . cannot be used to remedy a case of mistaken identity." Wasson v. Sonoma County Junior Coll., 203 F.3d 659, 662-63 (9th Cir. 2000).

[180] 429 U.S. at 287. It is important to distinguish the *Mt. Healthy* rule for § 1983 litigation from the somewhat similar rule followed in Title VII cases. In Title VII cases, the ultimate burden of proof is on the plaintiff when "the plaintiff's evidence is entirely of an indirect nature." Hankins v. City of Philadelphia, 189 F.3d 353, 363 (3d Cir. 1999). In addition, "[i]n those relatively infrequent instances where a plaintiff has direct evidence of discriminatory intent," certain remedies are available even if the employer can prove it would have acted as it did in the absence of the forbidden factor. *Id.* at 364. Some courts have mistakenly asserted that "the causation analysis for a § 1983 retaliation claim tracks the causation analysis for a Title VII retaliation claim." Johnson v. Univ. of Wis.-Eau Claire, 70 F.3d 469, 482 (7th Cir. 1995). *See also* Whitaker v. Wallace, 170 F.3d 541, 545 (6th Cir. 1999) (placing burden of proof on plaintiff).

[181] Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439, 444 (5th Cir. 1999).

[182] *See, e.g.*, Gattis v. Brice, 136 F.3d 724, 726 (11th Cir. 1998) (recognizing causation as question for fact finder subject to review by court); Gardetto v. Mason, 100 F.3d 803, 811-18 (10th Cir. 1996) (same); Shands v. City of Kennett, 993 F.2d 1337, 1343 (8th Cir. 1993) (same).

The jury's role is not limited to deciding causation, of course. "[T]he jury should decide . . . the nature and substance of the plaintiff's speech activity . . . and whether the speech created disharmony in the work place. The trial court should then combine the jury's factual findings with its legal conclusions in determining whether the plaintiff's speech is protected." *Id.* at 1342-43.

This doctrine invites government employers in retaliation cases to make causation an issue, and many do so.[183] As a result, the employee who speaks always has to worry about the possibility that the employer may have some other reason sufficient to fire him, or that the employer can convince a jury to draw this conclusion.[184] Judging from the reported cases, employers in retaliation cases often find some evidence of insubordinate behavior or some other legitimate sounding ground for the adverse employment action taken. Employers have a fair amount of success in showing that the other ground, and not the protected speech, was the determinative cause of the dismissal.[185] Defendants tend to do especially well in cases where the official who disciplined the plaintiff is someone other than the official with a bad motive.[186]

2. Adverse Employment Actions. Constitutional torts resemble common law torts in that one may not recover damages without proving an injury. A supervisor who wants to discourage speech need not fire the offending employee in order to get her message across. More subtle forms of punishment are available. The employee may be demoted, transferred, or disadvantaged in some other way. When the speech is protected, a question arises as to

---

[183] *See, e.g.*, Butler v. City of Prairie Village, 172 F.3d 736 (10th Cir. 1999) (asserting causation as issue by former government employer); Graning v. Sherburne County, 172 F.3d 611 (8th Cir. 1999) (same); Whitaker v. Wallace, 170 F.3d 541 (6th Cir. 1999) (same); Fultz v. Dunn, 165 F.3d 215 (3d Cir. 1998); Sales v. Grant, 158 F.3d 768 (4th Cir. 1998) (same); Gubitosi v. Kapica, 154 F.3d 30 (2d Cir. 1998) (same); Vasquez v. Lopez-Rosario, 134 F.3d 28 (1st Cir. 1998) (same); Kelly v. Mun. Courts of Marion County, 97 F.3d 902 (7th Cir. 1996) (same); Mize v. Jefferson City Bd. of Educ., 93 F.3d 739 (11th Cir. 1996) (same).

[184] *Cf.* Estlund, *supra* note 4, at 1673 (discussing causation hurdle in wrongful discharge law generally).

[185] *See, e.g.*, Heil v. Santoro, 147 F.3d 103 (2d Cir. 1998) (finding independent grounds for termination besides protected speech); Brady v. Houston Indep. Sch. Dist., 113 F.3d 1419 (5th Cir. 1997) (same); Bailey v. Floyd County Bd. of Educ., 106 F.3d 135 (6th Cir. 1997) (same); Harris v. Shelby County Bd. of Educ., 99 F.3d 1078 (11th Cir. 1996) (same); *see also supra* note 183 (citing cases where government employer made causation issue); *cf.* Pierce v. Tex. Dep't of Criminal Justice, 37 F.3d 1146 (5th Cir. 1994) (ruling for defendant on causation issue in spite of jury verdict for plaintiff).

[186] *See, e.g.*, *Mize*, 93 F.3d at 745 (finding against plaintiff because there is no clear connection between termination by one person and motive for retaliation from other); Pierce v. Tex. Dep't of Criminal Justice, 37 F.3d 1146, 1150 (5th Cir. 1994). In one recent case, remoteness in time between the protected speech and the employee's transfer was a significant factor in upholding a finding of no causation. *See* Leary v. Daeschner, 228 F.3d 729, 738-39 (6th Cir. 2000).

what kinds of supervisory decisions count as "adverse employment actions" for which a remedy may be awarded.[187] In *Rutan v. Republican Party*,[188] a closely divided Supreme Court held that plaintiffs could sue for other injuries besides dismissals and demotions, but the Court has left it to the lower federal courts to develop law on the point.[189] The general rule is that "[a]dverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands."[190] Beyond this, courts are divided. For example, the court in *Pierce v. Texas Department of Criminal Justice* ruled against an employee who complained that officials had investigated her for drug trafficking, had videotaped her, had required that she take a polygraph test, and had made a "threat to her to mind her own business."[191] These tactics, the court explained, "do not amount to adverse employment decisions because no adverse result occurred."[192] On the other hand, *Calvit v. Minneapolis Public Schools*[193] allowed a school social worker to sue for having been (1) denied the opportunity to be reassigned to the school he preferred; (2) disproportionately called on for "transportation duty"; and (3) subjected to "verbal abuse."[194] Courts also differ

---

[187] A similar line-drawing problem arises under federal statutory employment discrimination law. For a thorough treatment of the issue in that context, see Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998). Professor White argues that the "limitation of Title VII to ultimate employment decisions or to materially adverse employment actions is inconsistent with the statute, as written and as construed by the Court." *Id.* at 1130.

[188] 497 U.S. 62 (1990).

[189] *Id.* at 73-76.

[190] *Pierce*, 37 F.3d at 1149.

[191] *Id.* at 1150.

[192] *Id.*; *see also* Graves v. Ark. Dep't of Fin. and Admin., 229 F.3d 721, 723 (8th Cir. 2000) (finding that transfer is not adverse employment action); Jackson v. City of Columbus, 194 F.3d 737, 752 (6th Cir. 1999) (holding four-day suspension with pay is not adverse employment action); Nunez v. Los Angeles, 147 F.3d 867, 875 (9th Cir. 1998) (finding that being "bad-mouthed and verbally threatened" is not adverse employment action); Harrington v. Harris, 118 F.3d 359, 365-66 (5th Cir. 1997) (holding law professors suffered no adverse employment action when they received poor evaluations by dean and smaller raises than they deserved). For a recent case that is squarely at odds with *Harrington* on whether punishment by a small raise is an adverse employment action, see *Hollister v. Tuttle*, 210 F.3d 1033, 1035 (9th Cir. 2000).

[193] 122 F.3d 1112 (8th Cir. 1997).

[194] *Id.* at 1118; *see also* Suppan v. Dadonna, 203 F.3d 228, 236-38 (3d Cir. 2000) (allowing police officers to sue for having been denied promotion in retaliation for exercising First Amendment rights); Schuler v. City of Boulder, 189 F.3d 1304, 1309-10 (10th Cir. 1999)

on whether undesirable work assignments amount to adverse employment actions. In *Benningfield v. City of Houston*[195] a Fifth Circuit panel ruled that a police department employee may not sue for being transferred to the night shift.[196] But another Fifth Circuit case, *Forsyth v. City of Dallas*,[197] held that transfers from undercover jobs to night patrol were "demotion[s]," where "the evidence revealed that the Intelligence Unit positions were more prestigious, had better working hours, and were more interesting than night patrol."[198]

A narrow definition of "adverse employment action" serves the laudable goal of filtering out insubstantial claims. On the other hand, many people are, in fact, intimidated by the prospect of working the night shift or not getting as big a raise as they think they deserve. For better or for worse, the courts' limits on what counts as an injury have the effect of enabling sophisticated government supervisors to keep their employees in line without risking the loss of a lawsuit.

3. Damages. Even if the employee can prove an adverse employment action caused by the defendant's First Amendment violation, the suit may not be worth much in the absence of substantial damages. In *Memphis Community School District v. Stachura*,[199] the Supreme Court declared that damages in retaliation cases "are designed to provide *compensation* for the injury caused to plaintiff by defendant's breach of duty."[200] This principle, taken from the common law of torts, is unexceptionable when the defendant's wrong results in physical injury. Whether it works well in the free speech context is not so certain. Retaliation for free speech may produce easily provable harm, in the form of lost wages

---

(holding that employer's termination in retaliation for protected speech was actionable); Bernheim v. Litt, 79 F.3d 318, 325 (2d Cir. 1996) (allowing cause of action against employer for retaliation for protected statements).

[195] 157 F.3d 369 (5th Cir. 1998).

[196] *Id.* at 377; *see also* Southard v. Tex. Bd. of Criminal Justice, 114 F.3d 539, 555 (5th Cir. 1997) (noting that "[u]ndesirable work assignments are not adverse employment actions").

[197] 91 F.3d 769 (5th Cir. 1996).

[198] *Id.* at 774.

[199] 477 U.S. 299 (1986).

[200] *Id.* at 306 (internal quotation marks and citation omitted).

and emotional distress.[201] The imposition of penalties on protected speech, however, can produce harms that are hard to capture within traditional damages principles because the point of free speech is not just to guarantee the individual's liberty but also to serve the public's interest in access to information.[202] Accordingly, there is an argument for departing from traditional damages rules in this context by allowing presumed damages in retaliation cases. *Stachura* does not approve of presumed damages for free speech violations, nor does it squarely reject them. In its aftermath, lower courts have been loath to permit presumed damages. While a few cases have allowed awards of presumed damages,[203] most plaintiffs receive only damages they can prove, typically for lost pay and emotional distress.[204]

Unlike the victims of ordinary torts who can rarely do much to mitigate their injuries, many dismissed employees are likely to look for new jobs as soon as possible because they need the income. Ironically, the effect of promptly seeking to replace lost income is to diminish the provable damages caused by the illegal discharge. In addition, where the speech, the dismissal, or the ensuing lawsuit has created tension among co-workers, as will often be the case, a court may be reluctant to order that the defendant give the plaintiff her job back.[205] An alternative to reinstatement is the award of front-pay. Yet here, too, the plaintiff faces a hurdle because methods for calculating front-pay may be deemed "too speculative."[206] Punitive damages are rarely available in First Amendment

---

[201] *See* Dishnow v. Sch. Dist. of Rib Lake, 77 F.3d 194, 196, 199 (7th Cir. 1996) (recognizing ability to recover damages for lost wages and emotional distress in retaliation for free speech claim).

[202] Chappel v. Montgomery County Fire Prot. Dist. No. 1, 131 F.3d 564, 574 (6th Cir. 1997).

[203] *See, e.g.*, Walje v. City of Winchester, 827 F.2d 10, 12-13 (6th Cir. 1987) (allowing presumed damages); City of Watseka v. Ill. Pub. Action Council, 796 F.2d 1547, 1559 (7th Cir. 1986) (approving damages though their monetary value may be difficult to ascertain).

[204] *See, e.g.*, Forsyth v. City of Dallas, 91 F.3d 769, 774 (5th Cir. 1996) (finding appropriate emotional distress and exemplary damages based on evidence); Keenan v. City of Philadelphia, 983 F.2d 459, 469 (3d Cir. 1992) (awarding compensatory damages based on plaintiff's proof at trial).

[205] *See* Versarge v. Township of Clinton, 984 F.2d 1359, 1368 (3d Cir. 1993) (noting major disruption caused by speech); *cf.* McKinley v. Kaplan, 177 F.3d 1253, 1255 (11th Cir. 1999) (finding changed conditions mooted reinstatement claim).

[206] Sagendorf-Teal v. County of Renssalaer, 100 F.3d 270, 277 (2d Cir. 1996); *cf.* Gotthardt

retaliation cases, for they may be awarded only where the defendant's conduct was highly improper.[207] These limits on relief suggest that a plaintiff who wins on the merits may find that the victory is not worth much as a practical matter.

C. OFFICIAL IMMUNITY

When public employees bring First Amendment retaliation suits, they may seek relief either from officers responsible for the adverse employment action, from the relevant governmental body, or from both. Problems that arise in suits against governments are discussed in the next section. This section addresses "official immunity," a doctrine that often protects officers from liability for damages, even though they have violated the plaintiff's constitutional rights. The primary rationale for immunity is that, in its absence, officers would face skewed incentives because they would capture none of the benefits of bold actions in the cause of better government, but they would be vulnerable to liability for their torts. The result would be a systematic bias in favor of too much caution. Officials exercising legislative, judicial, or prosecutorial functions are absolutely immune, no matter how bad their conduct. Absolute immunity is rarely an issue in retaliation cases, because firing an employee is ordinarily viewed as an "administrative" task for which absolute immunity is not available.[208] But "qualified" immunity is a major problem for plaintiffs because it shields *all* employment supervisors from damages liability except when they violate "clearly

---

v. Nat'l R.R. Passenger Corp., 191 F.3d 1148, 1157 (9th Cir. 1999) (noting in Title VII case that "[a] court awarding front pay should consider plaintiff's ability to mitigate her damages by finding other employment in future"). Some courts take a more liberal approach to front pay. *See, e.g.*, Belk v. City of Eldon, 228 F.3d 872, 883 (8th Cir. 2000) (upholding use of ten-year period for calculating front pay).

[207] *See Forsyth*, 91 F.3d at 774-75 (awarding punitive damages based on malice or reckless disregard for plaintiff's rights); *Keenan*, 983 F.2d at 469-71 (3d Cir. 1992) (same); *see also* Wells, *supra* note 113 (arguing punitive damages are appropriate for deterrence purposes).

[208] Forrester v. White, 484 U.S. 219, 219 (1988); *see also* Meek v. County of Riverside, 183 F.3d 962, 965 (9th Cir. 1999) (recognizing lack of immunity for judge when not acting in judicial capacity). *But cf.* Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998) (holding elimination of position by city council to be "quintessentially legislative" regardless of motive); *accord* Macuba v. DeBoer, 193 F.3d 1316, 1320-21 (11th Cir. 1999) (citing *Bogan* with approval).

established" constitutional law[209]–regardless of the most malevolent subjective intent.[210]

The interaction of *Pickering-Connick* doctrine and the "clearly established law" immunity rule engenders precisely those real-world results that common sense would predict. As the Eleventh Circuit explained in *Martin v. Baugh* in finding that qualified immunity attached,

> [b]ecause both [the public-concern and particularized-balancing] prongs involve legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules, it is nearly impossible for a reasonable person to predict how a court will weigh the myriad factors that inform an application of the *Pickering-Connick* test.[211]

Official immunity is not *always* an insuperable obstacle. There are cases in which the speech is plainly protected and the only issue, if any, is the defendant's motive for taking action against the plaintiff.[212] Even so, there is much truth in *Martin*'s stark assertion

---

[209] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Michael Wells, *Constitutional Remedies, Section 1983, and the Common Law*, 68 MISS. L.J. 157, 203 & n.210 (1998) (noting objective reasonableness is often measured by clearly established law). Though *Harlow* was not a § 1983 case, the Court indicated that its rule would be applied in § 1983 cases, and later cases have done so. *See Harlow*, 457 U.S. at 818 & n.30 (finding no difference between § 1983 suits and suits brought directly under Constitution); Johnson v. Fankell, 520 U.S. 911, 914 (1997) (following *Harlow*); Burns v. Reed, 500 U.S. 478, 494-95 & n.8 (1991) (finding liability in § 1983 case only where official violates "clearly established" rights).

[210] *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987) (finding no place for official's subjective intent in conducting search).

[211] Martin v. Baugh, 141 F.3d 1417, 1420 (11th Cir. 1998).

[212] *See generally* Schuler v. City of Boulder, 189 F.3d 1304, 1308 (10th Cir. 1999) (holding critical issue is whether actions taken were unconstitutional retaliatory infringements); Gilbrook v. City of Westminster, 177 F.3d 839, 867 (9th Cir. 1999) (noting issue is whether it was patently unreasonable for defendants to conclude First Amendment did not protect plaintiff's speech); Chappel v. Montgomery County Fire Prot. Dist. No. 1, 131 F.3d 564, 572-80 (6th Cir. 1997) (finding speech clearly protected); Hyland v. Wonder, 117 F.3d 405, 410 (9th Cir. 1997) (same); Walker v. Schwalbe, 112 F.3d 1127, 1133 (11th Cir. 1997) (holding speech protected by First Amendment and subjective intent of government official to be critical factor); Vojvodich v. Lopez, 48 F.3d 879, 886-87 (5th Cir. 1995) (taking into account reasonable motive after speech held protected); *cf.* Sheppard v. Beerman, 94 F.3d 823, 828 (2d Cir. 1996) (holding where bad motive is alleged, facts must be determined before qualified immunity issue can be resolved).

that in public employee speech cases, "the defendant will rarely be on notice that his actions are unlawful."[213] No doubt the court's comments reflect to some degree the distinctive sympathy toward official immunity one finds in Eleventh Circuit case law.[214] But *Martin* is hardly atypical. Similar statements can be found in many circuit court opinions.[215] A significant number of plaintiffs will be left with no recourse other than reinstatement, a remedy that does not make the plaintiff whole, that is subject to the exercise of equitable discretion, and that many judges in fact are reluctant to impose.[216]

While the application of official immunity to the fact-sensitive standards of public employee speech law puts a formidable obstacle in the way of plaintiffs seeking damages, it presents problems for defendants as well, for it often deprives them of one of the major benefits of the immunity doctrine. The point of immunity—as the Court observed in *Harlow v. Fitzgerald*—is to minimize the "social costs" of litigation against officials, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[217] To this end, it is critical that the immunity rule permit "the dismissal of insubstantial lawsuits without trial."[218] But whenever there is a disputed issue of fact, it is impossible to avoid a trial. For that reason, the Court in *Harlow* abandoned the pre-existing immunity requirement that the official act in "good faith" in favor of an "objective reasonableness" test, measured solely by adherence to "clearly established law."[219] In a similar effort to protect defendants, the Court in *Mitchell v. Forsyth*[220] authorized

---

[213] 141 F.3d at 1420.

[214] *See* Hansen v. Soldenwagner, 19 F.3d 573, 576 (11th Cir. 1994) ("[T]he employer is entitled to immunity except in the *extraordinary* case where *Pickering* balancing would lead to the *inevitable* conclusion that the [act taken against] the employee was unlawful.") (internal quotation marks and citation omitted) (emphasis added by the court); *see also* Wells, *supra* note 209, at 203-04.

[215] *See, e.g.*, Moran v. State of Washington, 147 F.3d 839, 847 (9th Cir. 1998) (observing "difficulty of finding clearly established law under *Pickering*"), and cases cited therein.

[216] For examples of such cases see *supra* note 205.

[217] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[218] *Id.*

[219] *Id.* at 815-18.

[220] 472 U.S. 511 (1985).

interlocutory appeals of pretrial denials of both absolute and qualified immunity.[221]

However much these modifications harm the plaintiff, they may do little to protect defendants in public employee speech cases. As Judge Easterbrook has warned, "open-ended balancing approaches of the sort announced in *Pickering* create unavoidable risks and costs for well-intentioned public employers."[222] One of those costs is that the defendant often cannot avoid a trial on the merits. The defendant thus must face the disruption and expense the Court decried in *Harlow*, and society at large must suffer the consequences of employment supervisors' excessive caution that the prospect of enduring a trial may produce. For example, the plaintiff in *McVey v. Stacy*[223] had been the manager of an airport.[224] She alleged that she was fired by the airport commission because she had refused to sign a false response to a Freedom of Information Act request, and this was protected speech.[225] The defendants sought summary judgment on the basis of qualified immunity, but the trial court and the Fourth Circuit on interlocutory appeal denied the request.[226] According to the appeals court panel, important issues in the *Connick* balance included such matters as:

> whether the employee's speech "impairs discipline by superiors" . . . impairs "harmony among co-workers" . . . "has a detrimental impact on close working relationships" . . . impedes the performance of the public employee's duties . . . interferes with the operation of the agency . . . undermines the mission of the agency . . . is communicated to the public or to co-workers in private, . . . conflicts with the "responsibilities of the employee within the agency" . . . makes use of the "authority and public accountability

---

[221] *See id.* at 530 (holding that "a district court's denial of a claim of qualified immunity . . . is appealable").

[222] Wales v. Bd. of Educ., 120 F.3d 82, 85 (7th Cir. 1997).

[223] 157 F.3d 271 (4th Cir. 1998).

[224] *Id.* at 273.

[225] *Id.* at 274.

[226] *Id.* at 279.

> the employee's role entails" . . . [and] the extent to which [the employee's] role was a confidential, policymaking, or public contact role.[227]

A trial was necessary because "[d]epending on the response to these inquiries, airing publicly the tensions between her and the Airport Commission might well be the type of disrupting and confidence-destroying speech that the Supreme Court in *Connick* held must be subservient to the agency's interests."[228] Moreover, assuming the balance tipped in favor of the plaintiff on the substantive free speech issue, the trial court "would still have to determine whether the First Amendment principles were 'clearly established' so that a reasonable commissioner would have known that he was violating McVey's rights when he voted to fire her."[229]

D. GOVERNMENTAL LIABILITY

Qualified immunity may be avoided by suing the governmental unit that employs the official who fired the plaintiff, for governments do not enjoy any immunity under § 1983.[230] The utility of suits against governments is limited, however, by other doctrines. State governments and arms of the state are not "persons" within the coverage of the statute.[231] In *Monell v. Department of Social*

---

[227] *Id.* at 278 (quoting Rankin v. McPherson, 483 U.S. 378, 388-91 (1987)).

[228] *Id.* at 279; *see also* Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439, 445 (5th Cir. 1999) (holding development of facts insufficient to perform *Pickering* balancing test).

[229] 157 F.3d at 279; *see also* Helvey v. City of Maplewood, 154 F.3d 841, 844 (8th Cir. 1998) (holding disputed issues of fact on causation issue may preclude summary judgment); Victor v. McElveen, 150 F.3d 451, 457-58 (5th Cir. 1998) (same); O'Donnell v. Barry, 148 F.3d 1126, 1139 (D.C. Cir. 1998) (same); Gustafson v. Jones, 117 F.3d 1015, 1019 (7th Cir. 1997) (same); Latessa v. N.J. Racing Comm'n, 113 F.3d 1313, 1319-22 (3d Cir. 1997) (same); Johnson v. Multnomah County, 48 F.3d 420, 424-27 (9th Cir. 1995) (same); Bisbee v. Bey, 39 F.3d 1096, 1100-01 (10th Cir. 1994) (same).

[230] Owen v. City of Independence, 445 U.S. 622 (1980).

[231] Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997) (discussing "state agents and state instrumentalities"); Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989); Quern v. Jordan, 440 U.S. 332 (1979). The reason is that, while Congress could override the states' sovereign immunity in this context, § 1983 does not in fact abrogate the immunity. *See Quern*, 440 U.S. at 341 (stating disagreement with contention that "Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States").

Services,[232] the Supreme Court held that while local governments are "persons" subject to § 1983, they may not be sued on a respondeat superior basis for the wrongs of their employees.[233] They are liable only "when execution of a government's policy or custom . . . inflicts the injury."[234] In the two decades since *Monell*, a series of Supreme Court cases have dealt with the scope of this limiting principle. Though the Court has never arrived at a clear standard, recent cases indicate that a majority of the Court "seems eager to take any opportunity to defeat it,"[235] leading Professor Jeffries to characterize municipal liability as "a narrow deviation from the generally applicable rule of liability based on fault."[236]

One of the Supreme Court decisions, *City of Saint Louis v. Praprotnik*,[237] illustrates an important obstacle plaintiffs face when they sue municipal governments for retaliation. Praprotnik had worked as an architect for the city, but was transferred and eventually fired by his supervisor.[238] Under the city's charter, personnel decisions by supervisors were subject to review by the city's Civil Service Commission, which in this case approved some of the supervisor's actions and never ruled on others.[239] Praprotnik argued, among other things, that the supervisor acted in retaliation for Praprotnik's exercise of his First Amendment rights, and sued the city as well as the official.[240] The Supreme Court rejected his suit against the city.[241] Though the Justices were somewhat divided as to how one determines who is the city's policymaker on a given subject—with a plurality of Justices putting more emphasis on state law[242] and the others lending weight to how the law was adminis-

---

[232] 436 U.S. 658 (1978).
[233] *Id.* at 694.
[234] *Id.*
[235] John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 58 (1998).
[236] *Id.* at 59.
[237] 485 U.S. 112 (1988).
[238] *Id.* at 114.
[239] *Id.* at 115-16.
[240] *Id.* at 116.
[241] *Id.* at 118.
[242] *Id.* at 123-24 (plurality opinion) (asserting that identification of policymaking officials is question of state law).

tered in practice[243]—seven members of the Court agreed that Praprotnik's supervisor did not make city policy as to hiring and firing. Rather, the Civil Service Commission did.[244] The upshot of this holding was that the city was not suable for damages because there was no evidence that the Civil Service Commission acted with a bad motive when it approved Praprotnik's dismissal. For a plurality of four, Justice O'Connor maintained that "[s]imply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make policy."[245] Speaking for himself and two others, Justice Brennan agreed that Praprotnik's supervisor "did not possess final policymaking authority with respect to the contested decision,"[246] so that the city could not be held liable in light of the "policy or custom" rule.[247]

Plaintiffs in § 1983 cases routinely try to sue the municipal government that employed the offending official, partly to escape immunity and partly because juries may be more willing to rule against a faceless bureaucracy than against individual officers. In *Praprotnik*, for example, the jury found against the city but in favor of the officers who were sued.[248] Connecting a particular adverse employment action to a municipal "policy or custom," however, ordinarily is not an easy task. The issue of municipal liability takes form in an almost infinite number of fact patterns. Some cases are straightforward, like *Harman v. City of New York*.[249] In that case, because the city formally announced a general policy that employees must obtain permission before speaking to media, disgruntled workers could challenge the policy in a suit brought against the city for prospective relief before the policy's enforcement resulted in damages to anyone.[250] Almost always, however, the timorous

---

[243] *See id.* at 142-47 (Brennan, J., concurring in the judgment); *id.* at 144 (asserting that "identification of municipal policymakers is an essentially factual determination . . . and is therefore rightly entrusted to a . . . jury").

[244] *Id.* at 112-13.

[245] *Id.* at 130.

[246] *Id.* at 142.

[247] The subordinate, whose impermissible motive caused the dismissal, may still be liable. *See* Gilbrook v. City of Westminster, 177 F.3d 839, 854-56 (9th Cir. 1999).

[248] 485 U.S. at 116-17.

[249] 140 F.3d 111 (2d Cir. 1998).

[250] *Id.* at 115; *see also* Belk v. City of Eldon, 228 F.3d 872, 876 (8th Cir. 2000) (attributing to city actions of four aldermen without discussion of "official policy" issue).

plaintiff-employee will be confronted with the prospect of a post-dismissal damages action, so that it becomes necessary to draw "fine line[s]" between cases that fall on one side or the other of the "policy or custom" line.[251]

Once again, it is hard for a plaintiff to know where she stands before the courts have thoroughly examined the issue, as a great deal turns on the facts.[252] In *Keenan v. City of Philadelphia*,[253] for example, police officers were transferred to less favorable duties in retaliation for making statements protected by the First Amendment.[254] The city was held liable because the evidence established that the police commissioner–who was empowered to make city policy—"knowingly acquiesced to many of the actions of his subordinates."[255] But to the extent one may judge from the limited number of reported circuit court decisions on this issue, a more typical case is *Gattis v. Brice*.[256] An employee of the Palm Beach County Fire Department was demoted by the Fire Administrator—a policymaker—on the recommendation of underlings.[257] Though the plaintiff may have engaged in protected speech, and though the speech may have motivated the underlings' recommendation, the Eleventh Circuit affirmed summary judgment, as there was no evidence that the Administrator knew about the underlings' improper motive.[258]

---

[251] *See* Williams v. Butler, 863 F.2d 1398, 1402 (8th Cir. 1988) (noting that very fine line exists between delegating final policymaking authority to official and entrusting discretionary authority to that official).

[252] *See, e.g.*, Jeffes v. Barnes, 208 F.3d 49, 61-64 (2d Cir. 2000); Kujawski v. Bd. of Comm'rs, 183 F.3d 734, 739 (7th Cir. 1999) (indicating that whether board of commissioners delegated final policymaking authority to official is genuine issue of fact).

[253] 983 F.2d 459 (3d Cir. 1992).

[254] *Id.* at 468; *see also* Hyland v. Wonder, 117 F.3d 405, 416 (9th Cir. 1997) (holding that officials ratifying ban from juvenile hall was constitutional deprivation).

[255] *Keenan*, 983 F.2d at 469.

[256] 136 F.3d 724 (11th Cir. 1998).

[257] *Id.* at 725.

[258] *Id.* at 727. It is not so clear that the underlings who, by hypothesis, acted with improper motives in recommending the dismissal, should have escaped liability.

For more illustrations of the difficulty of establishing municipal liability, see *Venters v. City of Delphi*, 123 F.3d 956, 966 (7th Cir. 1997) and *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1295-96 (3d Cir. 1997). *See also* Scala v. City of Winter Park, 116 F.3d 1396, 1399-1403 (11th Cir. 1997); Hill v. Clifton, 74 F.3d 1150, 1152 (11th Cir. 1996); Radic v. Chi. Transit Auth., 73 F.3d 159, 161 (7th Cir. 1996); Greensboro Prof'l Fire Fighters Ass'n v. City of Greensboro, 64 F.3d 962, 966-67 (4th Cir. 1995).

E. OBSTACLES TO PROSPECTIVE RELIEF

Many of the problems described in the preceding paragraphs could be alleviated, if not eliminated, by a suit for prospective relief directed at clarifying the protected nature of planned speech. In such a suit, the plaintiff would go to court before speaking, thus avoiding the risk of adverse action and the need to pursue a complex constitutional tort suit. Official immunity is rarely available in actions for prospective relief,[259] and one need not prove that an unconstitutional act has already caused damages.[260] Unfortunately, however, suits of this kind are rarely available in the real world. One reason is that a suit for prospective relief needs a target, or else it will not be ripe for resolution. When a government puts in place a formal policy, such as a rule that forbids employees to speak to reporters without permission, it can be attacked prospectively.[261] The policy itself may be a sufficient reason to think that speech contrary to it will be punished, so the case is ripe.[262] But the Supreme Court has never required public employers to have such policies.[263] In their absence, the Court cannot know whether a given

---

[259] *See* JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 69-71 (2000).

[260] *See, e.g.*, Steffel v. Thompson, 415 U.S. 452, 459 (1974) (concluding that threat of prosecution is sufficient to make actual controversy).

[261] *See* Latino Officers Ass'n v. City of New York, 196 F.3d 458, 469 (2d Cir. 1999) (granting preliminary injunction in favor of police officers regarding department's parade policy), *cert. denied*, 528 U.S. 1159 (2000); Milwaukee Police Ass'n v. Jones, 192 F.3d 742, 751 (7th Cir. 1999) (vacating district court's denial of union's motion for preliminary injunction of police chief's directive restricting rights of officers who had made charges against other officers from discussing those charges); Scott v. Meyers, 191 F.3d 82, 88 (2d Cir. 1999) (affirming injunction of transit authority anti-adornment regulation as violation of employees' free speech rights); Harmon v. City of New York, 140 F.3d 111, 124 (2d Cir. 1998) (holding that child welfare and social service agencies' press policies violated employees' First Amendment rights).

[262] Even if there is a policy in place that inhibits speech, the effect may be too conjectural to warrant a finding of ripeness. *See* Latino Officers Ass'n v. Safir, 170 F.3d 167, 171 (2d Cir. 1999) (holding that although requirement that officers notify police department before speaking and provide summary of their comments afterward "may make some officers more reluctant to speak than they would be [otherwise], this kind of conjectural chill is not sufficient to establish real and imminent irreparable harm").

[263] *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 467-68 (1995) (holding that governments may choose to regulate employee speech either by broad rules or ad hoc decisions, and broad rules may receive stricter scrutiny because they affect more speech).

instance of speech would provoke an adverse action against the employee, and the case is likely not ripe. Another aspect of ripeness is that, in situations where the interests on either side are closely balanced, the Court perceives the need for factual development in order to decide which party should prevail.[264] All of the case law from *Pickering* through *Waters* suggests that resolving public employee speech claims requires close attention to the facts. Therefore, ripeness may remain a problem even if the employee could show a credible threat of adverse action.

Even if the Court were to require that public employers regulate employee speech by general policies rather than by ad hoc decisions, another hurdle would remain. Suits for prospective relief are useful only in situations where the First Amendment imposes stringent restrictions on what government can do, as where it regulates the conduct of private persons. When government is a proprietor, sponsor, or employer, it has significantly more leeway. Very general regulations are likely to withstand prospective scrutiny. For example, *National Endowment for the Arts v. Finley*[265] addressed the free speech limits on public funding for the arts. The Court upheld against a vagueness challenge a statute that directed the NEA chairperson, in establishing procedures for awarding grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[266] The Court distinguished the awarding of grants from "a criminal statute or regulatory scheme," where this "undeniably opaque" provision "could raise substantial vagueness concerns."[267] By contrast, "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."[268] Not only are the costs of vagueness less onerous, but there is a need for broad discretion. Thus, "[i]n the context of selective subsidies, it is

---

[264] *See* FALLON, JR. ET AL., *supra* note 118, at 254 (discussing need to know more about actual practices of enforcement beyond bare text of unenforced statute).

[265] 524 U.S. 569 (1998).

[266] *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1) (1994)).

[267] *Id.* at 588.

[268] *Id.*

not always feasible for Congress to legislate with clarity," for the criteria for such awards are necessarily subjective.[269]

Though the Court has not addressed the issue directly in the public employment context, the Court would likely take a similar approach there. The plurality in *Waters* suggested as much in the course of discussing the procedural aspects of public employee free speech. The plurality noted that, because of the Court's special solicitude for the government's interest as an employer, governments are permitted to regulate employee speech by means of "standard[s] almost certainly too vague when applied to the public at large," such as a prohibition on being "rude to customers."[270] Aided by counsel, public employers would probably find it easy to satisfy constitutional standards regarding the abstract statement of their policies,[271] and the only real possibility of relief would remain after-the-fact suits for damages.

Besides these doctrinal barriers, another feature of the pubic employee speech context diminishes the utility of prospective relief. In some circumstances, people who object to restrictions on speech can and do plan ahead sufficiently to bring prospective suits. This may occur, for example, when a group of people plans a demonstration, a business objects to an advertising ban, or a publisher contemplates printing possibly pornographic pictures. By contrast, the fact patterns that commonly give rise to retaliation cases suggest that public employees often speak more or less on the spur of the moment, without thinking carefully about constitutional issues, until the employer has acted against them.[272] In fact, frequently it is the employee's lack of careful pre-speech calculation that gives the speech its timeliness, relevance, and punch.[273] A

---

[269] *Id.* at 589.

[270] Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion).

[271] *See, e.g.*, Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 480 (2d Cir. 1999) (upholding against facial and as-applied First Amendment challenges directive requiring teacher to refrain from using religion as part of his instructional program). The court stated: "Aware that precise delineation of sanctionable conduct is close to impossible, courts have granted schools, acting in their capacity as employers, significant leeway." *Id.*

[272] Evidence for this proposition is that many speakers could, if they were careful, structure their comments so as to better their chance of winning a retaliation suit. *See* Rosenthal, *supra* note 18, at 555-56 (contending that if employees were aware of legal standards, they could contextualize their conduct).

[273] For example, in *Connick v. Myers*, 461 U.S. 138 (1983), had Sheila Myers, herself a

greater availability of prospective relief thus probably would make little difference in this class of cases. A no-less-serious practical problem arises because of the simple fact that any lawsuit—including a free speech suit for prospective relief—is expensive, time-consuming, and disruptive. Most people, including most public employees, would prefer to avoid these costs, even if the alternative is to avoid potentially protected speech or to forego anticipatory litigation.

III. RULES FOR PUBLIC EMPLOYEE SPEECH

Viewed as an exercise in applying First Amendment principles to public employment, the *Pickering-Connick* doctrine seems to represent a worthy effort to take seriously both the value of free speech and the government's special interest as an employer. Although numerous commentators have criticized the Court's substantive judgments,[274] for present purposes the substantive merit of the doctrine is not the issue. The concern of this Article is with how well the doctrine works in the real world of litigation. From that perspective, the problem with *Pickering-Connick* is that the Court pays no attention to the remedial context in which these rights are enforced. The solution, or at least part of it, is to reformulate the law by putting far greater emphasis on hard-edged rules. Fact-sensitive inquiries into "public concern" and "particularized balancing" of the competing interests thwart the Court's avowed goals and ought to be banished from constitutional tort suits for retaliation.

In *Pickering*, which was decided at the very beginning of this law-making project, the Court's caution was justified. "[T]he enormous variety of fact situations"[275] that may give rise to retaliation claims rightly persuaded the Court to proceed cautiously, avoiding "general

---

lawyer, given more thought to the wisdom of distributing her questionnaire, she probably would have put it in a drawer. She would have kept her job, but citizens of New Orleans would know less about the inner workings of the district attorney's office.

[274] *See supra* notes 15-17 (citing several law review articles critical of *Pickering-Connick* doctrine).

[275] 391 U.S. 563, 569 (1968).

standard[s]"[276] in favor of considering all potentially relevant factors in each case. At a time when courts had little experience with the problems of applying the First Amendment in the employment context, the risk of error was great, and prudence demanded that courts proceed one case at a time.[277] Another good reason for proceeding slowly at that time is that § 1983 doctrine was in its infancy when *Pickering* was decided. In the 1960s, no one could have foreseen that these two bodies of law, developing on parallel tracks over the ensuing thirty years, would work so poorly in tandem.

As the doctrine has evolved, however, the flaws of the Court's approach have become apparent, as documented at some length in Part II. Interestingly, in the parallel field of First Amendment defamation law, the Court has come to recognize the superiority of rules over case-by-case adjudication. In *Gertz v. Robert Welch, Inc.*,[278] it compared the costs and benefits of rules and standards. Conceding that "rules necessarily treat alike various cases involving differences as well as similarities,"[279] nonetheless, they are better than a "case-by-case approach," which "would lead to unpredictable results and uncertain expectations, and . . . could render [the Court's] duty to supervise the lower courts unmanageable."[280] Every decision about whether to formulate doctrine as a body of factors or rules ought to be accompanied by a similar analysis of the pluses and minuses of the alternatives.

---

[276] *Id.*

[277] This is the starting point for Professor Sunstein's broadly conceived argument in favor of judicial minimalism. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999). Whether or not the argument for prudence takes one as far as Sunstein would like to go with it, caution is surely a good policy in circumstances where the Court is writing on a clean slate.

[278] 418 U.S. 323 (1974). *See also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 902-04 (1999) (describing Court's use of prophylactic rules throughout much of First Amendment law, and noting, "[c]onstitutional doctrine, in order to have any useful meaning in governing the primary behavior of government, must be more rule-like than any of the most abstract standards that might be put forward as the basic principle of any given constitutional right").

[279] *Gertz*, 418 U.S. at 344.

[280] *Id.* at 343.

A. RULES AND STANDARDS

Since the term "rule" is often used in an imprecise way to denote all kinds of legal materials, and since my argument in favor of rules depends on a more narrow and technical definition, it will be helpful to clarify my use of the term. By advocating a more "rule-like" body of law, I mean to distinguish between legal norms that direct the decisionmaker to consider a large number of factors, such as the "reasonable person" test for negligence or the *Pickering-Connick* test of "public concern" and "particularized balancing," and legal norms that identify one or more features in fact patterns that always, or at least ordinarily, dictate outcomes.[281] The former are "standards" or "factors" and the latter are "rules."[282] Examples of rules include the doctrine that violation of a safety statute is negligence as a matter of law, the doctrine that a trespasser may not recover for negligent maintenance of the property, the doctrine that a defendant who engages in blasting with dynamite is strictly liable for harm, and the prohibition on suing a state without its consent.

Legal philosophers never seem to tire of debating whether it is better to state the law in the form of rules or standards. The great advantage of standards is that they allow more factors to be taken into account. Ideally, a body of law based purely on standards permits the careful decisionmaker to reach the optimum result in each and every case, for no relevant consideration needs to be left out of the analysis, and each factor receives the weight it deserves in the circumstances of the case at hand.[283] One cost of using standards is that in the real world, the decisionmakers, lacking firm

---

[281] There are degrees of "ruleness." Thus, a court may allow an actor to escape negligence per se by convincing the jury that he has a valid excuse for the statutory violation. Rules are best viewed as presumptions, some stronger than others, rather than all-or-nothing prohibitions. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 113-18, 196 (1991) (suggesting that having rules does not necessarily mean exceptions are not available in certain circumstances). In my view, a fairly strong set of rules is needed in order to avoid the lack of predictability that undermines the effectiveness of current law.

[282] *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510, 536-37 (1988) (distinguishing rule-based decisionmaking from decisions based on consideration of all relevant factors).

[283] Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 58-59 (1992).

guidance, may make too many mistakes.[284] Another cost is that the actors to whom legal directives are addressed need to be able to plan ahead, and to this end they need to be able to predict the legal implications of a given set of circumstances.[285] Rules, especially when they work well, do not allow decisionmakers to consider all relevant information, and so they necessarily produce less-than-optimum results in many cases to which they are applied.[286] On the other hand, handing a rule to the officers who apply law speeds up the administration of justice and minimizes the problem of the incompetent decisionmaker. Furthermore, rules give people subject to the law better information than do standards as to what is and is not permitted, so that they can better manage their affairs.

Much of the debate over rules versus standards is conducted at a high level of abstraction. Courts and legislatures dealing with real-world problems have taken a different approach. Rather than choosing one or the other as a general approach to formulating legal directives, they have recognized that the strength of the arguments for each varies depending on context.[287] Many would agree that police officers, having little time to make decisions and lacking legal training, need the guidance that firm rules provide.[288] Property law should be, and is, comparatively rule-oriented, because it is an area in which people need to be able to plan ahead.[289]

On the other hand, constitutional law is an area where the ultimate decisionmakers, Supreme Court Justices, can be trusted to reach good results, or at least think they can, and where it may be generally more important to get the right result than to maintain

---

[284] *See* SCHAUER, *supra* note 281, at 158-62 (noting that rules provide protection by allocating power).

[285] RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 60-62 (1961); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987).

[286] *See* SCHAUER, *supra* note 281, at 224-28 (showing that rule-based decisionmaking necessarily requires one to exclude some considerations bearing on optimum outcome of given case).

[287] *See* Schauer, *supra* note 282, at 542 (arguing that case for rule-based decisionmaking is stronger in some contexts than in others).

[288] *See* Frederick Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. REV. 729, 734-37 (1992) (showing that "many of the power-limiting aspects of the United States Constitution are based on a distrust of the ability of certain governmental decisionmakers to take, or refrain from taking, certain kinds of actions").

[289] *See* MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 122 (1988) (noting that "planning on the basis of the law is common and certainly is particularly important").

stability.[290] In a different vein, Professor Sunstein argues that the Court should be hesitant to lay down rules on certain constitutional matters because rules foreclose discussion. It is better, he argues, to leave issues open so as to give due regard to the views of the democratic branches in developing doctrine.[291] Thus, the case for rules may be weak in many fields of constitutional law. In the common law of torts, Holmes thought the amorphous "reasonable person" standard should evolve into a body of rules over time.[292] But most judges have seen the matter differently, finding little need for predictability in this area and preferring to maintain, with a few exceptions, the flexible test of the reasonable person.

Even though both constitutional law and tort law are dominated by standards, this Article argues the constitutional tort of retaliation for protected speech by a public employee ought to be governed by rules. My argument is not that there is reason to doubt the decisionmaking capacity of the federal judges who decide these issues. Though the decisions are sometimes hard to reconcile, one would hardly expect a diverse group of judges to reach uniform results on questions that call for the hard choices characteristic of public employee free speech cases. Rather, the argument rests on the unpredictability of outcomes in a regime of standards, a cost that is exacerbated, in the ways described in Part II, by the remedial context of suits for damages. The costs of the current approach are sufficiently great to call for an alternative, if a plausible one can be found.

B. RULES FOR PUBLIC EMPLOYEE SPEECH

Part of the justification for replacing *Pickering-Connick* with a regime of rules is that the fact-sensitive approach works poorly in the remedial context of constitutional tort law. But that is not all.

---

[290] MICHAEL J. GERHARDT, CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 177 (1993).

[291] *See* SUNSTEIN, *supra* note 277, at 5 (arguing that "certain forms of minimalism can be democracy-promoting").

[292] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 88-89, 96-99 (Mark D. Howe ed., The Belknap Press of Harv. Univ. 1963) (1881) (explaining that "cases with comparatively small variations from each other [do repeat themselves]"). A judge should consequently be able to develop a "fund of experience" from which to decide cases.

Whether we need to tolerate the awkward fit between right and remedy ultimately depends on whether a better alternative exists. Common sense demands that before abandoning the old regime, we ought to have some notion of the replacements available. One could eliminate virtually all the uncertainty that besets current doctrine with a draconian rule favoring one side or the other, either by reinstating *McAuliffe*'s denial of any free speech rights to public employees,[293] or by declaring that public employees have the same rights as everyone else. Yet neither of these alternatives is likely to win much support. In any event, endorsing either of them would cross the line I have drawn between criticism of the Court's substantive judgments (which is not the focus of this Article) and criticizing the way the Court has translated those judgments into legal directives.

For my purposes, the starting point for making rules is the policy mix articulated in *Pickering* and its progeny. These cases rest on three premises: (1) The cost that justifies special limits on public employee speech is that speech can impede the efficient delivery of government services; (2) Speech on matters of public concern is especially valuable and may be worth the cost; (3) The government's interest as an employer is weak when the speech is only tangentially connected to the workplace. The Court translates these values into doctrine by taking a wide variety of circumstances into account to determine whether speech is on a matter of public concern, to assess the costs of the employee's speech, and to balance the value of the speech against those costs.

Moving to a rule-based regime requires a different methodology. In place of norms that oblige the judge to evaluate the facts on a case-by-case basis, a few readily ascertainable features that control outcomes need to be identified. The disadvantage of this method is that it will produce arbitrary distinctions. In any given case, a factor that the rule would exclude from consideration may be compelling. On the other hand, the benefit of rules is that they may achieve the goals of public employee speech law more fully than the current regime, with its carefully calibrated test. We should not flinch from bearing the costs of arbitrariness if the price exacted by

---

[293] McAuliffe v. Mayor of New England, 29 N.E. 517, 517-18 (Mass. 1892).

the alternative is higher. Moreover, a regime of rules would, without apology, draw distinctions based on the content of speech. So does the "public concern" test of current law. Though content restrictions are disfavored in First Amendment law,[294] public employment is a special context. On account of the government's distinctive and strong interest as an employer, "many of the most fundamental maxims of [the Supreme Court's] First Amendment jurisprudence cannot reasonably be applied to speech by government employees."[295]

My aim is not to insist that the proposals advanced here represent the only good approach to making rules for public employee speech. The policy choices reflected in the Supreme Court's cases are consistent with a range of rules, some of them more speech-protective than the ones I propose, and others less so. The main value of the discussion that follows may be in identifying recurrent fact patterns that can serve as starting points for making rules. Alternatives in either direction will become apparent in the course of the discussion. Be aware, too, that a far more detailed regime than what I offer here may be preferable. The one constraint that must be respected is that the directives chosen not require much inquiry into or evaluation of the facts,[296] as do the "motive" and "disruption" standards of current law.

1. Part of the Job. In *Pickering* and *Connick*, the Supreme Court emphasized that an aim of public employee speech law is to separate the employee's speech "as an employee" from his speech "as a citizen."[297] The plainest instance of speech "as an employee" is

---

[294] *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . ." (citing Cohen v. California, 403 U.S. 15, 24 (1971))); *see also* JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 225 (2d ed. 1996) (asserting that subject to qualifications, "there is a good deal of truth in the observation that content regulation is a cardinal sin against the First Amendment").

[295] Waters v. Churchill, 511 U.S. 661, 672 (1994) (plurality opinion); *see also* Rosenthal, *supra* note 18, at 567-71 (quoting *Waters* and claiming it is because public workplace is not marketplace of ideas).

[296] Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 300 (1981).

[297] Connick v. Myers, 461 U.S. 138, 147 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

speech that is closely connected to the employee's specific duties. Unsurprisingly, courts often reject free speech claims in this setting.[298] The core value behind the government's interest as an employer is that it be permitted to get its work done, dismissing employees who choose their own agendas rather than working toward the goals chosen by their supervisors. Thus, in *Barnard v. Jackson County*,[299] a legislative auditor was, as part of his job, supposed "to release reports and conclusions from audits directly to the legislature."[300] Instead, Barnard would first discuss the results of his investigations with the press. Consistent with a "part of the job" rule, the Eighth Circuit rejected his assertion that the First Amendment protected his "right to leak" information.[301] Similarly, *Roe v. City and County of San Francisco*[302] appropriately refused to protect a police officer's "inter-office transmittal of case citations and summaries," done in the course of his work for the purpose of assisting colleagues.[303]

A different fact pattern, but one that reflects the same underlying theme, is that of the teacher who refuses to comply with the school district's directives regarding the curriculum. A recent First Circuit case, *Conward v. Cambridge School Committee*,[304] held that "regulations restricting classroom speech are constitutional if, and to the extent that, they are reasonably related to legitimate pedagogical concerns."[305] *Conward* relies on the Supreme Court's line of cases beginning with *Tinker v. Des Moines Independent*

---

[298] *Contra* Perry v. McGinnis, 209 F.3d 597, 603-08 (6th Cir. 2000); Curtis v. Okla. City Pub. Sch., 147 F.3d 1200, 1212 (10th Cir. 1998).

[299] 43 F.3d 1218 (8th Cir. 1995).

[300] *Id.* at 1222.

[301] *Id.* at 1224.

[302] 109 F.3d 578, 585 (9th Cir. 1997).

[303] *Id.*; *see also* Buazard v. Meredith, 172 F.3d. 546, 548-49 (8th Cir. 1999) (indicating assistant chief of police prepared report on firing of two officers); Morris v. Crow, 142 F.3d 1379, 1382 (11th Cir. 1998) (determining that filing accident report is part of deputy sheriff's job, not protected speech); Day v. Johnson, 119 F.3d 650, 657 (8th Cir. 1997) (holding jail employee's comments to federal district judge overseeing jail under consent decree were not protected because he "spoke to the district court on orders from his superior and as the Department's public information officer, not as a concerned citizen"); Holland v. Rimmer, 25 F.3d 1251, 1255 (4th Cir. 1994) (holding plaintiff's discipline of subordinates was part of his job, not protected speech).

[304] 171 F.3d 12 (1st Cir. 1999).

[305] *Id.* at 23.

School District[306] that address the First Amendment rights of students. Perhaps *Tinker* does imply that teachers have free speech rights in the classroom; yet, for constitutional purposes, teachers are fundamentally different from students. The teacher is an employee teaching the curriculum as part of the job, and the government/employer's interest in having the job done properly is paramount. A more rule-like approach, assuming *Tinker* does not foreclose it, would be to simply establish as a rule that the school authorities may regulate teacher's speech in the classroom. Under such a rule, the free speech clause of the First Amendment would have no bearing on decisions about what is taught.[307]

2. Job-Related Speech: Wrongdoing, Incompetence, and Policy Disagreements. There is a big difference between speech that is part of the job and speech that bears on the job, such as criticism of superiors or co-workers. Not only is the latter a far broader category, but the rationale that one is being paid to do the employer's bidding is absent. In addition, the value of speech that bears on the job is likely to be high. *Pickering* stressed that the public benefits when teachers discuss issues pertaining to education,[308] and *Waters* broadened the point, noting that public employees are "often in the best position to know what ails the agencies for

---

[306] 393 U.S. 503 (1969). For a later First Circuit case that seems to retreat from *Conward* on this issue, see *Hennessy v. City of Melrose*, 194 F.3d 237, 245 (1st Cir. 1999).

[307] For example, in *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998) (en banc), the issue was whether a school board could act against a drama teacher who insisted that she had the right to stage plays of her choice. The court rejected the free speech claim on the ground that the teacher had no right to determine the curriculum. *Id.* at 369-71; *see also* Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 477 (2d Cir. 1999) (upholding school's ability to regulate content of letter written in capacity as teacher); Edwards v. California Univ. of Pa., 156 F.3d 488, 491-92 (3d Cir. 1998) (concluding that public university professor does not have First Amendment right to determine curriculum); Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724 (8th Cir. 1998) (upholding school board rule to prohibit profanity in classroom); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 522 (9th Cir. 1994) (holding teacher does not have right to discuss religious beliefs in school); *cf.* Feldman v. Ho, 171 F.3d 494, 497 (7th Cir. 1999) (regulating speech that was part of professor's job); Urofsky v. Gilmore, 167 F.3d 191, 196 (4th Cir. 1999) (upholding statute that forbids professors access to sexually explicit materials on computers owned by state); Berg v. Bruce, 112 F.3d 322, 328-29 (8th Cir. 1997) (rebuffing teacher who claimed that principal violated her academic freedom by visiting her class). *But cf.* Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 972 (9th Cir. 1996) (holding college's sexual harassment policy was unconstitutionally vague as applied to professor's classroom speech).

[308] Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968).

which they work; public debate may gain much from their informed opinions."[309] Since much of this speech is valuable to the public, a rule that all statements about the job are unprotected would undermine the value of free speech in the employment context.

The harder question is just how much job-related speech should be protected. One possibility is a rule that no statements of this kind may be punished. Besides its simplicity, the advantage of a broad rule is that it would powerfully vindicate the free speech value endorsed in *Pickering*, for it would shield a large number of statements relevant to self-government. The downside of a strong speech-protective rule is that it would invite chronic malcontents to poison the atmosphere of the public workplace, undermine respect for authority, and generally interfere with carrying out the duties of government. Arguably, a broad rule would accord too little weight to the government's interest in a well-functioning workplace.

One way to make more finely drawn distinctions with regard to job-related speech is to divide this body of cases into two subgroups: (a) accusations of illegality, and (b) other disagreements and criticisms.[310] In the lower courts, accusations of corruption and other illegal actions are more likely to receive First Amendment protection than other critical speech, and with good reason.[311] The public's need to know is especially compelling when officials are charged with violating the law. There may be enough speech about

---

[309] Waters v. Churchill, 511 U.S. 661, 674 (1994) (plurality opinion).

[310] *See* Dangler v. N.Y. City Off Track Betting Corp., 193 F.3d 130, 140 (2d Cir. 1999) ("The content of the employee's speech is an important consideration in determining the extent of the employer's burden to show likely disruption. An employee's charge of unlawful conduct is given far greater weight than is a complaint as to the fairness of internal office operations.").

[311] *See, e.g.*, Paradis v. Montrose Mem'l Hosp., 157 F.3d 815, 818 (10th Cir. 1998) (recognizing that public employees have First Amendment interest in speech that exposes government corruption and illegal acts because subject is matter of public concern); Fikes v. City of Daphne, 79 F.3d 1079, 1084 (11th Cir. 1996) (same); Wallace v. Tex. Tech Univ., 80 F.3d 1042, 1051 (5th Cir. 1996) (same); Barnard v. Jackson County, 43 F.3d 1218, 1225 (8th Cir. 1995) (same); O'Connor v. Steeves, 994 F.2d 905, 915 (1st Cir. 1993) (same); Gorman v. Robinson, 977 F.2d 350, 356 (7th Cir. 1992) (same); O'Donnell v. Yanchulis, 875 F.2d 1059, 1061 (3d Cir. 1989) (same); *see also* Rosenthal, *supra* note 18, at 552-53 & nn.117-18 (indicating that allegations of corruption or misconduct made by public employee often satisfy public concern test). *But see* Lighton v. Univ. of Utah, 209 F.3d 1213, 1225 (10th Cir. 2000) (holding that professor's allegations of misconduct at university was not matter of public concern but rather personal "vendetta" against co-worker). In a regime of rules, of course, the motive would be irrelevant and the speech would be protected.

policy disputes and the like without the contributions of government workers. Wrongdoing of officials, however, is more likely to be concealed from the public, and the need to expose it may justify a more speech-protective rule. Although an employee may do serious harm by a false accusation, a rule that protects the employee from termination or demotion does not preclude the availability of formal and informal sanctions. An employee who violates the norms of the group by telling lies may be shunned by others and encounter a host of personal and professional hardships. In an extreme case, the aggrieved official may bring a defamation suit against the liar.

A rule that protects public employee speech regarding official wrongdoing only would have significant costs, for speech that criticizes government policy or that accuses supervisors of incompetence receives no protection. In assessing these costs, however, keep in mind that "job-related" can be defined narrowly. For example, in *Pickering*, the letter about school finance that the teacher wrote to the newspaper had nothing to do with the teacher's daily work and need not be regarded as job-related speech for the purposes of this rule.[312] By contrast, teachers who criticize the way the principal runs the school would, under this proposal, have no constitutional protection against dismissal. Champions of free speech may find such a rule unduly harsh, and it certainly does not reflect a consensus view in the lower courts.[313] As a matter of policy, this fact pattern presents a hard case because how schools are run undeniably is a matter of public concern. The argument for excluding "internal policy speech" from First Amendment protection is that this speech likely causes problems in the workplace simply because it challenges the authority of the supervisor. In a given case, part

---

[312] *See infra* Part II.C.; *see also* Schauer, *supra* note 21, at 101 & n.82 (characterizing letter in *Pickering* as "off the job" speech).

[313] *Compare* Hennessy v. City of Melrose, 194 F.3d 237, 247 (1st Cir. 1999), Porter v. Dawson Educ. Serv. Coop., 150 F.3d 887, 895 (8th Cir. 1998), Wales v. Bd. of Educ., 120 F.3d 82, 85 (7th Cir. 1997), and Khuans v. Sch. Dist. No. 110, 123 F.3d 1010, 1018 (7th Cir. 1997) (finding against plaintiff in this fact pattern), *with* Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 223 (5th Cir. 1999), and Wytrwal v. Saco Sch. Bd., 70 F.3d 165, 173 (1st Cir. 1995) (ruling in plaintiff's favor). *Cf.* Lee v. Nicholl, 197 F.3d 1291, 1292-96 (10th Cir. 1999) (ruling in favor of highway employee who criticized his supervisors' performance). Teachers' criticisms of public schools are usually considered matters of public concern. Rosenthal, *supra* note 18, at 554 & nn.121-22.

of the cost for the benefits of "ruleness" is that some worthy plaintiffs must lose. A rule would helpfully clarify matters. While the proposed rule is not free of all ambiguity, it *is* a considerable improvement over the virtually inescapable ambiguity that is built into *Pickering-Connick*. Under the "internal policy speech" rule, the public would know that government employees may be punished for speech commenting on the job performance of superiors and colleagues, so the public would learn not to rely on employees for such commentary.

In any event, this Article's objective is not to defend any particular regime of rules, but only to suggest that there are plausible rules for public employee speech that neither abandon free speech nor ignore the government's interest as an employer. This Article does not pretend that this rule is somehow more logical than a broader (or a narrower) one. The main point is that we would be better off with a rule than without one.

3. Distinguishing Among Jobs. What must be avoided is a test that would require courts to evaluate the importance of a particular policy disagreement, or the seriousness of a particular charge of incompetence. On the other hand, it is consistent with a regime of rules to distinguish among jobs, giving some government employees stronger First Amendment protection than others. The cases suggest that two groups are especially disfavored in the lower court case law. First, policemen, firemen, and other members of paramilitary groups have difficulty winning retaliation cases because, in this context, courts often find that the cost of speech is likely to be especially high.[314] Even when the content of the speech is plainly on a matter of public concern, such as a charge of corruption, courts are persuaded by the argument that, in these organizations, respect for hierarchy and a high capacity for teamwork is vital to effective performance.[315] A typical statement of the judicial attitude is that "the government's strong interest in maintaining discipline and harmony . . . is particularly acute in the context of law enforcement."[316]

---

[314] *See, e.g.*, Oladeinde v. City of Birmingham, 230 F.3d 1275, 1293 (11th Cir. 2000).

[315] *Id.* (refusing to protect police officer's speech on matter of public concern).

[316] Dill v. City of Edmond, 155 F.3d 1193, 1203 (10th Cir. 1998); *see also* Lytle v. City of

The other group of officials who tend to lose are those who hold high rank in the agency. In *Rankin v. McPherson*,[317] a low-level employee was fired for expressing the hope that any future assassination attempt on the president would be successful.[318] She sued and won, partly because she was merely a clerk. "The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails."[319] Conversely, in the lower court cases, the high rank of an employee is a factor that counts against a free speech claim.[320] Rather than using rank as a factor that may carry the day in any given case, it would be better to make a rule that high level employees, including heads of departments and their deputies, cannot win free speech cases. An illustration of this would-be principle is supplied by *Lewis v. Cowen*,[321] in which the person in charge of the Connecticut state lottery claimed he was fired for refusing an order to present a change in the lottery "in a positive way."[322] Even though this was a matter of public concern, he lost his First Amendment challenge on account of the state's "interests in running an effective and efficient office."[323] These

---

Haysville, 138 F.3d 857, 867 (10th Cir. 1998) (stressing importance of trust, loyalty, and unity among law enforcement officers); Green v. Phila. Hous. Auth., 105 F.3d 882, 888-89 (3d Cir. 1997) (same); Tyler v. City of Mountain Home, 72 F.3d 568, 570 (8th Cir. 1995) (same); Thomas v. Whalen, 51 F.3d 1285, 1291 (6th Cir. 1995) (same); Gillum v. City of Kerrville, 3 F.3d 117, 120-21 (5th Cir. 1993) (same); Shands v. City of Kennett, 993 F.2d 1337, 1344-45 (8th Cir. 1993) (same). *But see* Gilbrook v. City of Westminster, 177 F.3d 839, 865-70 (9th Cir. 1999) (reasoning that discipline and uniformity within fire department were not affected by fire fighter's criticism of mayor and city council).

[317] 483 U.S. 378 (1987).

[318] *Id.* at 379-80.

[319] *Id.* at 390.

[320] *See, e.g.*, O'Donnell v. Barry, 148 F.3d 1126, 1135-36 (D.C. Cir. 1998) (noting high rank of employee counted as factor against plaintiff); McEvoy v. Spencer, 124 F.3d 92, 102-03 (2d Cir. 1997) (same); Lumpkin v. Brown, 109 F.3d 1498, 1501 (9th Cir. 1997) (same). *But see* Campbell v. Ark. Dep't of Corr., 155 F.3d 950, 956 (8th Cir. 1998) (concerning warden); Beckwith v. City of Daytona Beach Shores, 58 F.3d 1554, 1554 (11th Cir. 1995) (concerning fire chief).

[321] 165 F.3d 154 (2d Cir. 1999).

[322] *Id.* at 159.

[323] *Id.* at 165; *see also* Tedder v. Norman, 167 F.3d 1213, 1215 (8th Cir. 1999) (stating when deputy director of state law enforcement training academy gave deposition testimony that county law enforcement officer had used excessive force, demoting him was constitutionally appropriate since "the relationship between the director of a training facility and his or her deputy is one that . . . requires a high degree of loyalty and confidence" and testimony

interests, the court noted, "are given the utmost weight where a high-level subordinate insists on vocally and publicly criticizing the policies of his employer."[324] Similarly, in *Jackson v. Leighton*,[325] a medical school administrator, demoted for opposing his supervisor's plan to merge the school with another hospital, lost because of the "departmental upheaval" caused by his opposition.[326]

In this line of cases, courts draw on the Supreme Court's rule in the "patronage" cases that certain high-level employees may be chosen on political grounds, because elected officials should be able to count on the loyalty of their staffs.[327] The difference between the two lines of cases is that the patronage cases state a rule that applies to a very narrowly defined group, while the free speech cases apply the principle to a broader category of high-ranking employees. These officers could not necessarily be fired on political grounds. Nonetheless, their high rank is a factor weighing against protecting their speech.[328] Some cases extend this reasoning to speech by any

---

"substantially undermined" that relationship).

[324] Lewis v. Cohen, 165 F.3d at 165.

[325] 168 F.3d 903 (6th Cir. 1999).

[326] *Id.* at 912; *see also* Klunk v. County of St. Joseph, 170 F.3d 772, 776 (7th Cir. 1999) (holding whether statement would create problems in maintaining discipline is factor to consider); Curtis v. Okla. City Pub. Sch. Bd. of Educ., 147 F.3d 1200, 1214 (10th Cir. 1998) (relying on description of working relationship); Hankard v. Town of Avon, 126 F.3d 418, 422 (2d Cir. 1997) (noting "First Amendment's shield does not extend to speech . . . that interferes with the proper functioning of the workplace"); Weisbuch v. County of Los Angeles, 119 F.3d 778, 784 (9th Cir. 1997) (noting not necessary to wait until office disrupted before taking action); Orange v. District of Columbia, 59 F.3d 1267, 1273 (D.C. Cir. 1995) (holding government's interest in efficient and effective investigation outweighed whatever interest employee had in disclosing confidential information); Barnard v. Jackson County, 43 F.3d 1218, 1224-25 (8th Cir. 1995) (holding "interest in the efficient functioning of the legislature outweighs [employee's] personal interest disseminating audit and investigation results to the press prior to providing it to his employer").

[327] *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 712-13, 719-20 (1996) (discussing relationship between doctrines and recognizing *Pickering* is more case-by-case while patronage doctrine is more rule-like, but "it is inevitable that some case-by-case adjudication will be required even where political affiliation is the test the government imposed"); Branti v. Finkel, 445 U.S. 507 (1980) (holding employees are protected from discharge based solely on their political beliefs); Elrod v. Burns, 427 U.S. 347, 367 (1976); *see also* McEvoy v. Spencer, 124 F.3d 92, 99 n.4 (2d Cir. 1997) (discussing application of *Pickering* balancing test); Brett v. Jefferson County, 123 F.3d 1429, 1433 (11th Cir. 1997) (stating that *Pickering* test applies when failure to reappoint is due to negative campaigning and disparaging remarks).

[328] *See, e.g.*, Weisbuch v. County of Los Angeles, 119 F.3d 778, 784 (9th Cir. 1997) ("At Dr. Weisbuch's high level, his supervisor may need to be confident that he agrees with the

employee in a "confidential" relationship, such as an assistant city attorney or a teacher whose work requires close cooperation with others.[329] Under the current multi-factor test, this approach makes sense, because speech by an employee in a sensitive post can cause just as much disruption as speech by a high-level employee. In a regime of rules, however, one must draw lines that can be administered without too much factual inquiry or the broad discretion fostered by vaguely stated tests. Otherwise, the benefit of a rule-based system is lost. It should not be too hard to determine which employees are at the top of the hierarchy. Figuring out which of them hold "confidential" jobs is probably a far more fact-sensitive and discretionary task. It seems, then, that the confidential-employee test should be avoided for the sake of sending clear signals as to what is protected speech.

4. Unrelated to the Job. If there is to be a rule that a public employee can be fired for speech in his role "as an employee," a corollary is that his speech "as a citizen" ought to be protected by the First Amendment. Government should be forbidden to fire a public employee for his speech when the speech does not address job-related issues. Part of the reason is that the individual's interest in speaking is comparatively strong now. *Pickering* recognized that working for the government is not the sole constituent of a government employee's identity. Though the government as employer has strong interests in regulation of employee speech, government employees may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."[330] *Pickering* recognized that

---

supervisor's policy."); Lumpkin v. Brown, 109 F.3d 1498, 1501 (9th Cir. 1997) (adverting to political patronage issue without addressing it).

[329] *See, e.g.*, Porter v. Dawson Educ. Serv. Coop., 150 F.3d 887, 893-94 (8th Cir. 1998) (discussing teacher of handicapped students who complained about policy that allowed release of their names, was fired, sued for retaliation, and lost, in part because success of program depended upon plaintiff's "ability to cooperate and communicate with ADE [Arkansas Department of Education] officials"); Rendish v. City of Tacoma, 123 F.3d 1216, 1225 (9th Cir. 1997) (discussing assistant city attorney who sued city, was fired, sued for retaliation, and lost, in part because "loyalty and confidentiality are essential to the effective performance of the City Attorney's office"); Jefferson v. Ambroz, 90 F.3d 1291, 1297 (7th Cir. 1996) (discussing probation officer who criticized police and courts and lost, in part because "[l]oyalty and confidence are critical to a probation officer's position").

[330] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

when "the fact of employment is only tangentially and insubstantially involved in the subject matter of the [speech], . . . it is necessary to regard the teacher as the member of the general public he seeks to be."[331] The point is that, quite apart from whether speech contributes to discussion of matters of public concern, the First Amendment protects "individual liberty and the value of personal self-expression."[332] When the Supreme Court, in *United States v. National Treasury Employees Union (NTEU)*,[333] struck down a federal law that prohibited federal workers from accepting money for speeches and writings, the Court relied on the distinction between job-related and non-job-related speech.[334] While "Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large,"[335] the burden is heavier where, as in *NTEU*, the plaintiffs' "speeches and articles . . . were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment."[336]

Another reason for a rule protecting non-job-related speech is that the costs of the speech are likely to be comparatively low. Speech that is unconnected to the workplace is unlikely to directly challenge managerial authority, upset close working relationships, or interfere with relations with other agencies and businesses. In *Pickering*, the Supreme Court protected the letter Pickering wrote about school finance, noting that the statements were "in no way directed towards any person with whom [Pickering] would normally be in contact in the course of his daily work as a teacher."[337] Since "no question of maintaining either discipline by immediate superiors or harmony among coworkers [was] presented,"[338] *Rankin v. McPherson*,[339] where the speech was unrelated to the work but

---

[331] *Id.* at 574.

[332] JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 82 (2d ed. 1996).

[333] 513 U.S. 454 (1995).

[334] *Id.* at 465.

[335] *Id.*

[336] *Id.* at 466.

[337] Pickering v. Bd. of Educ., 391 U.S. 563, 569-70 (1968).

[338] *Id.* at 570.

[339] 483 U.S. 378 (1987).

occurred at work, is a somewhat harder case. After hearing news of the attempted assassination of President Reagan, the plaintiff, a clerk at the county constable's office, said to a co-worker, "if they go for him again, I hope they get him."[340] Though the value of such speech was virtually nil, the Supreme Court held that the speech was protected, noting that "the state interest element of the [balancing] test focuses on the effective functioning of the public employer's enterprise."[341] Though the statement was made at the workplace, there was "no evidence that it interfered with the office."[342]

The generally low costs of non-job-related speech may explain why this fact pattern seems to produce few adverse employment actions, if the scarcity of lower court cases dealing with this fact pattern may be taken as a guide.[343] The benefit of capturing the few situations where the government does have a good case for disruption may not be worth the cost of the fact-sensitive inquiry required by current law. Moreover, the rule should extend to cases like *Rankin*, where the statement was made at work. No doubt some "unrelated to the work" statements, made at work, will interfere with the functioning of a government office. But the premise of a regime of rules is that the costs of identifying them should not be borne if the benefits are small, as they seem to be in this context.

Governments in cases of speech-unrelated-to-the-work sometimes avoid the need to show disruption of the workplace by advancing some other reason for restricting speech. *Horstketter v. Department*

---

[340] *Id.* at 380-81.

[341] *Id.* at 388.

[342] *Id.* at 389.

[343] *See, e.g.*, Edwards v. City of Goldsboro, 178 F.3d 231, 246-49 (4th Cir. 1999) (upholding at pleading stage free speech of police officer who taught off-job course on gun safety); Cragg v. City of Osawatomie, 143 F.3d 1346-47 (10th Cir. 1998) (rebuffing city's effort to fire police chief for erecting yard sign in political campaign and taking view that city should have shown "specific evidence" to support its predictions of disruption in order to prevail); Thomas v. Whalen, 51 F.3d 1285, 1290 (6th Cir. 1995) (weighing state interest in efficiency where plaintiff opposed gun control legislation); Blum v. Schlegel, 18 F.3d 1005, 1012 (2d Cir. 1994) (finding criticism of national drug policy implicated matters of public concern, but plaintiff lost on other grounds); Holder v. City of Allentown, 987 F.2d 188, 195 (3d Cir. 1993) (evaluating speech in which employee wrote letter to editor criticizing residence requirement for city employees).

of Public Safety[344] upheld a rule forbidding state police to place political signs in their yards on the ground that public confidence in the impartiality of law enforcement was at stake.[345] *Shahar v. Bowers*[346] upheld a state attorney general's withdrawal of an offer of employment to a lesbian, in part because her First Amendment right to association was outweighed by the attorney general's interest in harmonious relations with the public.[347] For present purposes we may assume that these courts reached the correct balance of competing interests. My objection to *Horstketter* and *Shahar* is that, in the larger context of rights and remedies for retaliation, the pluses of allowing such balancing are not worth the minuses.

5. Priority Rules. A given fact pattern may fall under two or more of the rules suggested in the foregoing paragraphs. A critical task for a rule-based system is to develop "priority" rules for resolving conflicts among the substantive rules. Moving to a regime of rules does not mean that courts must treat all paramilitary cases, or all "unrelated to the work" cases, or all "high ranking officials" cases alike. Courts may draw finer distinctions in an effort to more nearly realize the goal of protecting valuable speech while respecting the government's interest as a employer.

Horstketter[348] illustrates how more than one substantive rule may be implicated by a fact pattern. In *Horstketter*, a police officer engaged in speech unrelated to his work.[349] The "paramilitary rule" would leave the speech unprotected, while the "unrelated to the work" rule would shield it. One cannot resolve the case without a rule for deciding which of the two features of *Horstketter* outranks the other.

In fact, there may be priority rules at work, if often implicitly, in the current case law. Many seeming inconsistencies disappear if one conceives of "speech about corruption is protected" as a rule that trumps the "high-ranking" employee" rule, the "paramilitary" rule,

---

[344] 159 F.3d 1265 (10th Cir. 1998).
[345] *Id.* at 1273-75.
[346] 114 F.3d 1097 (11th Cir. 1997) (en banc).
[347] *Id.* at 1110.
[348] Horstketter v. Dep't of Pub. Safety, 159 F.3d 1265 (10th Cir. 1998).
[349] *Id.* at 1269.

and the "speech that is part of the work" rule. The priority of corruption is made explicit in *Wallace v. Texas Tech University*,[350] where an assistant college basketball coach asserted that he was fired for giving advice to members of the team about financial assistance and race discrimination. His First Amendment claim failed because "he was speaking primarily in his role as employee" and, in the Fifth Circuit, "speech made in the role as employee is of public concern only in limited cases: those involving the report of corruption or wrongdoing to higher authorities."[351] Another case that illustrates the priority courts accord the rule that corruption speech is protected is *Schultea v. Wood*.[352] In *Schultea*, a police chief was demoted for writing a letter, as part of his job, about a councilman's possible criminal behavior.[353] Acknowledging that he spoke "as a law enforcement employee," the Fifth Circuit gave priority to the content of the letter and protected the speech.[354] Similarly, in *Campbell v. Arkansas Department of Correction*,[355] a prison warden who made charges of corruption in the operation of the prison, and who would ordinarily be thwarted by the court's reluctance to protect the speech of high-ranking employees, nevertheless prevailed.[356]

Though these cases may reflect a *de facto* priority rule, the argument here is not that all of the case law can be happily reconciled in this way, nor that any particular priority rules should be favored. The argument advanced in this Article is that rules should be favored over standards. Since this argument cannot tell

---

[350] 80 F.3d 1042 (5th Cir. 1996).

[351] *Id.* at 1050-51; *see also* Blair v. City of Pomona, 223 F.3d 1074, 1079 (9th Cir. 2000) ("Blair had the right under the First Amendment to inform his superiors of misconduct in the police department."); Feldman v. Phila. Hous. Auth., 43 F.3d 823, 830 (3d Cir. 1995) (according especially strong protection to speech exposing corruption as part of job).

[352] 27 F.3d 1112 (5th Cir. 1994).

[353] *Id.* at 1115.

[354] *Id.* at 1120; *see also* Chappel v. Montgomery County Fire Prot. Dist. No. 1, 131 F.3d 564, 578 (6th Cir. 1997) (finding firefighter's speech on "matters of public safety, and the gross mismanagement and misappropriation of public monies" was " 'near [the] zenith' " of public concern). *But see* Gonzalez v. City of Chicago, 239 F.3d 939, 942 (7th Cir. 2001) (stating even if speech concerns police misconduct, "[s]peech which is made in all respects as part of the employee's job duties is generally not the protected expression of the public employee").

[355] 155 F.3d 950 (8th Cir. 1998).

[356] *Id.* at 958-63.

courts which rules are best, it seems sufficient for present purposes to identify the priority issue without attempting to resolve it definitively.

IV. MODIFYING CONSTITUTIONAL TORT DOCTRINE FOR RETALIATION CASES

Introducing considerably more ruleness into public employee speech law would solve some of the problems caused by the intersection of free speech and constitutional tort law. Since governments and public employees would better understand their rights and duties, the fragility problem would be minimized. Fewer employees would likely cross the line into unprotected speech, and fewer employers would likely take action against speech that should be protected. Summary judgment on qualified immunity would more often be available to employers who do not violate free speech rules, and employees would more readily defeat qualified immunity claims asserted by employers who have violated those rules.

Other obstacles to an effective remedial system can only be removed by pursuing reforms on the § 1983 side of the case. The problem here is that the Supreme Court's methodology in interpreting the statute can interfere with achieving the aims of constitutional tort law. Those purposes are to vindicate constitutional rights and to deter constitutional violations.[357] While the Court generally takes a "one rule fits all rights" approach to such issues as causation and damages in § 1983 cases, I propose that the remedial doctrine for free speech retaliation law ought to be custom-designed to the end of deterring free speech violations and vindicating First Amendment rights. In particular, the Court's requirement of "but for" causation, borrowed from the tort law of physical injuries, is ill-suited to those ends, as is its doctrine that the sole purpose of damages is to compensate plaintiffs for injuries they can prove. Distinctive features of free speech litigation, as well as constitu-

---

[357] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305-10 (1986); Owen v. City of Independence, 445 U.S. 622, 650-54 (1980); Carey v. Piphus, 435 U.S. 247, 254-56 (1978). *See generally* John C. Jeffries, Jr., *Compensation for Constitutional Torts: The Significance of Fault*, 88 MICH. L. REV. 82, 84-96 (1989) (describing importance and role of compensation in § 1983 cases).

tional policy considerations, favor modification of both of these principles.[358]

The Supreme Court has never directly faced these sorts of adaptive-remedy issues. Conceiving of the remedial questions arising under § 1983 as matters of statutory interpretation, and viewing the statute as a general authorization of damages suits for constitutional violations, the Court has taken a monolithic approach to remedial issues, ignoring the possibility that the remedial doctrine may appropriately vary depending on the right at stake. Before examining the policy issues raised by causation and damages, one must question whether the Court's methodology can be faulted.

A. THE METHODOLOGY OF CONSTITUTIONAL TORT LAW

Before the 1960s, suits brought to recover damages for constitutional violations were rare. For most of that period, the courts recognized few constitutional rights that could give rise to such claims,[359] and, in any event, there was no suitable remedial vehicle by which to maintain such suits. The Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, provided in sweeping language that "[e]very person who, under color of any [state law] subjects, or causes to be subjected, any [person] to the deprivation of any [constitutional rights] shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Though it is generally agreed that "an action at law" signifies a suit for damages, the statute languished for ninety years as courts read "under color of" to mean that a remedy was available only when

---

[358] The value of free speech would be served by modifying other remedial doctrines, such as the scope of municipal liability and of official immunity. But those doctrines are based largely on systemic values that are quite independent of the free speech context. *See* Jeffries, *supra* note 235, at 54-59 (arguing that these doctrines' main aim seems to be to limit imposition of liability without fault). It is unlikely that the Court would create exceptions to the doctrine limiting municipal liability and allowing officials to escape paying damages on account of liability in order to favor plaintiffs in retaliation cases. By contrast, the vindication and deterrence goals are supposed to be aimed primarily at protecting the constitutional values at stake in constitutional tort cases.

[359] Louise Weinberg, *The* Monroe *Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 752.

state law provided no remedy for the officer's unconstitutional conduct.[360] The latter barrier to damage suits was broken down by the Court's ruling in *Monroe v. Pape*[361] that the "under color of" element is met when a person commits a constitutional violation while acting under the pretense of state authority, even if state law forbids the conduct.[362] In addition, *Monroe* focused attention on the availability of damages as a constitutional remedy, while the growth of constitutional rights in the 1960s and 1970s supplied the substantive grounds for damages suits. In the wake of these developments, 42 U.S.C. § 1983 suits to recover damages for constitutional torts became a significant part of the business of the federal courts.[363]

The point that bears emphasis for present purposes is the *statutory* pedigree of the damages remedy for constitutional violations committed by state officers.[364] Since *Monroe* the Court has treated issues related to this remedy as questions of statutory interpretation.[365] The broad language of § 1983 does not address the

---

[360] Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 279-87 (1965).

[361] 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978).

[362] *Id.* at 172. Scholars differ as to whether this ruling reflects the understanding of the framers of the statute. *Compare* David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1, 5-6 (arguing *Monroe* gets it right), *with* Eric H. Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 502 (1985) (arguing *Monroe* gets it wrong).

[363] *See* FALLON, JR. ET AL., *supra* note 118, at 1121-22.

[364] There is no federal statute generally authorizing suit against federal officers for constitutional violations. The injured person is obliged either to find a federal statute authorizing suit in the circumstances, or else resort to a suit directly implied from the Constitution, under the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* suits are rare, perhaps because of the many obstacles to bringing them. *See* Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989) (criticizing obstacles to *Bivens* suits).

[365] For example, the broad reading of "under color of" is limited by the plain language of the statute in that officers may be sued only if they claim authority under *state* law. Thus, officers asserting *federal* authority may not be sued under 42 U.S.C. § 1983, even if they commit constitutional violations. *See, e.g.*, Cabrera v. Martin, 973 F.2d 735, 742-44 (9th Cir. 1992) (denying claim under 42 U.S.C. § 1983 where defendants acted "under color of" federal, not state, law); Rosas v. Brooks, 826 F.2d 1004, 1007 (11th Cir. 1987) ("[W]here the challenged action by state employees is . . . application of federal rules, the federal involvement is so pervasive that the actions are taken under color of federal and not state law.").

Another example of the Court's methodology comes from the law of municipal liability.

many tort-like issues that come up in these suits on such matters as damages, causation, and immunity. The Court's methodology in dealing with many of these questions is to declare that the intent of the statute's framers governs the outcome, to impute to those framers the intent that the doctrine on issues not specifically addressed in the statute should be taken from the common law of torts, and to examine nineteenth century common law, and perhaps later developments as well.[366] A consequence of the Court's backward-looking approach to statutory interpretation is that, since the framers did not distinguish among rights, the rules must be the same across the universe of substantive constitutional claims. Having endorsed a largely historical methodology for interpreting 42 U.S.C. § 1983, the Court bypasses the notion that there may be good reasons for varying the analysis of the damages and causation issues based on the particular right at issue in the underlying litigation on the merits.

If the Court's 42 U.S.C. § 1983 rulings manifested an unflagging commitment to the historical approach to interpreting the statute, it might be futile to suggest a change in methodology. Whatever the merit of giving more weight to the statute's purposes, one could hardly expect a change of heart from Justices who were both firmly committed to history as the appropriate source of law in this area and able to mine that history for determinate answers. But the Court itself has fatally undermined the credibility of its backward-looking methodology by departing from that methodology when an important social goal called for a different answer than the one yielded by history. The plainest example comes from the law of qualified immunity. *Pierson v. Ray*[367] was the Court's first important case on official immunity after *Monroe*. Looking to history for an answer,[368] the Court held that executive officers, such as the

---

Seventeen years after *Monroe*, the Court revisited a subsidiary holding in the case. *Monroe* ruled that a city government could not be sued under 42 U.S.C. § 1983 because it is not a "person" within the meaning of the statute. 365 U.S. at 191. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court overruled that aspect of *Monroe*, explaining that the legislative history on which *Monroe* had relied ought to be interpreted differently. *Id.* at 688.

366 *See* Wells, *supra* note 209, at 158-59.

367 386 U.S. 547 (1967).

368 *Id.* at 553-58.

police, were immune from damages liability so long as they acted with "good faith and probable cause."[369] With the passage of time and the growth of litigation, the subjective "good faith" element of this test began to cause problems. Officers were too often obliged to submit to burdensome discovery and trial because the subjective prong very often required an inquiry into both direct and circumstantial evidence of the officer's mental state. The policies behind the official immunity doctrine of avoiding undue interference with official action and overcautiousness in its exercise were ill-served by the good faith rule in the Court's view. *Harlow v. Fitzgerald*[370] dealt with the problem by eliminating the good faith test. It bears emphasis that *Harlow* justified the move exclusively on policy grounds without a bow to history.[371]

Even when the Court purports to rely on nineteenth-century law, there is reason to doubt whether history is as significant as the Court would have us believe. Often, the Court seems to manipulate history to serve some contemporary policy goal. In *Owen v. City of Independence*,[372] the Court ruled that municipalities have no immunity and claimed that nineteenth-century tort law supported that conclusion.[373] Yet Justice Powell's dissent advanced persuasive arguments to the contrary.[374] The point of these examples is that any effort to answer constitutional tort questions by historical investigation is likely to fail, for "[t]he legislators who spoke and voted in 1871 did so against a background of political experience and constitutional interpretation vastly different from what we know today."[375] It is probably illusory to suppose that the modern Court could genuinely succeed at the task of determining those legislators' intent as to issues they never considered.

---

[369] *Id.* at 557.

[370] 457 U.S. 800 (1982).

[371] Wells, *supra* note 209, at 181-82.

[372] 445 U.S. 622 (1980).

[373] *Id.* at 641-42.

[374] *Id.* at 676-79 (Powell, J., dissenting); *see also* Jeffries, *supra* note 235, at 52 n.21 (noting Court's misleading and opportunistic use of history in § 1983 jurisprudence); Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretations to Common Law Rules*, 19 CONN. L. REV. 53, 62-64 (1986) (arguing *Owen* decision is "internally inconsistent").

[375] PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 970 (4th ed. 1998).

The lesson of *Harlow*, and perhaps of *Owen* and other cases, is that policy can override historical arguments in constitutional tort law and justify departures from the common law. But this lesson cannot be limited in a principled way to situations, like the one presented by *Harlow*, in which policy considerations favor the government's interest in avoiding overdeterrence. If it is acceptable to ignore history for the sake of protecting officials from the burdens of defending suits, then it should be equally acceptable to ignore history in order to better serve the vindication and deterrence goals of constitutional torts.

If, as I shall argue, the vindication of First Amendment rights and the deterrence of violations of free speech call for special rules on the remedial issues that arise in 42 U.S.C. § 1983 cases, then *Harlow* is a precedent for ignoring the "relentless historicity"[376] of many of the opinions. A better method for addressing constitutional tort issues is the one the Court adopted in *Harlow* for official immunity. Following the methodology of the official immunity cases, the Court should pay less attention to history and give more weight to the purposes of 42 U.S.C. § 1983 in dealing with causation and damages issues. The purposes of § 1983 include vindicating constitutional rights and deterring constitutional violations.[377] These goals may be served best by varying the rules on causation and damages depending on the substantive right at stake. The aim should be to arrive at a rule that best serves the goals of vindicating the *particular* constitutional right at issue and deterring this *particular* type of constitutional violation.

B. CAUSATION

With respect to causation, the challenge is to fashion a rule that is well-suited to the purposes of vindicating the right of free speech and deterring First Amendment violations by means of constitutional tort litigation. The Supreme Court's principal ruling on causation in § 1983 litigation came in *Mt. Healthy City School*

---

[376] *Id.*

[377] *See supra* note 357 and accompanying text (discussing aims of constitutional tort law).

District Board of Education v. Doyle,[378] a retaliation case. In *Mt. Healthy*, a public school teacher was fired after he had engaged in protected speech on issues of school governance,[379] but he had also argued with school personnel and insulted students.[380] This latter conduct provided a constitutionally permissible reason to fire Mr. Doyle, but the former did not. The causation issue was whether the school district's decision was motivated by the protected speech or the unprotected activities. The Court held that once the plaintiff established that protected speech was a "substantial factor" or "motivating factor" in the decision, the school district could prevail by showing that "it would have reached the same decision . . . even in the absence of the protected conduct."[381] This is a variant of the "but for" test used in the common law for physical injuries. Though it was adopted in a retaliation case, the rule was stated in general terms and lower courts have used it in all types of constitutional tort suits.[382]

Whatever the merit of this rule in other constitutional contexts, it is not a good rule for constitutional tort suits charging retaliation for the exercise of First Amendment rights.[383] Oddly, in forging the *Mt. Healthy* approach, the Court looked for analogies in the law of criminal procedure, not suits to recover damages after the fact.[384] It endorsed the "but for" test with little analysis of the aims of constitutional tort law and how best to achieve them, observing only that "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the [protected] conduct."[385] But this reasoning ignores the distinctive fragility of the right of free speech. A consequence of that fragility is that speech is inhibited whenever

---

[378] 429 U.S. 274 (1977).
[379] *Id.* at 282-84.
[380] *Id.* at 281-82.
[381] *Id.* at 287.
[382] *See* Wells, *supra* note 209, at 174 & n.101 (noting cases where courts have used this variant of "but for" test).
[383] For a detailed and comprehensive criticism of *Mt. Healthy*, arguing that the Court's causation rule is generally inappropriate for constitutional torts, see Michael Wells, *Three Arguments Against* Mt. Healthy*: Tort Theory, Constitutional Torts, and Freedom of Speech*, 51 MERCER L. REV. 583 (2000).
[384] *Mt. Healthy*, 429 U.S. at 286-87.
[385] *Id.* at 285-86.

there are enforcement problems. The point is not that plaintiffs should be allowed to dispense with causation altogether. Fairness to defendants requires that plaintiffs be obliged to meet a reasonable causation rule in order to recover damages. Yet *any* causation rule will be a serious practical obstacle for plaintiffs to overcome, simply because the only harms for which they can recover are badly motivated ones, and the social context in which these claims arise will often yield other plausible motives for dismissal or transfer. The employee who gets into trouble for protected speech often will have gotten into trouble for other reasons as well. Even if he is an otherwise exemplary worker, the resource needs of agencies are constantly changing. One need not be cynical to suspect that public employers may challenge causation for purely tactical reasons. In fact, causation issues arise routinely in retaliation cases.[386]

Coping with fragility requires devising a causation rule that is not unduly demanding. The problem with the "but for" test of *Mt. Healthy* is that it creates the risk that the defendant will prevail whenever some other reason is sufficient to justify the adverse employment action, even though the employer was actually motivated by the employee's protected speech. The implication of *Mt. Healthy* is that, if the jury believes the employer would have acted anyway, for some other reason, the government and its officials escape liability. Now consider the impact of *Mt. Healthy* on the vindication and deterrence goals of constitutional torts. Vindication is thwarted when the defendant avoids paying for the injury even though his impermissible motive is sufficient to bring about the plaintiff's dismissal. As for deterrence, when employers who in fact terminate employees for unconstitutional reasons escape liability on causation grounds, governments will not bear the full cost of their unconstitutional actions, and the result will be systematic underdeterrence of free speech violations.[387]

The common law itself offers two alternatives. One of them is plainly more speech-protective than *Mt. Healthy*, and the other has the merit of focusing the jury's attention on the question of whether

---

[386] *See supra* notes 183-86 (citing retaliation cases).

[387] *See* Wells, *supra* note 383, at 588-89 (discussing fairness and deterrence related to "but for" test).

the employer's primary motivation was retaliation or something else. Either alternative would be an improvement over *Mt. Healthy*. The first, like the "but for" test, is ordinarily applied in the physical injury context. Sometimes called the "substantial factor" test, it provides that where two causes operate at the same time, either of which is sufficient to cause the harm independently of the other, the jury may find each to be a cause of the injury.[388] Suppose, for example, that two fires of equal strength, each capable of destroying the plaintiff's farm, converge before reaching the property and then proceed to ravage it. A defendant who negligently caused one of the fires would be liable even though the "but for" test is not met. Professor Thomas Eaton has pointed out that "[h]olding the wrongdoer responsible in such situations provides greater deterrence of future misconduct, vindicates the plaintiff's rights, and compensates the plaintiff for the injuries."[389] He argues that the "substantial factor" test should replace the "but for" test across the whole realm of constitutional torts. Whether or not he is correct in that broad assertion, the distinctive fragility of free speech provides a powerful reason to *at least* use the "substantial factor" test (which, for accuracy's sake, probably ought to be called a "sufficient cause" test)[390] in the retaliation context.

Both the "but for" test and the "substantial factor" test are typically used in physical injury cases. Another common-law causation rule focuses on the defendant's motive for acting and may be better suited to the motivation issue in retaliation law. The common law of defamation allows a defense when the speaker acts for a legitimate reason related to the speaker's or the recipient's business or personal interests.[391] Even where such interests are present, however, the speaker's motive for speaking must be determined,[392] just as the government employer's motive for

---

[388] RESTATEMENT (SECOND) OF TORTS § 432 (1965).

[389] Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 454-55 (1982); *cf.* Wells, *supra* note 209, at 205-10 (arguing that constitutional values justify departing from common law cause-in-fact rules).

[390] *See* Wells, *supra* note 383, at 595-99 (discussing "a more plaintiff-friendly causation rule, like the sufficient cause or dominant purpose test").

[391] *See* RESTATEMENT (SECOND) OF TORTS §§ 594-595 (1977) (providing conditional privilege to protect publisher's interest or interest of recipient or third person).

[392] Wells, *supra* note 209, at 185.

terminating is an issue in retaliation cases. In defamation law, as in retaliation law, someone may act for two motives, one good and one bad, and the speaker should not have a defense when he makes defamatory remarks out of a desire to harm the plaintiff.[393] Rather than applying the "but for" test, the common-law solution in defamation is to instruct the jury to determine the dominant purpose of the defendant's publication of a defamatory statement.[394] In other words, a defendant who can show that he would have made the defamatory statement for a legitimate purpose will nevertheless lose if the jury is persuaded that his dominant purpose was simply to harm the plaintiff.

While borrowing the "dominant purpose" test for the motivation issue in retaliation law would not vindicate First Amendment rights and deter constitutional violations as well as the "substantial factor" rule, it would serve those goals better than the "but for" rule, if only because it would focus the jury's attention on the role played by the impermissible motive in producing the plaintiff's injury. Applying the "dominant purpose" test requires the jury to determine the main reason why the employer acted. By contrast, the critical issue for most juries in "but for" causation is probably whether the defendant has a sufficient reason for acting apart from the impermissible one. This latter inquiry diverts attention from the constitutional rights at stake in the litigation, while the "dominant purpose" test stresses the role of the unconstitutional motive. The case for imposing liability, thereby vindicating rights and deterring violations, is strong when the main reason the defendant acted is constitutionally impermissible, even if he can show it is more likely than not that he would have done the same thing anyway. Whatever causation doctrine may be appropriate for constitutional torts in general, the fragility of free speech rights warrants replacing "but for" causation

---

[393] Consider, for example, the co-worker who is asked for an evaluation of the plaintiff's job performance, and who provides unflattering commentary out of two motives: (1) a desire to help the person who made the inquiry; and (2) a desire to thwart the plaintiff's career.

[394] RESTATEMENT (SECOND) OF TORTS § 603 cmt. a (1977). Though I believe a dominant purpose test is workable, that view is not universally shared. For arguments to the contrary, see John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1266-68 (1970) (favoring view that unconstitutional motive is sufficient to invalidate official's act without any "dominant purpose" inquiry).

with the "dominant purpose" test, if not the "substantial factor" test, as the rule in public employee retaliation cases.

C. DAMAGES

Carey v. Piphus[395] applied to § 1983 suits the common-law principle that the purpose of tort damages is to compensate the plaintiff for the injury,[396] and the Court in *Memphis Community School District v. Stachura*[397] ruled that the compensation principle governs damage awards in First Amendment retaliation cases. Elsewhere, I have advanced arguments for a general reformation of the Court's damages doctrine.[398] Here, the focus will be on special rules for retaliation cases.

In *Carey*, the constitutional violation resulted from a failure to afford procedural due process.[399] Though the plaintiff in *Stachura* argued that a different damages doctrine would be appropriate for the First Amendment, the Court rejected "a two-tiered system of constitutional rights, with substantive rights afforded greater protection than 'mere' procedural safeguards."[400] There is, however, a better way to frame the problem of what damages rules the Court should select. Distinguishing among rights need not entail a judgment that one right deserves greater or lesser protection than another. Rather, effectively vindicating constitutional rights and deterring violations of them may call for a damages doctrine that varies from one right to another, because, as the Court recognized in *Carey*, different rights protect different interests and their violations produce different types of harms.[401]

In *Stachura*, a § 1983 retaliation suit brought by a teacher who had been suspended with pay for his teaching methods, the Court disapproved of an instruction that had allowed the jury to "place a

---

[395] 435 U.S. 247 (1978).
[396] *Id.* at 254-55.
[397] 477 U.S. 299 (1986).
[398] *See* Wells, *supra* note 209, at 214-22 (arguing that vindicating constitutional rights and deterring constitutional violations may justify departures from common-law rules on damages).
[399] 435 U.S. at 250-51.
[400] 477 U.S. at 309.
[401] 435 U.S. at 258.

money value on the 'rights' themselves by considering such factors as the particular right's 'importance . . . in our system of government,' its role in American history, and its 'significance . . . in the context of the activities' in which [the plaintiff] was engaged."[402] The problem with this instruction, the Court said, was that "when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts. . . . [and such damages] are designed to provide *compensation* for the injury caused to plaintiff by defendant's breach of duty."[403] The challenged instruction violated the compensation principle because its "factors focus, not on compensation for provable injury, but on the jury's subjective perception of the importance of constitutional rights as an abstract matter."[404]

One problem with *Stachura*'s damages doctrine is that the harm resulting from a First Amendment violation is not measured solely in monetary terms. Though the plaintiff in *Stachura* lost no salary, he was excluded from the classroom and his teaching methods were questioned.[405] No one would happily submit to this kind of treatment for exercising a precious constitutional right.[406] The Court in *Stachura* acknowledged that the harm may not be monetary only, noting that "compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation . . . , personal humiliation, and mental anguish and suffering."[407] But the loss that results from an infringement of free speech does not depend on the reactions of the person whose right is violated. Regardless whether the victim is highly sensitive or thick-skinned, violations of free speech rights *always and intrinsically* produce "actual losses,"[408] albeit intangible ones.

---

[402] 477 U.S. at 308.
[403] *Id.* at 306 (internal quotation marks and citation omitted).
[404] *Id.* at 308.
[405] *Id.*
[406] The point is not limited to the retaliation context. Someone who is denied the right to stage a demonstration suffers a loss even if the denial costs him no money.
[407] 477 U.S. at 307 (citation and internal quotation marks omitted).
[408] *Id.*

In the common law of torts, courts have faced a similar problem of damages that are by their nature difficult to prove. For example, the plaintiff in a libel case will often have difficulty proving that any particular person has refused to have dealings with him after reading the defamatory statement. The solution adopted by courts is to allow the jury to presume damages.[409] In *Stachura*, the plaintiff argued that the challenged instruction could be defended as a way of authorizing "a form of 'presumed' damages."[410] The Court rejected this argument, but did so without closing the door firmly on the notion of presumed damages for constitutional torts. Though "some form of presumed damages may possibly be appropriate" for harms that are "likely to have occurred but difficult to establish,"[411] the challenged instruction "did not serve this purpose but instead called on the jury to measure damages based on a subjective evaluation of the importance of particular constitutional values."[412] Presumed damages deserve a fair hearing, free of any association with the *Stachura* instruction that the Court found repugnant. Whatever may be the appropriate rule for constitutional torts in general, in free speech cases the intangible nature of the harm justifies a properly drafted presumed damages instruction. Apart from vindicating rights, damages also serve as a means of deterring constitutional violations. In *Carey*, the Court took a narrow view of deterrence, finding "no evidence that [Congress] meant to establish a deterrent more formidable than that inherent in the award of compensatory damages,"[413] and *Stachura* echoed this view.[414] If the Court's "statutory interpretation" methodology is misguided as suggested by this Article, the Court is free to rethink this view of deterrence with an eye toward how best to deter violations of specific constitutional rights. Notably, the Court's maxim implicitly assumes that all the harm falls on the plaintiff. But this is not so. A distinctive feature of free speech law casts

---

[409] *See* DAN DOBBS, THE LAW OF TORTS 1140, 1144 (2000). Note, however, that such damages are not always available and the rule "may be headed for extinction." *Id.* at 1189.

[410] 477 U.S. at 310.

[411] *Id.* at 311.

[412] *Id.*

[413] Carey v. Piphus, 435 U.S. 247, 256-57 (1978).

[414] 477 U.S. at 307, 310.

doubt on the notion that compensatory damages are an adequate deterrent. Recall that, in public employee retaliation law, the speaker is not the sole beneficiary of the right.[415] The public benefits as well, for since *Pickering* a central aim of protecting public employee speech has been to serve "[t]he public interest in having free and unhindered debate on matters of public importance."[416] It was because "the question whether a school system requires additional funds [was] a matter of legitimate public concern,"[417] and because "[t]eachers are, as a class, the members of the community most likely to have informed and definite opinions" on this topic, that "it [was] essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."[418]

Economically rational public employers can be expected to calculate the benefits to them of a dismissal, compare that with the probable cost of paying damages, and decide whether the benefits are worth the cost. The problem is that the *Carey/Stachura* doctrine, as applied to retaliation claims, sends a false signal as to the costs of a free speech violation. Calculating damages by considering solely the harm suffered by the plaintiff systematically undervalues the harm done by a retaliatory dismissal by ignoring the harm done to the public interest. The result will be underdeterrence of First Amendment violations. Some means needs to be presented to combat this flaw in the Court's current approach to damages. If it is too late to reconsider *Stachura*'s rejection of damages for the abstract value of First Amendment rights, another possibility is to allow presumed damages for purposes of deterrence, even if they are not appropriate for purposes of vindication.[419] Alternatively, the doctrine of punitive damages could be remolded to deal, not only with egregious behavior by officials, but also with situations where, as in retaliation law, the rules of compensatory

---

[415] *See supra* text accompanying notes 39-46.

[416] Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968).

[417] *Id.* at 571.

[418] *Id.* at 572.

[419] A key premise of my argument here is that the risk of "overdeterrence" of beneficial official action is addressed by the immunity doctrine. Officers are liable for damages only when they have violated clearly established rights. *See supra* text accompanying notes 208-10. Accordingly, it is appropriate to stress other goals of constitutional tort law in making rules on damages and other matters.

damages do not capture the full cost of the harm done by a constitutional violation.[420]

V. CONCLUSION

Taking the long view of legal development, both public employee speech and constitutional tort law are in their infancy. As they mature, changes are likely for both of them. If the Supreme Court remains committed to the aims it staked out for the two doctrines, the tendency over time will be toward convergence, for otherwise each will be thwarted by the other. The problem is that the two bodies of law, though supposedly quite distinct, are better viewed as parts of one whole. Just as there would be little point to a free speech right that has no remedy, so also the § 1983 remedy would have no value in the absence of rights to enforce. Accordingly, each body of law has too great an impact on the aims of the other to allow them to remain in separate doctrinal compartments forever.

Rather than remain a body of public employee speech law grounded wholly in its free speech origins, the substantive doctrine will have to take into account the remedial context in order to (a) effectively protect speech that contributes to the free exchange of information bearing on matters of public concern, (b) respect the rights of citizens who are public employees to exercise their right of free speech, and (c) insure that the government employer retains effective control of the workplace. In similar fashion, existing § 1983 law, particularly in its broad insistence on restrictive causation and damages rules, needs to become less monolithic and more closely keyed to the underlying substantive rights at stake in the litigation. Only by melding "substantive" public employee speech law and "remedial" § 1983 law can the Court realize the aims of each.

---

[420] I have developed an argument along these lines in an earlier article. *See* Wells, *supra* note 113; *see also* Ciraolo v. City of New York, 216 F.3d 236, 242 (2d Cir. 2000) (Calabresi, J., concurring) (arguing for punitive damages against municipalities, on deterrence grounds); *cf.* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 592-93 (1996) (Breyer, J., concurring) (discussing use of punitive damages to make up for failure of compensatory awards to fully account for losses caused by defendant's violation).