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The Nonpartisan Freedom of Expression of Public Employees

Governmental activities affect each of us in a myriad of ways. The government's role as employer may pale in comparison with the more glamorous activities of the government as national defender, law enforcer, and allocator of scarce resources. Yet the legal ramifications of public employment—where the public interest in efficient governmental operation often conflicts with the public employee's freedom—have a profound influence upon American society.¹

In 1968, the Supreme Court in Pickering v. Board of Education² formulated a test designed to balance these interests in defining the scope of a public employee's freedom of expression.³ In examining the nonpartisan free speech rights of civilian governmental workers,⁴

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¹ In 1975 there were approximately 2.9 million civilian employees of the federal government, as well as 12.1 million civilian state and local employees. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1976, at xvi. When compared with the 1975 employed civilian work force of 84.8 million, id. at xvi, it becomes apparent that about 18% of American workers are employed in the public sector. Thus, as was pointed out by Professor Emerson, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 563 (1971), any restrictions placed upon the free speech rights of such a large proportion of our work force should be a matter of grave concern.


³ Critics are dissatisfied both with Pickering's use of a balancing approach and with the Court's express refusal to articulate a specific standard for striking the balance required in the announced test. See the discussion of the Pickering test in note 25 infra.

⁴ "Nonpartisan speech," as used in this Note, includes all expression by public employees that does not invoke the prohibition against political expression and activities found in the Hatch Act, 5 U.S.C. §§ 1501-1508 (1976), and its equivalents at the state and local levels. This distinction is not always easy to draw. For example, in Alderman v. Philadelphia Hous. Auth., 496 F.2d 164 (3d Cir.), cert. denied, 419 U.S. 844 (1974), the defendant housing authority had circulated a memorandum prohibiting its employees from talking with tenants about a referendum dealing with tenant representation on the housing authority. Plaintiffs were summarily discharged from defendant's employment for refusing to sign the memorandum. The Third Circuit recognized that the defendant might have a legitimate interest in preventing political or partisan interference with the referendum, but it concluded that the memorandum unjustifiably restricted all speech on the subject and thus constituted an unconstitutional prior restraint upon the freedom of expression of the employees. 496 F.2d at 169-73. The court distinguished the Supreme Court decisions in Broadrick v. Oklahoma, 413 U.S. 601 (1973), and United States Civil Serv. Commn. v. National Assn. of Letter Carriers, 413 U.S. 548 (1973), which upheld the validity of the prohibition against political activity by public employees found in the Hatch Act and its Oklahoma equivalent, by stating that those cases, "properly viewed, carve out carefully circumscribed exceptions to the sweeping injunction of the First Amendment, exceptions allowing a legislature—Congress or state lawmakers—to inhibit only 'partisan political activity' and not all political 'discussion.'" 496 F.2d at 172 (emphasis original). For a persuasive argument that the Alderman decision should have been based upon an over-
this Note analyzes *Pickering* and the cases following it, focusing on the proper application of that case’s balancing test and on the roles fashioned for public employees by these cases.\(^5\)

I. *Pickering v. Board of Education*

Until recently, the courts viewed public employment as a privilege bestowed upon governmental workers conditioned upon their waiver of those constitutional rights deemed in conflict with public service. Since prospective public employees could avoid these restrictions by obtaining employment in the private sector, acceptance of the privilege of public employment was viewed as voluntary acquiescence in the incidental limitations on their constitutional rights.\(^6\)

Several cases decided prior to *Letter Carriers* and *Broadrick* drew a distinction between partisan and nonpartisan political activity similar to that developed in *Alderman*. See Mancuso v. Taft, 341 F. Supp. 574, 582-83 (D.R.I. 1972), aff'd., 476 F.2d 187 (1st Cir. 1973); Gray v. City of Toledo, 323 F. Supp. 1281, 1286-89 (N.D. Ohio 1971). A recent decision by the First Circuit sought to clarify the distinction between partisan and nonpartisan political activity. In *Magill v. Lynch*, 400 F. Supp. 84, 90-92 (D.R.I. 1975), rev'd., 560 F.2d 22 (1st Cir. 1977), cert. denied, 46 U.S.L.W. 3519 (U.S. Feb. 21, 1978), the district court had held that a Pawtucket, Rhode Island, city charter provision prohibiting city employees from taking part in political campaigns or running for any political office, whether partisan or nonpartisan, was unconstitutional. On appeal, the First Circuit, in an opinion by Chief Judge Coffin, held that the prohibition against public employees running for nonpartisan municipal office was constitutional under *Letter Carriers* and *Broadrick* because the political environment in Pawtucket had infused partisanship into the facially nonpartisan local election process, 560 F.2d at 28, and because the city "could reasonably fear the prospect of a subordinate running directly against his superior or running for a position that confers great power over his superior." 560 F.2d at 29. The First Circuit did remand the case to the district court for consideration of whether the city charter provision was unconstitutionally overbroad in prohibiting municipal employees from taking part in a "political campaign," 560 F.2d at 29 n.6, or from running for "any public office, whether city, state or federal," 560 F.2d at 29. With respect to the restriction on "political" campaigning, the court indicated that, if the term "political" were construed to mean only "partisan," no overbreadth problem would exist. 560 F.2d at 29 n.6.


6. The classic statement of this right-privilege distinction is found in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892), where Justice Holmes, then a member of the Supreme Judicial Court of Massachusetts, rejected the constitutional argument made by a policeman who had been fired for engaging in
Even before *Pickering*, however, the harshness of the right-privilege distinction came into disfavor with the courts.\(^7\)

In *Pickering*\(^8\) the Supreme Court removed any doubt about the demise of the right-privilege distinction as a justification for limiting the freedom of expression of public employees. In the process of invalidating the dismissal of a teacher who had been fired for writing a letter critical of the school board to a local newspaper,\(^9\) the Court

political activities. Justice Holmes stated that

"[t]he 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 right 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.


7. To ameliorate some of the harshness resulting from the strict right-privilege distinction, courts began to adopt the doctrine of unconstitutional conditions. The essential element of this doctrine is the notion that "whatever an express constitutional provision forbids the government to do directly it equally forbids the government to do indirectly." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968). Thus, although the government is not required to provide its citizens with a certain privilege such as public employment, it may not condition the grant of the privilege upon the surrender of an explicit constitutional right, such as freedom of speech. *Id.* See Frost & Frost Trucking Co. v. Railroad Comm'n., 271 U.S. 583, 594 (1926). An example of the increased acceptance of the unconstitutional conditions doctrine was provided by Keyishian v. Board of Regents, 385 U.S. 589 (1967), in which the Supreme Court quoted with approval language from the lower court opinion: "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." 385 U.S. at 605-06 (quoting 345 F.2d 236, 239 (2d Cir. 1965) ).


9. The letter criticized the board of education's handling of certain bond issue proposals and the board's later allocation of financial resources between the educational and athletic programs of the school. In a subsequent termination hearing held pursuant to Illinois law, the board charged that publication of the letter unjustifiably impugned the integrity of the board and school administration and that false statements in the letter had a disruptive effect upon the school. No evidence was introduced regarding the effect of the publication of the letter on either the community as a whole or on the school system in particular, and the board made no specific findings regarding these matters. The Supreme Court of Illinois rejected Pickering's
rejected the suggestion that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens" as a condition of employment. The Court, nonetheless, recognized that the government, as an employer, may have greater interests in regulating the speech of its employees than in regulating the speech of the citizenry in general. To determine when these interests are sufficient to restrict employee speech, the Court adopted an ad hoc balancing test to weigh the interest of the employee as a citizen to comment upon matters of public interest against the interest of the state as an employer to maintain the efficiency of public service performed through its employees.

Although the Court refused to announce a general standard for determining when the expression of the employee would be protected, it did indicate some of the factors that might be considered in balancing the competing interests. Relevant variables that weigh in favor of the state include its interest in removing incompetent employees, in maintaining discipline by immediate superiors, in preserving harmony among co-workers, in maintaining personal loyalty and confidence when necessary to a particular working relationship or employment position, in avoiding the general impairment of governmental operations, and in rebutting without undue difficulty the false statements of its employees. Factors that reflect the employee's and the public's interest in free expression and that thus counter the government's interest in restricting an employee's speech include the relationship of the expression to an issue of public concern, the degree to which the speech is made in a public context, claim that his letter was protected by the first and fourteenth amendments. Pickering v. Board of Educ., 36 Ill. 2d 568, 225 N.E.2d 1 (1967). The United States Supreme Court reversed, holding that under the applicable balancing test, see text at notes 11-25 infra, Pickering's freedom of speech had been violated. 391 U.S. 563 (1968).

10. 391 U.S. at 568.
11. 391 U.S. at 568.
12. 391 U.S. at 569. The Court believed that no general standard could be developed because of the enormous variety of factual situations in which critical statements by public employees might be deemed by their superiors to justify dismissal. 391 U.S. at 569.
13. See 391 U.S. at 573 n.5.
14. 391 U.S. at 570.
15. 391 U.S. at 570 n.3. The Court there stated that it is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.
16. See 391 U.S. at 568.
17. 391 U.S. at 572.
and the likelihood that the employee would have an informed and definite opinion on the subject of the speech.\(^\text{18}\) On the facts in \textit{Pickering}, the Court found that the interest of the school authorities in limiting Pickering's speech was not significantly greater than its interest in limiting similar expression by a member of the general public,\(^\text{19}\) and thus it determined that the speech did not justify his dismissal.

The inquiry does not necessarily end when the balance is found to favor the employee. Drawing a loose analogy between the award of libel damages and the termination of public employment,\(^\text{20}\) the Court in \textit{Pickering} suggested that, even where the employee is treated as a general citizen, proof of false statements critical of the public employer that were knowingly or recklessly made might provide an adequate basis for dismissal.\(^\text{21}\) Absent any false statements that meet this standard, the outcome of the balancing test determines whether termination of public employment because of an employee's speech is constitutionally permissible or whether, instead, the speech is constitutionally protected.\(^\text{22}\) Because a reading of the cases following \textit{Pickering} indicates that the knowing and reckless falsehood standard has received little judicial attention in the context of public employment, this Note will focus primarily on the balancing test announced in \textit{Pickering}.

In its treatment of the facts, the Court in \textit{Pickering} indicated that, once a discharged public employee has met the initial burden of establishing that he was fired because of his expression, the balancing test shifts the burden of proof to the state to show that the speech

\(^\text{18}\) 391 U.S. at 569-73.

\(^\text{19}\) 391 U.S. at 573.

\(^\text{20}\) The Court did note its "disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism." 391 U.S. at 574. Justice White, however, appeared to be willing to make the equation. Relying on Garrison v. Louisiana, 379 U.S. 64, 75 (1964), for the proposition that false statements knowingly or recklessly made do not enjoy constitutional protection, Justice White concluded that a public employee enjoys no constitutional protection from dismissal for such statements. 391 U.S. at 583-84 (concurring in part and dissenting in part).

\(^\text{21}\) 391 U.S. at 574. \textit{See Note, 59 Iowa L. Rev. 1256, supra} note 8, at 1263. The Court appeared to establish the reckless and knowing falsehood standard of \textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964), as the minimum standard for dismissal. Over the objection of Justice White, 391 U.S. at 584 (concurring in part and dissenting in part), the Court did not rule out the possibility that "a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment." 391 U.S. at 574 n.6.

\(^\text{22}\) The logic of \textit{Pickering} seems to dictate that the knowing and reckless falsehood standard apply only after the balancing test has been resolved in favor of the employee. \textit{See Note, 59 Iowa L. Rev. 1256, supra} note 8, at 1264.
had impeded the employee's performance or otherwise interfered with efficient operation of the government.\textsuperscript{23} Where the state has shown impairment of the governmental interest, the extent of that impairment is to be balanced against the employee's interest in making and the public's interest in hearing the expression. By limiting itself to a very general discussion of the balancing test, the Court in \textit{Pickering} left for future clarification two issues important to the application of the test. First, because Pickering's dismissal was based solely on the publication of his letter, the Court did not specify the degree of causation between the speech and the dismissal that the employee must establish to initiate the balancing test. Until it was recently settled by the Supreme Court,\textsuperscript{24} this question produced disagreement among the lower courts. More important, because the Court assigned no weights to the variables considered in balancing the state's interest against that of the employee, lower courts in subsequent cases have been forced to develop the contours of the balancing test.\textsuperscript{25}

\begin{itemize}
\item\textsuperscript{23} This showing would involve proof of interference with one or more governmental interests, such as those discussed in the text at notes 13-17 supra.
\item\textsuperscript{24} See text at notes 42-64 infra.
\item\textsuperscript{25} The ambiguity of the \textit{Pickering} test is troublesome because it forces public employees and their supervisors to guess how courts will balance in any given case, with a likely chilling effect upon the exercise of the freedom of expression by these employees. In constructing the \textit{Pickering} balancing test, the Court presumed that the letter had caused no actual disruption of the regular operation of the school, 391 U.S. at 572-73, leaving for courts in later cases the more difficult question of how to balance when disruptive speech is involved. See T. Emerson, supra note 1, at 581.
\end{itemize}

In a work predating \textit{Pickering}, Professor Emerson identified several major difficulties with an ad hoc balancing test for defining the freedom of expression. First, he noted that the test contains no hard core of doctrine to guide a court in reaching a decision in any particular case. Second, he argued that, if a court takes the test seriously, the factual determinations involved are so difficult and time-consuming that they are unsuitable for the judicial process. Third, he remarked that, since a court using the test is forced to base its decision on broad policy considerations usually deemed to be more appropriately determined by the legislature than the courts, the test gives almost conclusive weight to legislative judgment. Fourth, he asserted that the test gives no more protection to speech than would be provided by the due process clause. Finally, because no factual situation is definitely protected until the Supreme Court so decides, the test fails to provide notice and thus is not feasible from the standpoint of judicial administration. Emerson, \textit{Toward a General Theory of the First Amendment}, 72 Yale L.J. 877, 913-14 (1963), reprinted in T. Emerson, \textit{Toward a General Theory of the First Amendment} 53-56 (1966).

For the reasons noted above, Professor Emerson suggested that \textit{Pickering} could be better read as announcing a constitutional test based on whether a worker's expression was incompatible with his commitments as a public employee. T. Emerson, supra note 1, at 581. Another commentator has suggested that a better test would be simply whether a rational nexus existed between the offensive speech and the employment of the offender. Grossman, \textit{Public Employment and Free Speech: Can They Be Reconciled?}, 24 Ad. L. Rev. 109, 119 (1972).

Although the courts have neither adopted Emerson's reading of \textit{Pickering} nor abandoned the balancing test for a rational nexus approach, some courts, in determining the constitutionally protected status of offensive speech made by a public employee, have given great weight to the relationship between such speech and the em-
II. Nonpartisan Free Speech Cases Involving Public Employees

In the wake of Pickering, plaintiffs from all walks of public employment—teachers, policemen, firemen, lawyers, and social workers—have sought damages, reinstatement, or other equitable relief upon being discharged or otherwise penalized allegedly in employee's employment responsibilities. For example, in Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971) (alternative holding), the plaintiff class of firemen challenged the constitutionality of a city charter and ordinance provision restricting their political expression and activities. In holding the restrictions unconstitutional as applied to proscribing the display of political bumper stickers on firemen's automobiles, the court determined that the display of a political bumper sticker was so unrelated to the performance of a fireman's duties that under Pickering he should be treated as a member of the general public. So viewed, the infringement on political activity was unjustified because the city had shown no compelling state interest supporting the restrictions. See also Kliskila v. Nichols, 433 F.2d 745 (7th Cir. 1970); Filarowski v. Brown, 76 Mich. App. 666, 677, 257 N.W.2d 211, 217 (1977) ("[i]n plaintiff's criticism dealt with matters outside the scope of his activities within the department"). But cf. Connealy v. Walsh, 412 F. Supp. 146, 155 (W.D. Mo. 1976) (juvenile court social worker may be discharged for displaying partisan bumper sticker on personal automobile used in her work in contravention of a regulation because this partisan speech would inhibit the establishment and maintenance of trust in troubled persons and would give the appearance of political partisanship in the operation of a court).

For discussions about the utility of a balancing test in constitutional law, see generally the sources collected in W. Lockhart, Y. Kamisar & J. Choper, Constitutional Rights and Liberties 356-67 (4th ed. 1975).

26. See, e.g., Board of Trustees v. Spiegel, 549 F.2d 1161 (Wyo. 1976), discussed in note 67 infra.


32. To raise a claim under Pickering, a public employee must show that he was denied a "valuable governmental benefit" because of his constitutionally protected speech. Perry v. Sindermann, 408 U.S. 593, 597 (1972). Thus, the first amendment protection extends to nonrenewal of a public employee's contract even when he lacks a contractual or tenurial right to renewal, Perry, 408 U.S. at 597-98, and to all administrative sanctions, see, e.g., Adcock v. Board of Educ., 10 Cal. 3d 60, 513 P.2d 900, 109 Cal. Rptr. 676 (1973), including a transfer that, although involving no loss of pay or status, removed the public employee from a position "uniquely suited to her talents and desires." Bernasconi v. Temple Elementary School Dist. No. 3, 548 F.2d 857, 860 (9th Cir. 1977).

The Supreme Court has recently stated that, although a public employer may decline to renew an employee's contract for "no reason whatever," he may not deny renewal in retribution for the lawful exercise of constitutionally protected rights. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84 (1977). The first portion of this comment undercuts the proposition asserted in Lowy, Constitutional Limitations on the Dismissal of Public Employees, 43 Brooklyn L. Rev.,
violation of their free speech rights. In defense of its disciplinary action, the public employer has usually maintained that the sanction was proper because it was imposed for reasons unrelated to the speech, 33 or because the speech demonstrated some undesirable trait—such as incompetence, 34 insubordination, 35 or disloyalty 36—in the employee, or because the speech threatened or resulted in disruption of governmental operations. 37 The first defense attempts to bypass any balancing, since a sanction imposed for nonspeech reasons does not trigger the balancing test. The second defense, if uncritically accepted by the courts, may likewise skirt the balancing test. Thus, in order to protect the employee's freedom of expression adequately, the courts should require the government to prove that the speech actually demonstrated the allegedly undesirable trait. Furthermore, at least where insubordination or disloyalty is alleged, the balancing test should be employed to determine whether the employee's performance is sufficiently impeded to justify the sanction. The third defense—that the speech threatened or resulted in disruption of governmental operations—most clearly activates the balancing test. Because these three defenses are by no means mutually exclusive, the lower courts' task in determining and balancing the competing interests is often extremely difficult. 38

26-28 (1976), that dismissal or denial of employment on grounds that are arbitrary, capricious, or unrelated to job performance is in contravention of due process of law. In addition, see Bishop v. Wood, 426 U.S. 341 (1976), where the Court stated that, absent an allegation that the public employer had been motivated by a desire to punish the exercise of an employee's constitutionally protected rights, the Court would presume that the official action was regular. In so holding, the majority asserted that the federal court is not the appropriate forum for reviewing even erroneous official actions of this sort, 426 U.S. at 349-50, which might indicate that the courts need not entertain such claims alleging violation of due process.


34. See, e.g., Lefcourt v. Legal Aid Socy., 445 F.2d 1150, 1153 (2d Cir. 1971), discussed in text at notes 74-75 infra. Incompetency would include inability or unwillingness to perform required functions.

35. See, e.g., Phillips v. Adult Probation Dept., 491 F.2d 951 (9th Cir. 1974), discussed in text at notes 78-82 infra.


37. See, e.g., Smith v. United States, 502 F.2d 512 (5th Cir. 1974), discussed in text at notes 76-77 infra.

38. Some courts have avoided applying the Pickering balancing test by invalidating departmental regulations restricting the public employee's freedom of expression on due process overbreadth or vagueness grounds. See, e.g., Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971) (alternative holding). Several recent Supreme Court decisions seemingly restrict the usage of these rationales, however. In United States Civil Serv. Commn. v. National Assn. of Letter Carriers, 413 U.S. 548 (1973), the Court rejected charges of vagueness and overbreadth in upholding the constitutionality of the provision in § 9(a) of the Hatch Act, 5 U.S.C. § 7324(a)(2) (1976), that prohibits federal employees from taking "an active part in political management
Teachers have been involved in many of the post-Pickering cases dealing with nonpartisan free speech of public employees. In light of the unique considerations that arise in the context of teacher em-

or in political campaigns." In a companion case, Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court rejected vagueness and overbreadth challenges and upheld the constitutionality of Okla. Stat. tit. 74, § 818 (1971), a provision of the Oklahoma equivalent to the Hatch Act, Okla. Stat. tit. 74, §§ 801-839 (1971), that restricted the political activities of the state's employees. The Court in Broadrick stated that, "particularly where [political] conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615 (emphasis added). In Arnett v. Kennedy, 416 U.S. 134 (1974), the Supreme Court upheld the dismissal of an employee who had made a defamatory statement about a superior. In so doing, the Court held that the provision of the Lloyd-LaFollette Act allowing for the discharge of a federal civil service employee "for such cause as will promote the efficiency of the service," 5 U.S.C. § 7501(a) (1976), was not unconstitutionally vague, given the intent of Congress to lay down a general rule "in order to give myriad different federal employees performing widely disparate tasks a common standard of job protection." 416 U.S. at 159. Finally, in Parker v. Levy, 417 U.S. 733 (1974), an Army physician was court-martialed for, inter alia, making public statements that urged black enlisted men to refuse to go to Vietnam and that castigated the integrity of Special Forces personnel. In upholding his conviction, the Court held that Articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1970), dealing with prohibitions against "conduct unbecoming an officer and a gentleman," 10 U.S.C. § 933 (1970), and "disorders and neglects to the prejudice of good order and discipline," 10 U.S.C. § 934 (1970), were not unconstitutionally vague or overbroad. The Court found that the construction given these phrases by the military courts and by military customs and usages created adequate specificity for these provisions, taking into account the nature of the military as a specialized society with a "jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." 417 U.S. at 744 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)).

Nonetheless, several subsequent lower court decisions have invalidated departmental regulations on overbreadth or vagueness grounds. For example, in Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974), cert. denied, 419 U.S. 1121 (1975), the plaintiff police officers, who were also union officials, were disciplined for expressing employment grievances to the city's chief labor negotiator without first consulting superior officers, as required by a departmental rule. The Seventh Circuit held that the rule under which the plaintiffs were sanctioned—a prohibition against "conduct unbecoming a member and detrimental to the service"—was unconstitutionally vague on its face and therefore could not justify the discipline. 501 F.2d at 1190, 1193. The court distinguished Parker by stating that, although the phrase "conduct unbecoming an officer and a gentleman" under scrutiny in that case might have developed a well-settled meaning in the military context, that meaning was not transferable to a civilian police department regulation. 501 F.2d at 1191-92. The court also distinguished Arnett by stating that, unlike the provisions of the Lloyd-LaFollette Act, the police department rule in question was not designed to apply uniformly to a large and disparate group of employees, but rather was to govern only a homogeneous group of police department employees performing similar job functions. 501 F.2d at 1189-90. Alternatively, the Bence court held that, even if the rule were not unconstitutionally vague on its face, it was vague as applied to the plaintiffs because it did not provide notice that merely utilizing established labor-management communication channels fell within its coverage. 501 F.2d at 1193.

In a decision nearly contemporaneous to Bence v. Breier, a different panel of the Seventh Circuit took a dissimilar tack by relying on Broadrick. In Herzbrun v. Milwaukee County, 504 F.2d 1189 (7th Cir. 1974), the court refused to invalidate a seemingly unconstitutionally vague regulation because the plaintiff's "hard core" conduct came so clearly within the prohibitions of the regulation, however narrowly it
employment and the extensive treatment given to the first amendment rights of teachers by legal commentators, this Note focuses upon the freedom of expression accorded governmental employees other than teachers, although cases involving teachers that are relevant to the broader spectrum of public employment are examined. Also, because of the nuances involved in determining “state action,” no attempt will be made to define where public employment ends and private employment begins. Rather, once the requisite state action is assumed, the question becomes one of identifying the constitutional limits on discipline imposed in response to a public employee's expression.

might be construed, that the plaintiff lacked standing to challenge the rule for vagueness. The court also found plaintiff's overbreadth argument to be without merit, concluding that any overbreadth in the regulation could be cured on a case-by-case basis. The court also found plaintiff's overbreadth argument to be without merit, concluding that any overbreadth in the regulation could be cured on a case-by-case basis.

For an analysis of the constitutional doctrines competing for application in the Bence and Herzbrun cases, see 53 Texas L. Rev. 1298 (1975).

These special considerations include the distinction that is often drawn between speech made in class and that made outside of class, which goes beyond the less specific distinction between on-the-job and off-the-job speech that is applied to nonteachers. In addition, the interest of the state in protecting juveniles creates special concerns with the content of teachers' speech, at least at the elementary and high-school levels. See generally sources cited in note 40 infra.


A basic tenet of constitutional law is that "state action" is required to trigger the protections of the first amendment. For an excellent discussion of the considerations that came into play in determining whether state action exists, see Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum. L. Rev. 656 (1974).

Federal jurisdiction in cases involving sanctions against public employees for nonpartisan speech is usually based on 42 U.S.C. § 1983 (1970). A plaintiff alleging a § 1983 violation is generally not required to exhaust state administrative or judicial remedies prior to filing the federal court action. See, e.g., Hochman v. Board of Educ., 534 F.2d 1094, 1096-97 (3d Cir. 1976), and cases cited therein. However, some authority exists for the proposition that, under some circumstances, state administrative remedies must be exhausted before a federal court will entertain the claim. See cases collected in Moskowitz & Casagrande, supra note 40, at 695 n.198.

For a recent case that has recognized a cause of action directly under the four-
A. Causation in Employee Discharge Cases: The Employee's Initial Burden and the Employer's Initial Defense

In the typical post-Pickering case, the employee was required to establish that his speech was protected under the balancing test and had been a factor leading to the sanction he received. Until the recent Supreme Court decision in Mt. Healthy City School District Board of Education v. Doyle, however, disagreement existed regarding the nature of the causal relationship the employee was required to show between his protected speech and any discipline imposed by the public employer. Some courts held that wrongful discipline could be found only if protected expression was the sole reason for the sanction. Other courts considered the sanction unconstitutional even if it was only partially in response to protected expression. A few courts took the intermediate view that the sanction was unlawful only if the protected speech constituted the predominant reason for the employee's discharge. Courts adopting the most stringent position—that any discipline designed even partially to punish the protected exercise of a constitutional right is unlawful—maintained that a contrary holding would chill the exercise of constitutional rights by public employees and would allow a facially legitimate ground for termination to mask unconstitutional motives. On the other hand, courts favoring the sole or predominant motive test argued that a more stringent rule would allow a public employee to ensure the permanency of his employment simply by engaging in constitutionally protected behavior.

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42. 429 U.S. 274 (1977).
43. Abeyta v. Town of Taos, 499 F.2d 323, 328 (10th Cir. 1974); Parker v. Graves, 340 F. Supp. 586, 590 (N.D. Fla. 1972), aff'd, 479 F.2d 335 (5th Cir. 1973).
44. E.g., Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 573 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976); Roseman v. Indiana Univ. of Pa., 520 F.2d 1364, 1367 (3d Cir. 1975), cert. denied, 424 U.S. 921 (1976); Simard v. Board of Educ., 473 F.2d 988, 995 (2d Cir. 1973); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 210 (5th Cir. 1971); Board of Trustees v. Spiegel, 549 F.2d 1161, 1173-74 (Wyo. 1976).
46. See Mabey v. Reagan, 537 F.2d 1036, 1044 (9th Cir. 1976), in which the court emphasized the importance of careful examination of alleged first amendment violations because of their potential chilling effect on the exercise of constitutional rights by other employees.
In Mt. Healthy, the Supreme Court resolved the conflict over the nature of the causal relationship the employee must show between his protected speech and the sanction imposed upon him. In that case Doyle, an untenured teacher who had previously been involved in several disturbances, had made a telephone call to a local radio station in which he had conveyed information contained in a memorandum he had received from his principal regarding teacher dress and appearance. Shortly thereafter, the school board decided not to renew Doyle's employment contract. In response to his request for a statement of the reasons for its decision, the board cited the "notable lack of tact in handling professional matters" demonstrated by his telephone call to the radio station and by his use of obscene gestures to correct unruly students. In an unpublished opinion, the federal district court ordered that Doyle be reinstated with back pay because the telephone call was clearly protected expression under Pickering and had played a substantial part in the board's decision not to rehire him. The Sixth Circuit affirmed this holding in an unpublished opinion.

In a unanimous opinion by Justice Rehnquist, the Supreme Court vacated the judgment and rejected the rationale of the district court's opinion, which would hold unconstitutional any employment termination decision based in substantial part on protected behavior. This rule, according to Justice Rehnquist, would require reinstatement in cases where the public employment decisionmaker would have dismissed the employee even if the constitutionally protected incident had not occurred, and thus it could place an employee who engages in a constitutionally protected activity in a better position than one who does not. The Court then stated that the proper causation test in an employee discharge case first places the burden of proof upon the employee to show that his expression was constitutionally protected and was a substantial or "motivating factor" in

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49. The trial court found that Doyle, who happened to be the past president and a member of the executive committee of the "Teacher's Association," had been involved in an altercation with another teacher, had argued with employees of the school cafeteria over the amount of spaghetti that they had served him, and had referred to students, in connection with a disciplinary complaint, as "sons of bitches." 429 U.S. at 281-82.
50. 429 U.S. at 282-83. The school board apparently did not specifically rely on the other instances of misconduct, see note 49 supra, to justify Doyle's dismissal.
52. The Court defined "motivating factor" by citing its contemporaneous decision in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). 429 U.S. at 287 n.2. In Arlington Heights, the Court refused to define that term as the "sole," "dominant," or "primary" factor leading to official action. 429 U.S. at 265. Rather, the Court in that case simply stated that determining
the public employer's disciplinary decision. The second stage of the test, adopted to avoid what the Court viewed as bestowing an unfair benefit upon employees who engage in protected activities, expands the causation analysis so that the employee's initial showing does not terminate the inquiry. Rather, at that point the burden merely shifts to the employer to prove that it would have reached the same decision regarding the worker's continued employment in the absence of the constitutionally protected behavior. In effect, the Court adopted the district court's "substantial factor" rule as a threshold test, to be followed by a "but for" causation analysis.

The causation test adopted in *Mt. Healthy* seems fair from the standpoint of the discharged public employee, because it places him in the same position vis-à-vis the employer that he would have occupied had no protected speech been involved. The *Mt. Healthy* test appears less acceptable, however, when its overall impact is scrutinized. First, the Court in *Mt. Healthy* did not adequately recognize that the causation test could have a chilling effect on the freedom of expression of Doyle's co-workers, who, because they might not understand the nuances of the test, could view the result in *Mt. Healthy* whether an unconstitutional purpose, which in *Arlington Heights* was alleged ini-

vidious racial discrimination, was a motivating factor in the government's action requires a "sensitive inquiry into such circumstances and direct evidence of intent as may be available," such as the impact of the action, the historical background of the decision, departures from normal procedural or substantive policy, and legislative and administrative history. 429 U.S. at 266. For a discussion of recent Supreme Court cases adopting a similar test for proving racial discrimination in violation of the equal protection clause, see *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh,* 12 Harv. C.R.-C.L. L. Rev. 725 (1977).

In employee discharge cases after *Mt. Healthy*, factors indicating improper motivation for discharge might include the pretextual nature of the unprotected bases for the action and the discriminatory application of rules. Cf. *Mabey v. Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976) (pre-*Mt. Healthy* decision noting these factors as indicating improper motivation).

53. 429 U.S. at 287.

54. 537 F.2d at 1036, 1045 (9th Cir. 1976) (pre-*Mt. Healthy* decision noting these factors as indicating improper motivation).

55. Of course, such employees might not appreciate the nuances of the *Pickering*
as explicit judicial recognition that the government can punish employees because they have engaged in constitutionally protected expression. More important, the Court apparently failed to recognize that it is the state’s attempt to punish constitutionally protected behavior, not the employee’s exercise of a constitutional right, that places the worker in a better position under the district court’s test. Under the test adopted in *Mt. Healthy*, the state will often have nothing to lose by considering the employee’s speech in its decision to terminate employment. If the employee successfully challenges the sanction—and probably few employees do litigate their dismissals—the state may show at trial that it would have reached the same decision in the absence of the protected speech. Under the analysis adopted by the lower court in *Mt. Healthy*, a public employer is free to treat an employee who engages in constitutionally protected activities as it would any other employee, but it could not allow such employee behavior to motivate disciplinary action. Thus, unlike the Supreme Court’s two-stage test, the lower court’s test would deter the public employer from ever discharging an employee for constitutionally protected activity.

One difficulty with this deterrence analysis is that it assumes that the public employer can differentiate between protected and unprotected speech, a determination requiring the application of the *Pickering* balancing test. In addition, it is perhaps unreasonable to require the employer to make the reasoned judgments called for by *Pickering* in the face of a dramatic and perhaps abrasive incident. 60 This shortcoming in rational decisionmaking, which is not addressed by the *Mt. Healthy* test, can be remedied, however—employees would be better protected if the employment termination decision were turned over to an unbiased official or committee. 67

The application of the *Mt. Healthy* test raises the further danger that the protection offered by *Pickering* will be diluted if, once the employee has shown that his dismissal was due in substantial part to his protected speech, the public employer is allowed to offer fictitious though facially permissible grounds for the discharge. 58 To

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57. Cf. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) (a criminal defendant charged by the judge at the end of his trial with contempt because of his slanderous attacks upon that judge is entitled to a public trial on those charges before another judge, since “[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication”).
58. See *Muir v. County Council*, 393 F. Supp. 915, 933 (D. Del. 1975), a pre-*Mt. Healthy* case in which the court stated that [once the *Pickering* balance is struck, the government may not demonstrably retaliate against the employee for the exercise of his right to free speech or associ-
avoid this unconstitutional result, courts should carefully scrutinize the evidence offered by the employer to prove that the employee would have been dismissed even in the absence of the constitutionally protected activity. The recent case of *Aumiller v. University of Delaware*\(^9\) illustrates the careful judicial inquiry that should be required under *Mt. Healthy*. After determining that the university's decision not to renew Aumiller's employment contract was based solely on his protected statements about homosexuality,\(^60\) the court went on to consider the university's contention that it would not have renewed the contract even in the absence of the protected speech.\(^61\) In finding the university's claim unpersuasive, the court rejected as weak and speculative the university's evidence that Aumiller's position would not have been funded for budgetary reasons or that, assuming appropriate funding, he would have been no more than a nonpreferred applicant because of the university's need to conduct an affirmative action search before filling the position.\(^62\) Noting that "neither of these reasons was ever suggested throughout the entire grievance proceeding,"\(^63\) the court was understandably skeptical of the employer's attempt to rely on *Mt. Healthy* to justify the nonrenewal.\(^64\)

**B. The Pickering Balancing Test in Operation**

Although *Mt. Healthy* has clarified the causation issue, courts applying the *Pickering* balancing test still must make a case-by-case resolution of the relative weight to be assigned various governmental and free speech interests. This section critically examines some of the competing interests that have attracted judicial attention in employee discipline cases. Categorization of these interests is difficult, however, and courts should guard against giving improper emphasis to any single governmental interest mentioned in the *Pickering* opinion.

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\(^9\) The record in *Aumiller* indicates that at least one university administrator was aware of the potential constitutional ramifications of the decision not to renew and urged that a facially valid justification—such as budgetary constraints—be advanced for the action. 434 F. Supp. at 1285.
With a few exceptions, the courts have read *Pickering* to require that, before sanctions can constitutionally be imposed under the balancing test, the public employer must prove that the employee's expression either caused or will cause some actual impairment of a governmental interest. This requirement operates as a presumption that the employee's speech has value and thus cannot be suppressed absent some actual harm to the government. Some courts have strengthened this presumption by utilizing a more stringent constitutional standard under which the speech-based discipline cannot stand unless the expression materially and substantially

65. Some courts have upheld employee discharges without any showing that actual impairment of the governmental interest resulted from the employee's expression. See Note, 8 GA. L. REV. 900, supra note 8, at 903-04, 906-07, 910-17; Note, 59 IOWA L. REV. 1256, supra note 8, at 1265-68, 1272-76, 1279-80. This result is probably justified where a showing is made that the employee's speech threatens violent disruption of governmental operations. See Birdwell v. Hazelwood School Dist., 491 F.2d 490 (8th Cir. 1974), discussed in Note, 59 IOWA L. REV. 1256, supra note 8, at 1266. It has been suggested that, absent proof that a governmental interest has been impaired, courts have used a "clear and present danger of disruption" standard to determine whether public employee expression may be restricted. See id. at 1266-68. See also Fisher v. Walker, 464 F.2d 1147, 1159 (10th Cir. 1972) (Doyle, J., dissenting).

Occasionally courts have avoided finding actual impairment by concluding that the content of the employee's expression ipso facto interferes with the operations of the governmental employer. See, e.g., Simard v. Board of Educ., 473 F.2d 988, 996 (2d Cir. 1973) (alternative holding), in which the court held that, where clearly insubordinate remarks by an employee had "manifestly threatened significant working relationships vital to the administration of the school," no evidence regarding any resulting impairment of governmental operations need be introduced at the dismissal hearing.

66. A showing of actual detrimental impact might not be required if the statements were knowingly or recklessly false. See notes 20-21 supra and accompanying text. Absent such statements most courts require a showing of actual impairment of governmental interests to justify discipline. See, e.g., Tygrett v. Washington, 543 F.2d 840, 845-50 (D.C. Cir. 1974) (summary judgment for employer held inappropriate because the judgment lacked a judicial determination that the plaintiff policeman's statement that he would violate departmental rules if a police labor dispute was not resolved detrimentally affected the efficiency of the officer or the police force in rendering service to the community); Holodnak v. Avco Corp., 514 F.2d 285, 290 (2d Cir.), cert. denied, 423 U.S. 892 (1975) (employee's speech could not justify dismissal because it had not interfered with production at defendant's plant); Dendor v. Board of Fire & Police Commrs., 11 Ill. App. 3d 582, 588-90, 298 N.E.2d 316, 321-22 (1973) (fireman's statement before village trustees in public meeting criticizing his superior held protected because reviewing board made no finding of fact that the expression had an adverse effect on the fire department); In re Gioglio, 104 N.J. Super. 88, 98-101, 248 A.2d 570, 575-76 (1968) (policeman's critical assessment of the police department in newspaper article held protected because no showing was made that the publication of the article impaired or disrupted the efficiency of the department); Chalk Appeal, 441 Pa. 376, 383-85, 272 A.2d 457, 460-61 (1971) (public assistance caseworker's public statements to welfare recipients urging them to pressure their caseworkers and demand their rights held protected because no evidence had been produced showing any harmful effects of the speech); Note, 8 GA. L. REV. 900, supra note 8, at 903-04, 906-07, 910-17; Note, 59 IOWA L. REV. 1256, supra note 8, at 1265-68, 1272-76, 1279-80.
tially impaired the governmental interest. Of course, a finding of “actual”—or even “material and substantial”—impairment does not end the inquiry under Pickering. The balancing process requires the trier of fact not only to determine the existence and extent of any harm to the governmental interest resulting from the disciplined

67. See Mabey v. Reagan, 537 F.2d 1036, 1047-50 (9th Cir. 1976) (college faculty member’s expression before academic senate can justify dismissal only if it substantially and materially disrupted the meeting and his subsequent relations with the administration and faculty); Smith v. United States, 502 F.2d 512, 518 (5th Cir. 1974) (clinical psychologist employed at a Veterans Administration hospital may be discharged for wearing a “peace pin” on the job, because in this peculiar therapeutic environment this form of symbolic speech presented a material and substantial interference with the performance of his duties); Smith v. Losee, 485 F.2d 334, 339 (10th Cir. 1973) (en banc) (if professor shows he was discharged for his exercise of constitutional rights, the state assumes the burden of proving that his acts materially and substantially interfered with the discipline required in the school’s operation); Los Angeles Teachers Union v. Los Angeles City Bd. of Educ., 71 Cal. 2d 551, 563, 455 P.2d 827, 835, 78 Cal. Rptr. 723, 731 (1969) (teachers could circulate petition relating to the financing of public education during their duty-free lunch periods because school officials had “failed to demonstrate the existence of ‘facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities’”) (emphasis original) (quoting Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 514 (1969)); Board of Trustees v. Spiegel, 549 F.2d 1161, 1176 (Wyo. 1976) (teacher may not be discharged for statements published in connection with union activities unless such expression “substantially interfered with the requirements and discipline in the operation of the school”). Cf. Battle v. Mulholland, 439 F.2d 321, 324-25 (5th Cir. 1971) (if a black policeman could show that he had been discharged or forced to resign because of the exercise of his constitutional right to allow two white female antipoverty workers to board at his home, the burden would then rest on the public employer to show that this conduct would materially and substantially impair his usefulness as a police officer). See also Abbott v. Thetford, 529 F.2d 695 (5th Cir.), revd. en banc, 534 F.2d 1101 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977), in which both the panel majority opinion and dissenting opinion would have required a finding of material and substantial interference. The Abbott case dealt in part with whether the filing of a legal action by a public employee against his employer is a form of expression. The case did not satisfactorily resolve the matter, however, because the panel dissenting opinion, which was adopted per curiam as the en banc opinion, raised more questions than it answered on this issue.

employee's speech, but also to weigh that impairment against the worker's and the public's interest in the speech.68

1. Incompetency and Work Philosophy

The courts have occasionally applied the Pickering balancing approach where the employee's expression evidences personal characteristics that either suggest incompetence or indicate a willingness to act contrary to a required work philosophy.69 In such cases, the speech does not disrupt the efficient functioning of the government so much as it calls into question the employee's qualifications for his position. Magill v. Board of Regents70 provides an example of employee speech held to indicate incompetence. In that case, a university professor alleged that he had been denied tenure as a result of his constitutionally protected expression. In holding that no constitutional violation had occurred, the Fifth Circuit upheld the university's determination that, since the professor had made false statements71 when he easily could have ascertained the truth, he had demonstrated that he lacked the character and intellectual responsibility required of a tenured professor.72 This notion that competency includes personal character and integrity would also appear

68. For a discussion of balancing where both the factors weighing in favor of the employee and those weighing in favor of the government are significant, see text at notes 102-19 infra.

69. Although some courts have applied Pickering to speech that demonstrates employee incompetence, the Court's language does not compel application of a balancing approach in such a case. The Court noted that the case before it did not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal. 391 U.S. at 573 n.5.

By treating an employee's speech as merely evidence of incompetence, an employer might be able to avoid the Pickering test and discharge an employee for incompetence or, for that matter, for no reason at all. Although normally such a dismissal would be permissible, see note 32 supra, the courts should carefully scrutinize the employer's actions in such a case to ensure that the protection granted employee speech by Pickering has not been circumvented. See text following note 73 infra.

70. 541 F.2d 1073 (5th Cir. 1976).

71. As noted earlier, Pickering held that false statements that resulted in no impairment of the governmental interest were to be measured by the New York Times Co. v. Sullivan libel test. See notes 21-22 supra and accompanying text; Arnett v. Kennedy, 416 U.S. 134, 162 (1974). The court in Magill did not hold that Magill's speech violated this knowing or reckless falsehood standard.

Several cases following Pickering have overturned an employee dismissal because his false statements neither harmed the government nor were libelous. See, e.g., Hanneman v. Breier, 528 F.2d 750 (7th Cir. 1976); Donahue v. Stauton, 471 F.2d 475 (7th Cir. 1972); cert. denied, 410 U.S. 955 (1973); Tepedino v. Dumpson, 24 N.Y.2d 705, 249 N.E.2d 751, 301 N.Y.S.2d 967 (1969).

72. 541 F.2d at 1085.
to be applicable to other public employees whose positions require public trust and confidence.\textsuperscript{73}

The analysis employed in \textit{Magill} is open to abuse, since under it the defendant public employer might assert—and the court might uncritically accept—an argument based on incompetency when the actual reason for discharge violated the dismissed employee’s first amendment rights under the \textit{Pickering} balancing test. To avoid weakening the protection afforded by the \textit{Pickering} balance, courts should conclude that an employee’s speech demonstrates incompetency only upon a clear showing both that the expression evidences a particular attribute and that the attribute conflicts with the requirements of the employee’s position.

It appears that some courts have found that certain positions held by public employees require them to maintain a work philosophy in accord with job requirements, regardless of what their personal philosophy might be. In these circumstances, employee expression indicating a willingness to act contrary to a justified work philosophy might demonstrate the inability to carry out job responsibilities. For example, in \textit{Lefcourt v. Legal Aid Society},\textsuperscript{74} a legal aid criminal defense attorney was discharged after making a statement to the effect that even if a client of the legal aid society were guilty, the society should eschew plea bargaining and take the case to trial on the chance that it might win. In upholding the attorney’s dismissal, the Second Circuit found that Lefcourt’s statement provided sufficient grounds for the society to conclude that he was unable and unwilling to implement various society policies and that “he was not representing and would not represent the best interests of [the society’s] clients.”\textsuperscript{75}

Adherence to a justified work philosophy is especially critical when the employee commonly deals with a sensitive clientele. In this situation, the worker’s failure to adhere to the philosophy might impede the performance of his duties, even if it does not indicate an unwillingness to carry out the tasks assigned to him. For example, in \textit{Smith v. United States},\textsuperscript{76} the Fifth Circuit affirmed a summary judgment that a clinical psychologist employed by a Veterans Administration hospital to provide therapeutic treatment for veterans in need of emotional rehabilitation could be discharged for wearing a “peace pin,” because in this peculiar environment this symbolic

\textsuperscript{73} That the weight accorded by the \textit{Pickering} balancing test to statements can vary depending upon the employment position of the speaker is also relevant to the protection given disclosures of governmental improprieties. \textit{See} text at notes 116-19 infra.

\textsuperscript{74} 445 F.2d 1150 (2d Cir. 1971).
\textsuperscript{75} 445 F.2d at 1153.
\textsuperscript{76} 502 F.2d 512 (5th Cir. 1974).
speech "presented a material and substantial interference with the performance of [his] duties." 

The rationale employed in Smith might have justified the suspension in Phillips v. Adult Probation Department. In that case, a deputy probation officer had placed a poster on his office wall that favorably depicted H. Rap Brown, Angela Davis, and Eldridge Cleaver, all of whom were fugitives from the Federal Bureau of Investigation at the time. The display of this poster might have impeded the officer’s ability to encourage his clientele—who presumably met with him in his office and therefore could observe the poster—to obey court orders and legal agreements faithfully. Although Phillips can be read as adopting this analysis, the opinion is not entirely clear on this point. An alternative reading of the opinion might suggest that, because the employee's continued display of the poster contravened his superior's order to remove it and indicated support for fugitives from justice, he had demonstrated a lack of the proper respect for authority required of such a probation officer. If applied uncritically, this alternative rationale would improperly restrict the freedom of expression of public employees who hold sensitive positions, for even these persons should be allowed to speak out on public issues and to respond critically to the orders of superiors so long as they can separate their duty to clients on the one hand from their personal philosophy and their dispute with the supervisor on the other.

77. 502 F.2d at 518. Analogous situations include the impact a teacher's expression can have in the classroom upon his "sensitive clientele," school children. See, e.g., Project, supra note 40, at 1447-55. But cf. James v. Board of Educ., 461 F.2d 356 (2d Cir. 1972) (upholding in-class symbolic speech rights of teachers).

78. 491 F.2d 951 (9th Cir. 1974).

79. The plaintiff in Phillips maintained that the poster actually facilitated his work with the office's clientele because many minority people with whom he dealt would, upon observing the poster, identify strongly with him and be more willing to talk and listen to him. 491 F.2d at 953 n.3.


81. The court also relied on the finding that the display of the poster caused disharmony among the plaintiff's fellow employees. 491 F.2d at 955. Any reliance on the alleged disharmony among co-workers to justify the five-day suspension in Phillips is suspect, for mere grumbling among fellow workers should not legitimate the suppression of expression. See text at notes 120-24 infra.

82. This analysis would indicate that the decision in Johnson v. County of Santa Clara, 31 Cal. App. 3d 26, 106 Cal. Rptr. 862 (1973), might well have given insufficient attention to the suspended worker's freedom of expression. In Johnson, the plaintiff, a deputy probation officer, had been suspended for writing an "insubordinate" poem defiant of his superior after the plaintiff had been transferred to another department against his will. The court upheld the suspension, finding that the tone and content of the poem were incompatible with the successful discharge of the plaintiff's duties, which included inculcating and fostering respect for authority among juveniles. 31 Cal. App. 3d at 34, 106 Cal. Rptr. at 866-67.
The above cases suggest that courts have found the concept of work philosophy to be somewhat amorphous. Courts should, in a manner similar to that suggested earlier regarding the justification of discipline based on incompetency evidenced by employee speech, be careful not to rely on an apparent conflict between personal and work philosophy to justify discipline where the apparent conflict does not impede governmental operations or demonstrate that the employee is unqualified. Thus, for example, the court in *Lefcourt* should have more fully assessed whether the legal aid attorney was merely expressing a personal opinion or was also indicating that he intended to act in accordance with that opinion in defending clients.

Although the results in *Smith* and *Phillips* appear justifiable because of the likelihood that the symbolic speech in each case would disrupt the relationship between the employee and the sensitive clientele, this rationale might be improperly extended to prohibit speech where the likelihood of actual disruption is highly speculative. Where evidence of the likelihood of interference is not clearly convincing, a court should resolve any doubt against the prior restraint and in favor of allowing the expression. Then, if the speech or personal philosophy does result in actual impairment of the employee's ability to deal with his clientele, the public employer should be allowed to limit further speech only to the extent necessary to cease the agitation of the clientele. In the final analysis, although the work philosophy requirements of certain types of public employment do not constitute the imposition of beliefs upon a captive audience because the employee voluntarily accepts the sensitive position, the demise of the right-privilege distinction in constitutional law suggests that work philosophy restrictions should extend only so far as is clearly required for the job.

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83. *See text following note 73 supra.*

84. *Connealy v. Walsh, 412 F. Supp. 146 (W.D. Mo. 1976), exemplifies a situation where this rationale—that the potential disruption of a working relationship with sensitive clientele may justify discipline for an employee's expression—might have been carried too far. In *Connealy*, the court upheld the discharge of a social worker employed by a juvenile court for failure to remove a "McGovern" bumper sticker from her automobile. After noting that the plaintiff's employment responsibilities required a relationship of mutual trust and confidence with the juveniles needing assistance, 412 F. Supp. at 151, the court was content to uphold the dismissal at least in part on the ground that "under some circumstances depending on the nature of the bumper sticker and the person receiving the counseling, a partisan political bumper sticker could have an adverse impact on the efficiency of the social worker." 412 F. Supp. at 152 (emphasis added). The court did not directly conclude that the "McGovern" sticker would create such an adverse impact, but rather it suggested that "stickers supporting candidates of the Nazi party [and] Ku Klux Klan" might "arouse and inflame the emotions of plaintiffs' probationers." 412 F. Supp. at 156.*


86. *See notes 6-7 supra and accompanying text.*
2. **Discipline of Superiors, Duty of Loyalty, and Disclosure of Governmental Improprieties**

Whereas incompetency and work philosophy relate generally to the qualifications of an employee or to the working relationship between the employee and the clientele, maintenance of discipline by superiors and of a duty of loyalty relates more directly to the working relationship between the employer and the employee. A reading of the relevant cases indicates that the alleged breach of a superior's discipline is probably the most common ground upon which courts rely to justify the discharge of a public employee claiming first amendment protection, although the use of a balancing test based on the totality of the facts makes such assessments difficult.

Insubordinate behavior is at best an amorphous concept, the ambiguity of which is heightened by the balancing test's lack of clear notice regarding the limits of protected expression. Without the development of some clear standards by which to evaluate one's own expression, the possibility of reprisals under the rubric of "insubordination" might well chill protected criticism of a public employer by an employee. One attempt to define "insubordination" is found in *Nebraska Department of Roads Employees Association v. Department of Roads.* In that case, the defendant discharged an employee for voicing his opinion in a private meeting of engineers that the state engineer and director of the roads department, with whom the employee did not have a close working relationship, was not qualified for his position. In rejecting the defendant's characterization of the employee's expression as "insubordination," the court stated that, where no close working relationship existed between the employee and the object of his criticism, insubordination meant disobedience of orders, infraction of rules, or unwillingness to submit to authority. The court then concluded that the dismissal could not stand because the defendant had made no showing of employee disobedience of any order or directive of the state engineer or any other superior.

Even clear disobedience of rules or orders from superiors does not necessarily justify sanctioning a public employee. The constitutionality of the rule or order itself must be determined if disobedience of it is to serve as a permissible basis for disciplinary action. The rule must not be constitutionally void for facial vagueness or

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87. *See note 25 supra; text at note 38 supra.*
overbreadth, and as applied it must not unconstitutionally restrict the expression of the employee as judged under the Pickering balancing test. Thus, merely labeling an employee as "insubordinate" in no way helps resolve the constitutional issue involved in any particular case. Rather, the application of that term should be limited to an employee's failure to abide by a rule that prohibits, or refusal to obey an order to cease, a form of expression only when the expression itself is unprotected under Pickering. The maintenance of discipline by superiors over their subordinates is certainly in the public interest, but the superiors have no cause to complain when their own wrongful stifling of constitutionally protected expression undermines supervisory control.

For some types of public employment, however, the question of insubordination or disruption of the superior-subordinate relationship is not so simple. Pickering acknowledged that the freedom of expression to which a public employee is entitled might vary with the degree of intimacy and loyalty inherent in his relationship with his superior. Illustratively, in Muir v. County Council, the court upheld the council's dismissal of the county administrator, who held his position by appointment of the council, for disagreeing in a council meeting with the procedure of enactment and the substance of a policy supported by several council members. The Muir court

90. See note 38 supra. In addition, see Gasparinetti v. Kerr, Nos. 76-1605 & 76-1606 (3d Cir., Nov. 3, 1977) (police department regulation prohibiting members from publicly commenting unfavorably on departmental actions held to be facially overbroad); Steenrod v. Board of Engrs., 87 Misc. 2d 977, 979, 386 N.Y.S.2d 788, 790 (Sup. Ct. 1976) (fire department regulation determined to be so overly broad that it almost completely suppressed fireman's freedom of speech).


92. See Coven, The First Amendment Rights of Policymaking Public Employees, 12 Harv. C.R.-C.L. L. Rev. 359 (1977); text at note 15 supra. In addition to the cases discussed in the text, see Mitchell v. King, 537 F.2d 385, 391 (10th Cir. 1976) (governor may dismiss a policymaking official, in this case a member of state museum board of regents, for "political reasons"); Gould v. Walker, 356 F. Supp. 421 (N.D. Ill. 1973) (governor may remove high-ranking official in Governor’s Office of Human Resources for making uncomplimentary remarks about the governor during a political campaign); Bennett v. Thomson, 116 N.H. 453, 363 A.2d 187 (1976) (plaintiff director of State Division of Economic Development may be discharged by governor and state executive council for criticism of governor's decisions that seriously compromised plaintiff's ability to carry out his responsibilities). As evidenced by these three cases, questions involving a duty of loyalty may overlap with those regarding patronage dismissals of governmental employees. See Pilarowski v. Brown, 76 Mich. App. 66, 678-79, 257 N.W.2d 211, 217-18 (1977). Although apparently the three-Justice plurality opinion in Elrod v. Burns, 427 U.S. 347 (1976), would hold that all patronage dismissals violate the first and fourteenth amendments, 427 U.S. at 368-73, Justices Stewart and Blackmun, concurring in the judgment, agreed only that dismissals of "nonpolicymaking, nonconfidential" employees solely on the grounds of their political beliefs violated the Constitution. 427 U.S. at 375.

recognized that the freedom of a high-ranking governmental employee to make even truthful public criticism of superiors might be forfeited if the working relationship requires continued loyalty and is actually damaged by this criticism in a way that impairs the public interest in governmental efficiency. The court stated that the necessity for and extent of this forfeiture was to be determined by balancing the competing interests of the employee and the public.94

Turning to the facts of the case, the court first found that Muir's position as head of the county's administrative hierarchy required a close working relationship with council members and a strong loyalty to the council. The court then determined that Muir's relationship with the council had been substantially disrupted by his personality conflicts with and opposition to the proposals of some of the members. Finally, the court determined that this disruptive effect outweighed Muir's free speech interest and thus that his dismissal was justified.95

An employee's breach of her duty of loyalty may impair her effectiveness in carrying out the employer's policies as well as in working with her superiors. For example, in Leslie v. Philadelphia 1976 Bicentennial Corp.,96 the defendant dismissed its coordinator of community development for publicly charging its leaders with racism. The court found that these statements had seriously impaired the plaintiff's effectiveness in discharging her responsibilities for fostering good relations between the black community and her employer. The court concluded that this loss of effectiveness, coupled with the defendant's belief that the plaintiff could no longer work effectively with its board members and staff, provided adequate justification for her dismissal in light of the high degree of cooperation and loyalty required by the sensitive nature of her duties.97

Muir and Leslie suggest that courts have been inclined to enforce strictly the duty of loyalty in cases involving employees who hold sensitive or high-level positions. However, disloyal expression

94. 393 F. Supp. at 933.
95. 393 F. Supp. at 933-34. It is curious that, although the Muir court held that a high-ranking employee might lose his right to make truthful public criticism of his employer, 393 F. Supp. at 933, the court upheld Muir's discharge without actually finding that his statements were made publicly.

Even though the Muir court expressed caution about after-the-fact, pretext grounds for dismissal, 393 F. Supp. at 933; see note 58 supra, the breach of loyalty test adopted by the court is perhaps particularly susceptible to pretext dismissals, for the court allowed an element of arbitrariness to enter the approved "balancing" process: "[U]nder the Pickering rule the public's interest in the efficient operation of government may be protected despite the fact that the attitude of an elected superior in these circumstances may have been somewhat arbitrary or less than conciliatory." 393 F. Supp. at 934-35.
97. 343 F. Supp. at 777.
that somehow impairs governmental efficiency should not be treated as per se justification for dismissal, because, as Pickering suggested, the public interest in the informed opinions of employees on issues of public concern can weigh in favor of protecting speech

98. See text at note 18 supra.

99. Some courts have indicated that nonpublic expression by public employees does not trigger first amendment protection. For example, in Ayers v. Western Line Consol. School Dist., 555 F.2d 1309 (5th Cir. 1977), cert. granted sub nom. Givhan v. Western Line Consol. School Dist., 46 U.S.L.W. 3610 (U.S. Apr. 5, 1978) (No. 77-1051), the court reversed the district court and upheld the dismissal of a school teacher, Bessie Givhan, who had made recommendations and criticisms to the principal concerning policies and practices of the school district that could be interpreted as evidencing racial discrimination. Even though the court conceded that the content of her speech related to an issue of public import, it concluded that the first amendment does not protect the private expression of a public employee, and thus it held that her dismissal need not be reviewed against the Pickering standard. 555 F.2d at 1318-19. For an excellent critique of the Ayers court's ruling and of its reliance on privacy cases for the proposition that "no one has a right to press even 'good' ideas on an unwilling recipient," 555 F.2d at 1319, see Petition for Rehearing and Suggestion for Rehearing En Banc on Behalf of Appellee Bessie B. Givhan, Ayers v. Western Line Consol. School Dist., 555 F.2d 1309 (5th Cir. 1977).

Although the Ayers court's distinction between the private and the public context of speech might be useful, its conclusion that "privately" delivered speech having content of public interest is never protected seems incorrect for at least two reasons. First, the public has an interest in promoting speech—even privately expressed speech—that conveys ideas of social importance, since this type of expression may result in action that affects the public interest. For example, Givhan's suggestion in Ayers that black employees be assigned to semiclerical positions instead of only to janitorial work, 555 F.2d at 1313, might well have prompted action that would have lessened the appearance, if not the practice, of racial discrimination by the school district. Although the public might have been better informed if she had aired her criticisms publicly rather than simply to her immediate supervisor, surely the public's interest in her expression justified application of the Pickering balancing test. So viewed, the degree to which the public interest in expression is influenced by whether the speech was made in a private context should simply be considered in the application of the Pickering balance. Cf. Roseman v. Indiana Univ. of Pa., 520 F.2d 1364, 1368 & n.11 (3d Cir. 1975) (first amendment interests associated with private statements by professor on an issue of little public importance outweighed by disruptive impact on departmental functioning, but "entirely different considerations would come into play" if the statements had concerned an issue of public interest or had been delivered to the news media).

Second, requiring public employees to publicize their criticisms or suggestions rather than to work through internal channels will often damage the interests of both the government and the employee. Since publicly expressed criticism will often result in disruption of governmental efficiency that could have been avoided had the expression been made privately, the government has an interest in encouraging the use of internal channels. Furthermore, because this disruption of efficiency weighs against the employee under the Pickering balancing test, he often will desire to make his criticism in a context where the public will not become agitated by it. Thus, it might be appropriate to afford greater protection to criticisms brought through proper channels. See Swaaley v. United States, 376 F.2d 857, 863 (Cl. Ct. 1967) (pre-Pickering decision holding that only the New York Times libel standard limits the right of public employees to use agency channels to petition for redress of grievances); Comment, Government Employee Disclosures of Agency Wrongs: Protecting the Right To Blow the Whistle, 42 U. Chi. L. Rev. 530, 538-41 (1975). The analysis adopted by the Ayers court, on the other hand, forces a public employee
critical of public employers. The conflict between the public’s interest in efficient government and its interest in the opinions of either to forfeit his protection under Pickering by making his criticism through internal channels or to risk losing under the Pickering balancing test by making his criticism publicly, which could result in a public uproar that would disrupt governmental efficiency. Clearly, applying the Pickering balancing test to Givhan’s statements would have been the proper approach in Ayers, as can be seen in the cases from four circuits that have applied Pickering when considering the protected status of statements that have content of public interest and are made in a private context. See Ring v. Schlesinger, 502 F.2d 479, 489-90 (D.C. Cir. 1974); Jannetta v. Cole, 493 F.2d 1334, 1337 n.5 (4th Cir. 1974); Smith v. Losee, 485 F.2d 334, 339-40 (10th Cir. 1973); Hostrop v. Board of Junior College Dist. No. 515, 471 F.2d 488, 493 n.13 (7th Cir. 1972). For a good recent analysis that supports the protection of employee speech on public concerns delivered in a private context, see Pilkington v. Bevilacqua, 439 F. Supp. 465, 474-76 (D.R.I. 1977).

It is also appropriate to analyze the variables of context and content on a more theoretical level. First, the Pickering balancing test clearly applies to public employee speech, such as that in Pickering itself, made in a public context and having content of public interest. Second, public employee expression that is delivered publicly but lacks content of public interest should also be balanced under Pickering against its disruptive impact—absent disruption, the employee should be treated as a private citizen, and as such his public expression may not be punished or prohibited merely because its content is not of pressing public importance, unless the speech falls within the narrowly defined categories of obscenity, fighting words, and defamation. See Roth v. United States, 354 U.S. 476 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Third, as the above critique of the Ayers decision indicates, public employee speech that has public importance and is made in a private context should also come under the Pickering balancing test. The above analysis, which indicates that three types of public-employee expression—public context-public content, public context-private content, and private context—public content—all should trigger the Pickering balancing test, suggests that the remaining category of speech—private context-private content—is the least deserving of protection. According protection to this type of expression would require the employer to justify a dismissal for such speech in terms of Pickering. On the other hand, if protection were not extended to this type of expression, the employer would be able to dismiss with impunity any employee who makes such speech, whether or not the speech had an impact upon the governmental interest. Although neither result appears particularly compelling, the courts probably should hold that this type of speech is protected under Pickering, if for no other reason than to guard against chilling valid criticism of governmental functioning. See Johnson v. Butler, 433 F. Supp. 331, 335 (W.D. Va. 1977) (dismissal of teacher because she complained to school principal about classroom assignment held to violate her free speech rights).

Even though the rationale of Ayers is indefensible, the result in that case might be justified by distinguishing between discipline designed to punish an employee for the content of her criticism and discipline designed to punish an employee for her conduct in making the expression—in this case, the repeated harassment of her supervisors with what were essentially the same criticisms and suggestions. Under this analysis, evidence that the public employer had tolerated the criticism for at least a short period of time before taking disciplinary action might suggest that harassment by the employee, rather than the content of the criticism, actually motivated the disciplinary action. Courts deciding these cases should carefully scrutinize the harassing-conduct rationale, however, to ensure that it is not advanced to mask a desire to silence criticism.

100. See, e.g., Kiiskila v. Nichols, 433 F.2d 745, 748-49 (7th Cir. 1970) (criti-
informed public employees becomes most pronounced when such employees publicly disclose governmental improprieties.\textsuperscript{101}

The recent case of \textit{Sprague v. Fitzpatrick}\textsuperscript{102} provides a good illustration of the public policy problems involved when a high-ranking employee's disloyal expression both disrupts governmental efficiency and discloses apparent official improprieties. In that case Fitzpatrick, the district attorney of Philadelphia County, discharged Sprague, his first assistant, after a controversy developed regarding the granting of probation to a criminal defendant whom Fitzpatrick had allegedly represented while engaged in private legal practice.\textsuperscript{103} Sprague had told the news media that, contrary to public statements made by Fitzpatrick, his understanding—which apparently was accurate—was that Fitzpatrick himself had recommended the probation.\textsuperscript{104} The district court dismissed\textsuperscript{105} Sprague's action for damages, and the Third Circuit affirmed, agreeing with the trial court that the working relationship had been irreparably dis-


With regard to the public interest in disclosures of government improprieties, Justice Marshall, presumably referring to the Watergate scandal, has stated that "[t]he importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors, must be self-evident in these times." Arnett v. Kennedy, 416 U.S. 134, 228 (1974) (dissenting opinion).


\textsuperscript{103} The district court stated that Fitzpatrick had allegedly represented the defendant at one time. 412 F. Supp. at 911. The court of appeals, on the other hand, asserted only that Fitzpatrick had once represented the defendant's codefendant on a federal blackmail charge. 546 F.2d at 562.

\textsuperscript{104} On appeal, the Third Circuit took it as a matter of fact that Fitzpatrick "personally appeared before [the criminal defendant's] sentencing judge and recommended probation." 546 F.2d at 562.

\textsuperscript{105} The Third Circuit noted that the trial court had considered matters outside the pleadings and thereby had converted the dismissal of the complaint into a grant of summary judgment. 546 F.2d at 563.
ruptured.106 Asserting that the key question in applying Pickering was whether the employment relationship had been seriously disrupted, the Third Circuit stated that, although the public importance of Sprague’s statement might be a factor to be weighed in favor of protecting his right to speak on matters of public concern, “[i]f the arousal of public controversy exacerbates the disruption of public service, then it weighs against, not for, first amendment protection in the Pickering balance.”107

In situations such as in Sprague, the public interest is best served if the unscrupulous activity of public officials is disclosed and the efficiency of the governmental agency involved is not permanently impaired. On its surface, the Sprague result achieved both outcomes. What cannot be ignored, however, is that Sprague upheld a dismissal in retaliation for an employee’s revelation of a possible impropriety of great public interest. This result, of course, does not encourage such disclosures by high-level employees, who find themselves in a dilemma. On the one hand, they have a duty of loyalty that might be breached by public criticism of their superiors. On the other hand, in general their positions afford them the best opportunity to discover irregularities, and, to the extent that they are imbued with a public-service ethic and view their positions as involving a public trust, they will desire to disclose the improprieties they discover.108

At least two alternatives exist that may somewhat ameliorate the dilemma faced by high-level employees who wish to “blow the

106. 546 F.2d at 565. The court stressed that Sprague, who was Fitzpatrick’s direct administrative and policymaking subordinate, had stated publicly “that his immediate superior had not told the truth.” 546 F.2d at 565.

107. 546 F.2d at 566. Chief Judge Seitz concurred because of the particular facts involved and stated that he did not read the majority opinion to hold that “the disruptive factor tips the scales in all such cases.” 546 F.2d at 566 (Seitz, C.J., concurring).

108. The undesirability of the Sprague result should now be manifest. First, the decision deters public employee disclosure of governmental improprieties. Second, the employees who are least deterred—and consequently most likely to be discharged for disclosure—are persons whose public-service ethic makes them highly qualified to hold positions of public trust. Third, disclosures of significant governmental wrongdoing, which are clearly in the public interest, also will most certainly lead to the disclosing employee’s dismissal, since the governmental efficiency will quite likely suffer at least short-term disruption because of the disclosure. Thus, given the result in Sprague, only those employees who have the extraordinary personal integrity and courage to sacrifice their employment in order to serve the public interest are likely to disclose governmental improprieties. And, because those personal characteristics that lead these employees to risk dismissal are precisely those desired in public employees, the result in Sprague is clearly perverse.

As the remainder of this subsection of the Note indicates, there are no simple solutions to the problems arising in Sprague. By failing to address these difficult issues, however, the Sprague court reached a result clearly contrary to the public interest. Although that court might not have been able to resolve all the issues satisfactorily had it attempted to face them, a thoughtful consideration of them would surely have produced an opinion less antithetical to the public interest.
whistle." 109 One, the judicial adoption of a two-stage balancing test, pertains to the proper constitutional analysis and remedy for cases involving a discharge in retaliation for a disclosure that results in disruption of the employment relationship. The other, the unauthorized news leak by the disclosing employee, seeks to avoid the discharge altogether.

The initiative for the first alternative lies with the courts, which could provide the disclosing employee with damages for dismissal while refusing to reinstate him because his utterance destroyed his working relationship with superiors. 110 Of course, damages could not be awarded unless the speech was held to be constitutionally protected, a determination that requires application of the *Pickering* balancing test. A distinction that the Court in *Pickering* had no reason to consider—the distinction between the disruption or impairment of governmental operations actually caused by the employee's speech and that caused by his continued presence following the criticism—might avoid the result in *Sprague*. In determining whether the speech is protected, a court would balance only the first element of disruption against the employee's free speech interest. If this balancing favors the employee's speech, the court would again apply a balancing approach to determine whether reinstatement—as opposed to merely

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109. A third alternative might be to discipline the employee only if he makes the disclosure in "knowing and reckless disregard of the likelihood that disclosure will result in serious harm" to the governmental interest. See Comment, 64 Calif. L. Rev. 108, supra note 101, at 141-42. This standard would not conform to the *Pickering* test, since disruption of governmental operations sufficient to outweigh an employee's free speech interests could occur whether or not the employee had actual knowledge of the likelihood of harm. Moreover, acting with "knowing and reckless disregard" for the consequences of the disclosure might be evidence that the employee lacked the qualifications required for continued public employment. See generally text at notes 70-73 supra.

110. Some courts have steadfastly maintained that a claim for reinstatement must be accepted if the employee had been discharged in violation of his constitutional rights, even if reinstatement may promote personal antagonisms. See, e.g., Sterzing v. Fort Bend Independent School Dist., 496 F.2d 92, 93 (5th Cir. 1974). Such cases should not be read for the proposition that the only remedy available is reinstatement. First, if the plaintiff seeks only damages, as did *Sprague*, the Constitution hardly compels the court to require reinstatement. Cf. Aumiller v. University of Delaware, 434 F. Supp. 1273, 1308-09 (D. Del. 1977) (back pay awarded where reinstatement was inappropriate since academic year in which untenured teacher had contract right to teach had ended). But cf. *Sprague* v. Fitzpatrick, 412 F. Supp. at 918 (trial court asserted that, by seeking only monetary relief, Sprague admitted that he had destroyed his working relationship with Fitzpatrick, thereby acknowledging that his speech was not protected under *Pickering*).

The real issue involved in the two-stage balancing test proposed in the text is whether a court can award only monetary damages to a plaintiff seeking reinstatement where it finds that the plaintiff's rights have been violated but that reinstatement is inappropriate. Courts have imposed this limited remedy in employment discrimination cases. See EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), and cases cited therein at 420 F. Supp. at 926 n.18.
damages—is the appropriate remedy. Rather than reaching constitutional dimensions, this second balancing would simply weigh the employee's interest in reinstatement against the government's interest in preventing the inefficiency and disruption that reinstatement might produce.\textsuperscript{111}

Applying this two-stage balancing test to the facts in \textit{Sprague}, a court might well have concluded that the dismissal violated Sprague's constitutional rights because the public's interest in Sprague's revelation outweighed the immediate disruption caused by the speech. This result at the constitutional protection stage does not require reinstatement, since at the remedy stage the disruption caused by reinstating Sprague might well have outweighed Sprague's interest in reclaiming the position. Under these circumstances, a court could justifiably limit Sprague's remedy to recovery of monetary damages.\textsuperscript{112}

Judicial acceptance of a two-stage balancing test in cases involving disruption of superior-subordinate relationships would increase the likelihood that public employees will more freely disclose gov-

\textsuperscript{111} Some presumption should be made in favor of reinstatement and against merely monetary compensation, if only because of the likelihood that the latter will inadequately encourage disclosure in the public interest. For a discussion of the factors that might weigh on both sides of the remedy balance, see note 112 infra.

In using the two-stage test, courts ought to look beyond any particular case and consider whether giving additional weight—at the constitutional balancing stage or at the remedy stage, or both—to the employee's disclosure of governmental improprieties might encourage future disclosures.

\textsuperscript{112} The result in \textit{Sprague} probably occurred because the court gave too much weight to the government's interest in preventing or avoiding future disruption of a working relationship that required mutual trust and confidence. This overemphasis on future disruption likely occurred because the court failed to separate the constitutional considerations from the remedy considerations. Whenever the disruption of future working relationships is significant, as in \textit{Sprague}, the employee's speech would not be protected under the court's approach.

The two-stage test suggested in the text avoids giving undue significance to the continued disruption of the "whistle blower's" working relationship with his superiors by considering the continued disruption only at the remedy stage. To facilitate the initial constitutional balancing, a court might treat the disclosure as though it were made by an employee who was not in an immediately subordinate relationship to the target of the disclosure—i.e., an employee who did not have a duty of loyalty.

Figure 1 illustrates the differing results that can be reached under the \textit{Sprague} court's apparent approach and under the two-stage balancing test. In this hypothetical employee disclosure case, the factors weighing in favor of the government have a value of 50x for the temporary disruption caused by the disclosure—a value unaffected by whether the disclosing employee continues his employment—and 200x for the continued disruption resulting if the employee is not discharged or has been discharged but is reinstated. On the employee's side are a weight of 150x, which represents the interests in his expression—a value composed of the employee's interest in making the disclosure, the public's interest in learning of the particular impropriety, and the public's interest in encouraging such disclosures—and 50x for the employee's interest in reinstatement.
environmental improprieties. Although application of this test does not prevent the removal of "whistle blowers" where the future governmental efficiency is sufficiently threatened, the availability of compensation for dismissal in appropriate cases might encourage revelations by otherwise reluctant public employees.

The alternative method by which the Sprague result can be avoided—the unauthorized news leak—could be employed by high-level public employees who wish to disclose improper governmental conduct while avoiding any disruption of their working relationship with superiors. Employees who make such disclosures and remain

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<tr>
<th>Employee's Expression</th>
<th>Governmental Disruption</th>
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<tr>
<td>150x: interest in expression</td>
<td>50x: temporary disruption independent of reinstatement or continued employment</td>
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<td>- employee's interest</td>
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<td>- public's interest in this disclosure</td>
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<td>- public's interest in encouraging disclosures</td>
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<tr>
<td>50x: interest in reinstatement</td>
<td>200x: continued disruption if not dismissed or if reinstated</td>
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Sprague Approach: Employee's disclosure not protected

Two-stage Approach: Employee's disclosure protected, but reinstatement denied

Constitutional balancing stage: 150x for employee

Remedy balancing stage: 50x for employee for government

As Figure 1 indicates, under the Sprague approach the resultant balancing favors the government and would uphold dismissal of the employee. On the other hand, the two-stage test results in the constitutional protection of the employee's disclosure, while the governmental interest in avoiding continued disruption dictates denying reinstatement.

113. The two-stage balancing test should not be used to preclude dismissal of employees whose speech demonstrates incompetency or manifests an incompatible work philosophy, even though it might be argued that often only the future consequences of such speech outweigh the individual's interest in the expression. The application of remedy-based balancing should be limited to cases, such as those involving a duty of loyalty, where the government's interest is only in the disruption caused by the effect of the employee's speech on others with whom the employee must work, rather than in those characteristics of the employee that are demonstrated by the content of his speech. This reasoning suggests that the remedy-based test should also apply to cases involving disruption of harmony among co-workers. See generally text at notes 120-24 infra.

114. "Deep Throat," possibly the most famous of all informants on illicit acts of governmental officials, was apparently able to avoid disruption of his or her work-
unidentified would be serving the public interest while retaining their employment.115 If the identity of the informant becomes known and results in his dismissal, the court should treat the unauthorized news leak as they would an overt disclosure—by utilizing the two-stage balancing test to determine whether the expression was protected and, if so, whether reinstatement is an appropriate remedy.

The lower courts have tended to view the role of the public employee more as that of a mild-mannered worker who follows orders than as that of a guardian of the public interest who should be encouraged to disclose governmental improprieties. Although the public interest in efficient government might often require this approach, Pickering stands for the proposition that the countervailing interests in free speech must be considered. Consistent with Pickering, the lower courts should recognize that the societal benefits resulting from public employee participation in the public discussion of governmental affairs and in the exposure of illicit governmental activity require that these workers be protected from discipline unless their expression significantly impairs the efficiency of governmental operations. And, even in that circumstance, the public importance of the employee’s speech might justify at least a recovery of monetary damages for his discharge.

A relatively complex relationship between the nature of an employee’s position, on the one hand, and the concepts of insubordination, duty of loyalty, and disclosure of governmental improprieties, on the other, emerges from the implications of Pickering and the cases discussed above. First, workers who criticize superiors with whom they have no intimate working relationship generally should not be disciplined, for that criticism will seldom result in actual impairment of governmental efficiency.116 Second, from the standpoint of his freedom of expression, the status of an employee’s position is a double-edged sword, cutting more one way or the other depending on the particular facts of each case. The courts have imposed a strong duty of loyalty on those employees who hold high, sensitive

115. The discussion in the text concerns news leaks of actual governmental improprieties. Presumably some employees will desire to leak information concerning actual or fictitious misdeeds not to serve the public interest but rather solely for personal reasons, such as to embarrass a disliked supervisor. See Comment, 42 U. Chi. L. Rev. 530, supra note 99, at 530.

116. See text at notes 88-89 supra.
While the expression of lower-level employees is relatively unfettered by any such duty, the freedom of expression enjoyed by relatively elite employees is further restricted because in most cases their speech is much more likely to disrupt severely the efficiency of the government than is the expression of lower-level employees. However, the position of a high-level employee also can cut in favor of increasing the protection accorded his expression. As recognized in Pickering, statements of public employees with informed and definite opinions are of special value to public debate, and employees in high-level positions are particularly likely to be reliably informed on those matters of public interest that come within the ambit of their employment.

3. Harmony Among Co-Workers

Pickering suggested that a disruption of the harmony among co-workers caused by a public employee's expression might justify his discharge. This factor weighing in favor of the state might have either of two possible dimensions. First, an employee's expression might consist of repeated criticism of and disagreement with co-workers that evidences an inability to work with others. In that circumstance, the disruption might best be treated as demonstrating the absence of a requisite employment qualification. Second, dis-harmony among co-workers may result from their reaction to the content of an employee's expression. This latter dimension more clearly requires a Pickering balancing. Since most cases involving this dimension have also been concerned with impairment of other aspects of governmental efficiency, it is difficult to define clearly the independent weight this factor carries in the Pickering balance. Although some courts have appeared to accord substantial weight to any disruption of harmony among co-workers, the better rule from

117. See note 92 supra; text at notes 93-107 supra. Presumably the government would have a more difficult time justifying the dismissal of a lower-level employee who made a disclosure comparable to that made in Sprague, because no intimate superior-subordinate relationship would have been destroyed as a result of the expression. In this circumstance, the government would be required to justify a resultant discharge by showing that the disclosure caused general disruption in governmental efficiency. Countering this governmental interest, the lower-level employee, just as a higher-level official, should be able to utilize the public importance of his revelations as a factor weighing in his favor in the Pickering balance.

118. In addition, the proper role of some high-level employees may be viewed as involving policy administration, which requires that the employee maintain a harmonious relationship with his policymaking superiors. This approach seems to have been adopted in Muir v. County Council, 393 F. Supp. 915 (D. Del. 1975), discussed in text at notes 93-95 supra.

119. See text at note 18 supra.

120. See text at note 14 supra.

121. See text at notes 70-72 supra.

the few cases that focus upon this variable is that statements by a
public employee that result in mere grumbling among co-workers
should not justify any retaliatory sanction.

_Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center_123 provides an example of a decision in which the court did not
allow a mere showing that an employee’s speech disturbed co-workers
to substitute for proof of actual impairment of governmental operations. In _Rafferty_, the plaintiff, a nurse, was discharged from her
position for her criticism, quoted in a newspaper article, of patient
care at a state hospital where she had previously been employed.
The court invalidated the dismissal, determining _inter alia_ that “staff
anxiety” over the newspaper article was not an acceptable reason for
the disciplinary action. In so doing, the court found that the de­
fendant public employer had made no showing that this staff reaction
would adversely affect patient care or would destroy staff morale and
discipline, and it had failed to prove that whatever temporary furor
had been created could not have been easily quelled by discussions
and meetings. The court concluded that any anxiety among co-workers
was caused by their proximity to a person who had engaged and
might further participate in “precisely the sort of free and vigorous
expression the First Amendment was designed to protect.”124

4. Speech Involving Public Employee Unions

The increasing unionization of public employees125 and the re­
sultant public sector labor-management interaction have added an
additional dimension to the _Pickering_ balancing process. The union
character of employee speech can cut either way in determining
the constitutional protection accorded the expression. That the
speech often has public importance and that the speaker usually has
more than merely a personal interest in delivering it both weigh in
favor of broad constitutional protection. On the other hand, speech
involving public employee unions, particularly if delivered by union
leaders, may have great disruptive impact upon both management-
employee relations and the harmony between union and nonunion
employees.126 Although the decision in any individual case depends

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(D. Ariz. 1972), _revd. on other grounds_, 512 F.2d 109 (9th Cir. 1975) (social criticism that upset fellow faculty members cannot justify dismissal).
125. Although only about one out of every four employees in the private sector
is a union member, better than 50% of public employees belong to a union. See
_Clark, Politics and Public Employee Unionism: Some Recommendations for an
126. The disruptive impact of at least some kinds of employee speech delivered
in a union context might be considered to be merely a component of whatever dis­
ruptive impact unionization in the public sector has on governmental effectiveness.
in large part upon its facts, the outcome also depends upon which of the relevant characteristics of union-related speech a court chooses to emphasize.

The difference in result dictated by this difference in emphasis is exemplified by the majority and dissenting opinions in *Fisher v. Walker*.[127] In that case, the president of a firemen's union wrote a letter, which was published in a union newspaper, critical of certain members of an association of fire department officers. He was suspended for five days without pay in retaliation for publishing the letter. The Tenth Circuit upheld the suspension, agreeing with the trial court that the letter dealt with a departmental matter rather than a public issue[128] and contained false criticism that had a disruptive impact on the morale and working relationships within the department.[129] Judge Doyle, in dissent, maintained that the defendant, the trial court, and the majority of the court of appeals panel all had given insufficient weight to the plaintiff's freedom of expression right to advance the union interest that he represented.[130] Judge Doyle viewed as insulating factors the union-management context of the speech and the private audience to whom the expression was made.[131] Arguing that the dissemination of information concerning a labor dispute is protected by the first amendment,[132] that the actual disruption of the working relationships in the fire department that the letter had caused was insufficient to outweigh the interests favoring protection of the speech,[133] and that speech may not be suppressed merely because it is intemperate,[134] Judge Doyle maintained

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127. 464 F.2d 1147 (10th Cir. 1972).
128. *But cf. note 99 supra* (distinctions between protection accorded speech based upon its private or public context and its private or public content).
129. The court concluded that these facts, together with the refusal of the plaintiff to try to remedy the situation, justified the suspension. 464 F.2d at 1153-54. *Cf.* Parker v. Graves, 340 F. Supp. 586, 590 (N.D. Fla. 1972), aff'd, 479 F.2d 335 (5th Cir. 1973) (state university athletic department may discharge employee whose actions in helping form an association of athletes bent on reforming departmental policies created disciplinary problems).
130. 464 F.2d at 1155 (Doyle J., dissenting). *See* Castleberry v. Langford, 428 F. Supp. 676 (N.D. Tex. 1977). *But cf.* Magri v. Giarrusso, 379 F. Supp. 353, 361 (E.D. La. 1974) (although police union president may have greater latitude to criticize a superior than does the average police officer, he may not make statements that destroy the working relationships between the superior and his subordinates).
131. 464 F.2d at 1155. For a discussion of how the *Pickering* balancing test is affected by whether expression is made in a private context, see note 99 supra.
132. 464 F.2d at 1157. Judge Doyle relied upon Thornhill v. Alabama, 310 U.S. 88, 102 (1940), to support this proposition.
133. 464 F.2d at 1155, 1159.
134. 464 F.2d at 1160.
that the imposition of the sanction was not justifiable under the first amendment.136

The public importance of union-related speech was also recognized in Holodnak v. Avco Corp.,136 although the result in that case is also supportable without reliance on the special value of such expression.137 In Holodnak, the defendant government defense contractor discharged an employee for publishing in a union newsletter an article that was critical of labor-management relations at the defendant's plant. At trial Judge Lumbard, in holding that the employee had been discharged under color of state law138 in violation of his right of free speech, stated that, because the employee's speech dealt with the "rough-and-tumble of labor relations," it deserved more tolerance than it would if expressed in other contexts, such as in "the refined atmosphere of a classroom."139 After applying the Pickering balancing test, Judge Lumbard concluded that the "use of vituperatives alone" was protected where such expression did not interfere with production at the defendant's plant.140

Police unionism presents a potential conflict between the emerging judicial recognition of the importance of the role of public employee union leaders and the traditional judicial conception of the nature of police work. Historically courts have justified severe restriction of the police officer's freedom of expression by viewing the police department as a paramilitary organization dependent upon rigid discipline.141 Although some recent decisions have adhered to this view,142 others have considered the characteristics of public

135. 464 F.2d at 1159-60.
137. The court found that the plaintiff's speech did not interfere with plant production. See text at note 140 infra.
138. 381 F. Supp. at 201-02.
140. 381 F. Supp. at 202-03. Cf. Board of Trustees v. Spiegel, 549 P.2d 1161, 1175-77 (Wyo. 1976) (teacher's statements in union publication held protected because no showing had been made of impairment of his job performance or of disruption of the school).
142. See Norton v. City of Santa Ana, 15 Cal. App. 3d 419, 426, 3 Cal. Rptr. 466, 93 Cal. Rptr. 37, 41 (1971); In re Gioglio, 104 N.J. Super. 88, 96, 248 A.2d 570, 574 (1968). Other cases have emphasized the special nature of police employment without expressly accepting the paramilitary model. In Kelly v. Johnson, 425 U.S. 238 (1976), the Supreme Court reversed a Second Circuit decision and let stand a county regulation limiting the length of policemen's hair. The court of appeals had concluded that the state had the burden of showing a genuine public need for the police regulation. Justice Rehnquist, speaking for the Supreme Court, disagreed:

This view was based upon the Court of Appeals' reasoning that the "unique judicial deference" accorded by the judiciary to regulation of members of the military was inapplicable because there was no historical or functional justifica-
employment unique to police officers that might justify some restri-
tion of their free speech as but one element in the *Pickering* bal-
ancing test. The balancing process becomes even more complex
when the characteristics of police employment combine with the
special governmental and public interests in union-related speech.
In *Brukiewa v. Police Commissioner*, the court resolved the con-
flicting interests in favor of the employee. The plaintiff in
*Brukiewa* made remarks critical of the police department while
appearing on a television program in his official capacity as president
of a police officer's union. In overturning the one-year suspended
dismissal the plaintiff received in response to his expression, the court
first noted that no showing had been made that the statements had
impaired the governmental interest. It then asserted that the expres-
sion dealt with a matter of public importance with which the officer
tion for the characterization of the police as "para-military." But the conclusion
that such cases are inapposite, however correct, in no way detracts from the de-
ference due [the county's] choice of an organizational structure for its police
force. Here the county has chosen a mode of organization which it undoubtedly
deems the most efficient in enabling its police to carry out the duties assigned to
them under state and local law. Such a choice necessarily gives weight to the
overall need for discipline, esprit de corps, and uniformity.

Another case that gives weight to the "special" role played by police is *Slocum
v. Fire & Police Commr.*, 8 Ill. App. 3d 465, 290 N.E.2d 28 (1972). In that case,
a policeman received a thirty-day suspension for refusing to wear an American flag
emblem on his uniform. In upholding the suspension over the policeman's argument
that the requirement unconstitutionally forced him to make symbolic speech of a
patriotic nature, the court reached the seemingly contradictory conclusions that,
although a flag emblem on a uniform has only a minimal and ambiguous speech ele-
ment, the emblem does tend to develop patriotism and thus furthers an important
governmental interest. 8 Ill. App. 3d at 470, 290 N.E.2d at 33. Presiding Judge
Stouder in dissent argued, *inter alia*, that the promotion of patriotism is not a func-
tion of special concern to police departments, as distinguished from other public
agencies. 8 Ill. App. 3d at 475, 290 N.E.2d at 36 (Stouder, P.J., dissenting).

143. See *Hanneman v. Breier*, 528 F.2d 750, 754 (7th Cir. 1976); *Bence v.
Breier*, 501 F.2d 1185, 1192 (7th Cir. 1974); *Muller v. Conlisk*, 429 F.2d 901, 904
(7th Cir. 1970). *See also* *Haurilak v. Kelley*, 425 F. Supp. 626, 631 (D. Conn.
1977) (Lumbard, J.). Regarding the proposition that the peculiar nature of some
types of public employment is simply one element to be considered in the *Pickering*
missal of Peace Corps volunteer who had written letter to newspaper and signed peti-
tion condemning Vietnam War held improper under first amendment), *with* *Murphy
petition condemning Vietnam War may be dismissed because their action improperly
identified VISTA with antiwar protest).


145. The court went somewhat further than most courts in rejecting the tradi-
tional view of the necessity for special restrictions on police expression. Rather than
merely treating the unique character of police employment as an element in the
*Pickering* balancing, the court purported to grant "full" first amendment rights to
policemen by substituting the word "policeman" for "teacher" in reading the *Pickering*
opinion. 257 Md. at 52, 263 A.2d at 218. The *Brukiewa* court cited the follow-
ing quotation from *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), in support
of its position: "We conclude that policemen, like teachers and lawyers, are not re-
had “experienced expertise,” presumably because of his role in the police union. The Holodnak and Brukiewa cases exemplify the better, more realistic view that public employee unions serve legitimate interests and that, as such, their representatives should be accorded the latitude necessary to represent their constituents vigorously in the “rough and tumble” setting of labor-management relations. These interests do not preclude disciplining employees for disruptive union-related expression. The courts should recognize the role harsh rhetoric often plays in labor-management disputes, however, and should not allow the tone of the speech to be a substitute for the Pickering requirement of substantial disruption of governmental operations.

III. CONCLUSION

Given the variety of factual settings that have faced the courts in public employee discharge cases, any conclusions to be drawn

146. 257 Md. at 52-53, 263 A.2d at 218. The Garrity case involved testimony of police officers who were coerced into forfeiting their privilege against self-incrimination by the threat of removal from public employment.

147. Another case that found that the first amendment interests in the speech of police union leaders outweighed any unique aspects of police department employment and any disruption caused within the department by the expression is Hanneman v. Breier, 528 F.2d 750, 754-55 (7th Cir. 1976).

148. According to a recent decision of the Supreme Court, however, the existence of these unions must not be allowed to cut off the individual nonunion employee's right of free speech on labor matters. In City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Commn., 429 U.S. 167 (1976), a nonunion teacher appeared before a public meeting of the Madison Board of Education and, over the objection of a representative of the teacher's union, read a petition signed by teachers in the school district regarding pending labor negotiations between the board and the union. Subsequently the union filed a complaint with the Wisconsin Employment Relations Commission that claimed that the board, in permitting the nonunion teacher to speak, had violated Wisconsin law by negotiating with a member of a bargaining unit other than the exclusive collective bargaining representative. The commission concluded that the board had committed a prohibited labor practice and ordered the board to permit no employees other than representatives of the union to appear and speak on such labor matters at board meetings. The commission's order was upheld by a Wisconsin circuit court and the state supreme court, the latter holding that the abridgement of the nonunion teacher's freedom of speech was justified in order to avoid chaos in labor-management relations. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Commn., 69 Wis. 2d 200, 212, 231 N.W.2d 206, 212-13 (1975). A unanimous Supreme Court reversed in an opinion by Chief Justice Burger, holding that, whatever its duties as an employer, a school board may not be forced to discriminate among speakers appearing at open board meetings on the basis of their employment or the content of their views. 429 U.S. at 176. The Chief Justice noted that nonunion teachers have the absolute right to consult among themselves and communicate their collective views to the general public, and therefore it would be inconsistent with first amendment concepts to hold that dissident teachers could not communicate their views directly to the governmental body that made policy on which they had an opinion. 429 U.S. at 176 n.10.
from the post-Pickering cases must be somewhat tentative. Perhaps the greatest contributions made by post-Pickering cases to an expanded protection of the freedom of expression of public employees are the notions (1) that discipline of a public employee may not be even partially motivated to punish him for his protected expression, unless the public employer would have discharged the employee even if he had not made the expression in question, and (2) that the employee's speech—so long as it is not knowingly or recklessly false—may justify discipline only if it results in material and substantial impairment of the governmental interest. Moreover, in addition to promoting freedom of expression, the establishment of these standards at least somewhat blunts the criticism that the predictability of the Pickering balancing test is low.

Although some courts have apparently felt constrained to limit their analysis to the specific elements mentioned in Pickering, others have adopted the spirit of the Pickering decision by incorporating into the balance other considerations that reflect the governmental, public, and private interests related to an employee's speech. This flexibility in applying Pickering is exemplified by those cases that have considered the effect of union-related speech on the balancing process. However, as indicated by the majority opinion in Fisher v. Walker, courts can still try to justify a decision under the balancing test that clearly gives too much weight to a single element mentioned in Pickering as favoring the state or that accords insufficient weight to factors favoring protection of the employee's expression.

This Note has been premised on the notion that the public interest in open government and the interest of public employees in their own speech warrant broad protection of the freedom of expression of these workers. Pickering and many of the cases following it recognize the desirability of protecting the first amendment rights of public employees, although the large number of cases arising on this issue may indicate that the significance of Pickering has not yet adequately imbued the thinking of governmental employment supervisors. As future cases further delineate the scope of the freedom of expression of public employees, the day may come when no worker holding a routine governmental position need feel that timidity is a job requirement. Possibly the most troublesome question yet to be resolved in this area involves the protection of employee disclosures of governmental improprieties, an issue in which

149. See text at notes 42-64 supra.
150. See text at notes 65-68 supra.
151. See note 25 supra.
152. 464 F.2d 1147 (10th Cir. 1972), discussed in text at notes 127-35 supra.
the public's interest in promoting the exposure of official wrongdoing collides with its interest in efficient government. How courts resolve this conflict will largely determine the extent to which higher-echelon governmental personnel are viewed as trustees of the public interest.