Three Arguments Against *Mt. Healthy*: Tort Theory, Constitutional Torts, and Freedom of Speech

Michael Wells

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Torts Commons

Recommended Citation
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol51/iss2/3
Three Arguments Against *Mt. Healthy*: Tort Theory, Constitutional Torts, and Freedom of Speech

by Michael Wells*

I. INTRODUCTION

*Mt. Healthy City School District Board of Education v. Doyle*¹ is among the most important, and least discussed, cases in constitutional tort law.² It stands for the abstract principle that the “but-for” rule of causation, which is the usual test in common-law torts, applies in constitutional tort suits as well. To understand the principle and its implications, it is helpful to have in mind a concrete example of its application, and *Mt. Healthy* provides as good an illustration as any other case. Doyle, a nontenured school teacher, quarreled with another teacher, with school employees, and with students.³ Two specific incidents deserve mention. First, on one occasion he “made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor.”⁴ Second, after the principal circulated a memorandum on a teacher dress code, he called a local radio station to criticize the administration.⁵ “[C]iting ‘a notable lack of tact in handling professional matters which left much doubt as

---

* J. Alton Hosch Professor of Law, University of Georgia School of Law. University of Virginia (B.A., 1972; J.D., 1975). The Author wishes to thank Tom Eaton and Richard Nagareda for helpful comments on a draft of this Article.
3. 429 U.S. at 281.
4. Id. at 282.
5. Id.
to [his] sincerity in establishing good school relationships," and giving
the radio station incident and the obscene gesture incident as examples,
the school district declined to offer him a contract for the next school
year. Doyle sued under 42 U.S.C. § 1983, which authorizes victims of
constitutional violations to sue for damages or injunctive relief. Though Doyle was able to show that protected speech played a part in
the decision, a unanimous Court held that he could not recover damages
for the discharge if the government could prove that he would have been
fired anyway, for constitutionally permissible reasons. Otherwise, Doyle would be "in a better position as a result of the exercise of
constitutionally protected conduct than he would have occupied had he
done nothing." The Court adopted a two-part test for causation in
mixed motive cases. First, the plaintiff must show that the "conduct
was constitutionally protected, and that this conduct was a 'substantial
factor'—or, to put it in other words, that it was a 'motivating factor' in
the Board's decision." Once the plaintiff meets the substantial factor
test, the burden of proof shifts to the defendant to show "by a preponder-
ance of the evidence that it would have reached the same decision . . .
even in the absence of the protected conduct." The Court's rule is a
variant of the but-for test that governs most cause-in-fact issues in the
common law of torts, differing only in its allocation of the burden of
proof. Unlike the issue of whether speech is protected by the First
Amendment, which is a question of law for the court, the causation issue

6. Id.
7. Id. at 282-83.
9. Id. at 277. The statute provides that "[e]very person who, under color of [state law]
subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights . . .
secured by the Constitution and laws, shall be liable to the party injured in an action at
10. 429 U.S. at 287.
11. Id. at 285.
12. Id. at 287.
13. Id. (footnote omitted).
14. Id.; see also Texas v. Lesage, 120 S. Ct. 467, 468 (2000); Givhan v. Western Line
15. Ordinarily, the plaintiff bears the burden of showing that but for the defendant's
breach of duty, the harm would not have taken place. Even in the common law, special
circumstances sometimes justify shifting the burden of proof on causation to the defendant.
See, e.g., Haft v. Lone Palm Hotel, 478 P.2d 465, 474-75 (Cal. 1970) (maintaining that
defendant's breach of statutory duty was responsible for the lack of evidence as to what
causation plaintiff's death).
is for the jury, subject to the customary judicial oversight for reasonableness.\textsuperscript{16}

As the other papers in this symposium attest, this mixed motives fact pattern arises frequently in constitutional tort law because the validity of government action may turn on the motive behind it.\textsuperscript{17} The \textit{Mt. Healthy} causation rule has spread from First Amendment retaliation law throughout section 1983 litigation. The topic of the symposium is whether the \textit{Mt. Healthy} rule goes to liability or only to damages. In my view, this is not the best way to frame the issue, for it seems to take the holding as a given and to focus attention only on the scope of the rule. The more fundamental question is whether either damages or liability ought to depend on meeting the \textit{Mt. Healthy} test.

This Article argues that \textit{Mt. Healthy} was wrongly decided and therefore should not be applied either in determining liability or in assessing damages. It should be replaced by a rule that allows the plaintiff to recover full damages whenever the constitutional violation was sufficient to cause them. Part II focuses on the role of causation in tort law. Examining \textit{Mt. Healthy} from the perspective of general tort theory, I argue that the ruling is at odds with the fairness and deterrence goals of tort law. Part III shifts to the special features of the constitutional tort context. Quite apart from the general principles of tort law, the special role of constitutional tort law as part of the system of constitutional remedies justifies a more plaintiff-friendly causation rule for constitutional torts. In Part IV, I return to the First Amendment origins of \textit{Mt. Healthy} and argue that certain distinctive features of retaliation cases, in particular the fragility of First Amendment rights, justify a special sufficient cause rule in this context, even if such a rule were rejected for other constitutional claims. Notice that, while the narrow focus of Part IV is the First Amendment retaliation doctrine, the rest of the analysis is relevant across the whole range of constitutional tort suits.

These three arguments are sufficiently distinct to require separate treatment, yet they are variations on a single theme. The Court in \textit{Mt.}

\textsuperscript{16} See, e.g., Gattis v. Brice, 136 F.3d 724, 726 (11th Cir. 1998); Gardetto v. Mason, 100 F.3d 803, 811-18 (10th Cir. 1996); Shands v. City of Kennett, 993 F.2d 1337, 1343 (8th Cir. 1993). The jury's role is not limited to deciding causation, of course. "[T]he jury should decide . . . the nature and substance of the plaintiff's speech activity, and whether the speech created disharmony in the work place. The trial court should then combine the jury's factual findings with its legal conclusions in determining whether the plaintiff's speech is protected." \textit{Shands}, 993 F.2d at 1342-43 (citations omitted).

\textsuperscript{17} See, e.g., Washington v. Davis, 426 U.S. 229, 240 (1976) (noting that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").
Healthy maintained that “[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.” Each of the three arguments I advance is a ground for doubting whether the but-for rule sufficiently vindicates the free speech rights of public employees. Principles drawn from tort theory, constitutional remedies, and First Amendment law all suggest that the but-for rule falls short.

II. TORT THEORY, MULTIPLE CAUSES, AND MIXED MOTIVES

Because there are significant differences between the aims of ordinary tort law and the section 1983 cause of action, it would be a mistake to resolve constitutional tort issues by simply transplanting general tort principles into the constitutional context. Even so, general tort law is an appropriate place to begin the analysis of constitutional tort issues, provided one keeps in mind that it is only the beginning. Over many years courts and scholars have brought substantial intellectual resources to bear on the issues that arise in suits to recover damages for past wrongs, and many of their insights are relevant in the constitutional tort context. The goals of tort law are to achieve fairness between the parties and to deter socially objectionable conduct, and the justification for the causation requirement is that it is a (more or less useful) tool for pursuing those ends. Though some theorists disagree,

18. 429 U.S. at 285-86. This is the main substantive argument in the opinion. The Court also expressed concern that the decision to rehire Doyle would have given him tenure:

The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle’s record was such that he would not have been rehired in any event.

Id. at 286. One answer to this argument is that it hardly justifies a blanket rule for all constitutional torts or all retaliation cases. Also, it is clear today, if it was not so in 1977, that the decision to create property interests in public jobs is solely up to the state. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-41 (1985). Governments do not need a favorable constitutional tort causation rule to avoid unwanted grants of tenure.

19. See infra Part III.

20. For a defense of the proposition that tort law serves both of these goals, see Gary T. Schwartz, Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, 75 TEX. L. REV. 1801 (1997).

21. See id. at 1817 & nn.123-24 (defending causation on economic grounds while conceding that “economic analysts often are uncomfortable with tort law’s causation requirement”); id. at 1822 (noting that “tort law’s causation standard . . . is an essential component of a corrective justice account of tort law”).
courts generally take it for granted that it is unfair to make even a faulty defendant pay damages if there is no connection between the fault and the harm. As for deterrence, the causation requirement is justified as a means of assuring that there is a real need for legal intervention. The absence of a causal link between the behavior and harm suggests that the defendant's actions do not have undesirable consequences, thereby undermining the case for liability.

The Court in *Mt. Healthy* applied the but-for test to the mixed motive issue with little analysis, as though it were a fundamental and incontestable rule of tort law. In reality, common-law courts do not view the but-for test as an immutable principle that applies without exception across the whole range of causation problems. It is a means toward realizing these aims and should not be used when fairness and deterrence are better served by other means. In most circumstances, the but-for test serves these goals well by distinguishing the cases in which defendants bear no responsibility for the harm from those in which there is such a connection. But this is not always so. In a fact pattern that somewhat resembles the mixed motives problem, they have rejected the but-for test in favor of a rule that is far more favorable to the plaintiff. Suppose two fires, each large enough to destroy the plaintiff's house, advance inexorably toward the property. They come together before reaching the plaintiff's property, and the larger fire consumes the house. Even though the but-for test is not met with regard to either fire, a defendant responsible for either of them would be


23. Consider a case in which the defendant's misdiagnosis or wrongful emission of toxic substances has increased the risk of harm across a range of potential injuries. If, in a population of one hundred, the risk of injury is 10% in the absence of the defendant's error, but 15% with it, the chance that any given harm is due to the defendant is only one in three. Though the defendant is responsible for one-third of the harms that result, the but-for test would absolve the defendant every time. See Steven Shavell, *Economic Analysis of Accident Law* 117 (1987). A better approach would be to "impose liability and distribute compensation in proportion to the probability of causation assigned to the excess disease risk in the exposed population, regardless whether that probability fell above or below the fifty-percent threshold and despite the absence of individualized proof of the causal connection." David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 859 (1984); cf. Sindell v. Abbott Lab., 607 P.2d 924, 936-38 (Cal. 1980) (favoring market share liability over the but-for test in circumstances where it is virtually impossible to tell which defendant is responsible for any particular harm).
liable under the substantial factor—or, more precisely, a sufficient cause—test of causation.24

The mixed motives issue decided in Mt. Healthy resembles the causation problem presented by the two-fires case. As a matter of fact, each of the motives may be sufficient to produce the dismissal. Indeed, this may be the typical case, yet under the Court's rule the defendant escapes liability so long as the jury finds that the permissible motive would have been sufficient.25 The Court never quite faced up to this implication of its rule. It characterized the holding as a rejection of "[a] rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire."26 But this formulation fails to address squarely the case in which the impermissible motive does not merely play a part, but is sufficient to bring about the dismissal. It may well be that the plaintiff should lose if the permissible motive is sufficient to bring about the employer's action and the impermissible motive has a subsidiary role, merely "mak[ing] the employer more certain of the correctness of its decision."27 By contrast, in a given case the jury may find as a matter of fact that each motive, the bad one as well as the good one, was sufficient by itself to produce the firing. Lower courts read Mt. Healthy as requiring them to find for the defendant in these circumstances.28

There are good reasons, based on both fairness and deterrence, why common-law courts have rejected the but-for test as a rule for sufficient cause cases. First, the judgment of the common law is that fairness between the parties favors the plaintiff's recovery, for "it is quite clear

24. W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 41, at 266-67 (5th ed. 1984). The term "substantial factor" is not wholly satisfactory, as it is used in several ways in tort law and has no precise meaning. Id. at 267-68, 278. I share the view that a better way to state the cause-in-fact rule of the two fires case is as follows:

When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.

Id. at 268. For convenience, I will call this a "sufficient cause" test. Note, however, that philosophers draw subtle distinctions between versions of sufficient condition tests for causation. See Tony Honoré, Necessary and Sufficient Conditions in Tort Law, in Philosophical Foundations of Tort Law 363, 363-85 (David G. Owen ed., 1995). For present purposes, it seems unnecessary to worry about these distinctions.

25. 429 U.S. at 287.
26. Id. at 285.
27. Id. at 286.
28. See, e.g., Whitaker v. Wallace, 170 F.3d 541, 544-45 (6th Cir. 1999); Heil v. Santoro, 147 F.3d 103, 110 (2d Cir. 1998); Harris v. Shelby County Bd. of Educ., 99 F.3d 1078, 1086 (11th Cir. 1996).
that each cause has in fact played so important a part in producing the result that responsibility should be imposed upon it.\textsuperscript{29} There is no apparent reason to treat mixed motives any differently from other kinds of causes. As for the deterrence theme in tort law, the need for legal intervention is established by the fact that the defendant's fire was sufficient to do the harm by itself and would have done so even if there was no other fire. Similarly, showing that the impermissible motive is sufficient to produce an adverse employment action satisfies the goal of establishing a need for intervention. It is a mere coincidence that a permissible reason is also present. That coincidence does not give us any reason to doubt that the defendant's conduct produces socially undesirable consequences or the need for courts to intervene.

Though fairness and deterrence favor a sufficient cause test over the but-for test, it does not necessarily follow that the second prong of \textit{Mt. Healthy} should simply be abandoned in favor of broad liability based on sufficient cause. Given the potential multiplicity of motives, it may be unwise to grant recovery whenever an impermissible one is sufficient. Fairness between the parties and deterrence of socially harmful activity may be better served by imposing liability only when the bad motive is the primary one. To this end the common law offers another alternative that is worth considering. Mixed motives are a problem in the common law of defamation, and the resolution of the issue there may provide guidance for constitutional torts. The issue comes up when a defendant asserts that defamatory comments are privileged because either the speaker has a legitimate personal or professional interest in making the comments or because the recipient has a legitimate interest in receiving them. If such an interest is present, there is justification for making the statements. Yet a given speaker may actually be motivated by a desire to hurt the plaintiff, or the speaker may simply like to gossip. In that event the justification for making the statement is much weaker. Rather than protecting the statement whenever a legitimate interest is present or instructing the jury to decide whether the statement would have been made but for the bad motive, courts instruct the jury to determine which was the dominant purpose.\textsuperscript{30}

\textsuperscript{29} Keeton \textit{et al.}, \textit{supra} note 24, § 41, at 267; see also Honoré, \textit{supra} note 23, at 364 (favoring liability in such cases on the ground that causal analysis supports an exception to the but-for test); Wex S. Malone, \textit{Ruminations on Cause-in-Fact}, 9 STAN. L. REV. 60, 88-94 (1956) (favoring liability in such cases on the ground that tort policy supports an exception to the but-for test).

\textsuperscript{30} \textit{See Restatement (Second) of Torts} § 603 cmt. a (1977). For an example, see Schafroth \textit{v.} Baker, 553 P.2d 1046, 1049-50 (Or. 1976).
Adopting the dominant purpose test would probably favor the plaintiff less than the sufficient cause test, but it would not take us back to *Mt. Healthy*. The difference between the dominant purpose test and the but-for test is that the but-for test asks a rather different question. Instead of directing the jury to determine which motive is most important, the but-for test tells it to ask only whether the permissible one was sufficient. Because a motive may be sufficient without being primary, the but-for test will more often foreclose recovery. At the same time, the dominant purpose test would not allow a plaintiff to recover whenever the impermissible motive is sufficient, because the permissible one may be primary. Because the purpose of this Article is limited to finding fault with *Mt. Healthy*, and not to defending any particular alternative, it seems appropriate here, and in the ensuing parts of the Article, to offer the sufficient cause and dominant purpose tests as possible replacements for *Mt. Healthy* without choosing between them.Either would be better than the current rule.

III. CAUSATION IN CONSTITUTIONAL TORT LAW

These common-law departures from the but-for test do not, by themselves, establish that *Mt. Healthy* is wrong. On the contrary, the better practice is to avoid mechanical application of any common-law rule to the constitutional tort context. Constitutional tort law serves a distinctive role in our system of constitutional remedies, and this distinctive role may call for special rules on causation and other matters. Drawing analogies to ordinary tort law is an effective way to cast doubt on the *Mt. Healthy* rule, as they show the divergence between the Court's superficial treatment of the causation problem in mixed-motive cases and the accumulated wisdom of the common law. Such analogies can never be decisive because the aims of constitutional tort law and the common law of torts diverge in important ways. Far from supporting the Court's decision, these differences furnish powerful arguments against *Mt. Healthy*. One distinction between constitutional torts and common-law torts, discussed in this part of the Article, concerns the distinctive role of constitutional tort law in our system of constitutional remedies. Another distinction, addressed in Part IV, relates to the special features of suits by public employees claiming retaliation for protected speech.

Assuming that the but-for test is appropriate for mixed-motive problems in ordinary tort law, two special features of constitutional tort

---

THREE ARGUMENTS

law call for replacing the Mt. Healthy rule with a sufficient cause or dominate purpose test in section 1983 litigation.\(^\text{32}\) One of these is the simple fact that constitutional tort law and the common law of torts protect different interests. The common law of torts concerns the allocation of responsibility for physical, emotional, or other personal harm. In constitutional tort law, the rights at stake are fundamental liberties. Perhaps the but-for test provides adequate protection for the plaintiff's interests in compensation for personal injury and property damage. It does not necessarily follow that the same judgment should be made when constitutional rights are at issue. The point is not that the plaintiff should be spared from any obligation to show a causal connection just because he is asserting a constitutional claim. Rather, the fact that constitutional tort law focuses on a narrow set of fundamental rights bears on the choice of a causation rule from among the plausible candidates. The sufficient cause rule assures that the defendant will be treated fairly. Only when the defendant's constitutionally impermissible reason is sufficient to bring about the harm will he be held liable. The dominant purpose rule goes further in protecting defendants by requiring that the impermissible motive be the primary one. At the same time, these rules better protect constitutional rights than the but-for test, as they permit recovery in cases in which there are two sufficient motives, whereas the but-for test does not.

The other noteworthy difference between constitutional tort law and the common law of torts concerns the aims behind imposing liability. In both areas the aims include not only vindicating the plaintiff's rights, but also deterring wrongful conduct. The former focuses on the merits of the plaintiff's claim, whereas the latter is concerned with the systemic impact of liability rules. But there is, or should be, a difference in the emphasis placed on each of these aims as one moves from the common law of torts to constitutional tort law. While systemic considerations play a role in the common law, the focus of the litigation is usually on the rights and duties of the parties toward one another. When systemic considerations are paramount, an appropriate solution is to replace the common law with a statutory scheme, as was done with workers' compensation.\(^\text{33}\)

---

32. See Eaton, supra note 2, at 454-55 ("Holding the wrongdoer responsible in such situations provides greater deterrence of future misconduct, vindicates the plaintiff's rights, and compensates the plaintiff for the injuries."); cf. Wells, supra note 31, at 205-10 (arguing that constitutional values justify departing from common-law cause-in-fact rules).

33. See Richard A. Epstein, The Historical Origins and Economic Structure of Workers' Compensation Law, 16 GA. L. REV. 775 (1982). For a recent argument that an effective response to the problem of mass torts may require replacing tort principles with an
As with the common law, one aim of constitutional tort law is to compensate victims for injuries attributable to constitutional violations. An equally if not more important goal is to use private lawsuits under section 1983 as a means to deter constitutional violations that cannot be inhibited in any other way. Suits for damages may be the only realistic means of dissuading government officials from violating the First Amendment rights of public employees. Sometimes constitutional rights can be asserted defensively, as a shield to civil or criminal liability, and in some situations one can bring a suit for prospective relief to stop a present or threatened constitutional violation. In other circumstances, however, constitutional wrongs can only be deterred through suits for damages for past violations. Retaliation is a good example.

Because governments fire employees without using the judicial process, there is no opportunity to raise one's rights defensively. Prospective relief is rarely available because of the fact-sensitive nature of the legal standard governing retaliation claims and the Court's willingness to allow employers to make ad hoc decisions. As a practical matter, the employee generally must bring a tort suit after the fact to obtain relief.

For these reasons constitutional tort law should be conceived of as a part of what Professor Abram Chayes has called "public law litigation." By this term Professor Chayes means to identify forms of adjudication that use the lawsuit as a vehicle for "the vindication of administrative mechanism, see Richard A. Nagareda, In the Aftermath of the Mass Tort Class Action, 85 GEO. L.J. 295 (1996).


36. Another example is a suit against the police or prison officials for the use of excessive force or deliberate indifference to an inmate's medical needs. See Michael Wells, Constitutional Torts, Common Law Torts, and Due Process of Law, 72 CHI.-KENT L. REV. 617, 627-36 (1997).


39. See Wells, supra note 31, at 190-96.
THREE ARGUMENTS

constitutional . . . policies\textsuperscript{40} rather than merely as a means of resolving the rights and duties of the parties in traditional "private law" fashion.\textsuperscript{41} Mt. Healthy's but-for test, with its emphasis on avoiding "[a] rule of causation . . . [that] could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing,"\textsuperscript{42} seems to reflect a strictly private law view, as do many other aspects of the contemporary Supreme Court's section 1983 doctrine.\textsuperscript{43} Instead, we should conceive of damage suits as a useful tool in the repertoire of remedies aimed at deterring constitutional violations,\textsuperscript{44} and as an essential tool in the retaliation context.

My point is not that all liability rules should favor the plaintiff. On the contrary, the public law dimension of constitutional tort law sometimes requires narrower liability. For example, the aim of the official immunity doctrine, which denies the plaintiff compensatory damages unless the defendant official is at fault,\textsuperscript{45} is to minimize the danger that government officials will act too cautiously because of fear of lawsuits.\textsuperscript{46} Accordingly, immunity is not available to private actors sued under section 1983.\textsuperscript{47} John Jeffries has recently argued that limits on the recovery of damages from officials serves a broader social goal: "[T]he curtailment of damages liability for constitutional violations has deep structural advantages for American constitutionalism . . . . [T]he right-remedy gap in constitutional torts facilitates constitutional change by reducing the costs of innovation . . . . More importantly, the fault-based regime for damages liability biases constitutional remedies

\textsuperscript{40} Id. at 193 (quoting Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1284 (1976)).

\textsuperscript{41} Chayes, supra note 40, at 1282-83. I do not mean to suggest that public law solutions are never appropriate for physical harms. On the contrary, they may be essential. See Nagareda, supra note 33, at 351-68; Rosenberg, supra note 23, at 859-60.

\textsuperscript{42} 429 U.S. at 285.

\textsuperscript{43} See Wells, supra note 31, at 190-93.

\textsuperscript{44} For a general introduction to this way of looking at constitutional remedies, see Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 COLUM. L. REV. 247 (1988).


\textsuperscript{46} See PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 59-81 (1983).

in favor of the future.”\textsuperscript{48} In this way constitutional reform is facilitated in that it can be realized without the added burden of obliging governments to pay reparations for what are now considered to be past wrongs.

Having adopted public law premises in the immunity context, the Court's basic obligation to strive for coherence in the law comes into play.\textsuperscript{49} If the Court cannot explain why public law premises are appropriate for one issue but not others, it ought to employ the public law model in resolving other constitutional tort issues as well.\textsuperscript{50} Once the plaintiff has overcome the fault hurdle, the case for further special restrictions on liability is weak, and the deterrence aim should be paramount. Quite apart from the equities between plaintiff and defendant, the causation rules should reflect this deterrent aim. The plaintiff should prevail when the impermissible motive is dominant and perhaps whenever it is sufficient.

The foregoing discussion has stressed the purposes of vindication and deterrence, paying no attention to precedent. In this context the emphasis on policy analysis is justified because there were no directly applicable precedents on either side of the causation issue raised in \textit{Mt. Healthy}. Justice Rehnquist, writing for the majority in \textit{Mt. Healthy}, cited three decisions, \textit{Lyons v. Oklahoma},\textsuperscript{51} \textit{Wong Sun v. United States},\textsuperscript{52} and \textit{Parker v. North Carolina},\textsuperscript{53} in which the issue was whether the government in a criminal prosecution may, after obtaining an illegal arrest or confession from a criminal defendant, use a later confession or guilty plea to convict him.\textsuperscript{54} These cases stand for the principle that the later event may stand on its own so long as the connection between it and the unconstitutional event is sufficiently attenuated.\textsuperscript{55} In \textit{Lyons}, \textit{Wong Sun}, and \textit{Parker}, the Court reasoned that the passage of time and changes in circumstances between the unconstitutional event and the valid one provide assurance that the later event is not tainted by the former one.\textsuperscript{56} This principle of criminal

\begin{itemize}
  \item \textsuperscript{49} See \textit{Ronald Dworkin}, \textit{Law's Empire} 95-96 (1986) (using the term "law as integrity" to describe this constraint on judges).
  \item \textsuperscript{50} See \textit{Wells, supra} note 31, at 195-96 (noting the inconsistency between the public law premises employed in immunity law and the private law premises underlying the causation and damages doctrines).
  \item \textsuperscript{51} 322 U.S. 596 (1944).
  \item \textsuperscript{52} 371 U.S. 471 (1963).
  \item \textsuperscript{53} 397 U.S. 790 (1970).
  \item \textsuperscript{54} 429 U.S. at 286-87.
  \item \textsuperscript{55} \textit{Id}.
  \item \textsuperscript{56} \textit{Id}.
\end{itemize}
procedure has little in common with the *Mt. Healthy* problem of mixed motives operating at the same time.\(^57\) The Court admitted that the analogy between the criminal procedure and mixed motive contexts is a strained one and declared that it used the analogy merely as an illustration of a general policy served by the causation requirement.\(^58\) Thus, "the type of causation on which the taint cases turn may differ somewhat from that which we apply here," yet "those cases do suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights."\(^59\)

IV. **PUBLIC EMPLOYEE SPEECH, THE FIRST AMENDMENT, AND SECTION 1983**

The mixed-motives issue is especially prominent in First Amendment retaliatory discharge cases. The First Amendment protects government employees from adverse employment actions\(^60\) taken against them because of protected speech, but it does not prohibit the government from taking adverse action against someone who has coincidentally engaged in protected speech. The typical fact pattern in retaliation cases features a plaintiff who has engaged in speech protected by the First Amendment but who has also acted in ways that are not shielded by the Constitution. Alternatively, the plaintiff may have acted in exemplary fashion, yet there could be staffing problems, resource allocation issues, or other routine features of the workplace that could justify dismissing, demoting, or otherwise disadvantaging the plaintiff. Even after the plaintiff has established that the First Amendment protects the speech, it must be determined whether the speech or some other reason prompted the employer to fire the plaintiff. This is not necessarily an either-or question, for the motivations for human behavior are often complex. Officials in charge of personnel decisions, like other human beings, do not typically segregate their thoughts into two

\(^{57}\) If there is a tort analogy to this rationale, it comes from the doctrine of proximate cause. Under that banner, courts hold that a driver who impedes the plaintiff's progress is not liable for an accident the plaintiff suffers hours later, though the plaintiff would not have been at the location of the accident had he not been impeded by the defendant. See, e.g., Marshall v. Nugent, 222 F.2d 604, 612 (1st Cir. 1955).

\(^{58}\) 429 U.S. at 287.

\(^{59}\) Id.

\(^{60}\) Adverse employment actions include not only dismissals but also demotions and perhaps other kinds of ill treatment. See, e.g., Rutan v. Republican Party of Ill., 497 U.S. 62, 73-76 (1990); Nunez v. City of Los Angeles, 147 F.3d 867, 874-75 (9th Cir. 1998); Pierce v. Texas Dep't of Criminal Justice, 37 F.3d 1146, 1149 (5th Cir. 1994).
categories, allowing only one set of reasons to influence their choices. The causation issue comes up in situations in which the public employer has mixed motives, at least one of which is a permissible reason for firing the plaintiff, and at least one of which is an impermissible one.

Whatever the merit of the *Mt. Healthy* rule in other constitutional contexts, it is especially ill-suited to constitutional tort suits charging retaliation for the exercise of First Amendment rights. To see why, it is necessary to understand certain features of the substantive context in which this kind of litigation takes place. The leading case in the area is *Pickering v. Board of Education,* in which a school teacher had been dismissed for criticizing the Board's policies on school finance in a letter to the newspaper. Upholding plaintiff's claim, the Court "unequivocally rejected" the premise "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." However, public employees do not enjoy as much freedom to speak as other citizens because "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering* gave rise to a distinctive body of First Amendment law relating to the rights of public employees. Fifteen years after *Pickering,* in *Connick v. Myers,* the Court gave the doctrine its current structure, setting out a two-part test. To prevail the plaintiff must first establish that the speech related to a "matter of public concern." If this hurdle is met, the court must engage in "particularized balancing," weighing the benefits of the speech against its costs, which are measured largely by its potential for disrupting the government workplace.

One general problem with this body of doctrine is that free speech is a "delicate and vulnerable" right that needs special protection to flourish. Though there are exceptions, the choice to engage in speech is usually a highly discretionary one. Moreover, most speakers gain nothing tangible by coming forward. Faced with a choice between

---

62. *Id.* at 564.
63. *Id.* at 568.
64. *Id.*
66. *Id.* at 147-51.
67. *Id.* at 147.
68. *Id.* at 150-51.
keeping silent and risking nothing, or speaking out and perhaps losing a secure job, many of us would be likely to choose the latter course. In some contexts the benefits of free speech go mainly to the speaker, and the fact that speakers may be intimidated by the fear of some sanction may not be troubling. However, the *Pickering/Connick* doctrine assures that the job-related speech for which public employees may recover addresses a matter of public concern. 70 Such speech is protected because "[t]he public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment." 71 Public employees should be encouraged to speak on matters of public concern because "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." 72

In theory the *Pickering/Connick* formulation of the public employee speech doctrine achieves an appropriate balance between the value of free speech and the special needs of the government workplace. In practice, however, it may exacerbate the problem of fragility and discourage valuable public employee speech. The problem is that both parts of the test are fact sensitive. For example, the "public concern" inquiry does not turn solely on the content of the speech. The speaker's motive is a significant factor in determining whether speech is on a matter of public concern. 73 Even if this test is met, *Connick* directs courts to balance the value of the speech against its potential for disruption on a case by case basis. 74 One can rarely be sure ahead of time whether a given instance of speech is protected or not. This uncertainty, combined with the official immunity doctrine, poses a further problem. Damages may not be obtained against the offending supervisor unless the right was clearly established at the time the adverse action was taken. 75 This test is difficult to meet in a legal regime that emphasizes fact-sensitive inquiries under *Pickering/Connick*. 76

70. 461 U.S. at 147; 391 U.S. at 573.
71. 391 U.S. at 573.
74. 461 U.S. at 147-48.
76. See, e.g., Moran v. Washington, 147 F.3d 839, 847 (9th Cir. 1998), and cases cited therein.
One way to make retaliation law a more effective tool for protecting public employee speech is to reshape the substantive law by moving from the current regime of flexible standards to a body of hard-edged rules.77 However, it may be unrealistic to expect the Court to undertake such a major reform. Moving from the but-for test of Mt. Healthy to a more plaintiff-friendly causation rule, like the sufficient cause or dominant purpose test, would ameliorate some of the problems plaintiffs face because of other features of the substantive and remedial doctrine on suing for damages.

The case for replacing Mt. Healthy is not solely a matter of making up for other obstacles to recovery. The Mt. Healthy causation rule operates in a social context in which officials often act with mixed motives. By requiring that the but-for test be met, the rule invites government employers in retaliation cases to make causation an issue, and many do so.78 As a result, the employee who speaks always has to worry about the possibility that the employer may have some other reason sufficient to fire him, that the employer can convince a jury that there is such a reason,79 or that the employer can convince a court to grant summary judgment on this ground without giving the plaintiff a chance to reach the jury.80 Employers in retaliation cases often find some evidence of insubordinate behavior or can point to some other ground for the action taken, and they have had a fair amount of success in showing that a permissible motive, and not the protected speech, was the cause in fact.
THREE ARGUMENTS

of the dismissal.81 Large governmental organizations have a special advantage, for defendants often prevail in cases in which the official who disciplined the plaintiff is someone other than the official who had an impermissible motive.82

V. CONCLUSION

There is a wide disparity between the importance of the rule announced in Mt. Healthy and the attention the issue received in the Court's opinion. Retaliation cases make up a significant part of the business of the federal courts, and a key issue in a large proportion of retaliation cases is identifying the motive for the adverse employment action. Despite the importance of causation, Mt. Healthy addresses the issue in just three pages at the end of an opinion devoted mainly to other matters.83 No doubt three pages would be sufficient, if they were used wisely. However, the Court in Mt. Healthy offered only fragments of arguments rather than cogent reasoning. The result is an unconvincing hodgepodge that leaves unanswered the difficult questions raised by the causation issue.

Adopting a more plaintiff-friendly causation rule would not be costless. Governments would be less free than they are now to fire incompetent, lazy, disruptive, or unneeded workers. But the costs are not nearly as great as the Court in Mt. Healthy made them out to be. The Court defended its rule as a way to avoid the undesirable consequences of allowing plaintiffs to win whenever the employer "considered constitutionally protected conduct,"84 or whenever "a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision"—in other words, whenever an impermissible motive influenced the employer's decision. The Court was understandably concerned that public employers would be hamstrung in their efforts to rid themselves of unproductive or disruptive workers if it adopted a lax causation rule.85 Given the breadth of speech covered by the First

81. See cases cited supra notes 78 & 80; Brady v. Houston Indep. Sch. Dist., 113 F.3d 1419, 1424-25 (5th Cir. 1997); Harris v. Shelby County Bd. of Educ., 99 F.3d 1078, 1085 (11th Cir. 1996).
82. See, e.g., Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 745 (11th Cir. 1996); Pierce v. Texas Dep't of Criminal Justice, 37 F.3d 1146, 1150 (5th Cir. 1994).
83. See 429 U.S. at 285-87. The other parts of the opinion deal with the school board's argument that section 1983 did not cover its actions, see id. at 277-79, its Eleventh Amendment argument, see id. at 279-81, and the substantive free speech issue, see id. at 281-84.
84. Id. at 286.
85. Id. at 285.
86. See id.
Amendment, virtually any clever employee could come up with a plausible argument that protected speech influenced the supervisor who fired him.

While the concern is real, its force depends on the target at which it is aimed. It is a persuasive reason against allowing recovery whenever an impermissible motive had any bearing on the decision. As applied to the alternatives proposed in this Article, however, the argument attacks a straw man. Neither the sufficient cause test nor the dominant purpose test would allow the plaintiff to prevail in such a broad category of cases. Under the sufficient cause test, the jury would be instructed to find for the plaintiff only when the impermissible motive would have been sufficient to produce the adverse employment action, and not whenever an impermissible motive figured in the decision. The dominant purpose test is at least equally demanding because it directs the jury to determine whether the impermissible motive was the primary reason for the action taken.

Whatever value the arguments advanced in this article may have, the evolution of the law over the past two decades provides another reason why Mt. Healthy needs to be reconsidered. The Court in 1977 may not have forecast the growth of section 1983 litigation in the ensuing decades. A number of developments in constitutional tort law during this period have reshaped the context in which the Court decided Mt. Healthy. For example, the Court adopted an objective approach to qualified immunity after it decided Mt. Healthy. Other developments in constitutional tort law in the years since Mt. Healthy also have altered the context in which the Court concluded that the but-for test sufficiently vindicates constitutional values. For example, the Court in Memphis Community School District v. Stachura forbade recovery for the abstract value of First Amendment rights and held that plaintiffs must prove actual harm to prevail. In addition, the Court in Monell v. Department of Social Services held that local governments may be liable if the constitutional violation is produced by an official policy or

89. Id. at 305-10.
custom, thereby giving rise to a body of law, some of which bears on retaliation law, that struggles to define those terms.

None of these developments are incompatible with the causation rule announced in *Mt. Healthy*. However, rulings about one dimension of law ought to reflect the whole array of principles related to the issue at hand. As law evolves and the context changes over time, it is good practice to reconsider established rules on related topics. For example, the new immunity rule took away the plaintiff's opportunity to divest the defendant of immunity by showing an impermissible motive, thereby making it more difficult for a plaintiff to prevail in virtually any constitutional tort case brought against an official. Whether *Mt. Healthy*'s but-for test sufficiently vindicates the free speech value at stake in the case, as the Court thought it did at the time, ought to be reconsidered in light of the new immunity rule and other developments in constitutional tort doctrine that have occurred over the past two decades.

91. *Id.* at 690-91.


93. For another important post-*Mt. Healthy* ruling, see Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).