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First Amendment and the Law Enforcement Agency: Protecting the Employee Who Blows the Whistle, The

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THE FIRST AMENDMENT AND THE LAW ENFORCEMENT AGENCY: PROTECTING THE EMPLOYEE WHO BLOWS THE WHISTLE

The following item appeared in a widely circulated Wyoming newspaper on April 7, 1983:

> A U.S. District Court jury ruled Wednesday that former Natrona County Sheriff Bill Estes fired two former deputies in retaliation for exercising their rights of free speech.
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> The verdict came after two days of deliberation by a jury in Cheyenne.
>
> The panel of four men and two women ordered Estes to pay the two former deputies, Mark Hamilton and Johnny Daniels, damages of $4,609.44 each for a total judgment of $9,218.88.
>
> . . . .
>
> Hamilton and Daniels claimed they were fired by Estes on June 5, 1981, for cooperating in investigations of incidents in the sheriff's office and because he blamed them for leaks of those incidents to the news media.[1]

FIRST AMENDMENT FREEDOM OF SPEECH—FOUNDATION FOR PROTECTING THE WHISTLE BLOWER

Throughout most of the history of the United States, the public employee who was brave enough or crazy enough to call attention to wrongdoing within his agency discovered that his speech merited no protection in the courts.[2] His superior was free to dismiss, demote, or reprimand him, since public employment was considered a privilege, not a right.[3] The courts adhered steadfastly to the doctrine expressed by Justice Holmes in his well-known statement: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[4]

1. Barron, *Jury Rules in Favor of Deputies*, Casper Star-Tribune, Apr. 7, 1983, at A1, col. 1.
2. Miller, *Whistle Blowing and the Law*, in WHISTLE BLOWING, THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY 27 (Nader, Petkas & Blackwell eds. 1972).
3. Comment, *The Unclear Boundaries of the Constitutional Rights of Public Employees*, 44 U. MO. KAN. CITY L. REV. 389, 389 (1976).
4. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517, 517 (1892). The court upheld the dismissal of a policeman who had violated departmental regulations against joining political committees or soliciting funds for political purposes. *Id.*, 29 N.E. at 518.

It was not until the mid 1950's that the United States Supreme Court began to apply the Bill of Rights to public employees. In *Slochower v. Board of Higher Education*[5] the Court held that a public school teacher could not be discharged for invoking the fifth amendment privilege against self-incrimination before a congressional subcommittee investigating subversive influences in the educational system.[6] By 1967, the Court had formally rejected the notion that the state has unlimited power to set conditions on public employment. In *Garrity v. New Jersey,*[7] the Court held that the fifth amendment applies to policemen as well as teachers[8] and concluded that "policemen . . . are not relegated to a watered-down version of constitutional rights."[9] Today, restrictions still exist on the ability of public employees to exercise first amendment rights. Government workers who blow the whistle on agency wrongdoing continue to be subjected to retaliation in the form of discharge, suspension, and demotion.

Statutory Protection

Since 1979, public employees at the federal level have enjoyed the protection of a "whistle blowers' statute."[10] This provision, which was enacted as part of the Civil Service Reform Act,[11] shields government employees who disclose information which they reasonably believe evidences a violation of the law or mismanagement, waste, abuse of authority, or a substantial danger to public health or safety.[12] Because whistle blowers reveal wrongdoing that would otherwise go undetected and because they often encounter economic and professional loss, Congress gave the Merit Systems Protection

5. 350 U.S. 551 (1956).
6. *Id.* at 553, 559.
7. 385 U.S. 493 (1967).
8. *Id.* at 499-500.
9. *Id.* at 500. *See also* Keyishian v. Board of Regents, 385 U.S. 589 (1967), in which the Court struck down a New York law that required removal of university faculty members for "treasonable or seditious" acts. *Id.* at 597, 604. The Court quoted with approval the Second Circuit Court of Appeals: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Id.* at 605-06.
10. 5 U.S.C. § 2301(b)(9) (Supp. V 1981).
11. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 codified *as amended in* scattered sections of 5, 10, 15, 28, 31, 38, 39, 42 U.S.C.
12. 5 U.S.C. § 2301(b)(9) (Supp. V 1981).

Board[13] and Special Counsel[14] the authority and duty to protect federal employees who call attention to agency abuses.[15]

At least two states have enacted statutes that expressly protect the whistle blower. In 1980, Michigan passed a comprehensive act[16] that prohibits employers in both the public and private sectors from discharging or otherwise discriminating against an employee on the ground that he has reported an unlawful activity to a public body.[17] An Alaskan statute protects school teachers who criticize school personnel, school board members, or any other public official outside of school hours.[18] The state and federal statutes provide coverage limited to their respective jurisdictions. Therefore, the vast majority of public employees[19] at the state and local level must rely exclusively on the first amendment guarantee of freedom of speech[20] to protect their interests should they choose to reveal information that incriminates their superiors.

The Pickering Balancing Test

Every case in which a public employee claims he was dismissed for activity protected by the first amendment must be analyzed in light of *Pickering v. Board of Education.*[21] In that case, the United States Supreme Court established a balancing test in which "the interests of the [employee], as a citizen, in commenting upon the matters of public concern"[22] are weighed against "the interest of the state, as an employer, in promoting the efficiency of the public services it performs

13. 5 U.S.C. §§1201-1203, 1205-1209 (Supp. V 1981).
14. 5 U.S.C. §§ 1204, 1205-1208 (Supp. V 1981).
15. S. REP. NO. 95-969, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2723, 2730. Each year about one thousand cases, alleging the affirmative defense of whistle blowing, are filed with the Merit Systems Protection Board. Katz, *EPA, Whistle Blower Tangle Over Criticism,* 68 A.B.A. J. 1064 (1982). The office of Special Counsel has been unsuccessful in establishing this defense, a fact which led Congresswoman Patricia Schroeder to introduce a bill, H.R. 6392, 97th Cong., 2d Sess. (1982), to abolish the controversial office. Katz, *Do Whistle Blowers Have Enough Protection?* 68 A.B.A. J. 1065 (1982).
16. MICH. COMP. LAWS ANN. §§ 15.361-.369 (1981).
17. See Franck, *Curb That Whistle!* 61 MICH. B.J. 106 (1982), for a brief discussion of the act as it applies to professions in which confidentiality is a major concern.
18. ALASKA STAT. § 14.20.095 (1982).
19. Private employers are not restricted by the first amendment in regulating the speech of employees because of an absence of state action. See WHISTLE BLOWING! (Westin ed. 1981) for a collection of whistle-blowing stories from the private sector.
20. "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I.
21. 391 U.S. 563 (1968).
22. *Id.* at 568.

through its employees."[23] Pickering, a teacher, was dismissed for sending a letter to a local newspaper which criticized the Board of Education and the superintendent for their handling of bond elections and their allocation of school funds.[24] The Court recognized the possibility of an infinite number of variations on Pickering's particular factual situation and declined to lay down a general standard against which all critical statements by public employees could be judged.[25] However, in concluding that Pickering's speech was protected under the first amendment, the Court developed guidelines which lower courts have followed in balancing the employee's interests against those of the state:

1. Consideration must be given to the working relationship between the employee and the person criticized. If the employee's statements are directed toward someone with whom he would normally come in contact during his working day, the likelihood of disruption of discipline by superiors or harmony among co-workers is increased. Public criticism by a subordinate is less likely to be protected in employment relationships that demand personal loyalty and confidence to function properly.[26]

2. The nature of the employee's speech is a significant factor. An item of legitimate public concern, disclosed by a knowledgeable worker, is likely to merit constitutional protection. The Court stressed the importance of encouraging free and open debate, which promotes intelligent choice by the electorate.[27]

3. The fact that an employee's statements are false does not render them *per se* detrimental to the operation of the department. The ease with which erroneous statements can be countered and their overall impact on the public must be weighed.[28]

23. *Id.*
24. *Id.* at 564.
25. *Id.* at 569.
26. *Id.* at 569-70.
27. *Id.* at 571-72.
28. *Id.* at 570-72.

Once an outspoken employee survives the balancing test and his communication is deemed to be protected, the standard of protection is that of *New York Times Co. v. Sullivan.*[29] That standard requires "proof of false statements knowingly or recklessly made,"[30] before the employee may be subjected to retaliatory dismissal.[31] Thus, the government employee whose speech is protected under *Pickering* is treated as though he were a member of the general public. He is free to criticize public officials at will, so long as he does so without malice.[32]

Restrictions Imposed by the Mt. Healthy Test

If a public employee is terminated for engaging in activities protected under *Pickering,* the employer can still prevail in an action for reinstatement or damages by showing that the employee would have been removed even in the absence of the protected conduct.[33] In *Mt. Healthy City School District Board of Education v. Doyle,*[34] conduct clearly protected by the first amendment[35] precipitated the school board's decision to discharge teacher Doyle. However, conduct which was not protected also afforded grounds[36] for his removal. The issue was whether the fact that the protected activity played a "substantial part" in the decision to dismiss constituted a violation of the first amendment.[37]

A unanimous Supreme Court held that the fact that protected conduct played a part in the decision to dismiss did not amount to a constitutional violation so long as the board would have reached the same decision had the protected behavior not occurred.[38] This holding was necessary, the Court reasoned, to avoid granting the incompetent employee a ready means of saving his job. A test that focused solely on whether protected conduct played a part in the decision to terminate could place

29. 376 U.S. 254 (1964).
30. Pickering v. Board of Educ., 391 U.S. at 574 (1968).
31. *Id.* at 573-74.
32. *Id.* at 574.
33. Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees,* 89 YALE L.J. 376, 376-77 (1979).
34. 429 U.S. 274 (1977).
35. Doyle revealed the contents of an intraschool memorandum regarding the faculty dress code to a local radio station. *Id.* at 282.
36. Doyle continually engaged in altercations with other teachers, cafeteria workers, and students. *Id.* at 281-82.
37. *Id.* at 285.
38. *Id.*

the employee who engaged in protected behavior in a better position than he would have been in had he done nothing.[39]

The *Mt. Healthy* Court set forth a two-part test for determining whether a public employee has been removed from his position in violation of the first amendment:

1. The initial burden is on the employee to show that his conduct was constitutionally protected and that this conduct was a substantial factor in his removal.

2. The burden then shifts to the government employer to show that the employee would have been dismissed even in the absence of the protected conduct.[40]

While the *Mt. Healthy* test serves as a potential aid to employers in wrongful discharge suits, the test has not played an important role in whistle-blowing cases. The reason for this apparent paradox is that the public official responsible for dismissing an employee generally acknowledges that the decision to terminate was based *solely* on the whistle-blowing employee's communications to the media, his superiors, or other agencies. In the structured environment of a police department or sheriff's office the disruption and the breakdown in discipline caused by the recalcitrant subordinate's speech is deemed by his superior to justify any retaliatory action.[41] Moreover, the whistle blower often has an exemplary record within the department, affording the employer no other grounds upon which to base dismissal. Consequently, the *Pickering* balancing test, unmodified by *Mt. Healthy,* functions as the tool for analyzing whether a decision to discharge a particular government employee violated the first amendment.

39. *Id.* at 285-86.
40. *Id.* at 287. Two years later, in Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979), the Court reformulated this test as the "but for" test. Even though protected activity constituted the "primary" reason for a decision to dismiss, to justify a finding of unconstitutional dismissal, the trier of fact must determine that the employee would have been retained *but for* his protected behavior. 439 U.S. at 417. For a critical analysis of the Court's "but for" test, see Note, *supra* note 33.
41. It should be kept in mind that these communications unquestionably would be protected by the first amendment were the speaker a member of the general public rather than a governmental employee. *See* Pickering v. Board of Educ., 391 U.S. at 573-74 (1968).

SCOPE OF THE FIRST AMENDMENT RIGHT TO BLOW THE WHISTLE

Since, under *Pickering,* an employee's freedom to disclose the wrongdoing of his associates or superiors must be balanced against the government's interest in maintaining an efficiently operating department, the scope of the right to blow the whistle will depend on the balance struck by the particular court.[42] In weighing the interests of the parties in the area of law enforcement,[43] courts have focused on two factors as being of particular significance: the nature of the employee's speech and his intended recipient.

Public Disclosure of Matters of Strong Public Concern

In *Williams v. Board of Regents*[44] the Fifth Circuit Court of Appeals emphasized the fact that the employee had disclosed a matter of grave public concern.[45] Consequently, a showing that the communication had caused departmental disruption and disharmony was not a per se defense to dismissal.[46] Williams, a lieutenant in the University of Georgia police force, had written a letter to his superiors protesting their alteration of an accident report concerning the city chief of police. Williams discussed the alteration with his father, who then revealed the incident to the press. Williams was fired as a result of the leaked report.[47] In a civil rights action[48] against the university, chief of police, and others, the jury awarded Williams compensatory and punitive damages.[49]

42. Comment, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle,* 42 U. CHI. L. REV. 530, 537 (1975).
43. Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970), was one of the first circuit court decisions subsequent to *Pickering* to rule on an employee's right to call attention to wrongdoing within a police department. The case is significant because the court expressly held that the *Pickering* balancing test was not limited to public school situations, but was applicable to employment relationships in the law enforcement context as well. *Id.* at 904. Lower courts since *Muller v. Conlisk* have applied *Pickering* to a variety of public employment situations. *See* Note, *Nonpartisan Speech in the Police Department: The Aftermath of Pickering,* 7 HASTINGS CONST. L.Q. 1001, 1011 (1980).
44. 629 F.2d 993 (5th Cir. 1980), *cert. denied,* 452 U.S. 926 (1981).
45. *Id.* at 1003.
46. *Id.* at 1004.
47. *Id.* at 995-98.
48. The employee in these cases typically brings an action against his employer under 42 U.S.C. § 1983 (1976), which provides:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
49. 629 F.2d at 998.

On appeal, the university argued that evidence of two of the *Pickering* defenses, "the necessity of discipline in a quasi-military organization and the breakdown of the working relationship between superior and subordinate," should have been admitted at trial and their validity should have been determined by the jury.[50] The court recognized the availability of the *Pickering* defenses and the importance of harmony in employment relationships and proper job performance.[51] The court found, however, that where first amendment rights are at stake, the balancing of interests between the employee and the state is for the court.[52]

Despite the fact that Williams' conduct was certain to lead to disruption in the department, and despite the fact that discipline is essential to a well-run police force, the gravity of Williams' communication tipped the scales in favor of first amendment protection. The court ruled that where the matter is of legitimate concern to the public, as is the falsification of police records for the protection of an official, "the employee's right to speak must be vigorously protected if the public is to be informed."[53]

Justice Rehnquist, dissenting from the United States Supreme Court's denial of certiorari in the case,[54] felt that the circuit court did not give sufficient weight to the need for maintaining discipline and control in a law enforcement agency. Since Williams' speech impugned the integrity of his immediate superiors, evidence as to the breakdown of the employment relationship and the necessity of police department discipline should have been admitted, according to the dissent.[55]

In *Choudhry v. Jenkins,*[56] the Seventh Circuit attributed considerable weight to the public's right to know about conditions that affect public safety. Choudhry, a correctional officer at the state prison, was discharged after he called members of

50. *Id.* at 1002.
51. *Id.*
52. *Id.* at 1002-03.
53. *Id.* at 1003.
54. Saye v. Williams, 452 U.S. 926, 929 (1981) (Rehnquist, J., dissenting).
55. *Id.* (Rehnquist, J., dissenting).
56. 559 F.2d 1085 (7th Cir. 1977), *cert. denied,* 434 U.S. 997 (1977).

the press to his home to comment on the inadequacy of security precautions at the prison.[57] In weighing the strong need for maintenance of discipline in the prison setting against the employee's right to speak out, the court found the public's interest in prison security conditions to be the crucial factor favoring protection of such disclosures.[58]

In *Sprague v. Fitzpatrick,*[59] the Third Circuit reviewed the case of the First Assistant District Attorney of Philadelphia County who had been discharged for revealing to the press the untruthfulness of the District Attorney's disclaimers regarding a controversial sentencing recommendation.[60] The court discounted the significance of the public's right to know and reached a result contrary to that reached in *Williams* and *Choudhry.*

In balancing the assistant's interest in free speech against the likely harm to the state's provision of service, the court gave primary weight to the working relationship between the criticizing employee and the person criticized.[61] The First Assistant District Attorney was characterized as the "alter ego" of the District Attorney.[62] The court held that the fact that the disclosed information concerned matters of "grave public import" did "not tilt the *Pickering* balance in favor of first amendment protection where, as here, the effectiveness of the employment relationship between employee-speaker and employer-target is so completely undermined."[63]

Since an employment relationship based on loyalty and respect is necessary for an effective police department as well as an effective district attorney's office, the divergent results reached by the *Sprague* and *Williams* courts may be explained by comparing the weights that the courts attributed to the public's right to information. The *Sprague* court reasoned that an informed and aroused public that aggravates the disruptive situation within a department weighs against, not for, first

57. *Id.* at 1086-88.
58. *Id.* at 1089-90.
59. 546 F.2d 560 (3d Cir. 1976), *cert. denied,* 431 U.S. 937 (1977).
60. *Id.* at 562.
61. *Id.* at 564.
62. *Id.* at 562, 565.
63. *Id.* at 565.

amendment protection under *Pickering*.[64] The *Williams* court, on the other hand, emphasized the need for governmental agencies that are accountable to a knowledgeable electorate.[65]

In *Kannisto v. City and County of San Francisco*, [66] the Ninth Circuit *presumed* that the public officer's comments had a substantial, disruptive influence on the daily operation of the agency.[67] Kannisto, a lieutenant in the police department, was suspended from duty for making derogatory comments about a superior officer to his subordinates during morning inspection.[68] The court held that Kannisto's speech was unprotected, but emphasized in dicta that an important factor to be weighed in the *Pickering* balance is the right of the public to be informed.[69] As a member of the police force, Kannisto was particularly able to communicate departmental deficiencies to the public.[70] However, in this case, where Kannisto's remarks were simply disparaging and disrespectful and were made, not to the public, but during the regular performance of his duties, the public's interest in being informed could not override the disruption which the remarks generated.[71]

Thus, *Kannisto* is consistent with *Williams* and *Choudhry*. Under all three cases the significance of the communication in relation to the public's legitimate interest in the performance of its law enforcement agencies determines the likelihood of protection under *Pickering*. Where disharmony within the department appears to be the purpose, rather than an unfortunate side effect, of the speech, the court may be reluctant to find first amendment protection.

Communication of Intra-Departmental Concerns to Ultimate Superiors

The courts are in disagreement as to whether the public employee who solicits the aid of a superior governing body in redressing perceived misconduct within his agency deserves

64. *Id.* at 566.
65. 629 F.2d at 1003.
66. 541 F.2d 841 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).
67. *Id.* at 844.
68. *Id.* at 842.
69. *Id.* at 843.
70. *Id.*
71. *Id.* at 844.

protection under the first amendment. In *Clary v. Irvin,*[72] the Chief of Police dismissed three policemen for communicating to city council members their concerns regarding the Chief's mishandling of his duties.[73] The federal court of the eastern district of Texas, in applying the *Pickering* balancing test, attached significance to the fact that the police officers had revealed their concerns to the city council, the only body with power to dismiss the Chief. The court determined that, as public employees, the police officers had the right, even the duty, to comment on inept performance within the department in an effort to remedy the situation.[74] Since the officers had spoken with the council members on an informal basis, the court found that the privacy of the communication minimized any disruption within the department and, therefore, weighed in favor of the terminated employees.[75]

A recent Tenth Circuit case indicates that private communication by a public employee will not be protected if it results in discord within the department. In *Key v. Rutherford,*[76] the chief of police spoke with the mayor and city manager regarding budget grievances. The chief was discharged for violating a departmental rule that prohibited employees from discussing grievances with city council members.[77] The trial court ruled the provision unconstitutional on its face. This ruling was in error, according to the circuit court, as the provision should have been evaluated under the *Pickering* balancing test.[78]

The court identified two situations in which it is permissible for the state to regulate an employee's right to speak: (1) speech which disrupts the employment relationship, and (2) speech which does not concern matters of public interest.[79] The court determined that the chief's communications involved a matter of public interest and, therefore, satisfied one

72. 501 F. Supp. 706 (E.D. Tex. 1980).
73. *Id.* at 706-07.
74. *Id.* at 709.
75. *Id.* at 711.
76. 645 F.2d 880 (10th Cir. 1981).
77. *Id.* at 881-84.
78. *Id.* at 884. Although the Tenth Circuit stated that the *rule* was to be evaluated according to *Pickering,* on remand the district court was directed to balance the competing interests presented by the particular factual situation. *Id.* at 885.
79. *Id.* at 884.

criterion for protection. However, the circuit court found that should the district court determine on retrial that the content of the chief's speech or his method of communication "significantly interfered" with his ability to function as chief of police or with the efficient operation of the police department, such speech would not merit protection under the first amendment.[80]

Thus, the Tenth Circuit requires for first amendment protection that an employee's speech concern a matter of public interest, even though it is made to members of the city council in an effort to privately correct a perceived wrong. In addition, speech that results in significant disruption within the agency will not be afforded protection. Instead of engaging in a true balancing of the competing interests to determine whether the whistle blower deserves protection, the Tenth Circuit appears to attribute veto weight to a finding of either significant departmental discord or absence of public interest.

Disclosure of Violations of the Law to Investigatory and Enforcement Authorities

The courts look with favor upon the private disclosure of illegal acts to the appropriate authorities.[81] In *Simpson v. Weeks,*[82] police officer Simpson was demoted for conferring with the attorney representing city prisoners in their civil rights action against the chief of police.[83] The Eighth Circuit ruled that the award to Simpson of punitive damages was supported by the evidence,[84] since the interests of the officer as a subpoenaed witness in a court proceeding in discussing relevant matters with the attorney associated with the case outweighed the interests of the police department in maintaining silence.[85]

The federal district court of the eastern district of Pennsylvania in *Hoopes v. City of Chester*[86] went so far as to con-

80. *Id.* at 885.
81. *See, e.g.,* Shoemaker v. Allender, 520 F. Supp. 266 (E.D. Pa. 1981) (court upheld a police officer's constitutional right to report allegations of police misconduct to the F.B.I.).
82. 570 F.2d 240 (8th Cir. 1978), *cert. denied,* 443 U.S. 911 (1979).
83. *Id.* at 241.
84. *Id.* at 243.
85. *Id.* at 242.
86. 473 F. Supp. 1214 (E.D. Pa. 1979).

clude that the *Pickering* balancing test is not appropriate when the federal interest in encouraging disclosure of possible violations of federal crimes is implicated.[87] Chief of Police Hoopes was demoted for his assistance in the federal criminal investigation and prosecution of the mayor, his immediate superior.[88] The city relied heavily upon *Sprague v. Fitzpatrick*,[89] claiming that the mayor's removal of Hoopes was justified by the fact that the effective working relationship between the two was completely undermined. The court, however, was concerned that effective law enforcement might be frustrated if potential witnesses, fearing demotion or termination, were reluctant to cooperate with investigative authorities.[90] The court found, therefore, that *Pickering* was not controlling.[91]

ANALYSIS OF THE CURRENT STATE OF THE LAW

It is not surprising that the lower courts arrive at divergent results when applying the *Pickering* balancing test. The Supreme Court intended the test to be a flexible one, capable of application to a nearly infinite variety of factual situations.[92] However, the inconsistent results reached by the lower courts when analyzing similar factual patterns suggest a need for specific direction from the Court.[93] The lower courts are in agreement that the private disclosure of a violation of the law to the appropriate investigatory or enforcement authority merits constitutional protection.[94] It is in the areas of disclosure of employment-related concerns by public employees to the media and to their ultimate superiors that the courts are split.[95]

87. *Id.* at 1223.
88. *Id.* at 1215-18.
89. *See supra* text accompanying notes 62-67.
90. Hoopes v. City of Chester, 473 F. Supp. at 1223 (E.D. Pa. 1979).
91. *Id.*
92. Pickering v. Board of Educ., 391 U.S. at 569 (1968).
93. See Note, *supra* note 43, at 1003 for an argument that the lack of uniformity among the lower courts produces a chilling effect on the exercise of first amendment rights by government employees.
94. *See supra* text accompanying notes 81-91.
95. *See supra* text accompanying notes 44-80.

The decision of a court whether to afford a whistle blower first amendment protection is a function of both the content[96] of a communication and the identity of the recipient of that communication.[97] Since any disclosure of a negative nature will precipitate disruption within an agency, the balance struck by a particular court depends on the weight that court attributes to the public interest in the content of a given disclosure.[98] This public interest factor is directly related to the public's right to be informed of misfeasance within an agency and the right to assume that public employees will attempt to remedy serious departmental deficiencies. *Choudhry v. Jenkins* is an obvious example of a case involving strong public interest.[99] Members of the public had a right and need to know about prison security measures as they affected the safety of the community. An equally clear example of a situation in which legitimate public interest is minimal is the case involving personality conflicts or petty disputes within an agency.[100] The majority of cases, of course, lie between these two extremes, involving budgetary concerns, alterations of records, mendacity, and the like. In these areas, courts have examined parallel factual situations and reached opposite results, based on the importance the court attributes to the public interest factor.[101]

The public's right to information is an important concept underlying the *Pickering* balancing test.[102] The Court in *Pickering* stressed the need to encourage free and open debate among the electorate.[103] Even erroneous statements by a public employee are to be judged according to the strict *New*

96. The Supreme Court has determined that the content of the speech of the ordinary citizen can be regulated only under strictly confined circumstances. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842-45 (1978) (speech posing a clear and present danger); Lehman v. City of Shaker Heights, 418 U.S. 298, 307-08 (1974) (Douglas, J., concurring) (speech to a captive audience); Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748-50 (1978) (speech broadcast over radio and television).

97. *See supra* text accompanying notes 42-91.

98. First amendment freedom of speech includes both the right to speak and the right to receive speech. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

99. 559 F.2d 1085.

100. Trivial, vitriolic remarks have not merited first amendment protection by the lower courts. *See* Magri v. Giarusso, 379 F. Supp. 353 (E.D. La. 1974).

101. *Compare* Williams v. Board of Regents, 629 F.2d 993 (5th Cir. 1980) *with* Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976); *Compare* Clary v. Irvin, 501 F. Supp. 706 (E.D. Tex. 1980) *with* Key v. Rutherford, 645 F.2d 880 (10th Cir. 1981).

102. When *Pickering* was decided in 1968, the notion that public employment could not be subjected to unlimited conditions was still relatively new. Therefore, the Supreme Court took pains to emphasize the public interest component of the balancing test.

103. *See supra* text accompanying note 27.

York Times Co. v. Sullivan standard.[104] The rationale behind the Court's emphasis on the public interest factor is twofold. First, the public employee is likely to be especially knowledgeable concerning his agency. He has access to unpublicized information and is aware of intangible elements within the agency, such as the operating philosophy of his superiors. Often he has formed definite opinions as to ways in which the agency could perform more effectively. Second, the public agency is, by definition, supported by public funds. The public has a legitimate interest in the manner in which these funds are spent. Moreover, public officials are often elected. Informed decisionmaking by the electorate is enhanced when public employees are encouraged to reveal misfeasance within their department.

In recent years the Supreme Court has expanded the concept of the public's right to information. This expansion has occurred in diverse fields. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[105] the Court recognized the interest of the particular consumer and the interest of society in general in the free flow of commercial information.[106] More recently, the right of secondary school students to receive ideas was upheld by the Court in *Board of Education v. Pico.*[107] Until certiorari is granted in a whistleblowing case, the Supreme Court's expansion of the public interest notion in other contexts should guide lower courts when called upon to apply the *Pickering* balancing test.

Proponents for curtailing the speech of law enforcement employees point to the importance of discipline and conformity in such departments.[108] Police and sheriffs' departments have been described as quasi-military agencies which demand unquestioning obedience to fulfill their designated purposes.[109] It has been argued that government employers would be seriously hampered in performing their essential functions if

104. *See supra* text accompanying notes 29-32.
105. 425 U.S. 748 (1976).
106. *Id.* at 763-64. The Court held unconstitutional a state statute banning the advertising of prescription drug prices. *Id.* at 770.
107. _____ U.S. _____, 102 S.Ct. 2799, 2808 (1982).
108. Sprague v. Fitzpatrick, 546 F.2d at 565 (3d Cir. 1976); Brukiewa v. Police Comm'r, 257 Md. 36, 263 A.2d 210, 218 (1970).
109. Saye v. Williams, 452 U.S. at 929 (1981) (Rehnquist, J., dissenting); Muller v. Conlisk, 429 F.2d at 904 (7th Cir. 1970).

employees were allowed to disclose incriminating information at will.[110] The argument, however, loses sight of the appropriate relationship between the public and public servants. The existence of powerful law enforcement agencies contemplates an electorate sufficiently informed to control abuses of power by these agencies. As the court pointed out in *Williams,* agency wrongdoing "must be disclosed to the public if the *people* are to remain the true sovereigns in this country."[111]

CONCLUSION

Conflicts between the rights of law enforcement employees to blow the whistle on agency wrongdoing and the importance of a smoothly operating department are beginning to surface in Wyoming. Application of the *Pickering* test to these sorts of conflicts has led to divergent results among the lower courts in other parts of the country. Since the disclosure of any substantial misconduct will cause disruption and disharmony within an agency, the decision to afford first amendment protection to such disclosures will depend on the weight a particular court attributes to the public's right to know. So far, the Supreme Court has been content to allow inconsistent results among the lower courts to stand. Fifteen years after *Pickering,* a definite statement as to the permissible parameters of the balancing test is needed.

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110. Comment, *supra* note 42, at 560.
111. 629 F.2d at 1003 (emphasis in original).