

Approved:

Frank S. Day

Repl. F. Turner

Clarence H. Perry

ABSTRACT

PICKERING AND THE POLICE: A MATRIX FOR DECISION-MAKING

By

Cary Ira Klafter

Police departments in the United States are public agencies operated in a quasi-military fashion. The dictates of discipline, regimentation and secrecy attendant with the police function and the military model of organization have led to the imposition of restraints on the on- and off-duty behavior of police officers. Though more visible and pervasive in police agencies, such restraint on personal conduct is widely utilized by all manner of public agencies with regard to their employees. Federal and state case-law, and statutory enactments such as the Hatch Act, have legitimized the imposition of such rules and regulations, which are generally unknown in the private sphere of the economy.

The recent Supreme Court case of Pickering v. Board of Education, 391 U.S. 563 (1968), dealt with the First Amendment rights of public employees to speak on matters of public concern relating to their employment, and the right of the state qua employer to regulate those rights. This thesis will attempt to assess the impact of Pickering on the rules and regulations of police agencies which control the enjoyment of First Amendment freedoms by police officers.

This topic was explored through the use of a "factor-analysis" which was constructed in matrix form (p. 44). It combined varying types of expression by officers, the context within which the expression was made, the receiving audience, and the relevant interests of the agency in controlling expression

and the officer in being able to express himself freely. The assorted combinations of these factors presented a number of probable situations within which a question of agency regulation versus First Amendment right could arise. Drawing on existing case-law and legal commentary, predictions were made concerning what party might prevail within each situational context: the agency or the officer. The construction of the entire matrix is presented as a tool and a guide for prediction concerning the outcome of hypothetical and future cases dealing with the extent to which a police agency can promulgate rules affecting First Amendment rights of its officers.

The conclusions of the study point to the idea that there are assorted situations where, with some clarity, one might say that the balance of interests does favor either police regulation or personal freedom. For the agency, the retention of secret data is an interest which is controlling in almost all the situations where it might be legitimately found. Generally, the agency is found to have more need for legitimate control over expressions within the agency context and related to the agency itself, while the officer has the maximum claim for freedom of expression in off-duty situations and when dealing with subjects not directly involved with his agency's operations.

**PICKERING AND THE POLICE:
A MATRIX FOR DECISION-MAKING**

By

Cary Ira Klafter

A THESIS

Submitted to

Michigan State University

in partial fulfillment of the requirements

for the degree of

MASTER OF SCIENCE

School of Criminal Justice

1971

TABLE OF CONTENTS

Introduction and Scope	1
Background	
The Right-Privilege Distinction	6
Police Administrative Procedures	9
The Unconstitutional-Conditions Doctrine	10
The Pickering Balance-of-Interests Test	22
Possible Standards	26
A Pickering Factor-Analysis	35
The Expressions	38
The Interests	38
The Operative Factors	39
False Matter in Statements	40
The Matrix	40
Factor-Analysis	43
False Matter in Expressions by Officers	121
Conclusion	129
Bibliography	142

LIST OF TABLES

Operative Factors

44

INTRODUCTION AND SCOPE

A recently expanding and evolving body of constitutional law has been that dealing with the rights of the public employee¹. Originally, the rights of the public employee were very meager, much less than those held claimed by the private employee as the natural boon of citizenship². Then - Judge Holmes declared that a person "may have a constitutional right to talk politics, but he has no right to be a policeman"³, and the right-privilege distinction was born. The basic premise of this distinction was that any form of government largess which the state did not have to provide - such as various goods and services, and public employment opportunities - was a privilege. And, as a privilege, it might be dispensed with conditions attached thereto. The conditions often times exacted from the public employee included his agreement to forego the enjoyment of certain rights afforded him by the Constitution. His rights were "bought back" by the government for a place on the public payroll. Like a contracts of adhesion, the potential employee had a take-it-or-leave-it choice facing him. For example, if the individual did not want to sign a loyalty oath, he was "at liberty to retain (his) beliefs and associations and go elsewhere"⁴. The choice was simple, but hard.

Later case-law, through such standards as the unconstitutional-conditions doctrine⁵, undercut the Holmesian approach to public employment and afforded the public employee much more freedom to engage in the kind of expression allowed the private citizen⁶. Said the Supreme Court in Keyishian v.

Board of Regents⁷: "public employment may (not) be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action".

Finally, Pickering v. Board of Education⁸ came down in 1968, setting up a balancing-test approach for the whole area of public-employee freedom of expression. Pickering raised many issues concerning the inevitable conflict between the interests of state qua employer and citizen qua public employee: such as problems about the maintenance of discipline and agency morale, and the impact of false statements by an employee. It left to future individual cases the resolution of those conflicts.

The attempt of this paper, after giving a short overview of the pre-Pickering law and of Pickering itself, will be to use the Pickering balancing-test method in a discussion of the problems likely to arise in one type of public-employee case: that which involves police officers and police agencies. Interests and factors of circumstance related to both the individual officer and the agency will be isolated and analyzed in a number of situations. The resultant factor-analysis will then, theoretically, yield a basis upon which a systematically-arrived-at decision might be reached in any specific police-officer freedom of expression controversy.

There are certain areas with which this article will not deal. First, it will not cover the kind of political activity which has been restricted by Hatch Act statutes. This topic has been exhaustively covered by other writers⁹. In like

fashion, and for the same basic reason, the paper will not attempt an in-depth study of the problems attendant with public-employee unionization¹⁰. Finally, when freedom of expression and regulatory statutes clash, there is usually a question of statutory vagueness or overbreadth present in the controversy. These factors will be dealt with here, but only in a limited fashion. Vagueness and overbreadth are not the kinds of problems with which Pickering attempted to deal. The assumption in this paper is that, in most instances, a police agency that has had its expression-regulation declared unconstitutionally vague or overbroad¹¹ will be able to rewrite it carefully to do away with those particular infirmities. It is at the point when the regulation is narrowly-drawn and easily understood as to its scope that the hard questions of the Pickering balancing-test must be dealt with. That is the thrust of this paper.

1.

See generally W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968); Comment, *The First Amendment and Public Employees--An Emerging Constitutional Right To Be A Policeman?*, 37 Geo. Wash. L. Rev. 409 (1968); H. Bruff, *Unconstitutional Conditions upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 Hastings L. J. 129 (1969); Note, *The Public Employee and Political Activity*, 3 Suffolk L. Rev. 380 (1969).

2.

One author has argued that the validity of governmental restriction on public employee freedom of expression should depend on whether or not the state could force private employers to impose the same regulations on their employees. H. Linde, *Justice Douglas on Liberty in the Welfare State: Constitutional Rights in the Public Sector*, 40 Wash. L. Rev. 10, 75-77 (1965). But see W. Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 UCLA L. Rev. 751 (1969). On the powers of the private employer over his employees, see generally Miller, *The Constitutional Law of the "Security State"*, 10 Stan. L. Rev. 620 (1958); Berle, *Constitutional Limitations on Corporate Activity--Protection of Personal Rights from Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933 (1952).

3.

McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29NE517, 517-18 (1892).

4.

Adler v. Board of Education, 342 US 485, 492 (1952). See generally Note, *Loyalty Oaths*, 77 Yale L. J. 739 (1963).

5.

Frost & Frst Trucking Co. v. Railroad Commission, 271 US 583, 593-94 (1926). See Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144 (1968).

6.

See e.g., *Sherbert v. Verner*, 374 US 398 (1963); *Elfbrandt v. Russell*, 384 US 11 (1966); *Bond v. Floyd*, 385 US 116 (1966); *Thorpe v. Housing Authority*, 386 US 670 (1967); *United States v. Robel*, 389 US 258 (1967); *Gardner v. Broderick*, 392 US 273 (1968). See generally C. Reich, *The New Property*, 73 Yale L. J. 733 (1964).

7.
385 US 589, 605-06 (1968).

8.
391 US 563 (1968).

9.
See generally Annot., 28 ALR3d 717 (1969), and citations therein; Rose, A Critical Look at the Hatch Act, 75 Harv. L. Rev. 510 (1962); C. Antieau, MODERN CONSTITUTIONAL LAW s. 1:95 (1969). See Lecci v. Looney, 33 A.D.2d 910, 307 NYS2d 594 (1970).

10.
See generally Cornell, Collective Bargaining by Public Employee Groups, 107 U. Pa. L. Rev. 43 (1959); R. Woodworth & R. Peterson, COLLECTIVE NEGOTIATION FOR PUBLIC AND PROFESSIONAL EMPLOYEES (1969); R. Walsh, ed., SORRY... NO GOVERNMENT TODAY (1969).

11.
Muller v. Conlisk, 429 F.2d 901 (CA7 1970). See generally Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960); Note, Less Drastic Means and the First Amendment, 78 Yale L. J. 464 (1969); Note, The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 808 (1969); Developments in the Law--Equal Protection, 82 Harv. L. Rev. 1065, 1120-23, 1127-31 (1969); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

BACKGROUND

The Right-Privilege Distinction

The premier doctrine utilized by governmental bodies to curtail the degree of personal expression allowed to public employees in both on and off duty circumstances has been the "right-privilege distinction". This doctrine was expounded in its most famous form by then Judge Holmes in the case of McAuliffe v. Mayor of New Bedford¹². New Bedford's police regulation no. 31 forbade officers from soliciting "money or any aid" for political purposes, an act in which Officer McAuliffe engaged. The officer's legal attack on the regulation was turned aside by Judge Holmes with an epigram destined to be much quoted¹³:

The petitioner may have the constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech.....

Holmes' distinction was used in areas expanding far beyond freedom of expression, with the right-privilege dichotomy being one of the pinchpins of the basic view that "no one has a constitutional right to government largess"¹⁴. Thus, through the use of this distinction, certain rights afforded to all citizens, such as the rights of free expression, might be "bought back" by the government with various types of largess. Since the largess offered is in the form of a good or service that the government is not obligated to provide, its receipt would be a privilege. And, as a privilege, it might be legitimately offered with any number of conditions attached to it. Thus, to offer gainful employment to certain of its citizens

is not required of government, and so if it is offered the government might legitimately condition its offer on the acceptance of various conditions by the potential employee. One of these conditions could be that the employee agrees to "give back" his right to engage in political activity¹⁵, or join a union¹⁶, or attend public rallies. This same buy-back process would also work with other citizen-government relationships besides the employer-employee model: a "fee" of constitutionally-protected rights might also be exacted of a customer of a governmentally supplied service¹⁷, or from an applicant asking permission to ply a governmentally-regulated trade¹⁸. Thus, the government had the option of either being relatively miserly in terms of what goods and services it generated, or, if it chose to act, had the ability to drive a hard bargain in the price it exacted from those who would deal with it¹⁹.

In its history, the distinction has been utilized to intrude on many aspects of freedom of expression, personal beliefs, and freedom of association. It was used to uphold a compulsory ROTC requirement at a state university²⁰, a ban on the teaching of Darwinian evolutionary theory in public schools²¹, and it allowed public employees to be subject to a loyalty-oath requirement²². It also allowed the well-known Feinberg Law²³ of New York to curtail the associational liberties of the public employee²⁴. The distinction's greatest continuing effectiveness has been in the area that was dealt with factually in *McAuliffe*: the banning of political activity

on the part of public employees. It is in this field of expression that right-privilege has retained its most generalized vitality over time²⁵, though the exceptions are growing more numerous of late²⁶.

Within the police context, right-privilege has remained good law in keeping unions out of law-enforcement agencies, despite the general trend recently towards relaxation of the bans against unionization of public employees²⁷. The courts have declared police and fire departments to be "sui generis", occupying such a unique role by their makeup and tasks that any changes in policy towards unionization of public employees generally would not affect the status of those in the police and fire agencies. To allow otherwise, it is said, would lead to a diminution of needed discipline in the police ranks²⁸, and make the impartiality of the force suspect in their future handling of labor disturbances²⁹.

Police attempts to break out of the unique category they have been placed into for purposes of retarding unionization have generally been unavailing³⁰, though in some instances they have been able to take advantage of broad state laws allowing unionization in all employment situations³¹. And even when police unions have been allowed to form and act as bargaining agents³², the right to strike has never been given them. In this respect they resemble the other public employee groups, who are finding the right to strike seldom legally provided them³³. In the police circumstance, the wisdom of that decision might be attested to in part by the results of

the Montreal police strike of 1969 and the resultant anarchic conditions that ensued³⁴.

Police Administrative Procedures

One area where right-privilege has not been a moving force has been in dealing with the procedural aspects of police administrative hearings, disciplinary boards, and so on. While one case stated that "(t)here is no vested property right in public employment beyond the right to have statutory procedure for dismissal followed"³⁵, a complete statement of the law should go beyond that to include the right to have constitutionally-protected procedural due process afforded also. In a hearing, the officer is no longer the second-class citizen he once was because of his employment³⁶.

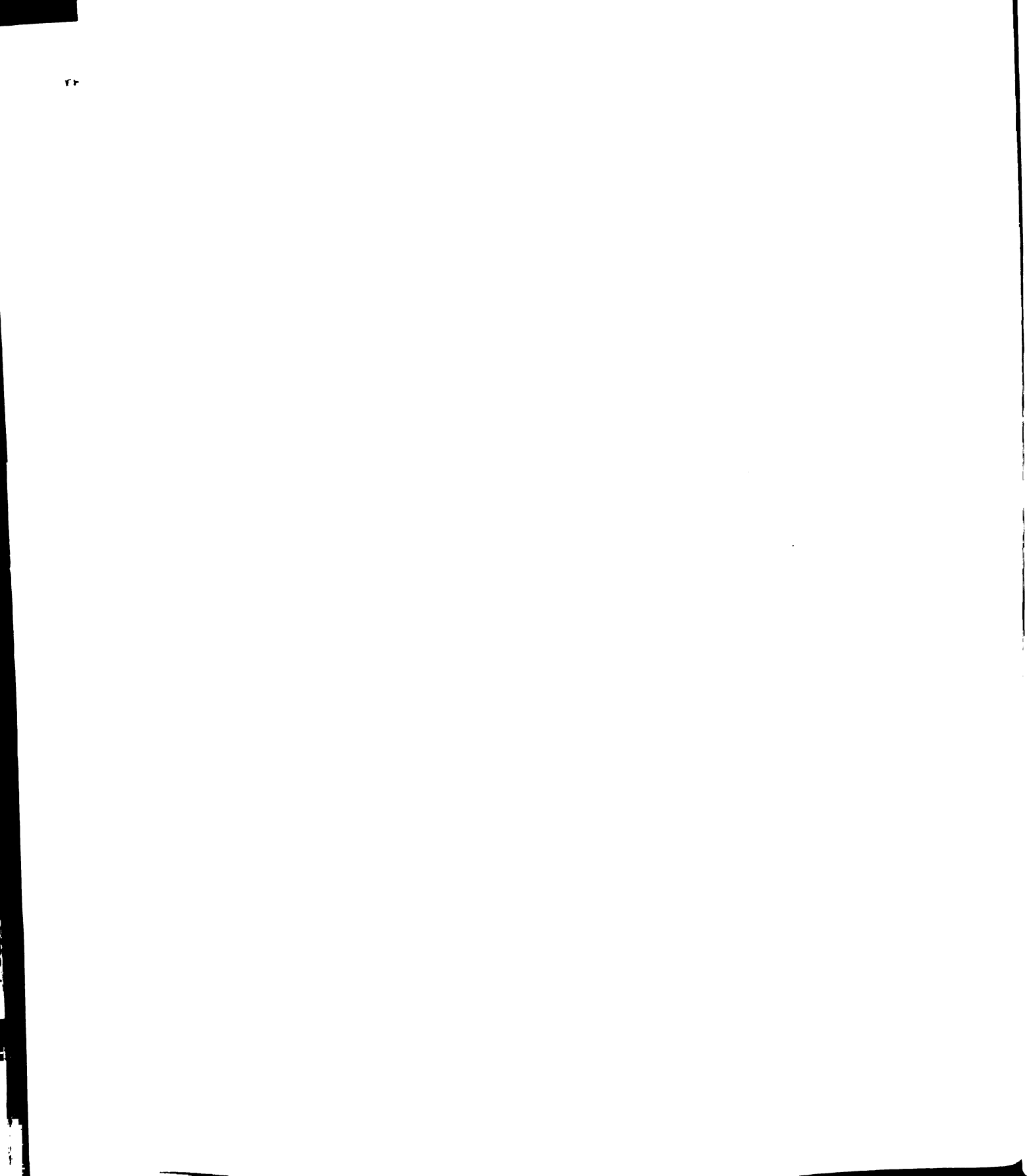
Officers normally come under the administrative jurisdiction of local Police or Civil Service Board³⁷ which delegates to the chief or superintendent the power to issue regulations and General Orders. Such regulations normally have the force and effect of law³⁸. Police regulations also include within them the procedures for dealing with disciplinary matters in the department³⁹. Though the disciplinary tribunal may be dealing activities that might not be actionable crimes, or cause for dismissal from a position in private industry⁴⁰, the procedures of the tribunal must reach a respectable-enough level to pass outside scrutiny. Having exhausted his administrative remedies, an officer is able to appeal to the courts from an adverse decision or ruling by the board⁴¹, and, as with infirmities of a regular trial court, he will be able to obtain a

reversal on the grounds of procedural irregularities⁴². Such requirements as an opportunity for the accused to be heard⁴³, and the need for evidence to substantiate guilt⁴⁴ are fully operable in the disciplinary hearing. The officer's position may be the result of governmental largess, but, once tendered to the holder, it vests in that person at the very least a number of procedural safeguards to aid him if his hold on the position is threatened⁴⁵.

The Unconstitutional-Conditions Doctrine

It is a significant limitation on the right-privilege distinction that, though a police agency may have great leeway in defining what it determines to be substantive offenses by an officer⁴⁶, the agency is still required to afford the officer a full panoply of procedural safeguards if he is brought up on charges. The largess of a governmental position may arrive encumbered with any number of restrictions attached thereto⁴⁷, but it may not be taken away at will. The safeguards of the hearing procedure afford a further boon to the officer in addition to the equity and regularity of procedures he is provided with: they provide him with a forum for exposing what may have been unconstitutional conditions placed upon him in the receipt of his position⁴⁸.

The unconstitutional-conditions doctrine⁴⁹ was the first major formulation used by the Supreme Court to limit the scope of operation of the right-privilege distinction. Its basic thrust was to forbid the encumbrance of governmental largess with conditions that had no rational connection to the largess



being offered⁵⁰. For example, in Garrity v. New Jersey⁵¹, it was held that to be a policeman was not so unique and sensitive an occupation for an individual to have that he might be required to forego his rights to use the Fifth Amendment privilege against self-incrimination⁵². Thus, this standard prevented many constitutionally-protected rights from being "manipulated out of existence" by demanding that they be "sold back" to the government in an omnibus fashion and without any regard for what type of largess-privilege was being offered by the state. Various rights that could almost always be enjoyed without adversely affecting the government and its employment⁵³ or service⁵⁴ offerings, were brought under the unconstitutional-conditions umbrella: rights of procedural due process, freedom of religion⁵⁵, and the privilege of refusing to submit to a warrantless search⁵⁶, to name a few examples.

The use of this doctrine has not provided as much protection for freedom of expression for the public employee as might be desired, however. The doctrine approaches an absolute rule in operation, and lacks the sensitivity of a balancing-test approach: it is unable to function where there are good reasons on both sides of the argument, both for restricting allowable expression and for retaining it at the levels afforded the private citizen. The bundle of rights involved in the First Amendment are less than absolute⁵⁷, and the extent of allowable conduct is generally determined by both the specific right involved⁵⁸ and the circumstances in which it is

being used⁵⁹. In the police context, competing interests are always present where the agency attempts to curtail the freedom of expression of its officers, and the legal questions generated by those attempts center around the extent to which an unreasonable discrimination against the officer has been set up⁶⁰, or his rights abridged for no good purpose.

On a more doctrinal level, the unconstitutional-conditions standard was also somewhat deficient. McAuliffe had relegated public employment to a most ephemeral status, with the only right attendant to it being the freedom to spend the salary already paid and in the employee's pocket. The courts still echoed that feeling⁶¹, even as they provided some stability through unconstitutional-conditions and procedural due process. "A right to status in the public sector"⁶² did not come out of the cases, even though many of the factors co-incident with a claim of substantive due process were present in the fact situations⁶³. Except for some of its more egregious manifestations, the McAuliffe right-privilege distinction held on in both theory and practice to bedevil the public employee. A fresh attempt to change the law came in Pickering v. Board of Education⁶⁴ to destroy "a premise that had been unequivocally rejected in numerous prior decisions of (the Supreme) Court"⁶⁵.

12.
155 Mass. 216, 29 NE 517 (1892).

13.
Id., 29 NE at 517-18.

14.
W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1442 (1968).

15.
United Public Workers v. Mitchell, 330 US 75 (1947).

16.
E.g., CIO v. City of Dallas, 198 SW2d 143 (Tex. Civ. Ct. App. 1946).

17.
Starkey v. Board of Education, 14 Utah2d 227, 381 P2d 718 (1963)(married high school student barred from extra-curricular activities).

18.
Barsky v. Board of Regents, 347 US 442, 451 (1954).

The practice of medicine in New York is lawfully prohibited by the State except upon the conditions it imposes. Such practice is a privilege granted by the State under its substantially plenary power to fix the terms of admission.

Cf. Willner v. Committee on Character, 373 US 96 (1963)(state cannot deny admission to the Bar without meeting requirements of due process); Ball v. City Council of City of Coachella, 60 Cal. Rptr. 139, 141-42 (1967):

A public officer or employee serving at the pleasure of the appointing authority may not have a "vested" right to retain his employment, but it does not follow that the power to terminate his services is an unbridled one free of all legal restraints. ...Recent decisions have discredited the notion that the power to dismiss a public employee without cause includes the power to dismiss for any cause.

See H. Monaghan, First Amendment "Due Process", 83 Harv. L. Rev. 518 (1970).

19.

The right-privilege distinction has appeared in different semantic guise in other areas of constitutional law. One of its earliest appearances was in *Lafayette Ins. Co. v. French*, 59 US (18 How.) 404, 407 (1856). The issue was whether a foreign company could be required by a state within which it was doing business to appoint an agent in that state to receive service of any legal papers that might arise:

A corporation created by Indiana can transact business in Ohio only with the consent...of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose...

Justice Holmes used the distinction himself once again, though in a metamorphized form. *Ferry v. Ramsey*, 277 US 88, 94 (1928). The issue involved the liability statutorily placed on bank directors for certain losses, and Holmes upheld it using a "greater includes the lesser" approach. Much like the argument that a privilege might be a) unconditional, b) conditional, and c) nonexistent, Holmes declared that since the statutory liability might have been absolute (the greater), it can clearly be valid when a bit less than that (the lesser). This idea was not accepted in later cases, one of the reasons being that, in many circumstances, a partial restriction on X may bring up problems of the denial of equal protection or unreasonable discrimination which would not arise under a more sweeping restriction of the same X.

20.

Hamilton v. Regents of the University of California, 293 US 245 (1934).

21.

Scopes v. State, 154 Tenn. 105, 289 SW 363 (1927). The ban was declared unconstitutional in *Epperson v. Arkansas*, 393 US 97 (1968).

22.

Garner v. Board of Public Works, 341 US 716 (1951).

23.

NY Laws ch. 360 (1949) as amended, NY Laws ch. 681 s.1 (1953), enacting NY Educ. Law. s. 3022 (McKinney 1953), requiring that any individual who "becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means" shall be "dismissed or declared ineligible" from "any office or position in the service of the state".

24.

Adler v. Board of Education, 342 US 485 (1952), effectively overruled in Keyishian v. Board of Regents, 385 US 589 (1967).

25.

The leading case is United Public Workers v. Mitchell, supra note 4, which upheld the Hatch Act, 5 USC 113 (1964), originally 53 Stat. 1149 (1940). See generally Annot., 28 ALR3d 717 (1969). Cf. Heidtmann v. City of Shaker Heights, 163 Ohio St. 109, 126 NE2d 138 (1955)(circulation by firemen of initiative petition to establish ordinance concerning certain department procedures held not prohibited "taking part in politics").

26.

E.g., Bagley v. Washington Tp. Hosp. Dist., 65 Cal2d 499, 421 P2d 409, 55 Cal. Rptr. 401 (1966); Minielly v. Oregon, 242 Ore. 490, 411 P2d 69, 28 ALR3d 705 (1966).

27.

See e.g., Cornell, Collective Bargaining by Public Employee Groups, 107 U. Pa. L. Rev. 43 (1959); Annot., 31 ALR2d 1142; R. Woodworth & R. Peterson, COLLECTIVE NEGOTIATION FOR PUBLIC AND PROFESSIONAL EMPLOYEES (1969); Atkins v. Charlotte, 296 F. Supp. 1068 (DCNC 1969). But see Dade Cty. Classroom Teachers Assoc. v. Rubin, Fla., 217 So2d 293 (1968).

28.

Carter v. Thompson, 164 Va. 312, 180 SE 410, 412 (1935).

29.

The labor disputes of the 1930's are replete with instances where the unionists battled the police and strikebreakers. L. Litwack, THE AMERICAN LABOR MOVEMENT 82-113 (1962). Some police agencies, in fact, were brought into existence primarily to serve in the coming labor battles. B. Smith, THE STATE POLICE 28-42 (1969 ed.). See City of Jackson v. McLeod, 199 Miss. 676, 24 So2d 319, 321 (1946); Coane v. Geary, 298 Ill. App. 199 (1939)(activities of an officer, including presenting a motorist with a bumper-sticker reading "Compliments of a Chicago Policeman who refuses to club or shoot strikers or the unemployed", held to show "seditious state of mind and open defiance of superior officers"). See also Rules and Regulations of the Police Dep't of the City of New York, ch.2, s.13.

30.

E.g., *City of Greefield v. Local 1127*, 35 Wis.2d 175, 150 NW2d 476 (1967); *Perez v. Board of Police Com'rs*, 78 Cal. App.2d 638, 178 P2d 537 (1947); *Ludolph v. Board of Police Com'rs*, 30 Cal. App.2d 211, 86 P2d 113 (1939).

31.

Potts v. Hay, 318 SW2d 826 (Ark. 1953). See *Amer. Fed. of State, City, etc. v. Woodward*, 406 F2d 137 (CA8 1969).

32.

E.g., *City of Greefield*, supra note 30. The AFL-CIO has been making attempts to charter a national police union. The union would have a no-strike clause in its charter. N.Y. Times, Feb. 21, p. 1 at col. 6, May 27, 1970, p. 94 at col. 1. A Gallup Poll showed that 60% of the population would not object to a police union, but only with the no-strike proviso. N.Y. Times Jan. 12, 1969, p. 42 at col. 1.

33.

E.g., *Board of Education v. Redding*, 32 Ill2d 467, 207 NE2d 427 (1965); *New York v. DeLury*, 23 NY2d 766, 295 NYS2d 901, 243 NE2d 128, app. den. 23 NY2d 766, 296 NYS2d 958, 244 NE2d 472, app. dismd. 394 US 455 (1969). Mediation and fact-finding procedures might provide a partial substitute for the benefits lost with the power to strike forbidden. J. Loewenberg, *Labor Relations for Policemen and Firefighters*, Monthly Labor Review, May 1968, pp. 36-40. Df. G. Taylor, *Public Employment: Strikes or Procedures?*, 20 Indust. and Lab. Rel. Rev. 617 (1967). See *Elfbrandt v. Russell*, 334 US 11, 17 (1966).

34.

See generally N.Y. Times, Oct. 8, 1969, p. 1 at col. 6; Nov. 16, 1969, s.V p. 45.

35.

Pranger v. Break, 9 Cal. Rptr. 293, 297 (1960).

36.

E.g., *Garrity v. New Jersey*, 385 US 493 (1967)(right to plead privilege against self-incrimination without automatically forfeiting job); *Gardner v. Broderick*, 392 US 273 (1968)(New York City charter provision for discharge of officer who refused to waive immunity from prosecution violated constitutional privilege).

37.

See generally K. Davis, 1ADMINISTRATIVE LAW TREATISE ss. 6.01-6.12 (1953)(hereinafter cited as Davis).

38.

E.g., Riley v. Board of Police Com'rs of City of Norwalk, 147 Conn. 113, 157 A2d 590 (1960)(special law); Degrazio v. Civil Service Com'n of City of Chicago, 31 Ill2d 482, 202 NE2d 522 (1964)(general force of administrative regulations). See Ill. Rev. Stat. 1967 ch. 24 para. 3-7-3.1 (1967). See also 1 Davis ss. 2.07-2.15.

39.

Compare O. Wilson, POLICE PLANNING 242 (2d. ed. 1958) with 1 Davis ss. 8.01-8.20. See also G. Gourley, Police Discipline, 41 J. Crim. L., C. & P.S. 35 (1950).

40.

E.g., Riley v. Board of com'rs, supra note 38 (officer dating a 16-year-old girl); Degrazio v. Civil Service Com's, supra note 27 (consorting with known gangsters); Kennet v. Barber, 31 So2d 44 (Fla. 1947)(dismissal of fireman for beating wife in public).

41.

See generally 3 Davis ss. 24.01-24.07 (state forms of proceeding for review).

42.

E.g., Skinkle v. Murray, 221 App. Div. 301, 223 NYS 146 (1927); Ball v. City Council, supra note 18. See generally 2 Davis ss. 14.01-14.17 (evidence) and 16.01-16.14 (findings, reasons, and opinions).

43.

See generally 1 Davis ss. 7.01-7.13.

44.

E.g., Haynes v. Brennan, 135 NYS2d 900 (Sup.Ct. 1954)(officer's dismissal on unsubstantiated charge of leftist sympathies overturned); Harrison v. Civil Service Com'n of City of Chicago, 1 Ill.2d 137, 115 NE2d 521 (1953)(insufficient evidence to characterize money gift to officer as payment for services). See also Cruise v. Com'n of Public Safety of City of Hudson, 204 App. Div. 678, 198 NYS 635, 636 (1923)("The evidence in the record fully sustains the charges of neglect of duty, incompetency, and conduct subversive of good order and discipline of the force..."); 4 Davis ss. 29.01-29.11.

45.

For a discussion of the possibility that various governmentally-supplied goods and services are turning into "vested property rights" for the recipients, see C. Reich, *The New Property*, 73 Yale L. J. 733, 749-56, 760-64 (1964). But see *Bailey v. Richardson*, 86 US App. DC 248, 182 F2d 46 (1950); *Jenson v. Olsen*, 353 F2d 825, 828-29 (CA8 1965). The requirements of procedural due process in administrative hearings, which are not able to be "bought back" by the government for the price of a job, merely manifest the great feelings of worth which our legal system puts in equitable procedure. As Justice Traynor says,

We cannot now tolerate the debasement of the judicial process itself by a shortsighted pre-occupation with correct results regardless of what violence may have been done to the substantial rights of litigants.

R. Traynor, *THE RIDDLE OF HARMLESS ERROR* 19-20 (1970). See *People v. O'Bryan*, 165 Cal. 55, 65-66, 130 P. 1042, 1046 (1913); *Kotteakos v. United States*, 328 US 750, 762-63 (1945).

46.

E.g., *Riley*, supra note 40. Cf. *Ball v. City Council*, supra note 7.

47.

Davis v. Massachusetts, 167 US 43, 48 (1897); *Packard v. Banton*, 264 US 140, 145 (1924).

48.

E.g., *Roth v. Board of Regents of State Colleges*, 310 F. Supp. 972 (WD Wisc. 1970) (non-tenured professor, upon non-retention, must be provided with procedural safeguards, including a written statement of reasons for non-retention, and a hearing, to assure his non-retention was not arbitrary or in violation of First Amendment); *Pred v. Board of Public Instruction of Dade Cty., Fla.*, 415 F2d 851 (CA5 1969).

49.

See generally Merrill, *Unconstitutional Conditions*, 77 U. Pa. L. Rev. 879 (1929); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

50.

Frost & Frost Trucking Co. v. Railroad Commission, 271 US 533, 593-94 (1926):

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens to otherwise withhold..... If the state may comple the surrender of one constitutional right as a condition of its favor, it may, in like manner, comple a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

See O'Neil, Unconstitutional Conditions: Welfare Benefits with Strings Attached, 54 Calif. L. Rev. 443 (1966).

51.

385 US 493 (1967). See also Gardner v. Broderick, supra note 36.

52.

385 US, at 497, 500:

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent..... We conclude that policemen... are not relegated to a watered-down version of constitutional rights.

Accord, Slochower v. Board of Education, 350 US 551 (1956) (teachers); Spevack v. Klein, 385 US 511 (1967) (attorneys), overruling Cohen v. Hurley, 366 US 117 (1961). See also Murphy v. Waterfront Com'n, 378 US 52 (1964); Albertson v. SACB, 382 US 70 (1965).

53.

See Roth and Pred, supra note 43.

54.

Dixon v. Alabama State Board of Education, 294 F2d 150, 156, cert. dem. 368 US 930 (CA5 1961) (procedural due process during student expulsion proceedings).

55.

Sherbert v. Verner, 374 US 398, 404 (1963)(disqualification for unemployment compensation because of refusal of accept Saturday work for religious reasons held unconstitutional). Cf. *Gallagher v. Crown Kosher Market*, 366 US 617 (1961)(Mass. Sunday Closing Laws not unconstitutional in operation, even though petitioners were Orthodox Jews whose business was closed on Saturday for religious reasons).

56.

Compare *Parrish v. Civil Service Commission*, 425 P2d 223, 57 Cal. Rptr. 623 (Sup. Ct. 1967)(welfare payments cannot be conditioned on consent to submit to warrantless searches) with *Camara v. Municipal Court*, 387 US 523 (1967)(housing code regulations which provided for warrantless searches unconstitutional).

57.

See *Herndon v. Lowry*, 301 US 242, 258 (1937):

The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find justification in a reasonable apprehension of danger to organized government.

Thomas v. Collins, 323 US 516 (1944). But cf. *Kovacs v. Cooper*, 336 US 77, 89 (1949)(Frankfurter, J., concurring); *Schenck v. United States*, 249 US 47, 52 (1919).

58.

The penumbral rights, such as a "right to privacy", are especially difficult to deal with. See e.g., *Mapp v. Ohio*, 367 US 643 (1961)(search); *Griswold v. Connecticut*, 381 US 479 (1965)(birth control); *Katz v. United States*, 389 US 347 (1967)(eavesdropping) Cf. *Time Inc. v. Hill*, 385 US 374 (1967). See also *NAACP v. Alabama*, 357 US 449 (1958)(Freedom of association).

59.

See *Schenck*, supra note 57.

60.

See *Baxter v. City of Philadelphia*, 426 Pa. 240, 231 A2d 151, 159 (1967):

Essentially plaintiffs' position is that the regulation requiring uniformed employees, including police, to work longer than certain other employees was prima facie discriminatory... (W)e are convinced that the peculiar sensitivity of the public interests protected by police... justify such differences as existed between treatment by the city of its police and other employees.

; *Iben v. Monaco Borough*, 158 Pa. Super. 46, 43 A2d 425 (1945).

61.

See e.g., *Slochower v. Board of Education*, supra note 52 at 599:

This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College.

Cf. *Thorpe v. Housing Authority*, 386 US 670 (1967); Reich, supra note 45.

62.

Van Alstyne, supra note 14 at 1449.

63.

H. Bruff, *Unconstitutional Conditions upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 *Hasting L. J.* 129, 158 (1969).

64.

391 US 563 (1968).

65.

Cd., at 563.

The Pickering Balance-of-Interests Test

Pickering v. Board of Education⁶⁶ is the leading case for today's law on the rights of public-employee free expression. It has done so through the conscious use of a balancing-test to weigh all the arguments and factors as they present themselves in each unique case-situation. The use of a more absolute rule would make it easier to generalize as to the repercussions of each succeeding decision under such a freedom-of-expression doctrine, but the Court apparently felt, as it has often done in expression cases⁶⁷, that a balancing-test approach is the most equitable. The major thrust of this paper will be to attempt to utilize the tools provided by Pickering and its progeny, and so construct some guide to the interrelationship and weighing of factors that are likely to present themselves in the context of the police agency. This would then lead, hopefully, to greater predictability concerning the outcome of various Pickering-type appeals that might be made by officers in differing fact-situations.

The Pickering case involved a public-school teacher who had written a letter⁶⁸ to a local paper. The letter was published, and it contained criticisms of the local School Board's handling of various school-bond issues proposals, and of the predilection of the Board to allocate too much money to the athletic programs as opposed to the educational plans. It also complained of the school superintendent's actions in attempting to stifle teacher criticisms of those issues. Pickering was dismissed, and subsequently granted a hearing

pursuant to Illinois law, which upheld the dismissal. After losing in the state courts⁶⁹, Pickering's dismissal was overturned by the Supreme Court, which set up a balancing-test to decide such issues⁷⁰:

The problem in any case is to arrive at a balance between the interests of the teacher as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

The Court left an analysis of "controlling interests" to future case-by-case development⁷¹, though it took note of a number of factors which might be apt to arise relatively consistently in future cases. These included the "question of maintaining either discipline by immediate superiors or harmony amongst coworkers"⁷², the problem of false matter in the employee's statements⁷³, and the extent to which an employee could be required to follow official grievance-procedures before carrying his case to the public⁷⁴. No generalizable rule was provided by the Court as relates to any of those factors, and, as will be shown later, it appears that the loyalty and harmony facets of Pickering are acted upon by lower courts independently of the false matter facet. Such independent weighing of those factors follows from Pickering and from the type of fact situations which have confronted the courts.

While Pickering did greatly undercut the already-embattled right-privilege distinction of McAuliffe, it did not vitiate it entirely. As one commentator noted, "(i)f Justice (sic)

Holmes mistakenly failed to recognize that dismissal of a government employee because of his public statements was a form of restraint on his free speech, it is equally a mistake to fail to recognize that potential dismissal from government employment is by no means a complete negation of one's free speech"⁷⁵. The question the police officer must ask is whether Pickering is able to provide the tools that will help distinguish lawful restraint from unlawful abridgement.

The lower courts picked up Pickering quite quickly, but there is only three years of case-law generated under it so far, and it is unclear just how effective it has been in either liberalizing and maximizing the opportunities of public employees to engage in protected expression, or in providing the courts with a workable test in this field. It has been used with police officers⁷⁶, welfare workers⁷⁷, legal-aid attorneys⁷⁸, teachers⁷⁹, and Peace Corps Volunteers⁸⁰, to name a few occupational groups. In some cases it has been used correctly, with an actual analysis made of the competing factors in the case, and a balance made in the end⁸¹; in other cases, however, it provided only a litany in the opinion, with little true factor-analysis present⁸². Courts apparently knowing what its impact is supposed to be, usually make a point of mentioning it, although often using it a bit inelegantly. For example, in the recent police-officer case of Muller v. Conlisk⁸³, Pickering played a prominent part in the opinion, but the case was decided on the

grounds of unconstitutional overbreadth by the regulation questioned in the case. The problem was a Pickering-type, quite clearly, but the Court found the solution lay elsewhere, in older legal tools⁸⁴.

Following is a short discussion of earlier freedom-of-expression tests as set up by the Supreme Court. As will be noted, most of them suffer from one drawback that Pickering has, by definition, escaped from: they were not tailored to the problems of the public employee and governmental restraints on his speech. This would sometimes make their use in these cases inapplicable, not just inelegant. The roots of Pickering are, however, noted in the earlier cases, for Pickering is no radical departure into "new law". It is merely the latest step in continued growth in this field, as is most recent doctrine a modification of the old to some degree.

POSSIBLE STANDARDS

Considering what has been called "the quicksilver quality of First Amendment doctrines"⁸⁵, it is not too surprising that the law in relation to public-employee freedom of expression has been relatively unsettled over time. This uncertain status of the ruling case-law has been greater in respect to this occupational group than has existed in the subject of freedom of expression generally. The reason for this is that most First Amendment cases have centered around the more visible topics of obscenity⁸⁶, loyalty and communism⁸⁷, and civil rights⁸⁸, rather than having had dealt with the special fact situations that the public-employee cases involve. One result of this paucity of case-law in the specific area of public-employee freedoms is that most of the First Amendment tests which have arisen have not been geared to acts so mundane as an officer's criticisms of his police superintendent⁸⁹: rather, they look to "fighting words", criminal solicitation and treasonous acts.

The first major First Amendment test was the "clear-and-present-danger" test of Schenck v. United States⁹⁰. It allowed interference with some social objectives by certain forms of expression, but only as long as other social interests were in a clear and immediate danger of being harmed. Though this test was used in Wood v. Georgia⁹¹, it is generally recognized that the "clear-and-present-danger" standard has become an obsolete tool in constitutional law⁹².

A test contemporaneous with "clear-and-present-danger" was the "bad tendency" test of Gitlow v. New York⁹³. This

formulation offered very little protection to freedom of expression, as it looked to the protection of all other social objectives first, and only as an afterthought sheltering whatever allowable expression might be left. Political criticism and dissent was quite vulnerable under this test, and its use was terminated in Dennis v. United States⁹⁴.

A corollary to the basic premise of the "clear-and-present-danger" test, and a notion completely contrary to the preferred-position doctrine. This doctrine placed a presumption of unconstitutionality on statutes restricting freedom of expression, and called for the government to justify its restrictions rather than for the citizen to show how his rights were being abridged. The Court's use of this standard has been irregular⁹⁵. Because this test was not formulated to deal with such extreme situations, like criminal solicitation, as some of the other tests were, its basic tenets could be applied relatively easily to public-employee cases and the factual situations found therein.

The root test from which Pickering has sprung is the "ad hoc balancing" test of American Communications Association v. Douds:⁹⁶ "The formula is that the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression"⁹⁷. The use of this test has been the object of much debate⁹⁸. Its use was not accepted in the landmark case of New York Times v. Sullivan⁹⁹, which set an absolute rule as to the effects of falsity in the law of

defamation: this even though the Times doctrine was derived from an early minority-view case which "may well be the most elaborate, careful, extended act of balancing in the history of American law"¹⁰⁰: Coleman v. MacLennan¹⁰¹.

One test which has never been accepted for use by the Supreme Court is the "absolute test"¹⁰². This standard seeks to define clearly such terms as "abridgement" and "freedom of expression", and set up lasting barriers to state action across the board, rather than continually to balance interests on an ad hoc and ad hominem basis. The standard would then, through its definitions, limit the area of allowable restraint to a smaller field than is permitted by other tests. Because this test has not been developed as fully as it might, it has remained subject to criticism as the embodiment of merely "an unlimited license to talk"¹⁰³.

As with the preferred-position doctrine, the breadth of the "absolute test" would allow it to operate quite effeciently within the context of public-employee expression cases.

Finally, there are a number of miscellaneous doctrines, none of which has grown to the size of a full-blown First Amendment test, but all of which have dealt with the topic to some degree.

There is the two-level theory, holding that "(t)here are certain well-defined and narrowly limited classes of speech, the prevention of and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the

insulting or fighting words"¹⁰⁴. This special attempt to avoid the "clear-and-present-danger" test is probably defunct today, the victim of later First Amendment doctrine¹⁰⁵.

A two-tier theory, holding that First Amendment rights are to be protected more stringently against acts of the federal government than against actions of the states, has never been accepted by a majority of the Court.¹⁰⁶ It would have been based on a use of the Fourteenth Amendment¹⁰⁷. It was explicitly rejected in the New York Times case¹⁰⁸.

It should also be noted that the concepts of void-for-vagueness¹⁰⁹, overbreadth¹¹⁰, and the "chilling effect"¹¹¹ as they relate to regulations and statutes are operational in all First Amendment cases, regardless of what "major" test might be used in the decision. As with the preferred-position doctrine and the "absolute test", these three concepts are quite broad in scope and present no difficulties in their use in public-employee cases.

66.

391 US 563 (1968).

67.

E.g., American Communications Association v. Douds, 339 US 382 (1950); O'Brien v. United States, 391 US 367, 377 (1968).

68.

The court reprinted the letter and performed its own analysis to determine the extent of false matter in the charges. 391 US, at 575-78.

69.

Pickering v. Board of Education, 36 Ill2d 563, 225 NE2d 1 (1967).

70.

391 US, at 563. The Court had discussed the unconstitutional-conditions doctrine and the line of cases that have followed it, but did not accept its use here. The earlier cases had refused to move into any discussion of "whether an abstract right to public employment exists", Wiemann v. Updegraff, 344 US 183, 192 (1952). See Schware v. Board of Bar Examiners, 353 US 232, 239 n.5 (1957). The relatively recent case of Keyishian v. Board of Regents, 385 US 589 (1967) stood by the unconstitutional-conditions formula even though its discussion of academic freedom could have easily been fit into a balancing-test. Id., at 603-05.

71.

391 US, at 569:

Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all statements may be judged.

72.

Id., at 570.

73.

Id., at 572.

74.

Id., at 572 n. 2.

75.

Address by Assistant Atty. Gen. W. H. Rehnquist before the Federal Bar Association, Sept. 18, 1970, "Public Dissent and the Public Employee", at 4.

76.

Brukiewa v. Police Commissioner of Baltimore, 257 Md. 36, 263 A2d 210 (1970).

77.

Tepedino v. Dumpson, 24 NY2d 705, 249 NE2d 751 (1969).

78.

Lefcourt v. Legal Aid Society, 38 USLW 2633 (SDNY 1970).

79.

Puentes v. Board of Education, 24 NY2d 996, 250 NE2d 232 (1969). See Goldwasser v. Brown, 417 F2d 1169 (CA DC 1969)(civilian teacher employed by the military).

80.

Murray v. Vaughn, 300 F. Supp. 638 (D.R.I. 1969)(preliminary motions); Murray v. Blatchford, 307 F. Supp. 1038 (D.R.I. 1969) (final disposition).

81.

Watts v. Seward School Board, Alaska, 454 P2d 732, pet. for cert. filed, 397 US 921 (1969).

82.

Brukiewa v. Police Com'r, supra note 76.

83.

429 F.2d901 (CA7 1970).

84.

See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 845 (1970).

85.

W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propoganda in the United States: Comments and Footnotes*, 31 L. & C.P. 530, 546 (1966).

86.

E.g., *Roth v. United States*, 354 US 476 (1957); *Manual Enterprises v. Day*, 370 US 473 (1962); *Stanley v. Georgia*, 394 US 557 (1969).

87.

E.g., *Wiemann v. Updegraff*, 344 US 133 (1952); *Yates v. United States*, 354 US 293 (1957); *Keyishian v. Board of Regents*, 385 US 589 (1967).

88.

E.g., *NAACP v. Alabama*, 357 US 449 (1958); *NAACP v. Button*, 371 US 421 (1963); *Shuttlesworth v. City of Birmingham*, 394 US 147 (1969).

89.

Pranger v. Break, 9 Cal. Rptr. 293, 297 (1960):

The "clear and present danger" doctrine has no application to activities of public employees where the sanctions imposed are suspension or dismissal from the public service.

90.

249 US 47, 52 (1919).

91.

370 US 375 (1962).

92.

See McKay, *The Preference for Freedom*, 34 NYU L. Rev. 1182 (1959); F. Strong, *Fifty Years of "Clear and Present Danger"*; *From Schenck to Brandenburg--and Beyond*, 1969 Sup. Ct. Rev. 41 (1969).

93.

263 US 652, 670-71 (1926).

94.
341 US 494, 507 (1951).

95.
The origin of the doctrine is in Mr. Justice Stone's remarks in "footnote four" of *United States v. Carolene Products Co.*, 304 US 144, 152-53 n.4 (1938). Its most lucid exposition has been in *Thomas v. Collins*, 323 US 516, 529-30 (1945). See *McKay*, supra note 92, at 1191. The demise of preferred-position as a continuing test followed Mr. Justice Frankfurter's comments on the standard in *Kovacs v. Cooper*, 336 US 77, 95-96 (concurring)(1949).

96.
339 US 382 (1950).

97.
T. Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L. J. 877, 912 (1963).

98.
See citations, *Id.*, at 912 n.37.

99.
376 US 254 (1964).

100.
H. Kalven, Jr., *The New York Times Case: A Note On "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191, 215 (1964).

101.
78 Kan. 711, 93 p. 281 (1908).

102.
The most consistent exponents on the Court of this standard have been Justices Black and Douglas. See e.g., *Bareblatt v. United States*, 360 US 109, 140-45 (1959)(Black, J., dissenting); *Scales v. United States*, 367 US 203, 262 (1961)(Douglas, J., dissenting). See also A. Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245 (1961); W. Brennan, Jr., *The Supreme Court and The Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965). For criticisms of the absolute-test see e.g., *Konigsberg v. State Bar*, 366 US 36 (1961)(Harlan, J. for the majority); *McKay*, supra note 92, at 1193-1203.

103.

Konigsberg v. State Bar, 366 US 36, 50 (1961).

104.

Chaplinsky v. New Hampshire, 315 US 563, 571-72 (1942).

105.

See Kalven, supra note 100, at 217-18.

106.

H. Kalven, Jr., Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 21-23 (1960).

107.

Beauharnis v. Illinois, 343 US 250, 287-95 (1952) (Jackson J., dissenting); Roth v. United States, 354 US 476, 496-508 (1957) (Harlan, J., concurring and dissenting).

108.

376 US, at 276-77.

109.

E.g., Whitehill v. Elkins, 389 US 54 (1967); Keyishian v. Board of Regents, 385 US 539 (1967). See generally Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

110.

E.g., United States v. Robel, 389 US 258 (1967); Kunz v. New York, 340 US 290 (1951). There are different constitutional considerations involved in attacks on the ground of vagueness (procedural due process) as opposed to overbreadth (substantive due process). Keyishian, supra note 109, at 603-04, 608-10. See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970); Note, Less Drastic Means and the First Amendment, 73 Yale L. J. 464 (1969).

111.

E.g., Walker v. City of Birmingham, 388 US 307, 344-45 (1967) (Brennan, J., dissenting); Dombrowski v. Pfister, 380 US 479 (1965). Cf. Cameron v. Johnson, 390 US 611 (1968). See generally Note, The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 308 (1969). See also CPUSA v. SACB, 367 US 901 (1961) ("chilling effect" does not automatically invalidate state action); Barenblatt v. United States, 360 US 109, 125-34 (1959) (use of balancing test with "chilling effect").

A Pickering Factor-Analysis

The balancing-test approach of Pickering requires the court to weigh the interests of all sides to a controversy, place the facts of the case in their particular setting, and render a verdict on the case. Though the Supreme Court disavowed any realistic hope of it laying down any generalizable standards for future cases to follow¹¹², the natural hope of litigants, lawyers and judges is that some standards will arise over time, and in the case-law, to guide future decisions into some recognizable pattern of established rights for both the employee and the agency.

Predictability, useful for both the police officer and his agency, is especially valued in the area of freedom of expression. Lest a "chilling effect"¹¹³ set in, inhibiting the officer from engaging in expression that is both borderline and almost certainly protected, for fear that he will transgress against an agency regulation, the courts have provided the officer with a broad standing to move for a determination of his rights¹¹⁴. Where vital First Amendment rights are in potential jeopardy, an organization related to the officer, such as his local police union, will also have standing to move for a determination of the extent of freedom of expression allowed to members of the force¹¹⁵.

The factor-analysis presented here is an attempt to show what a court will have to engage in to evaluate and balance effectively the kinds of factors presented to it in cases involving police officers. A number of interests, distilled from various cases of both the pre- and post-Pickering periods, have been chosen to represent the desires of both the

officer and his agency. Each of these interests, in turn, has been linked with the same three "operative factors": representing settings which vary the audience toward which an officer's communication might be aimed. Basically, this presents nine interests, six on the part of the agency and three on the part of the individual officer. Coupled with the three operative factors, a basic matrix of twenty-seven analysis-situations is presented. This matrix is, in turn, reproduced twice: once for expressions by the officer which are related to his employment, and once for expressions by the officer which are not related to his employment. Finally, in what would be a complete re-run of the double-matrix if it were broken down into the fifty-four analysis-situations, the factor-analysis deals with statements which contain false matter within them: the original double-matrix is based on both employment and non-employment-related statements that are assumed to be completely truthful in content. A detailed breakdown is not made of instances involving false statements because the controlling case-law on that factor does not vary in result depending on the presence or absence of the types of factors and interests presented here as it is an "absolute rule" rather than one dependent on a balancing-test approach.

At this point, having spoken of nine interests and three operational factors and double-matrices, it is important to disclaim any intention of engaging in what has been known as "mathematical jurisprudence"¹¹⁶. At the idea scientific level, each analysis-situation in the matrix (a form chosen

merely for clarity of presentation) would be assigned a value. When a case arose, the relevant analysis-situations would be isolated and divided between the agency and the officer. Each would then have a "score" consisting of the combined values of their respectively "owned" analysis-situations. The winner would be the one with the highest score, his interests, in effect, having weighed more in the overall balance-process. This will not take place here, as there are no final weightings attached to each square in the matrix, nor could there be. Each analysis, based on the case-law and the sociological "realities" of the police agency, presents a tentative formulation of the issues likely to be present when a particular interest is allegedly affected in the milieu of a specific operational factor. Within each potential case it is expected that a number of interests will be affected, possibly within a number of operational factor situations. Theoretically, then, an aggregate of the formulations relevant to the specific case would then yield a guide to an appropriate decision in the case. To go beyond the offering of a tentative guide would require a surety in analysis not present here, and, most importantly, the presentation of a valid system for placing relative mathematical weights on such interests as "competence", the "right to generally criticize", and the fact of "communication addressed to the public". Those weightings, the underpinning of mathematical jurisprudence, will be hard-pressed to come of fruition here.

The Expressions

The two basic expressions dealt with are those (A) Related To The Job, and (B) Not Related To The Job. As the factor-analysis will attempt to show, this dichotomy parallels the major difference in case-law decisions which results from a determination of the subject-matter of the expressions involved. Two of the interests of the individual officer subdivide (A) into personal grievances (a "gripe") and general grievances. An example of the former might involve a complaint that accumulated overtime-pay is not being paid out to the officer, as is required by his contract. An example of the latter might be that the superintendent's policies are allocating resources poorly and undercutting the morale of the force. A model statement (B) could involve something like, "I oppose the President's policies in Vietnam."

The Interests

The interests used are necessarily broad in scope, to keep the factor-analysis manageable and to allow it to cover most of the issues that might be thought to arise in a police-officer freedom-of-expression case. The interests are as follows:

(Agency)

1. Competence
2. Intra-agency harmony
3. Good public relations
4. Obedience to orders
5. High standards of personal conduct
6. Retention of confidential data

(Individual officer)

7. Right of expression of uniquely personal grievance
8. Right to criticize generally
9. Use of professional expertise

Some of the titles, such as "competence", cover interests that would affect almost any employer. The interest becomes more unique as a determination is made of the exact type of competence required by a law-enforcement agency. Such specific qualifications for a specific role will vitally affect the factor-analysis. Other titles, such as "retention of confidential data", are less often found in other employment-situations than they are in the law-enforcement field. Here too, however, the type of data the agency wishes to keep secret determines the factor-analysis to be made.

Each analysis-situation which introduces a new interest provides a definitional explanation of it. The common-sense meaning of all terms used has been retained to aid understanding and clarity.

The Operative Factors

The operative factors simply designate the audiences towards which the officer's expressions are directed:

- a) communications within the agency
- b) communications addressed to the public
- c) communications addressed to "lawmakers"

The categories are independent, though in any given case more than one category is likely to be found. For example, the analysis under (a) assume that the communications are

retained within agency channels alone, and do not reach the general public. In most circumstances, of course, the facts could easily show that both (a) and (b) must be taken into account. Thus, both analysis-situations will have to be taken into account in such a case. The analysis discuss the problems inherent in various border-line situations such as the "news leak."

The use of the term "lawmakers" is somewhat arbitrary. It denotes elected legislators, elected executives, and highly placed appointive officials in agencies hierarchically superior to the police agency. It does not denote officials of laterally placed agencies such as, on a municipal level, the sanitation and parks departments.

False Matter in Statements

As was noted earlier, a theoretically complete use of the false-matter situation would entail a complete re-run of the double-matrix with false statements substituting for true ones. Because of the nature of the law in this area, there is no need for this, and the entire issue is encapsulated in one section at the end of the individual factor-analysis.

The Matrix

A matrix has been provided, infra, to show the complete inter-relationship of all the factors and the interests. The analysis-situations are coded according to their content. For example, with an expression related to the job, (A), and the interest being discussed as intra-agency harmony, (2) and the

communication addressed to the public, (b), the analysis-situation is A-2-b. The analysis are presented in order from A-1-a to B-9-c, covering all of (A) first, and covering each interest in order.

112.
391 US, at 569.

113.
See generally Note, The Chilling Effect in Constitutional Law, *supra* note 111.

114.
Standing to litigate is quite broad when First Amendment questions are involved. See e.g., *Dombrowski v. Pfister*, 380 US 479 (1965); *Lamont v. Postmater General*, 381 US 301 (1965); *Flast v. Cohen*, 392 US 83 (1968). See generally C. Wright, *LAW OF FEDERAL COURTS* s. 13 (2d ed. 1970).

115.
Generally, one party cannot assert the constitutional rights of another, *McGowan v. Maryland*, 366 US 410 (1961). This is waived, however, when such a situation is necessary to protect vital rights. See e.g., *NAACP v. Alabama ex rel Patterson*, 357 US 449, 453-60 (1958); *Heilberg v. Fixa*, 236 F. Supp. 405 n.6 (ND Cal. 1965), *aff'd sub. nom.* 381 US 479 (1965).

116.
See generally L. Loevinger, *Jurimetrics, The Next Step Forward*, 33 Minn. L. Rev. 455 (1949); F. Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the Right To Counsel Cases*, 51 Amer. Poli. Sci. Rev. 1 (1957); G. Schubert, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959).

Factor-Analysis

(A) EXPRESSIONS RELATED TO THE JOB

(B) EXPRESSIONS NOT RELATED TO THE JOB

Interests:

(Agency)

1. Competence
2. Intra-agency Harmony
3. Good Public Relations
4. Obedience to Orders
5. High Standards of Personal Conduct
6. Retention of Confidential Data

(Individual Officer)

7. Right of Expression of Uniquely Personal Grievances
8. Right to Criticize Generally
9. Use of Professional Expertise

Operative Factors:

- a) communications within the agency
- b) communications addressed to the public
- c) communications addressed to "lawmakers"

Plus repeat of matrix based on statements being false in content (see section on False Matter in Expressions by Officers)

INTERESTS
(agency)

Competence

Intra-agency
harmony

Good public
relations

Obedience to
orders

High standards of
personal conduct

Retention of
Confidential data

(individual officer)

Right of expressions
of personal grievances

Right to generally
criticize

Use of professional
expertise

OPERATIVE FACTORS

w/in agency		Addressed to Public		Addressed to Lawmkr.		w/in agency		Addressed to Public		Addressed to Lawmkr.	
A-1-a	A-1-b	A-1-c		B-1-a	B-1-b	B-1-c					
A-2-a	A-2-b	A-2-c		B-2-a	B-2-b	B-2-c					
A-3-a	A-3-b	A-3-c		B-3-a	B-3-b	B-3-c					
A-4-a	A-4-b	A-4-c		B-4-a	B-4-b	B-4-c					
A-5-a	A-5-b	A-5-c		B-5-a	B-5-b	B-5-c					
A-6-a	A-6-b	A-6-c		B-6-a	B-6-b	B-6-c					
A-7-a	A-7-b	A-7-c		B-7-a	B-7-b	B-7-c					
A-8-a	A-8-b	A-8-c		B-8-a	B-8-b	B-8-c					
A-9-a	A-9-b	A-9-c		B-9-a	B-9-b	B-9-c					
Expressions Related to Job				Expressions Not Related to Job							

A-1-a

All agencies require their employees to have a level of competence high enough to enable them to perform their assigned tasks. Personal views and idiosyncracies are overlooked more easily (or should be) than is incompetence in one's role. Within the agency setting the airing of grievances in such a manner as to interfere with legitimate work output can be interpreted as a lowering of competence¹¹⁷. This could be so because, by not using the established grievance procedures as set up by the agency, either or both of the following reasons are possible: first, the officer shows that his grasp of the agency's internal organization is deficient, and any efforts made to determine the correct course of action to take were weak and incomplete; and second, even assuming that the officer realized his burdening of the wrong set of internal communication line with his grievances was not the prescribed operative mode, he placed his well-being above that of the agency and acted in that fashion anyway¹¹⁸.

Internal management is a strong factor here, and where adequate grievance procedures exist within an agency, their use is clearly desired over the cluttering of other channels with information that serves no function within the use-context of those channels¹¹⁹.

A-1-b

An officer deals with the public in much of his work, and how the public interacts with him determines his effectiveness to a great extent. Should the officer become a well-known exponent of some policy which a large segment of the local population feels is inimical to their interests, his effectiveness on the street could be undercut by a neighborhood's refusal to grant the officer respect or aid in his job. Any advantage he initially gains in a situation by reason of his role and organizational stature¹²⁰ is lost when he is viewed by his "clients" as a repugnant individual, unworthy of any professional respect. While the larger agencies might be able to transfer an officer in such a situation, both pleasing his former "clients" and affording the officer no real loss in intra-agency esteem, the smaller agencies have a harder time offering such a "solution".

In one respect this problem often goes beyond "expression", into "action", causing circumstances such as disobedience to orders on the part of the officer. This can be seen where the exponent of a "get-tough" stratagem to stop crime does in fact "get tough", in the process undercutting his agency's police-community relations programs¹²¹. Conversely, and more rarely, there are problems of effectiveness when an officer works in a neighborhood where the ethos demands he "earn" the right to be respected by the residents via the use of legal and extra-legal displays of force¹²², and the officer declines to do so.

A-1-c

Petitioning public officials for a redress of grievances is a right set forth in the First Amendment. In the presentation of grievances by officers to lawmakers, the same broad processes of lessened esteem and respect as they relate to job-competence are present here as in A-1-b. The weight given to those factors should be different here, however. The "clientele" of the police agency is the public, and while the ire of the legislature could result in lessened appropriations for the agency, this is not generally a reflection on an officer's professional competence, but rather on his tact. Naturally, were the officer in the position of a legislative liason from the agency, the interjection of his own grievances into the picture would clearly be grounds for his removal to a less sensitive post.

It must also be noted that where a jurisdiction allows its public employees statutory access to lawmakers for the purpose of petitioning for a redress of grievances¹²³, it would take a combination of other factors to make the use of such a right reflect adversely on competence¹²⁴.

A-2-a

If the grievance is presented via the established channels, then there is no legitimate reason to discipline simply because the grievance may antagonize some co-workers. The channels exist to accept the airing of criticisms and complaints, and their use should be encouraged. If, on the other hand, an officer expresses his dissatisfaction in the agency through a different medium, resultant co-worker disharmony may be grounds for some disciplinary action. The use of pamphlets passed out to agency personnel¹²⁵ may undercut co-worker harmony, and the use of anonymous letters may do so even more¹²⁶. This is also true with respect to the effect of such publications on the future maintenance of discipline by immediate superiors of those exposed to the grievances¹²⁷.

Courts, when faced with these circumstances, should demand that the burden of proof be met by the agency in respect to contentions of intra-agency disharmony and so forth¹²⁸. To do less would allow decisions to be based on vague discussions of the Pickering test, followed by no real and explicated use of that test¹²⁹.

A-2-b

Pickering leaves open the question of "the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public"¹³⁰. Here is an area where the balance must be struck between the agency's natural inclination to want to keep complaints about its operations away from the public purview, and the employee's desire to get swift action on his grievances¹³¹ and retain his rights of free speech as accorded all citizens.

The fact that a police department has strong internal disciplinary standards and is a "military-type organization"¹³² does not mean that grievance procedures, no matter how egregiously drawn, must always be followed. While the agency has a clear and legitimate interest in channeling complaints through its processes at first¹³³, the disgruntled officer has an equally clear right to a prompt response. At some point the dilatory and obfuscatory tactics of a less-than-scrupulous department could lead to the legal conclusion that the officer has exhausted his administrative remedies¹³⁴, and may now go to the courts and, depending on the circumstances, the bar of public opinion.

It must be noted that the situation where an officer exhausts his administrative remedies before going to another forum is different from the situation where an officer uses agency procedures and simultaneously goes to the public¹³⁵,

or where he skips the agency steps and goes directly to the public. The different weightings of those circumstances depend more on the use of the interests of competence and obedience to orders, however.

Assuming that an officer is not disobeying orders by going to the public with his grievance against the agency, and that his statements divulge no confidential information of the agency's, the question becomes as to when disharmony alone will provide some grounds for disciplinary action. Depending on the facts of the specific case, it may¹³⁶ or may not¹³⁷ be true that public exposure of the grievance has caused the department to suffer ridicule and public censure. Assuming that to be true, though, it might be expected that such ridicule from the public would cause dissension between the "instigator" of the trouble and others in the agency suffering from his accusations.

This all encompasses an interrelated chain of factors. If the public statements were wrong for some reason, as where they might expose undercover agents to some harm or attenuated usefulness, and if they led to ridicule of the department, and if that in turn led to intra-agency disharmony, then a relatively clear case for disciplinary action could be made out, absent counter-balancing factors. But if the speech itself was not prohibited, the adverse reactions of co-workers alone clearly should not be enough to warrant sanctions against the speaker¹³⁸.

A-2-c

This is related to A-2-b in most respects. If access to lawmakers is allowed by statute or agency regulation, then the basic premise would seem to be on the side of allowable action by the officer, in that he should not normally be held accountable for the adverse reactions of others to his communications¹³⁹. Delicate problems will arise where the agencies are small, making it harder to transfer an officer away from those he may have named in his grievance, or where the only transfer-posts will result in a diminution of responsibility, status, or the like,

A-3-a

By definition there can be no adverse public reaction to grievances retained within agency channels. Inadvertent publicity should not result in disciplinary action against an officer who had no intention of opening up the scope of his audience. In the case of "news leaks" it will be a question of fact as to who gave out the information. If it was the officer initiating the grievance, or another person actively associated with his activities in this respect, then the considerations involved in A-3-b should be brought into play.

A-3-b

The first point to look at here is the public reaction to the statements. In the Pickering case itself there was no discernible groundswell of adverse commentary aimed at the agency involved¹⁴⁰, while in Watts v. Seward School Board there was "no small amount of controversy (over) the last year and a half"¹⁴¹. This is clearly an issue of fact, and where public opinion is concerned the presumption should generally be that the statements at issue did not cause an adverse reaction amongst the populace¹⁴², with rebuttal of that presumption dependent on evidence of a reaction deleterious to the agency and its effectiveness.

Secondly, there is a point with which the case-law has not dealt, but which offers a difficult path towards more predictable decisions. This point encompasses the courts making certain value judgements as to what types of critical public reactions to a police agency are deleterious, and what types are not. As with decisions of a "political" nature¹⁴³, this practice could lead to a morass of trouble, but only because what may now be happening sub silentio would be brought into the open in court rulings.

For example, in Muller v. Conlisk¹⁴⁴ a Chicago police detective publicly charged that there was corruption within the department's Internal Investigations Division¹⁴⁵. He was disciplined because the agency found the speech to be "deregatory" to the agency¹⁴⁶, and thus prohibited by agency regulation. The court held that the agency regulation prohibited all

criticism of the agency, and thus was unconstitutionally overbroad. Assuming the regulation to be redrawn narrowly to skirt such legal infirmities as overbreadth and vagueness, and that Det. Muller utters the same statements in a good-faith effort to initiate reform, the question arises whether the officer could be disciplined anyway. Given that the local citizenry may have less respect for the agency after hearing the officer's allegations, would not such a reaction of the public still be warranted if the charges of corruption were borne out by the facts? To disallow valid criticism merely because it reflects adversely on the agency would protect the police structure, while allowing its vital functions to be eroded away¹⁴⁷.

Finally, and related to the issue of fact as to the effect of the speech, it may be that special circumstances would make it more incumbent that public criticisms be toned down for a period of time, lest repercussions occur that clearly outweigh the utility of the public expressions at that juncture. In both Meehan v. Macy¹⁴⁸ and Brukiewa v. Police Commissioner¹⁴⁹, public statements were made after civil disorders had taken place in the jurisdictions. In Brukiewa, the lower court had stressed the need for cohesion, a rebirth of respect, and a general closing of the ranks in the police agency against certain "vitriolic attacks" on the force by those critical of its actions during the recent disturbances. For those reasons the critical remarks of an officer were held actionable through administrative procedures.

The state Supreme Court refused to follow such reasoning, holding that the agency had not shown how the officer's public comments had adversely affected the operations of the agency¹⁵⁰. In Meehan, on the other hand, public statements were made by the officer during a time when there was still a demonstrable possibility of renewed violence. His comments were critical of both the Canal Zone Governor, for whom he worked, and the Panamanians, whom the Governor had proposed to add to the local police force as a way to compromise with their demands¹⁵¹. The court held that the "tense and troubled time" gave the Governor the right to restrict public statements about such matters, as Meehan's views "could have had an incendiary effect upon the public"¹⁵². It is the courts' cognizance of these particular fact-situations that lies at the heart of the Pickering test and its use.

A-3-c

As in A-2-b, the main question here is how far the courts will allow an agency to go to discipline an officer who has incurred the wrath of some group, here the lawmakers, because of some statements addressed to them. It will be easier to do if the officer acted in an outrageous fashion, divulged confidential data, and appeared generally unfit for his post. In less extreme situations, though, there are more problems about what course of action to take. It eventually shades into a moral dilemma, with the threat of lessened appropriations forming the backdrop. Things get easier if the controversy gets to the public, bringing in A-3-b.

A-4-a

The communications channels of an agency carry its policy manifestations. To clutter the channels not set aside for processing grievances with those grievances is to frustrate the policy of the agency. Not only is the policy being implicitly opposed, but the operations set up for internal management are being misused. This leads to inefficiency and waste¹⁵³. Assuming this to be a deliberate violation of standing orders, the needs of internal management carry a high value here in comparison to the worth of the expression put forward.

It should be noted that in the case of an officer in a line, or non-policy-formulation position, mere opposition to certain policies of the agency should not normally be the threshold after which administrative disciplinary action might be taken. That would be in total opposition to the relative freedoms offered by the Pickering formulation of public-employees' rights of expression. Different standards should be permitted, of course, for those whose public stances are required to be in tune with the current agency doctrine, as with deputy chiefs and administrative aides appointed by the superintendent.

Where grievance procedures are lacking, the values change, but not greatly. Where a showing can be made that the enjoyment of some substantive right will suffer because of the "impossibility or improbability of obtaining adequate relief by pursuing administrative remedies"¹⁵⁴ the courts are probably the best

forum for resolution left to turn to. Adequate resolution of the grievance would be less likely from a haphazard attempt to carry a grievance through agency channels not prepared to accept and deal with it. It would be highly improbable that an exhaustion¹⁵⁵ or inadequacy of administrative remedies¹⁵⁶ would not open up the option of going to the courts.

A-4-b

Here there are three possible consequences of such a statement as this. The first is that an unacceptable diminution of discipline would occur if a direct order not to speak publicly on a grievance issue was disobeyed. This could be dangerous to the overall tenor of operations in a semi-military organization like a police department¹⁵⁷. The second consequence is that the established grievance procedures would be underused, preventing efficient adjudication of the issue, and frustrating the agency's policy and desire to keep employee grievances as under-publicized as possible in most instances. The latter is natural, but needs much bolstering before it could hold back a "freedom of expression" plea.

Finally, there is the question of loyalty as it relates to obedience. In the Meehan case the violation of a direct order was held to have been no cause for disciplinary action because the order had not "set forth its prohibitions with reasonable clarity and particularity"¹⁵⁸. The same activity was held actionable, however, on the grounds that it violated Meehan's duty of loyalty to the Governor in that situation¹⁵⁹.

Loyalty in this sense is not an easier concept to deal with than are questions involving political loyalty. The latter questions turn into legal battles over the requirements of loyalty oaths before some position of public employment will be tendered¹⁶⁰, the employment repercussions of associations with disfavored political groups¹⁶¹, and the

procedural efforts of an agency to rid itself of the tainted employee¹⁶². With loyalty oaths there is at least a statute to read and refuse to obey, but with "guilt by association" it is usually just the discretion of the tribunal that determines the extent of the taint on the employee. That is the same type of ephemeral gauge used to look at the degree to which an officer's expressions might be termed "disloyal". Oftentimes not even grounded in a regulation or rule¹⁶³, the case law suffers from the use of loose language in describing why an act is "disloyal".

Some cases reflect notions of morality, but their standards fluctuate between using "ordinary truth and morality as its base"¹⁶⁴ for conduct, to requiring the officer to be a model of good conduct, rising above the general population by his exemplary conduct¹⁶⁵. The requirement of a high moral stature implies an easier burden for the department to show where an officer has gone amiss. Standards that border on piety call for adherence via monkish, quiet behavior¹⁶⁶. Such a standard seems too nebulous to function fairly, and calls for the use of "less drastic means"¹⁶⁷ to achieve the legitimate goal of obedience to orders by the agency personnel.

The better cases allow for freedom of expression up to the point at which it impairs the administration of agency objectives fairly stated¹⁶⁸. While such a standard still requires a case-by-case approach in implementation, it deals with a consequence that can be shown by the proffering of attainable evidence: the disruption of legitimate agency

operations. The situation of the agency, relevant current events, and observable repercussions of the statements in question can all be established. In this way the alleged disobedience can be put into its proper context and evaluated with some degree of objectivity¹⁶⁹.

A-4-c

Absent circumstances of information-security, there are few legitimate reasons to circumscribe access of officers to lawmakers. The statute allowing federal employees to petition or furnish information to Congress, 5 U.S.C. s. 7102,¹⁷⁰ provides a useful tool for both employees and lawmakers, the latter being better able to procure needed information about agency activities¹⁷¹.

The few cases that have taken an employee out from under the protection of this statute generally contain findings that the activity of the employee had gone beyond contact with the lawmakers, and into "external concerted activities" such as passing out handbills¹⁷² or publishing grievances in a newspaper¹⁷³. In Meehan v. Macy¹⁷⁴ a letter and poem critical of the officer's superior was held actionable conduct when distributed in handbill form, but not when transmitted to a Congressman who had the same material reproduced in the Congressional Record¹⁷⁵. These cases show the legitimate differentiation in rulings between grievance-related activities addressed to the public as opposed to a petition to lawmakers concerning the same grievances.

A-5-a through A-5-c

Because of the semi-military cast of the police agency, it has traditionally been able to have relatively sweeping disciplinary jurisdiction over its men¹⁷⁶. One manifestation of the agency's disciplinary powers has been through the use of the relatively vague actionable charge of "conduct unbecoming an officer". Though the first modern police force, Sir Robert Peel's Metropolitan Police of London, attempted in some degree to escape the military mold in their operations and organization¹⁷⁷, it is obvious that "conduct unbecoming..." has ancient military roots as a standard of conduct¹⁷⁸.

As used by the police and the military, "conduct unbecoming..." has been the basis for a vast number of cases. Police agencies have used it to deal with a wide variety of activities by their men: failure to pay personal debts¹⁷⁹; making racist statements to the news media¹⁸⁰; consorting with known criminals¹⁸¹; assaulting a citizen without provocation¹⁸²; and being intoxicated while off-duty¹⁸³, to name a few examples. The military, operating under different circumstances, have been even more creative in declaring various types of activity actionable under their Art. 133¹⁸⁴. Additionally, the military have had at their disposal the General Article, Art. 134, which makes actionable "all disorders and neglects to the prejudice of good order and discipline in the armed forces....."¹⁸⁵. There is not much that could escape Art. 134.

In most instances, "conduct unbecoming..." will be a legitimate tool for a police agency to use. The officer, standing out in his distinctive uniform, represents the whole department in the eyes of those who see him: "he is being held up as a model of proper conduct; it is one of the obligations he undertakes upon voluntary entry into the public service"¹⁸⁶. It would probably be stretching the definition of "freedom of expression" pretty far to hold that beating one's wife in public is protectable as a symbolic act of some sort¹⁸⁷.

The possible dangers arise in the existence of such a tool when one turns from conduct generally assumed to be morally questionable, and projects its use into situations where the act being punished would clearly be an act of expression¹⁸⁸. The military, through Art. 33 of the UCMJ, is able to punish an officer for uttering "contemptuous words" against various specified high public officials¹⁸⁹, and it was used in United States v. Howe¹⁹⁰ to convict a junior officer for engaging in an anti-war protest off-base and out of uniform. Similar use of "conduct unbecoming..." in a civilian police agency would definitely lead to a chilling effect on expression by the officers.

It is probable that a police agency would be unable to utilize such a charge to deal with acts of expression, especially of the political variety. As the Supreme Court has said, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting

effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser"¹⁹¹. A "buffer zone"¹⁹² exists to protect the rights of expression which does not exist to protect the officer who feels a prediliction to travel to Europe in the company of assorted hoodlums¹⁹³.

A-6-a

The retention of confidential data in a police agency is a very important tool in the maintenance of the agency operations. Such data forms the basis of future prosecutions¹⁹⁴, future planning of "surprise" operations, and the allocation of resources within the agency structure. Such retention is very close to a "conclusive" interest, in that its unauthorized publication to those not normally privy to its contents can have speedy and dangerous repercussions to officers on undercover missions, potential witnesses in criminal actions, and others; the freedom of expression gained by exposure of such material is not worth the costs incurred in the vast majority of instances.

Though there is less danger of harm if the data is retained within agency channels, the risk of public exposure caused by its use in too free a manner is heightened. Naturally, there would be no grounds for disciplinary action if standard procedures were followed in the use of the data, or if special access- and use-privileges were granted¹⁹⁵. The danger still exists, though, of procedures not geared to the realities of the need for strict confidentiality in many instances.

A-6-b

The greatest danger in the unauthorized use of confidential data lies in the possibility of exposure, whether inadvertent or by design, of its contents to the public. In the larger departments, and more frequently now in the smaller agencies through increased inter-agency cooperation, an officer has potential access to vast amounts of stored data. The computerization of agency records has greatly facilitated access and, concomitantly, possibilities of abuse¹⁹⁶.

The officer has access to two major sets of records with potential of abuse if used incorrectly: criminal records¹⁹⁷ and agency employment records. The unauthorized public use of criminal records can cause harm in two ways: it can cause harm to future agency operations, creating a reaction that may "dry up" certain sources of aid and information, and it can stigmatize the individual whose record is laid bare. Such disclosures can not only hurt the man trying to "go straight" after a previous conviction¹⁹⁸, but may place the criminal label on someone arrested in error, later acquitted, or otherwise never officially declared a lawbreaker¹⁹⁹. The tragedy of such stigmatization is seen especially in the case of juvenile offenders or arrestees, whose records, more often than not, are filed in the same system as are the adult-offender records²⁰⁰. The disclosure of their contents clearly frustrates much of the *raison d'etre* behind the special procedures of the juvenile-courts and proceedings²⁰¹.

It serves both the public interest and the agency interest to uphold an absolute rule of non-disclosure of criminal

records to the public, except in the narrow and specifically defined instances where regulations allow such use. Unauthorized public disclosure of such sensitive material cannot be tolerated²⁰².

The unauthorized public release of data in employment files can cause just as much stigmatization of the subject as with the use of criminal records. Governmental agencies have great amounts of personal, sensitive data concerning their employees²⁰³, oftentimes acquired through psychological testing²⁰⁴ or the use of polygraphs²⁰⁵, and dealing with such sensitive topics as homosexuality and drug usage²⁰⁶. As with criminal records, this data too should be held to carry with it a very high value in its confidentiality, and its unauthorized public use should be strictly proscribed and punished.

Finally, it should be noted that strict administrative action against officers who release confidential data without authorization may be the only effective means of deterring such acts. This is because, following the doctrine of sovereign immunity, the tort liability of public officers and employees is quite limited, thus preventing the harmed individuals from achieving a substantial redress in the courts²⁰⁷. And, though courts recognized quite early that personal liability was a most effective tool to prevent and deter public officers from overstepping the bounds of their power²⁰⁸, the generally-held law today is that even "willful and malicious" acts by an officer are immune from court

action²⁰⁹. Some case-law holds officers to a stricter standard of behavior²¹⁰, but unless the officer can be successfully sued in libel, slander or invasion of privacy as an individual, in most situations it will have to be administrative disciplinary action that must be looked to for deterrence and punishment of the malfeasants.

A-6-c

When an officer passes confidential data along to lawmakers the problems that arise are twofold: first, will the lawmaker divulge the data to the public, causing the greatest possible misuse of the information, and second, will the agency find its political position compromised vis-a-vis the lawmakers because the data has been opened up to those who were not meant to know of its existence?

Where the data has gone to the public via the lawmaker there can be good reasons present to discipline the officer²¹¹, though the wrong information divulged at the wrong time to the wrong people can definitely hurt during appropriations-time. Probably, if the rule on confidentiality is valid at all, it can and should be used against those who leak data to other governmental personnel and agencies. Whether political pressure from the parties receiving the information can protect their sources from punishment is another matter²¹².

A-7-a

A personal grievance, a gripe, is differentiated from general criticism by the scope of the allegedly defective conduct of the agency. If the conduct touches on the professional lives of most or all of the force it is general criticism²¹³ to speak of it, but if the alleged wrong is more personally related to the speaker than it is a gripe²¹⁴.

The right to gripe would be very hard to suppress. In the vast majority of cases the reason for the gripe is cleared up or forgotten relatively quickly, and no lasting harm is done by the act or the complaint. Where the griping reaches such a level as to adversely affect agency morale or efficiency, however, then some corrective action is clearly called for.

Within the agency setting, informal measures can usually temper the griping. The officer who takes his gripe through administrative channels can always, as a last resort, seek satisfactory relief in the courts. Action would be warranted where the officer refuses to avail himself of the options presented to him to deal with his personal grievance, and who persists in his griping to the detriment of co-workers harmony or the undermining of discipline by an immediate superior.

The probability of cases of intra-agency griping that disrupt the functioning of the organization is low, and great leeway should be given to those who are "blowing off steam". When the griping reaches the level of insubordination, however, freedom of expression is not a concept that can be hidden behind to escape disciplinary action²¹⁵.

A-7-b

Personal grievances that reach the public, except in the case of truly atrocious situations, rarely cause much of a lasting stir. And if the officer has a good case the stir is usually all for the best, bureaucratic inertia being what it is. Generally, "in the absence of a showing that (the officer's) conduct impaired the public service", personal grievances expressed in public are constitutionally protected²¹⁶. Where the expressions shade into action, however, other rules take over, and the law should not be so free as to allow the acts to be completely protected. A grievance protest by way of absence-without-leave may be cause for disciplinary action²¹⁷, as would non-feasance amounting to neglect of duty or willful failure to enforce the law²¹⁸.

That the grievance would cast the agency in a bad or ludicrous light, or that the manner of content of the grievance is not the most tactful, appear to be poor reasons for discipline in themselves. Form or style of the communication is "a doubtful criterion for measuring the limits of free expression even in the case of a government employee²¹⁹".

A-7-c

While the cases are divided as to whether municipal police departments are local functions and subject only to municipal regulation²²⁰, or are also subject to state statutes²²¹, the better law leans towards classifying all police agencies within a state as creatures of the state in the final analysis²²². General enabling or freehold acts usually allow the municipalities to organize and pay for the agencies²²³, and the municipalities oftentimes set up a Police or Civil Service Board to oversee the agency on a regular basis²²⁴.

Though the legislature or higher executive body retains the ultimate power over a police agency and is involved with the fiscal matters of the agency, it is in the Police Board where the operating regulations are promulgated, including the establishment of standard grievance procedures. Such regulations carry with them the presumption of validity as to constitutionality and legality²²⁵. For this reason the appeal of an officer to a lawmaker will not usually bring him within a new set of grievance-procedure options. Besides generating political pressure or causing the passage of something akin to a "private bill", there is little the officer can accomplish to redress his grivance in this method²²⁶.

The standard of allowable freedom of expression here should be the same as was noted in A-7-b. Both the public and the lawmakers have an interest in, and a right to know about, any inequities that may be present in the police

agency's personnel operations. Lacking issues of confidentiality (doubtful with a personal grievance) or some solid and legitimate interest of the agency in keeping certain information from the lawmaking bodies²²⁷, a wide latitude should be given the officers in terms of access to the lawmakers to express dissatisfaction with the employment conditions.

A-3-a

General criticism of an agency's policies, as opposed to mere griping, because it touches on the conduct and status of the entire organization or reflects adversely upon the senior management personnel, carries with it a greater probability of starting a chain of negative repercussions for someone. Rather than being bothered by "someone else's troubles", co-workers are subjected to comments indicating that they too are suffering under someone's incompetence or general venality.

Because the criticism is retained within agency circles, the problems of an adverse public reaction to the targets of the criticism are non-existent. And, as with griping, where the criticisms are generally put forth in private discussions there is little right to curtail such speech. Where the criticisms do reach a level of vociferousness to the extent that efficiency and harmony are threatened, however, then disciplinary measures are in order. Especially in smaller agencies, or in specialized work-units, a continued and vocal manifestation of antipathy by one officer towards his superiors and their policies could cause such feelings to eventually start "generalizing throughout the staff"²²³. In such extreme cases efficiency would suffer as orders get carried out less and less without question, and the organizational unit would slowly be divided into two or more antagonistic camps. These situations are rare, but when they arise they must be dealt with by the agency if it is to function effectively in the future.

A related problem in this area concerns the spirit within which the criticisms are put forth. The continuum between personal antipathy and selfless devotion to the force presents many possible motivating factors to cause an officer to put forth his views. In times past, and in times yet to come, situations will arise where the factual bases of an allegation are lost under rhetorical arguments about "maliciousness", insubordination and the like.

At common law the "fair comment" doctrine protected criticism or expressions of opinion²²⁹, but only if based on true statements of fact and not aimed at named individuals. Malice, improper motives, or abusive tenor of the criticisms could vitiate such protection for the speaker²³⁰. Only a very few courts provided legal protection against libel and slander suits with a liberal "good faith" threshold standard for statements²³¹, allowing for misstatements of fact.

Today, the tone of the criticism, its relation to named individuals, and its actual basis in fact is no longer relevant to the protection of the speaker under law---rather, it is the "actual malice" standard of New York Times v. Sullivan²³² which controls. Thus, what is now constitutionally protected in the courts as to criticisms becomes the standard of allowable expression in an administrative setting too²³³. It is the result of the officer's criticisms which determines the extent of any disciplinary action to follow, not his comments per se.

A-8-b

General public criticism of a police agency is probably easier to protect under the Pickering doctrine than is intra-agency criticism²³⁴. Following the basic premise that the speaker, absent action-oriented words²³⁵, should not be punished because his audience disagrees with him and causes a ruckus²³⁶, it will be rare that the speaker's public comments are the true cause of agency inefficiency and disharmony. Depending on the subject-matter of the criticism it is also probable that the statements will not be directed towards "a superior with whom (the officer) would come into daily or frequent contact"²³⁷. Thus, there would be no question of public insubordination or an undercutting of agency discipline²³⁸.

Also, it may be that the higher one aims in the agency hierarchy to criticize, the more likely it is that the New York Times doctrine will protect the comments. This is because the class of individuals known as "public officials" are legitimate targets for public criticism under the doctrine, and open to the loose commentary the doctrine protects²³⁹.

A-8-c

The right of a citizen to complain to his government and seek a redress of grievances is guaranteed by the Constitution²⁴⁰. The method of his petition may go beyond verbal expressions, and into "appropriate types of action"²⁴¹ which are also protected. And the subject of his complaint may clearly be the acts of government officials²⁴². Using those rights as a basis, it would be only a clear showing of impairment of the agency's operations that would warrant disciplinary action in this circumstance. Disclosure of confidential data is an interest to be preserved, but overbreadth of a regulation which "would allow persons to be punished merely for peacefully expressing unpopular views"²⁴³ is not so valued.

A-9-a

The Pickering opinion notes that misstatements of fact by a teacher (read "officer") might have an overly harmful impact in terms of their acceptance by the public "because of the teacher's presumed greater access to the real facts"²⁴⁴. For the police officer, this imputation of "experienced expertise" also exists and acts as a legitimizing and corroborating factor for his comments²⁴⁵. In some circumstances this engendered feeling of heightened reliability placed the officer into a position where his duty to speak with circumspection increases.

Most public figures from all the professions, and many governmental employees, find themselves by virtue of their roles being listened to attentively on all subjects they care to expound on. Much of this is a result of "transferred expertise", whereby the speaker deals with topics not related to his role in a direct fashion. Rather, his role provides him with the aura of knowing just a little bit more on most subjects than the average citizen. Within their own profession their aura of knowledgeability is much greater, for after all, "that's their job".

This is not so much the case within an audience of co-workers, however. An officer in the technical divisions may be the resident expert in a scientific specialty, but everyone has "been on the street" at one time or another. The agency setting calls for no special standards as to the use of professional expertise.

A-9-b

The public has the least-available access to the true facts of a situation expounded upon by an officer who is drawing on his knowledge and status as a law-enforcement operative. Where he is part of the agency hierarchy, or holds a position in a parallel hierarchy (e.g. the police union local), he appears even more likely to have all the facts at his fingertips. This situation may demand of him more than the ordinary amount of reticence and tact in periods of community tension and so forth²⁴⁶.

Criticisms made by drawing on special expertise are more likely to have an impact on the community if the expertise is noted by the audience. This situation differs from the circumstances of other criticism in that its impact may be greater on the audiences because of the corroborating experience factor. Though the admission or deletion of a statement such as "I am a police officer, and I know that..." should not determine the extent of possible disciplinary measures available to the agency, the expertise-aura is a proper factor to look at in determining the adverse effects of the expressions on the police agency and its operations.

Contrariwise, it should be taken into account that those with expertise often feel a moral duty to use their knowledge for the public enlightenment, and expose pertinent facts to the public gaze²⁴⁷. As with all good things, even this type of civic-mindedness can be overdone and result in more harm than good.

A-9-c

Lawmakers have a greater potential access to factual data than does the public at large, and so they should be less likely to be led astray by clever innuendoes and half-truths of officers' statements based on incomplete information. This is not to say that the lawmakers might not want to believe what they are told as long as it fits in with their preconceived notions on the subject, but they do have more information-sources to utilize if they wish to.

If a statement can go out to the public it can go out to lawmakers, and so no special rules are needed in that respect. If the statement is confined to an audience of lawmakers, however, then the issues of confidentiality, regulation constitutionality and employee competence come into play.

The fact that an officer may have greater access to the lawmakers on law-enforcement issues because of his experience and training is not a fact to be held against him. How he uses or abuses such access is the question to be explored.

B-1-a

Fewer difficulties in balancing interests exist with expressions not related to an officer's job. The policeman speaks as an officer qua citizen, and deals with issues that affect his agency only in broad terms, as would all major political decisions or sociological trends. The officer may rely on his title to gain an audience, but he relies on transferred-expertise to boost the reception of his views²⁴⁸.

To inhibit and curtail expressions by officers on issues of public concern would deal a crippling blow to all employee rights of free expression. As long as the employment relation is not impaired, the officer should be permitted all the freedom accorded private citizens in the same circumstances. As one Federal report stated: "Public employees should be permitted to express their opinions freely in private and in public on any political subject or candidate"²⁴⁹.

In relation to competence, as with expressions related to one's job, the statements may betray an insensitivity or inability to grasp certain postulates on the part of the officer. This, in turn, may affect his ability to function efficiently with his co-workers or superiors²⁵⁰. The smaller the agency or work-unit, the harder it is for informal or ameliorative measures such as lateral transfer to effect a resolution of the conflict engendered. Thus the need for stronger controls in the extreme situations. The big danger in this type of situation is that the speaker may be punished because of the over-reaction or pre-existing malice of his

co-workers²⁵¹, rather than because of the intrinsic abrasiveness and disrupting tendencies of his expressions²⁵².

B-1-b

As with expressions related to the job (see A-1-b) the intemperate remarks or rash actions of an officer as they relate to any subject may easily affect his standing in the community or neighborhood within which he works. The hard question with expressions of a non-employment related nature is to what degree they may be indirectly proscribed by their use as grounds for disciplinary action²⁵². Who is "at fault" when the anti-war police officer in Orange County, California finds himself the victim of a non-cooperation campaign by the local residents?

One distinction available as to what could be actionable conduct and expressiveness could center around their relation to some mythical norm in viewpoints, or closeness to certain expressed policies of the state or nation. Thus, if the expressions of the officers deviated too greatly from the express public policies of the jurisdiction, and led to public controversy that engenders agency inefficiency²⁵⁴, then such statements might be the basis for some disciplinary action²⁵⁵. The problem with this type of test is obvious, however: what is the "norm" in viewpoints, who will declare it, and who can isolate even a very few "non-controversial" tenets to work with? As Justice Douglas once noted: "(f)ree speech is not to be regulated like diseased cattle and impure butter"²⁵⁶. Complex issues rarely are resolved by the use of arbitrary solutions.

B-1-c

Petitioning lawmakers for a redress of grievances is a cherished right and a cornerstone of our democracy. When an officer engages in such expression, he should be allowed the same latitude given any private citizen in the same circumstances.

The officer does, however, have a responsible role to play in the community which carries with it a unique visibility oftentimes not attendant to those in other professions. When the officer goes beyond the borders of permissible speech and conduct²⁵⁷ and into legally-proscribed activities of some form²⁵⁸, then his agency would probably be able to discipline the officer. The officer is a symbol of his law-enforcement function and agency, and the taint of scandal or unlawfulness upon him is good "cause" for the administration of disciplinary action²⁵⁹.

B-2-a through B-3-c

These topics are combined because the greater allowances of freedom of expression provided employees to speak on matters unrelated to their jobs tend to make certain differences in circumstances of no legal consequence. The assumption here is that in most cases the officer will be allowed the same degree of freedom of expression that is afforded the private citizen. That co-workers or members of the general public might become angered by the officer's views is accepted as a sign that the body politic is healthy and pluralistic, not a call for such speech to be proscribed: "the very function of the system of freedom of expression is to permit and indeed encourage conflict within the society. Conflict is as vital to a community as consensus. And the system of freedom of expression provides the structure in which the most useful, and the least destructive, form of conflict can take place"²⁶⁰.

The agency would be acting within its rights to discipline an officer in only two types of circumstances here: first, where the officer's actions were legally proscribed by laws other than agency regulations, and secondly, where the officer's actions clearly led to agency inefficiency, co-worker disharmony, or the like.

When an officer's public expressions and acts go beyond those allowed by the law, that would seem to be a clear time for the legitimate use of a "conduct unbecoming..." provision by the agency. Unlawfulness on the part of a law-enforcement officer cannot, for the public's sake, be tolerated or tacitly

condoned²⁶¹. The same standard is applicable towards the use of proscribed degrees of expression and action as they relate to other substantive criminal acts. This would include disobeying court injunctions²⁶², engaging in criminal solicitation²⁶³ and engaging in acts that go beyond the limits of protected "symbolic speech"²⁶⁴.

In respect to possible effects upon agency efficiency, good public relations, and co-worker harmony, the expressions of the officer must be clearly shown to be an impediment to the attainment of those goals. Only a compelling or sufficiently important governmental interest demonstrably affected by the officer's expressions can justify restrictions being put on such non-job-related speech. "It cannot be denied that the behavioral pattern of a policeman off-duty as well as on is of paramount interest to the department. His associations are limited by his law enforcement employment. But it can only be limited to such associations or off-duty activities that affect his morals or integrity or are inimical to the department"²⁶⁵.

The off-duty behavior of the policeman qua citizen is not normally actionable by his agency²⁶⁶. It is only where his machinations become too intimately tied to the work-environment, causing all the troubles that such acts might tend to carry with them, that such expressions become actionable grounds for disciplinary orders²⁶⁷.

B-4-a through B-4-c

In dealing with speech not related to the job, the assumption must be that courts will look quite critically at agency regulations that attempt to control such speech. In most such instances the use of a balancing test²⁶⁸ would yield the freedom of expression outweighing the tenuous use of some legitimate interest by the agency in calling for restrictions on expression: the agencies have little business in monitoring and controlling the speech and speech-related activities of their employees in off-duty circumstances.

Where such regulations have been set up, however, the problem often facing the officer is what to do in the face of such unlawful authority. On the one hand, he can disobey the regulation, be disciplined, and move for courtroom adjudication of the constitutionality of the rule²⁶⁹. Of late it has also been possible to attack a threatened prosecution that affects First Amendment rights before the use of the regulation presenting the threat has been actually brought into play²⁷⁰.

On the other hand there is the danger that the agency may, in some unique circumstances, obtain a court injunction which prohibits future purposeful transgressions against the rule. This brings up the frustrating situation where the officer may be able to escape eventual punishment for violating the regulation (later voided)²⁷¹, but cannot escape the contempt citation issued for acting in contravention to the court injunction which dealt with the same regulation²⁷².

The form of authority transgressed against still holds great sway in the American law as a determinative factor in case resolution²⁷³.

One way the officer might get to the courts, but which entails his disobeying the regulation and receiving departmental disciplinary action, is through the exhaustion-of-remedies doctrine²⁷⁴. Many state²⁷⁵ and federal courts²⁷⁶ demand such exhaustion before entertaining jurisdiction over the case, though there are exceptions²⁷⁷.

B-5-a through B-5-c

See discussion at A-5-a through A-5-c.

B-6-a through B-6-c

Where retention of confidential agency data is not directly hampered by an officer's actions and expressions, this interest becomes inoperative in a balancing-test approach. Where an officer speaks to subject unrelated to his employment, by definition the retention of confidential data from his agency is not at issue.

B-7-a through B-8-c

"When the expression is not connected with the employee's job few difficulties arise. The starting proposition, that a government employee is in the same position as an ordinary citizen, is applicable without substantial qualification... What this means, in essence, is that government employment does not in itself prevent an employee from engaging in expression critical of the government or that tends to defeat government policies"²⁷⁸.

At this point the officer's status as a public employee becomes a fact of only passing notice. The agency's interests in competency, co-worker harmony, obedience to orders and so forth are still present, but they generally remain unaffected by any expressions of the officer in this context. There is generally no sacrifice of agency effectiveness present when the officer speaks out as a citizen on issues of broad concern and not relating directly to his employment.

Overbreadth would be the problem with agency regulations that attempted to encompass this type of speech with no proper purpose articulated for its use²⁷⁹. Upon such a finding, the courts will generally put the burden on the agency to come up with an acceptable regulatory scheme that does not trample on constitutionally-protected freedoms²⁸⁰, though sometimes the court will make suggestions as to appropriate alternatives legally available to the agency²⁸¹. Such new regulations should be able to do little more than embody as a standard of proscription the existing mass of doctrine as

it presently relates to the private citizens' rights of
freedom of expression²³².

B-9-a through B-9-c

Where the expressions of the officer deal with non-job-related subject there is no professional expertise used in the normal sense of the term. He may receive an aura of transferred-expertise from his position and role with the agency, but such "expertise" provides him only with public exposure and ready access to a podium, not with any greater knowledge of the subject about which he will speak. An agency would have the legitimate power to control the extent of allowable off-duty wearing of the agency uniform²⁸³ and the use of the agency seal in advertisements as ways to deal with possible abuses by officers using their role to gain an audience for their expressions. Beyond that there is no way an agency could forbid its employees from mentioning their employment status just as a point of information.

117.

Jenson v. Olsen, 353 F2d 825, 828 (CA 8 1965). In this case a welfare worker made criticisms and allegations about his agency within his case reports. His discharge was upheld.

118.

See Turner v. Kennedy, 332 F2d 304 (1964)(dismissal of FBI agent), discussed in Note, Dismissals of Public Employees for Petitioning Congress: Administrative Discipline and 5 USC Section 652(d), 74 Yale L. J. 1156, at n.4 (1965).

119.

It should be remembered that amongst those within positions of a confidential or policy-making character, such employees generally serve at the pleasure of their superiors and may be removed at almost any time. This removal is allowable even though the professional competence of the employee is stipulated. In such circumstances it is the loyalty to the superior and his policies which is the paramount value, Keim v. United States, 177 US 290, 293 (1900); Leonard v. Douglas, 321 F2d 749 (CA DC 1963). See also Cafeteria Workers v. McElroy, 357 US 836 (1961); 5 USC s. 7532(b)(Supp. III 1968)(allowing the non-reviewable dismissal of employees in defense-related agencies when the agency head determines it "necessary or advisable in the interests of national security".). Peace Corps Volunteers serve "at the pleasure of the President", 22 USC s. 2405(i)(1964).

120.

See M. Banton, THE POLICEMAN IN THE COMMUNITY, ch. 6(1964).

121.

See generally A. Brandstatter & L. Radelet, eds., POLICE AND COMMUNITY RELATIONS: A SOURCEBOOK (1968). See also Harrison v. Civil Service Commission, 1 Ill2d 137, 145, 115 NE2d 521, 529 (1953):

(T)he discharge of a police officer for conduct unbecoming a member of the department is not only for the purpose of punishing the officer, but for the protection of the public.

; Olsen v. Civil Service Commission, 28 Ill. App2d 146, 171 NE2d 80 (1960)(dismissal for drawing pistol without provocation).

122.

Banton, supra note 120, at 174.

123.

Steck v. Connally, 199 F. Supp. 105 (1961); 5 USC s. 7102 (80 Stat. 523)(1966). But see Turner v. Kennedy, supra note 118.

124.

Such factors could include the irresponsibility of the allegations presented to the lawmakers, Veatch v. Resor, 266 F. Supp. 893 (1967), or the fact that the officer coupled his presentation to the lawmakers with a release of grievances to the public. Harrington v. United States, 161 Ct. Cl. 432, 443 (1963). Cf. Klein v. Civil Service Commission, 260 Iowa 1147, 152 NW2d 195 (1967). While one case has implicitly noted that an allowed communication to a lawmaker might then be released by the latter in such a fashion as to hold the officer blameless for the resultant public exposure of the grievance, Meehan v. Macy, 129 App. DC 217, 392 F2d 822 (CADC 1968), it is doubtful that the purposeful use of such a ploy could leave the agency without recourse as to disciplining the instigating officer.

125.

Harrington v. United States, supra note 124.

126.

Krennich v. United States, 169 Ct. Cl. 6, 8, 340 F2d 653, cert. den. 382 US 870 (1965)(among other things, calling a fellow employee a "cheap, brazen hussy"). As one author has stated:

Be not reasonable with inquisitions, anonymous informers, and secret files that mock American justice... Exercise the full judicial power of the United States; nullify them, forbid them, and make us proud again.

Cahn, Can the Supreme Court Defend Civil Liberties, in TOWARDS A BETTER AMERICA 132, 144 (H. Samuel ed. 1968), quoted in Flast v. Cohen, 392 US 83, 110-11 (1968)(Douglas, J., concurring). Of late, both the police and the military have been criticized for lapsing into such behavior as a reaction to the rise of the "New Left". See Comment, Secret Files: Legitimate Police Activity or Unconstitutional Restraint on Dissent?, 58 Geo. L. J. 569 (1970); Note, Chilling Political Expression by Use of Police Intelligence Files: Anderson v. Sills (106 NJ Super. 545, 256 A2d 293), 5 Harv. C.R.-C.L. L. Rev. 71 (1970).

127.

Watts v. Seward School Board, Alaska, 454 P2d 732, 735, pet. for cert. filed, 397 US 921 (1969).

128.

See *Klein v. Civil Service Commission of Cedar Rapids*, supra note 124, 152 NW2d at 201; *Brukiewa v. Police Com'r of Baltimore*, 257 MD. 36, 263 A2d 210, 213, 211 (1970); *Los Angeles Teachers Union v. Los Angeles City Board of Education*, 78 Cal. Rptr. 723, 731, 455 P2d 830, 835 (1969). Due process requirements demand that convictions in courts be supported by evidence. *Thompson v. City of Louisville*, 362 US 199 (1960).

129.

Compare the opinion in *Watts*, supra note 127, especially the dissent by Rabinowitz, J., at 739-55, with the opinion in *Brukiewa*, supra note 128.

130.

391 US 563, at 572 n.2 (1968).

131.

See generally *Freedman v. Mad.*, 380 US 51, 58-9 (1965); *Teitel Film Corp. v. Cusak*, 390 US 139, 140 (1968). See also *State v. Barry*, 123 Ohio St. 458, 175 NE 855 (1931), for a twist on the "interest" the officer wanted to pursue by going to the courts with his case.

132.

See e.g. *In Re Gioglio*, 104 NJ Super. 83, 248 A2d 570, 574 (1968).

133.

See generally Note, supra note 118.

134.

See generally L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-58 (abridged student ed. 1965); 3 Davis ss. 20.01-20.10; Note, Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings, 72 Yale L. J. 574 (1963).

135.

Klein v. Civil Service Com'n, supra note 124.

136.

Watts, supra note 127, at 737.

137.

In Pickering, the Court noted that "(s)o far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief". 391 US, at 570.

138.

See Terminiello v. Chicago, 337 US 1, reh. den. 337 US 934 (1949); Gregory v. Chicago, 394 US 111 (1969).

139.

But see Erkman v. Civil Service Commission, 193 P2d 233 (Utah 1948)(officer discharged for "disrespect" after presenting true charges concerning illegal acts by the police chief, the presentation being made before and at the request of the city council).

140.

Supra note 137.

141.

Supra note 136.

142.

Donovan v. Mobley, 291 F. Supp. 930, 933 (1968)(lifeguard fired by police for publishing articles about lifeguard duties ordered reinstated).

143.

See generally J. Wisdom, The Frictionmaking, Exacerbating Political Role of the Federal Courts, 21 So. W. L. J. 411(1967).

144.

429 F.2d 901 (CA 7 1970).

145.

Said Muller:

The IID is just a big washing machine.
Everything they put into it comes out
clean.

429 F.2d, at 902.

146.

Rule 31 of the Police Department of the City of Chicago forbade officers from "Engaging in any activity, conversation, deliberation or discussion which is derogatory to the Department or any member or policy of the Department". *Id.*

147.

In *Turner v. Kennedy*, *supra* note 113, one of the charges leading up to the dismissal of the FBI agent was that he had a "poor attitude towards the FBI and its Director". Turner had written to then Sen. Kefauver that "(i)t would appear that any statement not serving to perpetuate the Hoover myth is...an 'unfounded allegation'". 74 Yale, at 1157 n.10. See generally on the subject of police secrecy as an integral part of agency administration W. Westley, *Secrecy and the Police*, 34 Social Forces 254-7 (1956); J. Skolnick, *JUSTICE WITHOUT TRIAL* 14, 234 (1966); A. Niederhofer, *BEHIND THE SHIELD* 5, 113, 172, 185 (1967).

148.

Supra note 124.

149.

Supra note 123.

150.

263 A2d, at 213-14.

151.

Meehan, as the local president of the police union, wanted only American nationals on the Canal Zone force.

152.

392 F2d, at 834.

153.

See *Jenson v. Olsen*, *supra* note 117.

154.

3 Davis s. 20.07.

155.

E.g., *Myers v. Bethlehem Shipbuilding Corp.*, 303 US 41 (1938); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 US 10 (1963); L. Jaffe, *The Exhaustion of Administrative Remedies*, 12 Buff. L. R. 327 (1963).

156.

E.g., *McNeese v. Board of Education*, 373 US 663 (1963); *Jeffers v. Whitley*, 309 F2d 621 (CA4 1962); *Glover v. United States*, 236 F2d 84 (CA8 1961).

157.

Police and fire departments are the twin governmental agencies at the state and local levels always noted in opinions to be "quasi-military" or "semi-military" in organization. See e.g., *In Re Gioglio*, supra note 132; *City of Newark v. Massey*, 93 NJ Super. 37 Chicago Legal News 150 (1904):

A police force is peculiar, sui generis, you might say, in its formation and in its relation to the city government. It is practically an organized force resembling in many respects a military force... It is a department which requires that the members of it shall surrender their individual opinion and power to act, and submit to that of a controlling head just as much as the common soldier must surrender his own opinion to that of his commanding officer.

158.

392 F2d, at 837. See generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). See *Keyishian v. Board of Regents*, 385 US 589 (1967); *Swickler v. Koota*, 389 US 241, 249-50 (1967).

159.

392 F2d, at 834:

The fact that Meehan was also the spokesman for the police union may have increased his authority to speak in behalf of his union members when he confined his speech to appropriate channels. It also gave him a stature and commensurate responsibilities, both to the union and to the employer, to confine himself to channels and exercise temperance.

160.

E.g., *Garner v. Board of Public Works*, 341 US 716 (1951); *Shelton v. Tucker*, 364 US 479 (1960); *Elfbrandt v. Russell*, 384 US 11 (1966); *Keyishian v. Board of Regents*, 385 US 589 (1967). See generally H. Hyman, *TO TRY MEN'S SOULS: LOYALTY OATHS IN AMERICAN HISTORY* (1959); J. Israel, *Elfbrandt v. Russell: The Demise of the Oath?* 1966 Sup. Ct. Rev. 193 (1966).

161.

E.g., *American Communications Association v. Douds*, 339 US 382 (1950); *Konigsberg v. State Bar of Calif.*, 353 US 252 (1957); *United States v. Robel*, 389 US 258 (1967); *Schneider v. Smith*, 390 US 17 (1968). See also T. Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L. J. 1 (1964); G. Gunther, *Reflections on Robel: Its not What the Court Did, But The Way That It Did It*, 20 Stan. L. Rev. 1140 (1968).

162.

Haynes v. Brennan, 135 NYS 2d 900 (Sup. Ct. 1954) (dismissal of probationary patrolman overturned as being solely based on an unsubstantiated charge that he had Communist sympathies or affiliations). Though it is true that "the stain is a deep one", *Wiemann v. Updegraff*, 341 US, at 191 (1952), to be turned out of employment for disloyalty to the nation, such may be the conclusion often generated by the summary procedures extant in the national-defense areas. It would appear that analogy between the police and the military organizations do not go this far in terms of the abrogation of procedural due process. See supra note 119.

163.

Asbury Park v. Dep't of Civil Service, 17 NJ 419, 429, 111 A2d 625, 630 (1955); *Appeal of Emmons*, 63 NJ Super. 136, 140, 164 A2d 184, 187 (App. Div. 1960); *In Re Gioglio*, supra note 132.

164.

Martin v. Smith, 100 NJL 50, 52, 125 A. 142 (Sup. Ct. 1924).

165.

Appeal of Emmons, supra note 163, 164 A2d, at 137:

Appellant argues that a police officer should not be held to a different standard from that of an ordinary citizen. While this may be true with respect to criminal violations...such is assuredly not the case here. An officer cannot complain that he is being held up as a model of proper conduct; it is one of the obligations he undertakes upon voluntary entry into public service. His obligations are greater if he desires to maintain his position as a police officer.

; Rules and Procedures of the Police Department of the City of New York, ch. 2 s. 17.0 ("A member of the department shall not drink intoxicants while in uniform. He shall not drink intoxicants at any time to an extent making him unfit for duty"). Cf. *Garrity v. New Jersey*, 385 US 493 (1967).

166.

Cf. *City of St. Petersburg v. Pfieffer*, Fla., 52 So.2d 796, 797 (1951):

Civil service cannot be expected to compel personal admiration of one's superior. Personal loyalty and esteem is most generally a matter of mutual concern.

167.

United States v. Robel, 389 US 258, 268 (1967). See Wormuth & Mericin, *The Doctrine of the Reasonable Alternative*, 9 Utah L. Rev. 254 (1964); Note, *Less Drastic Means and the First Amendment*, supra note 110.

168.

E.g., *DeStefano v. Wilson*, 96 NJ Super. 592, 233 A2d 682, 685 (1967); *Belshaw v. City of Berkeley*, 246 Cal. App.2d 493, 54 Cal. Rptr. 727, 729 (D. Ct. App. 1966); *Kinnear v. City, etc. of San Francisco*, 61 Cal2d 341, 38 Cal. Rptr. 631, 392 P2d 391, 392 (1964).

169.

The use of standards based on degree of morality and goodness reach the courts in various contexts. One of the most common situations is where the question confronting the court is whether or not to categorize an act as having involved "moral turpitude": this for the purpose of finding someone as having or not having "good moral character", the presence of which would make the individual eligible for some benefit. See e.g., *Cummings v. Missouri*, 71 US \$4 Wall.) 277 (1866)(fitness to be a minister); *United States v. Francisco*, 164 F2d 163 (CA2 1947)(fitness to become a naturalized citizen); *In Re Brooks*, 57 Wash.2d 66, 355 P2d 840 (1960), cert. den. 365 US 813 (1961)(fitness to be admitted to the state bar). See also the opinions of L. Hand and Frank, JJ., in *Repouille v. United States*, 165 F2d 152 (CA2 1947)(applicant for citizenship had performed euthanasia on his "horribly deformed" child).

170.

80 Stat. 523 (1966).

171.

The statute was originally passed in response to Exec. Order No. 163 (Jan. 31, 1902) of Pres. Theo. Roosevelt, a "gag rule" which had set up an absolute bar to the petitioning of Congress by employees of the Executive branch. The gag rule was later extended to employees of "independent government establishments" also. Exec. Order No. 402 (Jan. 25, 1906). See 48 Cong. Rec. 5223 (1912). The statute was originally passed as part of the Lloyd-LaFollette Act, Act of August 24, 1912 (37 Stat. 555)(1912).

172.

Eustance v. Day, 198 F. Supp. 233 (DDC 1961), aff'd. per. curiam 314 F2d 427 (CA DC 1962).

173.

Levine v. Farley, 107 F2d 186 (CA DC 1939), cert. den. 308 US 622 (1940).

174.

392 F2d 822 (1968).

175.

110 Cong. Rec. 3918-19 (Feb. 27, 1964).

176.

E.g., *Nolting v. Civil Service Commission of Chicago*, 7 Ill. App.2d 147, 159-60 (1955); R. Myren, *A Crisis in Police Management*, 50 J. Crim. L.C. & P.S. 600 (1960); *Banton*, supra note 120, at 114.

177.

The "Bobbies" wore a standardized civilian dress at their inception to clearly set them apart from the military, whose occasional use a domestic police force "angered...rather than ...frightened" British crowds. J. Cramer, *THE WORLD'S POLICE HERITAGE IN ENGLAND AND AMERICA* (1962); B. Smith, *POLICE SYSTEMS IN THE UNITED STATES* (1940).

178.

The statute is currently art. 133 of the Uniform Code of Military Justice (UCMJ), 10 USC s. 933. See also Arts. 88 (Contempt toward officials) and 134 (General article). See generally F. Weiner, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 Harv. L. Rev. 1, 266 (1958); K. Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 AFJAG L. Rev. 124, 126-30 (1970).

179.

Sayles v. Board of Commissioners, 25 Ill. App.2d 262, 166 NE2d 469 (1960). See also *Manual for Courts-Martial*, 1969 (rev.ed.), para. 213f (7); *United States v. Boyles*, CM 362520, 10 CMR 446 (1953); *United States v. Swanson*, ACM 14745, 25 CMR 832 (1957).

180.

Reagan v. Bichsel, 284 SW2d 935 (Tex. Civ. Ct. App. 1955). This charge was for "conduct prejudicial to good order", an included offense under Art. 134 in a military Art. 133 charge. *Swaim v. United States*, 28 Ct. Cl. 173 (1893), aff'd 165 US 553 (1897); 18 Op. Atty. Gen. 113 (1835).

181.

DeGrazio v. Civil Service Commission of City of Chicago, 31 Ill2d 482, 202 NE2d 522 (1964). Cf. *United States v. Tuck*, ACM 5871, 7 CMR 829 (1953), holding that where an officer hired two enlisted men for off-duty help in building a home, and the enlisted men "borrowed" a military bulldozer to do the work, acquiescence by the officer in that act was not actionable under Art. 133, but was under Art. 121 (wrongful appropriation).

182.

Skinkle v. Murray, 221 App. Div. 301, 223 NYS 146 (1927).

183.

Appeal of Emmons, 63 N.J. Super. 136, 164 A2d 134 (1960).

184.

E.g., United States v. West, ACM 8656, 16 CMR 587 (1954) (cheating at cards); United States v. Halliwell, CM 351646, 4 CMR 283 (1952)(larceny of drugs by Army nurse); United States v. Jackson, CM 364867, 12 CMR 403 (1953)(making homosexual advances); United States v. Love, CM 365501, 12 CMR 290, Pet. Den. 13 CMR 142 (1953)(black-marketering); United States v. Mallory, CM 374664, 17 CMR 409 (1954) (fraternization with "notorious" prostitute).

185.

Such an open-ended inclusion of activity bears no mean resemblance to the use of the "analogy principle" in totalitarian law. For example, the Nazi law of June 28, 1935:

Whoever commits an action which the law declares to be punishable or which is deserving of punishment, according to the fundamental idea of a penal law and the sound perception of the people, shall be punished. If no determinate penal law is directly applicable to the action, it shall be punished according to the law, the basic idea of which fits it best.

Quoted in S. Kadish & S. Paulsen, CRIMINAL LAW AND ITS PROCESSES (1969). See Preuss, Punishment by Analogy in National Socialist Penal Law, 26 J. Am. Inst. Crim. L. & Criminology 847 (1936); Cohen, THE CHINESE CRIMINAL PROCESS 1949-1963, AN INTRODUCTION 220, 302, 336-39 (1963); J. Berman, The Cuban Popular Tribunals, 69 Colum. L. Rev. 1317 (1969). See also F. Weiner, Are The General Military Articles Unconstitutionally Vague, 54 ABAJ 357 (1968); Hewitt, General Article Void for Vagueness, 34 Neb. L. Rev. 529 (1958).

186.

Emmons, supra note 183, 164 A2d, at 187.

187.

Kennet V. Barber, 31 So2d 44 (Fla. 1947).

188.

Cf. Baggett v. Bullitt, 377 US 360, 373 (1964)("Well intentioned prosecutors....do not neutralize the vice of a vague law").

189.

10 USC s. 833. See J. Kester, Soldiers Who Insult the President: An Uneasy Look at Art. 38 of the Uniform Code of Military Justice, 81 Harv. L. Rev. 1697 (1968); M. Brown, Must The Soldier be a Silent Member of Our Society, 43 Mil. L. Rev. 71 (1969)(DA Pam 27-100-43, 1 January 1969).

190.

17 USCMA 165, 37 CMR 429 (1967)(carrying a placard calling Pres. Johnson a "petty, ignorant fascist").

191.

Smith v. California, 361 US 147, at 151 (1959). See NAACP v. Button, 371 US 415, 438 (1963);

Broad prophylactic rules in the areas of free expression are suspect...Precision of regulation must be the touchstone in...area(s) so closely touching our most precious freedoms.

See Note, Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harv. L. Rev. 1208 (1948); Note, The Chilling Effect in Constitutional Law, supra note 111; Comment, Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association from Scales to Robel, 57 Calif. L. Rev. 240 (1969).

192.

Collings, Unconstitutional Uncertainty--An Appraisal, 40 Cornell L. Q. 195, 318-19 (1955); Note, Constitutional Law, Void For Vagueness: An Escape from Statutory Interpretation, 23 Ind. L. J. 272, 284 (1948).

193.

DeGrazio, supra note 131.

194.

The scope of pre-trial discovery in criminal cases is notably less than is allowed in civil actions. See e.g., Panel Discussion, Discovery in Criminal Cases, 44 FRD 481 (1968); N. Biggers, Jr., Enter A Stranger to the Common Law--Criminal Discovery, 40 Miss. L. J. 1 (1968); Note, Pretrial Discovery in Criminal Cases, 9 Ariz. L. Rev. 305 (1967); Annot. 7 ALR3d 8 (1966). This lack of access extends to materials held by police agencies in the normal course of their operations. See e.g., Comment, Criminal Law: Pre-Trial Discovery--The Right of an Indigent's Counsel to Inspect Police Reports, 14 St. L. U. L. J. 310 (1969); Comment, Defendant's Right to Inspect Investigative Files of Law-Enforcement Agencies, 25 Wash. & Lee L. Rev. 70 (1968). See also Roviario v. United States, 353 US 53 (1957)(qualified privilege against disclosure of informant's names at trial).

195.

See *Bennett v. Price*, 446 P2d 419 (Colo. 1968)(officer dismissed for removing own personnel file for examination without first obtaining permission to do so).

196.

See generally Project, *The Computerization of Government Files: What Impact on the Individual?*, 15 UCLA L. Rev. 1371 (1968); US House of Reps. Comm. on Govt. Ops., Special Subcomm. on Invasion of Privacy. *The Computer and Invasion of Privacy: Hearings before the Subcomm. 89th Cong., 2d Sess.*, July 26-28, 1966(Wash. D.C.; GPO 1966).

197.

The keeping of criminal records has been called the "modern elaborate development of the taboo", a secondary form of punishment for the act done, beyond the court's formal disposition of the case by sentencing. C. Mead, *The Psychology of Punitive Justice*, 23 Am. Jrnl. of Soc., at 589(1928).

198.

See Note, *Employment of Former Criminals*, 55 Cornell L. Rev. 306 (1970).

199.

See R. Schwartz & J. Skolnick, *Two Studies of Legal Stigma*, 10 Social Problems 133 (1962); Comment, *Guilt by Record*, 1 Calif. Western L. Rev. 126 (1965). The problem of stigmatization by public exposure of sensitive, personal information also presents itself in other contexts, such as with the mentally ill. See Comment, *The "Titicut Follies" Case: Limiting the Public Interest Privilege*, 70 Colum. L. Rev. 359 (1970); K. Erikson & D. Gilbertson, *Case Records in the Mental Hospital*, in *ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE* 389 (S. Wheeler, ed., 1969). See also O. Reubhausen & O. Brim, Jr., *Privacy and Behavioral Research*, 65 Colum. L. Rev. 1184 (1965).

200.

J. Kenney & D. Pursuit, *POLICE WORK WITH JUVENILES* 125 (1965). See E. Ferster & T. Courtless, *The Beginning of Juvenile Justice, Police Practices, and the Juvenile Offender*, 22 Vand. L. Rev. 567, 598-603 (1969).

201.

See G. Geis, *Publicity and Juvenile Court Proceedings*, 30 Rocky Mtn. L. Rev. 1 (1958); G. Geis, *Publication of the Names of Juvenile Felons*, 1962 Montana L. Rev. 1 (1962). See generally A. Cicourel, *THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE*(1967).

202.

The Federal Freedom of Information Act does not apply to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency". 5 USC s. 552(b)(7), 80 Stat. 333 (1966). See generally K. Davis, The Information Act, 34 U. Chi. L. Rev. 761 (1967). The Federal government generally provides criminal penalties for violation of its data-confidentiality statutes. E.g., 13 USC ss. 9(a), 214 (1967 Supp.) (Census Bureau); 18 USC ss. 1905-07 (1951) (general statute; bank examiners; farm credit examiners); 26 USC ss. 6103, 7213 (1967) (Internal Revenue Service); 42 USC ss. 602(a)(3), 1306 (1967 Supp.) (Social Security Administration). See Capitol Vending Co. v. Baker, 35 FRD 510 (DDC 1964).

203.

See generally W. Creech, The Privacy of Government Employees, 31 L. & C. P. 413 (1966); Mirel, The Limits of Governmental Inquiry into the Private Lives of Government Employees, 46 Bost. U. L. Rev. 1 (1966).

204.

E.g., Hearings of Subcomm. on Const. Rts., Senate Comm. on Judic., Psychological Tests and Constitutional Rights, 89th Cong., 1st Sess. (June 1965); W. Creech, Psychological Testing and Constitutional Rights, 1966 Duke L. J. 332 (1966).

205.

E.g., Hearings on the Use of Polygraphs as "Lie Detectors" by the Federal Government Before a Subcomm. of the House Comm. on Govt. Ops., 88th Cong., 2d Sess. (1964), 89th Cong., 1st Sess. (1965); Comment, the Polygraph in Private Industry: Regulation or Elimination?, 15 Buff. L. Rev. 655 (1966).

206.

See J. Gusfield, On Legislating Morals: The Symbolic Process of Designating Deviance, 56 Cal. L. Rev. 54 (1968).

207.

See 3 Davis chs. 25-26; Note, Remedies Against the United States and its Officials, 70 Harv. L. Rev. 827 (1957).

208.

E.g., Ashby v. White, 2 Ld. Raym. 938, 956 (1703):

If public officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from like offenses.

209.

E.g., *Barr v. Matteo*, 360 US 564 (1959); *Gregoire v. Biddle*, 177 F2d 579 (CA2 1949), cert. den. 339 US 949 (1950); *Spalding v. Vilas*, 161 US 433 (1896). See also Comment, *Spying and Slandering: Absolute Privilege for the CIA Agent?*, 67 Colum. L. Rev. 752 (1967); *Handler & Klein, The Defense of Privilege in Defamation Suits Against Executive Officers*, 74 Harv. L. Rev. 44 (1960).

210.

Carr v. Watkins, 227 Md. 578, 177 A2d 841 (1962)(county police only have a qualified immunity from slander suits, conditioned on an absence of malice); *State v. Tyndall*, 224 Ind. 364, 66 NE2d 755 (1946)(right to not have fingerprints or photo exhibited prior to a conviction, unless the subject is a fugitive from justice); *Schulman v. Whitaker*, 117 La. 701, 42 So. 227, 7 LRA, N.S. 274 (1906)(same); Annot., 165 ALR 1302 (1946).

211.

The extent to which the lawmaker may be available as a sueable party to a suit because of his official acts is unclear. See generally Note, *The Scope of Immunity for Legislators and Their Employees*, 77 Yale L. J. 366 (1967). See also *Bond v. Floyd*, 385 US 117, 132-7 (1966).

212.

In the celebrated case of *Otto Otepka*, political pressure from Congress did not help. Otepka was a State Department chief security evaluations officer who gave confidential data to the Senate Internal Security subcommittee. Sec. Rusk fired him for his troubles. N.Y. Times, Nov. 6, 1963 at 1, col. 8 & 20, col. 4.

213.

E.g., *Baxter v. City of Philadelphia*, 426 Pa. 240, 231 A2d 151 (1967)(48-hour week for police); *Pranger v. Break*, 9 Cal. Rptr. 293 (1961)(general criticism of labor policies of the agency); *Perez v. Board of Police of City of Los Angeles*, 78 Cal. App.2d 638, 178 P2d 537 (1947)(establishment of police union forbidden).

214.

E.g., *City of Newark v. Massey*, 93 NJ Super. 317, 225 A2d 723 (1967)(suit to reduce penalties for previous infractions and acts of "insubordination"); *Riley v. Board of Police Com'rs of City of Norwalk*, 147 Conn. 113, 157 A2d 590 (1960)(suit to declare that officer's relationship with a 16-year-old girl was not "cause" enough to allow for dismissal from the force).

215.

E.g., *Krause v. Valentine*, 263 App. Div. 733, 43 NY32d 901 (1944); *Cook v. Civil Service Com'n of Chula Vista*, 173 Cal. App. 113, 2 Cal. Rptr. 336 (1960). See generally 4 McQuillin, MUNICIPAL CORPORATIONS s. 12.240 (1963).

216.

In *Re Gioglio*, supra note 132. See *Wood v. Georgia*, 370 US 375, 389 (1962).

217.

In *Re Gioglio*, 243 A2d, at 574. Cf. *Connelly v. Housing Authority of Jersey City*, 63 NJ Super. 424, 164 A2d 306 (1960).

218.

E.g., *Campbell v. Hot Springs*, 232 Ark. 873, 341 SW2d 225 (1960); *Nelson v. State*, 156 Fla. 139, 23 So2d 136 (1945); *Harrell v. Middleboro*, 237 SW2d 614 (Ky. 1956); *Stafford v. Firemen's and Policemen's Civil Service Com'n of Beaumont*, 355 SW2d 555 (Tex. Civ. App. 1902).

219.

T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 577 (1970).

220.

Armas v. Oakland, 135 Cal. App. 411, 27 P2d 666, reh. den. 135 Cal. App. 411, 23 P2d 422 (1934).

221.

Luhrs v. Phoenix, 52 Ariz. 433, 83 P2d 233 (1938); *State v. Eichelberger*, 76 Ohio App. 103, 61 NE2d 818 (1945). The term "police force" is not synonymous with the term "police power". *Frank v. Wabash R. Co.*, 295 SW2d 16 (Mo. 1956); *Police Pension Board of Phoenix v. Warren*, 97 Ariz. 180, 393 P2d 892 (1965).

222.

E.g., *People v. Draper*, 15 NY 532, Aff'g. 25 Barb. 344 (1857); *Van Gilder v. Madison*, 222 Wis. 53, 267 NW 25, 263 NW 103, 105 ALR 244 (1936); *State v. Smith*, 329 Mo. 1019, 49 SW2d 74 (1932).

223.

E.g., *Metropolis v. Industrial Com'n* 339 Ill. 141, 171 NE 167 (1930); *Dallas v. McDonald*, 130 Tex. 299, 103 SW2d 725 (1937); *Prince v. Boston*, 143 Mass. 235, 19 NE 213 (1839).

224.

E.g., Fraternal Order of Police v. Lansing Board of Police & Fire Com'rs, 306 Mich. 68, 10 NW2d 310 (1943); People v. Wilson, 20 Ill.2d 568, 170 NE2d 605 (1960). Cf. Phillips v. Ober, 197 Md. 167, 78 A2d 630 (1951).

225.

E.g., Application of Delehanty, 202 Misc. 33, 115 NYS2d 602 (1952); State v. Seamer, 217 Minn. 214, 14 NW2d 113 (1944); Local No. 201, Amer. Fed. of State, etc. v. Muskegon, 369 Mich. 334, 120 NW2d 197 (1963).

226.

Removal, suspension and other disciplinary action against an officer follows the same procedures generally in operation concerning all municipal employees, though the applicable standards of conduct and skill will vary. See generally 4 McQuillin, MUNICIPAL CORPORATIONS ss. 12.229-12.270 (1968).

227.

Naturally, the interest would have to be embodied in a narrowly-drawn regulation.

228.

Lefcourt v. Legal Aid Society, 38 USLW 2633, 2634 (DCSDNY 1970)(dismissal of staff attorney).

229.

Rogers v. Courier-Post Co., 2 N.J. 393, 66 A2d 869 (1949).

230.

Brewer v. Hearst Publishing Co., 135 F2d 846 (CA7 1950).

231.

E.g., Houston v. United States, 297 F2d 838 (Ct. Cl. 1962); Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908); Mulderig v. WilkesBarre Times, 215 Pa. 470, 64 A. 636 (1906). Contra, Keyton v. Anderson, 229 F2d 519 (CA10 1956); Levine v. Farley, 107 F2d 136 (CA10 1939). See Veatch v. Resor, 266 F. Supp. 893 (DCColo. 1967).

232.

376 US 254, 279-80 (1964). See generally A. Berney, Libel and The First Amendment---A New Constitutional Privilege, 51 Va. L. Rev. 1 (1965). See the section on "False Matter in Expressions by Officers", test at Notes 234-310 infra.

233.

This degree of freedom of expression opens up new vistas to officers who find themselves frustrated by the repercussions of recent court decisions. See E. Van Allen, *OUR HANDCUFFED POLICE* (1968). The Times doctrine has protected comments about both judges, *Garrison v. Louisiana*, 379 US 64 (1964), and specific court decisions, *Sellers v. Time, Inc.*, 299 F. Supp. 582 (ED Pa. 1969). See also *Crosswhite v. Municipal Court of Eureka Judicial District*, 260 Cal. App.2d 428, 67 Cal. Rptr. 216 (1968).

234.

One pre-Pickering case which protected intra-agency criticisms with Pickering-type standards was *City of St. Petersburg v. Pfieffer*, supra note 166.

235.

The difference between "expression" and "action" has been made on its broadest level by Prof. Emerson in *Toward A General Theory of the First Amendment*, 72 Yale L. J. 877 (1963). See *Schenck v. United States*, 249 US 47 (1919); *Chaplinsky v. New Hampshire*, 315 US 568 (1942).

236.

See text at supra note 138; *Cox v. Louisiana*, 379 US 536, 551-52 (1965). Cf. *Fiener v. New York*, 340 US 315 (1951). See generally on the problem of the "heckler's veto", H. Kalven, Jr., *THE NEGRO AND THE FIRST AMENDMENT* 140-60 (1965).

237.

Brukiewa v. Police Com'r, 257 Md. 36, 263 A2d 211, 218 (1970).

238.

Morgan v. Thomas, 200 A2d 696 (R.I. 1964). Cf. *Pranger v. Break*, 9 Cal. Rptr. 293 (1961).

239.

Rosenblatt v. Baer, 383 US 75, 85 (1966). In this respect there is a distinction without a legal difference concerning the designation of policemen as "officers" or "employees". Such a dichotomy goes to the effect of listed qualifications, compensation, tenure and workmens' compensation acts, but not to the various rights under the Times doctrine. E.g., Bowman v. Eldher, 149 Colo. 551, 269 P2d 977 (1962)(officer); Blynn v. Pontiac, 135 Mich. 35, 151 NW 681 (1915)(officer); Kirmse v. Gary, 114 Ind. App. 558, 51 NE2d 883 (1944)(employee); Wise v. Knoxville, 194 Tenn. 90, 250 SW2d 29 (1952)(employee); State v. Scott, 95 Ohio App. 197, 118 NE2d 426 (1952)(employee and officer simultaneously); Curry v. Hammond, 154 Fla. 63, 16 So2d 523 (1944)(employee with status of officer). See Annot., 5 ALR2d 415 (1949).

240.

U.S. Const. Amend. I. See Douglas v. City of Jeanette, 319 US 157, reh. den. 319 US 782 (1943); 42 USC s. 1983 (17 Stat. 13)(1871); Hayes v. Cropper, Civil No. 21165 (DC Md. 1970) (police captain unconstitutionally dismissed for appearing before city council to seek better working conditions); Los Angeles Teachers Union v. Los Angeles Board of Ed., 78 Cal. Rptr. 723, 455 P2d 827 (1969)(First Amendment protect right of teachers to petition state officials in opposition to education revenue cutbacks).

241.

E.g., Brown v. Louisiana, 383 US 131, 141-42 (1966); Wright v. Georgia, 373 US 284, 292 (1963); Stromberg v. California, 283 US 359, 369 (1931). See Note, Symbolic Conduct, 68 Colum. L. Rev. 1091 (1968).

242.

Mills v. Alabama, 384 US 214 (1966).

243.

Cox v. Louisiana, 379 US 536, 551 (1965). See Edwards v. South Carolina, 372 US 229, 237 (1963).

244.

391 US, at 572.

245.

Brukiewa, supra note 237, 263 A2d, at 218; Meehan, supra note 159.

246.

See Meehan, Id.

247.

As the Court noted in Pickering, 391 US, at 572:

Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent.

See T. Emerson, *supra* note 235, at 881.

248.

The civil-rights and anti-war movements have spawned many newspaper advertisements containing statements of opinion on those issues, often sponsored by various vocational/professional groups brought together on an ad hoc basis: e.g., Plumbers for Peace or Doctors against Racism. Where the members named in the copy include their title and place of employment there is always a disclaimer of some sort present which notes that the individuals have signed in their own capacities and not as representatives of the organizations they are affiliated with. The formation of one group, called "Government Employees Against the War in Vietnam", prompted the then-Chairman of the House Committee on Un-American Activities, Cong. Edwin Willis (D.-La.), to introduce a bill allowing for summary suspension of federal employees whose activities might advantage a foreign power with whom we are in "conflict", or undercut morale or loyalty in the armed forces or the executive branch. He stated his belief that the bill "in no way...impinges upon or violates any constitutional freedom". 114 Cong. Rec. 6792-3 (March 18, 1968). No further action was ever reported on the measure.

249.

Commission on Political Activity of Government Personnel, 1 Findings and Recommendations 4 (1968).

250.

See *Birnbaum v. Trussell*, 371 F2d 672 (1966) (municipal doctor dismissed for alleged acts of abuse against Negro subordinates).

251.

See *Robeson v. Fanelli*, 94 F. Supp. 62 (DCNY 1950).

252.

A number of cases have upheld the denial of a forum for expression on the grounds that it interfered with various rights inhering in private property, such as a right to quiet and privacy. E.g., *Watchtower Bible and Tract Society v. Metropolitan Life Ins. Co.*, 297 NY 339, 348, 79 NE2d 433, 436, cert. den. 335 US 836 (1948); *Kovacs v. Cooper*, 336 US 77 (1949). Whether the "captive audience" doctrine might be viably utilized in a governmental work-environment situation is open to debate. See *Public Utilities Com'n v. Pollack*, 343 US 451 (1952), especially the dissents of Black and Douglas, JJ.

253.

Cf. *Bates v. Little Rock*, 361 US 516, 523 (1960):

Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental influence.

254.

See E.g., *Reagan v. Bichsel*, 284 SW2d 935 (Tex. Civ. Ct. App. 1955)(racist and anti-Semitic statements by an officer); *Appeal of Emmons*, 63 NJ Super. 136, 164 A2d 184 (1960)(drunk off-duty and refusal to take a sobriety test). Cf. *United States v. Korner*, 56 F. Supp. 242 (DC Cal. 1944)(member of German-American Bund); *Schneider v. Smith*, 390 US 17 (1968) (former Communist).

255.

But cf. *Kingsley Pictures Corp. v. Regents*, 360 US 684, 688-9 (1959):

It is contended that the state's action was justified because the motion picture actively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

256.

Kingsley Books, Inc. v. Brown, 354 US 436, 447 (1957).

257.

The Supreme Court has adopted a two-level theory that distinguishes between "pure speech" and "speech plus", with the latter receiving less First Amendment protection than the former. Cox v. Louisiana, 379 US 559, 563-64 (1965). See H. Kalven, Jr., The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 13-21 (1965).

258.

The distinction between "expression" and "action" is used by Prof. Emerson to determine what is constitutionally-protected conduct ("expression") and what is subject to governmental regulation ("action"). Emerson, supra note 235, at 917.

259.

See e.g., Skinkle v. Murray, 221 App. Div. 301, 223 NYS 146 (1927)(assault); Sayles v. Board of Commissioners, 25 Ill. App.2d 262, 166 NE2d 469 (1960)(failure to pay personal debts); DeGrazio v. Civil Service Com'n of City of Chicago, 31 Ill2d 482, 202 NE2d 522 (1964)(consorting with known gangsters).

260.

Emerson, supra note 219, at 44.

261.

Harrison v. Civil Service Com'n, 1 Ill.2d 137, 145, 115 NE2d 521, 529 (1953). Accord, DeGrazio, supra note 259, 31 Ill.2d at 488, 202 NE2d at 526.

262.

Compare Walker v. City of Birmingham, 388 US 307 (1967), with Shuttlesworth v. City of Birmingham, 394 US 147 (1969). Cf. Carroll v. President and Com'rs of Princess Anne, 393 US 175 (1968).

263.

See Schenck v. United States, 249 US 47 (1919); Dennis v. United States, 341 US 494 (1951); Yates v. United States, 354 US 298 (1957). See also Mendelson, Clear and Present Danger--From Schenck to Dennis, 52 Colum. L. Rev. 313 (1952); F. Strong, Fifty Years of "Clear and Present Danger": from Schenck to Brandenburg--and Beyond, 1969 Sup. Ct. Rev. 41 (1969).

264.

E.g., *United States v. O'Brien*, 391 US 367 (1968) (burning draft card); *People v. Radich*, 53 Misc.2d 717, 279 NYS2d 680 (NY City Crim. Ct. 1968) (use of American flag in sculpture). Cf. *Street v. New York*, 394 US 577 (1969) (conviction for flag-burning overturned). See D. Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 Sup. Ct. Rev. 1 (1968); Note, *Symbolic Conduct*, supra note 241.

265.

Bruns v. Pomerleau, 39 USLW 2240, Civil No. 21035 (DC Md. 1970) (First Amendment forbids police department from refusing to hire prospective patrolman solely on basis of his declaration that he is a practicing nudist).

266.

E.g., *Murray v. Blatchford*, 307 F. Supp. 1038 (DC R.I. 1969), preliminary motions dealt with at length in *Murray v. Vaughn*, 300 F. Supp. 688, 705 (DC R.I. 1969) (Peace Corps Volunteer signs anti-war petition, published in Chilean newspaper):

The more reasonable view of this case is that Murray spoke about matters of vital interest to him as a human being, a United States citizen, and a Peace Corps Volunteer. Any inhibition on speech so far removed from the government interest alleged to support it must fall... To permit a termination such as this would be to value bureaucratic paranoia over the central commitment of the First Amendment to "uninhibited, robust, and wide-open" debate on public issues.

The case is discussed at length in R. O'Neil, *Public Employment, Anti-War Protest and Preinduction Review*, 17 UCLA L. Rev. 1028 (1970).

267.

Murphy v. Facendia, 307 F. Supp. 353, 355 (D.Colo. 1969) (VISTA volunteers signed public statement opposing Vietnam war):

Plaintiffs used the facilities of VISTA a VISTA sponsored meeting to discuss and draft their anti-war resolution... Moreover, the statement in question caused a conflict between plaintiffs and their immediate superiors... In short, the "Declaration of Conscience" in this action conflicted with a definite goal of VISTA, detracted times and effort from the primary work of the volunteers, prompted dissension between volunteers and their superiors, and generally interfered with the regular operation of VISTA.

268.

E.g., *O'Brien v. United States*, 391 US 367, 377 (1968); *Cox v. Louisiana*, 379 US 536, 577 (1965); *Barenblatt v. United States*, 360 US 109, 126 (1959); *Dennis v. United States*, 341 US 494, 510 (1951).

269.

This doctrine is derived from *Thornhill v. Alabama*, 310 US 88, 95-8 (1940).

270.

Dombrowski v. Pfister, 380 US 479 (1965). This case modified the federal-court policy on abstention from interference with state-court proceedings absent a showing of "irreparable injury" as acceptable to the federal court. See *Ashwander v. TVA*, 297 US 288, 346-48 (1936); *Douglas v. City of Jeanette*, 319 US 157 (1943). See generally C. Wright, *LAW OF FEDERAL COURTS* s. 52 (2d ed. 1970). A declaratory judgement might be obtained in circumstances where the threatened injury is not great enough to allow for issuance of an injunction. *Zwickler v. Koota*, 389 US 241, 252-55 (1967); C. Wright, *LAW OF FEDERAL COURTS* s. 100 (2d ed. 1970). See also *McLaughlin v. Telendis*, 398 F2d 287 (1968) (public employee rights of free association protectable through use of 42 USC s. 1983).

271.

Shuttlesworth v. City of Birmingham, 394 US 147 (1969) (ordinance held unconstitutional, convictions summarily reversed).

272.

Howat v. Kansas, 258 US 181, 189-90 (1922); *Walker v. City of Birmingham*, 388 US 307 (1967) (same facts as in *Shuttlesworth*, Id., but contempt citations upheld). See S. Tefft, *Neither Above the Law Nor Below It: A Note on Walker v. Birmingham*, 1967 Sup. Ct. Rev. 181 (1967); M. Edelman, *Absurd Remnant: Walker v. Birmingham two years later*, 34 Albany L. Rev. 523 (1970).

273.

E.g., *Howat v. Kansas*, 258 US 181 (1922) (court order); *State v. Koonce*, 89 NJ Super. 169, 214 A2d 428 (App. Div. 1965) (unlawful arrest); *Wright v. Georgia*, 373 US 284 (1963) (unlawful police order). But see *Thomas v. Collins*, 323 US 516 (1945) (form of authority not determinative here).

274.

See generally 3 Davis ss. 20.01-20.10; P. Graham, Action and Exhaustion: The Problem of Denial of Constitutional Defense Because of Failure to Exhaust Remedies, 44 Wash. L. Rev. 547 (1969).

275.

E.g., Poulos v. New Hampshire, 345 US 395 (1953); State v. Nagle, 148 Me. 197, 91 A2d 397 (1952); Commonwealth v. Gardner, 241 Mass. 86, 134 NE 638 (1922). But see Prather v. People, 85 Ill. 36 (1877).

276.

E.g., Falbo v. United States, 320 US 549 (1944); United States v. Carter, 197 F2d 903 (CA10 1952).

277.

E.g., Smith v. United States, 199 F2d 377 (CA1 1952); United States v. Harvey, 131 F. Supp. 493 (ND Tex. 1954); Glover v. United States, 286 F2d 84 (CA8 1961). See L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 450-53 (1965).

278.

Emerson, *supra* note 219, at 563. See Murray v. Blatchford, *supra* note 266.

279.

Muller v. Conlisk, *supra* note 144. See Walker v. City of Birmingham, 388 US 307, 344-45 (1967) (Brennan, J., dissenting); Wolff v. Selective Service Local Board No. 16, 372 F2d 817, 824-25 (1967).

280.

Sherbert v. Verner, 374 US 398, 407 (1963). See also Talley v. California, 362 US 60, 66-67 (1960) (Harlan, J. concurring); Thornhill v. Alabama, 310 US 83, 98 (1940).

281.

E.g., Butler v. Michigan, 352 US 330 (1957). Cf. Martin v. City of Struthers, 319 US 141 (1941); Schneider v. State, 308 US 147 (1939).

282.

The currency of any such rule would probably be quite short-lived, as the First Amendment doctrines rapidly shift and metamorphize into new doctrines. See H. Kalven, Jr., "Uninhibited, Robust, and Wide-Open"--A Note on Free Speech and the Warren Court, 67 Mich. L. Rev. 289, 295 (1968). For an excellent and up-to-date sourcebook on First Amendment freedoms, see T. Emerson, D. Haber & N. Dorsen, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES vol. I (3d ed. 1967) and 1969 Supplement (Greenawalt ed.).

283.

Wearing of uniforms by servicemen at off-base demonstrations is forbidden. Army Reg. No. 600-20 para. 46(2)(31 Jan. 1967); AFM 35-10 para. 1-10 D (26 June 1968), upheld in Locks v. Laird, 300 F. Supp. 915 (1969).

False Matter in Expressions by Officers

The Pickering opinion spent the bulk of its length discussing the issue of falsity in the appellant's published allegations concerning the school district's fiscal policies.²⁸⁴ The Court made its own content-analysis of the document to determine the degree of falsity present²⁸⁵, and noted the possible dangers that could come from the dissemination of false material in a situation such as that which was presented²⁸⁶. Agreeing that some of Pickering's information was false, it characterized the School Board's reaction to that falsity as a two-level process. First, it noted that the Board charged that the false information led to damaged "professional reputations" of the Board and administrators, and had caused the fomentation of "controversy and conflict" in the district²⁸⁷. The Court dismisses the worth of those charges because no evidence had been introduced at any hearing to back up such allegations²⁸⁸. Secondly, the Court noted that, with no evidence to sustain the first charges, the Board must have felt that the false statements were "per se harmful" to the school system. The Board apparently had equated its own interests (allegedly harmed), with the interests of the school district²⁸⁹.

The Court proceeded to hold that the doctrine enunciated in New York Times v. Sullivan²⁹⁰ would determine the impact of falsity in a public employee's statements: to wit, that "absent proof of false statements knowingly or recklessly made"²⁹¹ by the employee, such statements could not furnish "the basis for his dismissal from public employment"²⁹².

Depending on the factors present in a specific case, it might safely be assumed that punishment of a lesser degree than dismissal would also be foreclosed by the application of this doctrine.

The Times decision set up an absolute rule, rather than a balancing-test, as to the repercussions of false matter in a statement²⁹³: thus, the factor of falsity becomes relevant as a ground for disciplinary action in a fashion quite unconnected with any other contemporaneous conditions. Falsity without malice in any set of circumstances will provide only a non-actionable set of events, while falsity with malice in almost any grievance context will open up the possibility of a successful suit or administrative discipline²⁹⁴.

Previous case-law concerning public employees, following the "fair comment" doctrine²⁹⁵, had held that the right to petition for a redress of grievances did not extend to the making of false charges within the petition²⁹⁶. Such charges were "cause" for dismissal, and the presence of that strict doctrine was clearly a Sword of Damocles hanging over the heads of public employees wishing to express themselves on a job-related subject. The minority view, allowing for the protection of good-faith misstatements of facts²⁹⁷, also had a minority following in public-employee cases²⁹⁸. The New York Times case was a vindication of the minority viewpoint in the law of defamation²⁹⁹, and its holding, by combining the tort law of defamation with the constitutional doctrines of free speech, has opened up a new era in the legal doctrines in this field³⁰⁰. Besides dealing with defamation

suits, the opinion has been used generally to back up the view that "debate on public issues should be uninhibited, robust, and wide-open"³⁰¹.

The language of the Court in applying the New York Times test to determine the legal implications of false matter in public employees' speech makes no special point of looking at the specific occupation of the speaker. Rather, it only looks to the question of whether the person was attempting to speak as a "member of the general public" whose "fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication"³⁰². This view of the officer qua citizen is the basic concept behind Pickering: the assumption that in most circumstances the fact of a person's public employment will have no bearing on the constitutional standards of freedom of expression to be applied to his comments.

The New York Times test provides a very broad area within which a speaker might voice his opinions and suggest facts, subject only to the prohibition against speaking "with 'actual malice'- that is, with knowledge that (the statement) was false or with reckless disregard of whether it was false or not"³⁰³. This holds true in civil defamation actions by a public official³⁰⁴, criminal defamation actions by a public official³⁰⁵, and defamation actions by both "public figures"³⁰⁶ and those involved in "matters of public interest"³⁰⁷.

Looking to the future it is noteworthy that while there is little case-law on the constitutional rights surrounding

the right to petition for a redress of grievances, what there is generally parallels the Times doctrine in language used: protecting all petitions for redress but those containing malicious statements against public figures³⁰⁸ and institutions³⁰⁹. The existence of the Times case and its progeny should reinforce that case-law and solidify the right to criticize and petition for a redress of grievances with as much freedom of content as is now allowed in the news media³¹⁰ and general statements of criticism by private citizens.

284.
391 US, at 568-75.

285.
Set out in the Appendix to Opinion, Id. at 575-78.

286.
391 US, at 572:
(Trouble could arise) with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter on because of the teacher's presumed greater access to the real facts.

287.
Id., at 570.

288.
Id. This lack of evidence to sustain charges of that sort was also noted in the context of *Brukiewa v. Police Com'r*, supra note 237.

289.
391 US, at 571.

290.
376 US 254 (1964). See generally H. Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191 (1964); Note, *Vindication of the Reputation of a Public Official*, 80 Harv. L. Rev. 1730 (1967); Note, *The New York Times Rule and Society's Interest in Providing a Redress for Defamatory Statements*, 36 Geo. Wash. L. Rev. 424 (1967).

291.
391 US, at 574.

292.
Id. See the discussion of White, J., concurring in part and dissenting in part, 391 US, at 582-84.

293.
Kalven, supra note 290, at 214-16.

294.

The liberality of this doctrine does provide on area of possible abuse uniquely attuned to the position of the public employee: that his role in the official hierarchy will invest him with "experienced expertise", providing him with a corroborating aura for all his statements when they concern the operations of his agency. See quote, *supra* note 286. Perhaps the "knowing or reckless" standard may be too lenient towards an agency insider who has much greater access to the true facts of a situation than an outside critic. There is probably a point at which the value of "uninhibited public speech" is vitiated by the false content of such speech:

(T)he only interest in protecting falsehood is to give added 'breathing space' to truth.

Time, Inc. v. Hill, 385 US 374 at 405 n.2 (Harlan, J., concurring in part and dissenting in part). See S. Cohen, *Is The Right To Lie Protected by the First Amendment*, 3 J. Beverly Hills B.A. 10 (1969). For the Court to make a distinction in the test to be applied to an agency employee as opposed to an outside critic, calling for a higher standard of care in checking sources and material for the former, might undercut one of the major premises in *Pickering*, though: that the broad boundaries of permissible freedom of speech are granted to the employee qua citizen, not employee qua employee. 391 US, at 574.

295.

See e.g., *Eickhoff v. Gilbert*, 124 Mich. 353 (1900); W. Prosser, *Handbook of the Law of Torts* ss. 109-10 (3rd. ed. 1964); Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875, 896 n.102 (1949).

296.

E.g., *Keyton v. Anderson*, 229 F2d 519 (1956); *Levine v. Farley*, 107 F2d 186 (1939). See *Veatch v. Resor*, 266 F. Supp. 893 (1967).

297.

See *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908); Noel, *supra* note 295, at 896-97 & n.103; Annot., 150 ALR 353, 362 (1944).

298.

Houston v. United States, 297 F2d 838 (1962).

299.

See Annot., 95 ALR2d 1450 (1964), for an early assessment of the impact of the Times doctrine on prior case-law in the field.

300.

"(The opinion) may prove to be the best and most important (the Court) has ever produced in the realm of freedom of speech". H. Kalven, Jr., *supra* note 290, at 194.

301.

New York Times v. Sullivan, 376 US, at 270. See Bond v. Floyd, 385 US 116, 136 (1966). Compare NAACP v. Button, 371 US 415 (1963) with Mills v. Alabama, 384 US 214 (1966).

302.

391 US, at 574.

303.

New York Times v. Sullivan, 376 US, at 280. The concurring opinions of Justice Black and Goldberg called for an unconditional privilege to criticize the official conduct of public officials. 376 US, at 293, 297. See A. Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245 (1961); W. Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965.)

304.

New York Times v. Sullivan, 376 US 254 (1964)(suit by police department supervisor); St. Amant v. Thompson, 390 US 727 (1968)(suit by a deputy sheriff). The findings that these law-enforcement officers were "public officials" for the purposes of the Times test centers around the meaning given, that term in Rosenblatt v. Baer, 383 US 75, 85 (1966), that the "designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

305.

Garrison v. Louisiana, 379 US 64 (1964)(suit against district attorney for criticism of local judges as lazy and obstructive of the proper enforcement of the vice laws).

306.

Curtis Publishing Co. v. Butts, 383 US 130 (1967); Associated Press v. Walker, 389 US 23, reh. den. 389 US 997 (1967). See Rosenbloom v. Metromedia, Inc., 239 F. Supp. 737 (ED Pa. 1963).

307.

Time, Inc. v. Hill, 385 US 374 (1967). See H. Kalven, Jr., The Reasonable Man and the First Amendment: Hill, Butts and Walker, 1967 Sup. Ct. Rev. 267 (1967).

308.

E.g., Gray v. Pentland, 2 S & R 23 (Pa. 1315); Howard v. Thompson, 21 Wend. 319 (NY 1339); Bodwell v. Osgood, 20 Mass. (3 Pick.) 330 (1825); Reid v. Delorme, 2 S.C. (2 Brev.) 76 (1306); Harris v. Huntington, 2 Ver. (2 Tyler) 129, 140 (1302).

309.

Plaintiffs other than natural persons have been allowed to initiate libel actions for over a century. See generally Note, Libel and the Corporate Plaintiff, 69 Colum. L. Rev. 1496 (1969).

310.

Today's mass society has thrust upon the mass media many functions normally associated with petitioning the government for a redress of grievances. It is only through the use of mass-communication techniques that many groups are able to bring their grievances to the public eye, and it is only through such exposure that enough pressure is usually generated on governmental bodies to cause them to act in dealing with the grievance. The use of the mass-media in such a fashion helps to link the New York Times cases more closely to the sparse body of law dealing with petitioning for a redress of grievances. See supra note 308; Corwin, THE CONSTITUTION AND WHAT IT MEANS TODAY 203-04 (Atheneum ed. 1963). This linkage of the realistic ability to get results by petitioning through the use of the mass-media brings up the various issues of differential access afforded different groups in our society to the use of such facilities. See generally, J. Barron, Access-The Only Choice for the Media, 43 Tex. L. Rev. 766 (1970); C. Daniel, Right of Access to Mass Media-Government Obligation to Enforce First Amendment, 43 Tex. L. Rev. 783 (1970). See also B. Richards, The Historical Rationale of the Speech-and-Press Clause of the First Amendment, 21 U. Fla. L. Rev. 203 (1968).

CONCLUSION

The evolution of case-law under Pickering is just beginning to take hold in public-employee cases in general, and police-officer cases in particular. The courts have not yet found the outer boundaries of the Pickering doctrine, though they will be forced to do so as more varied fact-situations confront them in cases, demanding that they use the balancing - test in more skillful fashion over time.

Pickering will not spell the complete end of the McAuliffe right-privilege distinction in the area of freedom of expression. Its facts were limited to a situation where a dismissal resulted from the inclusion of false matter in critical public statements related to the speaker's employment. Confidentiality, an interest close to being "conclusive" in this factor-analysis, was only mentioned in a conjectural dictum by the Court³¹¹. Likewise, the Pickering opinion itself had nothing concrete to offer concerning the great realm of opinion-expressions which a person might present in public. This most sensitive area must be dealt with through a process of discounting the occurrences of factors which Pickering suggested might lead to a legitimate disciplinary action by the agency involved. Still, if Pickering has forced agencies into the position where they must come up with some concrete evidence of agency disruption as demonstrably caused by the expressions of a particular officer, then the case has probably offered that officer some real protection for his actions, albeit in a somewhat passive fashion³¹².

The courts' use of the Pickering standard via a factor-analysis appears to be an efficient method for determining the true extent to which a claim of unconstitutional abridgement of expression exists within the circumstances of a case before the court³¹³. When the interests of both the officer and the agency are brought out into the open, and an assessment is made of their legitimacy for use in the circumstances at hand, a true analysis in the Pickering mold is performed. Additionally, the analysis will afford the court a greater opportunity to determine to what extent the "ubiquitous and slippery 'chilling effect' doctrine"³¹⁴ might be profitably employed to end the "pervasive threat"³¹⁵ of a regulation trampling on privileged activity. It will also, in the end, aid the court in determining just how few and unforeseen a regulation's applications against assorted forms of expression are³¹⁶. Such knowledge gleaned from the analysis would then be available to rework the analysis-situations with, and more realistically face the interests found therein.

Pickering is not the most explicit of cases that have attempted to deal with the issue of public-employee freedoms of expression by setting up a rule of some sort; other cases, confining themselves to more limited issues, have gone further in enumerating definitive standards³¹⁷. But Pickering has tried to set up some unified basis upon which to channel the freedoms of the national First Amendment to the employees of all public agencies in the nation. For any particular

agency, like the police departments, this enables the state courts to deal with realistic and practical functional analyses of the occupational peculiarities found therein. The other police cases, rather than being distinguishable because of the different wording in the pertinent statutes and regulations, are right "on point" because of their similar sociological and administrative backdrops.

Pickering is a good example of the sociological jurisprudence (interessenjurisprudenz)³¹⁸ of the twentieth century. As Holmes himself wrote:³¹⁹

I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what is really before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. The social question is which desire is stronger at the point of conflict.

The Court has not always been very masterful in its resolution of the controversies surrounding clashing societal interests³²⁰, and it is not suggested here that Pickering is a zenith in its efforts. It has opted for flexibility, though, in an area where absolute rules are usually unable to deal with all the subtleties and competing interests which arise³²¹. Where the unconstitutional-conditions doctrine looked only for a "clear, direct, and material infringement of a specific constitutional right"³²², Pickering has given the courts the needed freedom to "go into imaginary cases"³²³ and engage in a much more complete factor-analysis of the relevant interests and circumstances³²⁴. The effective protection of the favored

First Amendment rights³²⁵, to make sure that they do not degenerate for the public employee to the point where they exist only "in principle but not in fact"³²⁶, requires the use of a judicial test that is able to discriminate effectively between circumstances of unconstitutional abridgement³²⁷ and times when the "public trust" placed in an individual like a police officer legitimately may be used to call for an accounting of his behavior³²⁸.

The protection of First Amendment rights for those in professions such as law enforcement carry a special urgency for both the officer and the general public. For the officer, the inability to obtain³²⁹ or hold³³⁰ a position on the force often hurts his chances for like employment at another police agency, and the private alternatives for those inclined towards a law-enforcement career lack the security of civil-service tenure and the potential career advancement which a public agency can provide³³¹. For the general public, their interest in the prevention and suppression of anti-social conduct is served by the ability of the officer to speak freely about the occurrence of abuses and misdirection in his agency's quest to fulfill its missions. As the Court has noted: "As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the

government, in the course of securing a conviction, wrings a confession out of an accused against his will"³³².

Ultimately, the worth of Pickering will depend not on the quality of the analyses which the courts use in meeting its doctrine: as its use continues, the expanding body of precedent will force the courts to take greater cognizance of the true issues facing it³³³. The moving cause in bringing the potential of Pickering to fruition must be the individual officer who is willing to stand up and loudly complain about what he considers to be infringements upon his rights. A police officer risks more than the possibility of administrative punishment or a contempt citation³³⁴ for speaking his mind thusly. The social isolation accorded his profession³³⁵ has turned its members secretive and protective by proclivity. "(T)he police in a sense are a service without clients. The police serve the public as a collectivity rather than distributively"³³⁶. With such a sense of togetherness engendered to such a great degree, to break the code of secrecy and complain in public becomes interpreted as a treasonous act³³⁷, calling for ostracism and the application of informal sanctions by those who were content with their lot³³⁸. The officer qua citizen becomes the officer qua pariah. For many this will be too high a price to pay, a "choice between the rock and the whirlpool"³³⁹ that will immobilize them and keep them silent. Those will be the still-borne cases of First Amendment abridgement, and only the strongest repercussions of later Pickering-derived

doctrine will force a grudging change in the agencies they work at. Pickering and the factor-analysis will only have a chance at effectiveness when the cases are generated which demand its application. This will come when the officers for whose potential benefit and protection Pickering exists, decide to assert their rights. Their agency is their meal-ticket and source of companionship, but in the final analysis "the state is the state, bound by uniform constitutional constraints regardless of the capacity in which it purports to act"³⁴⁰.

311.
391 US, at 570 n.3.

312.
See eng., In Re Gioglio, supra note 132; Brukiewa v. Police Com'r of Baltimore, supra note 237.

313.
Cf. Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599, 626 (1962). The rationale underlies the case-or-controversy requirement. See C. Wright, LAW OF FEDERAL COURTS ss. 12-15 (2d ed. 1970); F. Frankfurter & H. Hart, The Business of the Supreme Court at October Term, 1934, 49. Harv. L. Rev. 63, 95-96 (1935):

The importance of having a concrete issue derives partly from the importance of having data relevant and adequate to an informed judgement....Constitutionality is not a fixed quantity....(A) statute valid as to one set of facts may be invalid as to another, and hence...the necessity of a full presentation of the context of the circumstances under which the issue of validity is posed.

See also F. Frankfurter, A Note On Advisory Opinions, 37 Harv. L. Rev. 1002, 1005 (1924)("Facts and facts again are decisive").

314.
Zwickler v. Koota, 339 US 241, 256 n.2 (1967)(Harlan J., concurring).

315.
Thornhill v. Alabama, 310 US 33, 97 (1940):

(There is a) pervasive threat inherent in (the) very existence (of a statute) which does not aim specifically at evils within the allowable area of state control but...sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech.

See also Keyishian v. Board of Regents, 385 US 539, 599 (1967):

It is no answer (to a claim of overbreadth) to say that the statute would not be applied in such a case.

316.

Cf. Kunz v. New York, 340 US 290, 304 (1951):

(I)t is very easy to read a statute to permit some hypothetical violation of civil rights but difficult to draft one which will not be subject to the same infirmity.

For a comment on the problem of "drafting a statute that will satisfactorily discriminate between harmless and pernicious forms of the same activity", see L. Fuller, ANATOMY OF THE LAW 24 (1963). See also Sedler, supra note 313, at 612-26.

317.

E.g., Bagley v. Wash. Tp. Hosp. Dist., 65 Cal.2d 499, 501-02, 421 P2d 409, 411, 55 Cal. Rptr. 401, 403 (1966):

(Governmental restrictions on the political liberties of public employees must be justified by a demonstration:) (1) that the political restraint rationally relate to the enhancement of the public service; (2) that the benefits which the public gains by those restraints outweigh the resulting impairment of constitutional rights; and (3) that no alternatives less subversive of constitutional rights are available.

; Rosenfield v. Malcolm, 65 Cal2d 559, 421 P2d 697, 55 Cal. Rptr. 505 (1967); Fort v. Civil Service Commission, 61 Cal.2d 331, 392 P2d 335, 38 Cal. Rptr. 625 (1964). See also Klein v. Civil Service Commission, 260 Iowa 1147, 1157, 152 NW2d 195, 201 (1967).

313.

The seminal writer in this school of thought was Rudolf von Jhering. See R. von Jhering, *DER ZWECK IM RECHT* (1877); *LAW AS A MEANS TO AN END* (Husik trans. 1913). For a contrary view of the judicial role, which has been derisively called "mechanical jurisprudence", see *United States v. Butler*, 297 US 1, 62 (1936)(Roberts, J.):

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch has only one duty, - to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgement on the question. The only power it has, if such it may be called, is the power of judgement.

319.

O. Holmes, *COLLECTED LEGAL PAPERS* 239 (1920). See also O. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 467 (1897). Cf. Van Alstyne, *supra* note 2, at 755:

The emphatic rejection of the analogical model (that what is constitutionally permitted in the private sector is therefore permitted to government when it acts in a "private way", e.g., as entrepreneur, proprietor, or employer), however, merely clears the air of canards.

320.

See R. Jackson, *THE STRUGGLE FOR JUDICIAL SUPREMACY* x (1941) (The Court's "judgement was wrong on the most outstanding issues upon which it has chosen to challenge the popular branches"). See generally H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); L. Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 103 U. Pa. L. Rev. 1 (1959); A. Miller & R. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661 (1960).

321.

See *Becker v. Philco Corp.*, 339 US 979 (1967)(denial of cert.)
(Warren, C.J., and Douglas, J., dissenting).

322.

Oppenheim, Unconstitutional Conditions and State Powers, 26
Mich. L. Rev. 176, 136 (1927).

323.

New York ex. rel. Hatch v. Reardon, 204 US 152, 160 (1907)
(Holmes, J.)("this court...will not go into imaginary cases,
notwithstanding the seeming logic of the position that it
must do so, because if for any reason...the law is unconsti-
tutional, it is void as to all").

324.

See generally Fried, *Two Concepts of Interests: Some Relections*
on the Supreme Court's Balancing Test, 76 Harv. L. Rev. 755
(1963).

325.

United States v. Carolene Products Co., 304 US 144, 152-53
n.4 (1933).

326.

Tinker v. Des Moines Indep. Comm. School Dist., 393 US 503,
513 (1969):

Under our Constitution, free speech is not a
right that is given only to be so circumscribed
that it exists in principle but not in fact.
Freedom of expression would not truly exist if
the right could be exercised only in an area
that benevolent government has provided as a
safe haven for crackpots.

327.

See e.g., *Shelton v. Tucker*, 364 US 479, 433 (1960) ("even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose"). Cf. *United States v. Robel*, 339 US 253, 263 (1967). See generally Wormuth & Merycin, *The Doctrine of the Reasonable Alternative*, supra note 167; Note, *Less Drastic Means and the First Amendment*, supra note 110.

It should be noted that in the spirit of the preferred position accorded freedom of expression, standards such as those involving over breadth and equal protection have been relaxed with respect to "a reform measure aimed at eliminating an existing barrier to the exercise" of such fundamental rights. *Katzenbach v. Morgan*, 334 US 641, 657 (1966). See e.g., *Red Lion Broadcasting Co. v. FCC*, 395 US 367 (1969); *NLRB v. Gissel Packing Co.*, 395 US 575, 619-20 (1969).

323.

Uniformed Sanit. Men v. Sanit. Commissioner, 392 US 230, 234-35 (1963). See also *Gardner v. Broderick*, 392 US 273 (1963). Cf. *Stevens v. Marks*, 333 US 234 (1966). See *Steward v. Leary*, 57 Misc.2d 792, 293 NYS2d 573 (1963).

329.

Even if an individual does not have a constitutional right to become a policeman, he does have a constitutional right not to be exposed to invidious discrimination should he apply for such a position. See e.g., *Beasley v. Cunningham*, 171 Tenn. 334, 103 SW2d 13, 110 ALR 306 (1937); *Wilson v. Los Angeles Board of Civil Service Commissioners*, 54 Cal2d 61, 4 Cal. Rptr. 439, 351 P2d 761 (1960).

330.

Haynes v. Brennan, 135 NYS2d 900 (Sup. Ct. 1954). See *Wieman v. Updegraff*, 344 US 183 (1952).

331.

A. Germann, F. Day, and R. Gallati, *INTRODUCTION TO LAW ENFORCEMENT* 275-76 (rev. fourth prt. 1966). See J. Rinck, *Career and Salary Feature of the Police and Fire Services*, *Inst. of Pub. Ad.* (1952).

332.

Blackburn v. Alabama, 361 US 199 (1960). See e.g., Brown v. Mississippi, 297 US 273 (1936); Mapp v. Ohio, 367 US 643 (1961); Miranda v. Arizona, 384 US 436 (1966). See generally, H. Friendly, The Bill of Rights as a Code of Criminal Procedure, in BENCHMARKS 235 (1967); D. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970); W. LaFare, Improving Police Performance through the Exclusionary Rule, 30 Mo. L. Rev. 391 & 566 (1965).

333.

See B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 113 (1921) ("If you ask how he (the judge) is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself").

334.

Cf. Note, Defiance of Unlawful Authority, 33 Harv. L. Rev. 626 (1970).

335.

See e.g., J. Clark, The Isolation of the Police: A Comparison of the British and American Situations, 56 J. Crim. L.C. & P.S. 307 (1965); W. Westley, Violence and the Police, 59 Am. J. of Soc. 35 (1953); W. Westley, Secrecy and the Police, 34 Social Forces 254 (1956); M. Banton, supra note 120, at 216.

336.

A. Reiss Jr. & D. Bordua, Environment and Organization: A Perspective on the Police, in THE POLICE: SIX SOCIOLOGICAL STUDIES 25, 30 (1967) (Bordua ed.).

337.

See Banton, supra note 120, at 114; W. Westley, THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY 137-88, Ph.D. thesis, Department of Sociology, U. of Chicago (1951):

Secrecy is loyalty...Secrecy is solidarity
for it represents a common front against the
outside world...Secrecy and silence are among
the first rules impressed on the rookie.

338.

See R. Hall, Dilemma of the Black Cop, Life, Sept. 18, 1970, at 60. See generally J. Wilson, The Police and Their Problems: A Theory, 12 Public Policy 139 (1963).

339.

Frost & Frost Trucking Co. v. Railroad Commission, 271 US 533, 593 (1926).

340.

Van Alstyne, *supra* note 2, at 754. Generating litigation is a "medium which has been employed, with varying degrees of emphasis and success, by other groups that have wanted legal change". G. Hazard, Jr., Law Reforming in the Anti-Poverty Effort, 37 U. Chi. L. Rev. 242, 243 (1970). See e.g., Eastern Railroad Presidents Conf. v. Noerr Motor Freight, 365 US 127 (1961); Walden, More About Noerr--Lobbying, Anti-trust and the Right to Petition, 14 UCLA L. Rev. 1211 (1967); G. Wolfskill, THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE, 1934-40 (1962). The courts are quite aware of their role as judicial lawmakers. See W. Schaefer, PRECEDENT AND POLICY (1956); C. Breitel, The Courts and Lawmaking, in LEGAL INSTITUTIONS TODAY AND TOMORROW 1 (M. Paulsen ed. 1959); R. Traynor, The Well-Tempered Judicial Decision, 21 Ark. L. Rev. 237 (1967).

Finally, as one commentator has submitted, "the great majority of today's law enforcement officers want to act in a proper and constitutional manner; they need and deserve cleaner guidelines for their actions, particularly from the highest tribunal in the country". F. Carrington, *Chimel v. California--A Police Response*, 45 Notre Dame Lawyer, 559, 560 (1970). Hopefully such an attitude on the part of the line officers and their superiors will carry forward into the First Amendment problems arising from their agency regulations.

BIBLIOGRAPHY

BIBLIOGRAPHY

- Alfange Jr., Free Speech and Symbolic Conduct: The Draft-Card Burning Case, 1968 Sup. Ct. Rev. 1 (1968)
- Annot., 165 ALR 1302 (1946)
- Annot., 95 ALR2d 1450 (1964)
- Annot., 28 ALR3d 717 (1969)
- Antieau, MODERN CONSTITUTIONAL LAW (1969)
- Banton, THE POLICEMAN IN THE COMMUNITY (1964)
- Barron, Access-The Only Choice for the Media, 48 Tex. L. Rev. 766 (1970)
- Berle, Constitutional Limitations on Corporate Activity--Protection of Personal Rights from Invasion Through Economic Power, 100 U. Pa. L. Rev. 933 (1952)
- Berman, The Cuban Popular Tribunals, 69 Colum. L. Rev. 1317 (1969)
- Berney, Libel and the First Amendment--A New Constitutional Privilege, 51 Va. L. Rev. 1 (1965)
- Biggers Jr., Enter A Stranger to the Common Law--Criminal Discovery, 40 Miss. L. J. 1 (1968)
- Bordua, ed., THE POLICE: SIX SOCIOLOGICAL STUDIES (1967)
- Brandstatter & Radelet, eds., POLICE AND COMMUNITY RELATIONS: A SOURCEBOOK (1968)
- Brennan Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965)
- Brown, Must The Soldier Be a Silent Member of our Society, 43 Mil. L. Rev. 71 (1969)(DA Pam 27-100-43, 1 January 1969)
- Bruff, Unconstitutional Conditions upon Public Employment: New Departures in the Protection of First Amendment Rights, 21 Hasting L. J. 129 (1969)
- Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921)
- Carrington, Chimel v. California-- A Police Response, 45 Notre Dame Lawyer 559 (1970)

Chapman & Johnston, THE POLICE HERITAGE IN ENGLAND AND AMERICA (1962)

Cicourel, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE (1967)

Clark, The Isolation of the Police: A Comparison of the British and American Situations, 56 J. Crim. L.C. & P.S. 307 (1965)

Cohen, Is The Right To Lie Protected by the First Amendment, 3 J. Beverly Hills B. A. 10 (1969)

Collings, Unconstitutional Uncertainty--An Appraisal, 40 Cornell L. Q. 195 (1955)

Comment, Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association from Scales to Robel, 57 Cal. L. Rev. 240 (1969)

Comment, Guilt By Record, 1 Calif. Western L. Rev. 126 (1965)

Comment, Spying and Slandering: Absolute Privilege for the CIA Agent?, 67 Colum. L. Rev. 752 (1967)

Comment, The "Titicut Follies" Case: Limiting the Public Interest Privilege, 70 Colum. L. Rev. 359 (1970)

Comment, The First Amendment and Public Employees--An Emerging Constitutional Right To Be a Policeman?, 37 Geo. Wash. L. Rev. 409 (1968)

Comment, Secret Files: Legitimate Police Activity or Unconstitutional Restraint on Dissent?, 58 Geo. L. J. 569 (1970)

Comment, Another Look at Unconstitutional Conditions, 117 U. Pa. L. Rev. 144 (1968)

Comment, The Right of an Indigent's Counsel to Inspect Police Reports, 14 St. L.U.L.J. 310 (1969)

Comment, Defendant's Right to Inspect Investigative Files of Law-Enforcement Agencies, 25 Wash. & Lee L. Rev. 70 (1968)

Davis, ADMINISTRATIVE LAW TREATISE (1958 & 1970 Supp.)

Davis, The Information Act, 34 U. Chi. L. Rev. 761 (1967)

Edelman, Absurd Remnant: Walker v. Birmingham Two Years Later, 34 Albany L. Rev. 523 (1970)

Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION (1970)

Emerson, Haber & Dorsen, eds., POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (1967 & 1969 Supp.)

- Emerson, Toward A General Theory of the First Amendment,
72 Yale L. J. 877 (1963)
- Emerson, Freedom of Association and Freedom of Expression,
74 Yale L. J. 1 (1964)
- Erikson & Gilbertson, Case Records in the Mental Hospital, in
ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE (Wheeler,
ed., 1969)
- Ferster & Courtless, The Beginning of Juvenile Justice, Police
Practices, and the Juvenile Offender, 22 Vand. L. Rev.
567 (1969)
- Frankfurter, A Note On Advisory Opinions, 37 Harv. L. Rev. 1002
(1924)
- Frankfurter & Hart, The Business of the Supreme Court at October
Term, 1934, 49 Harv. L. Rev. 68 (1935)
- Fried, Two Concepts of Interests: Some Reflections on the
Supreme Court's Balancing Test, 76 Harv. L. Rev. 755 (1963)
- Friendly, The Bill of Rights as a Code of Criminal Procedure, in
BENCHMARKS (1967)
- Fuller, ANATOMY OF THE LAW (1968)
- Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mtn. L.
Rev. 1 (1958)
- Geis, Publication of the Names of Juvenile Felons, 1962 Montana
L. Rev. 1 (1962)
- Germann, Day, & Gallati, INTRODUCTION TO LAW ENFORCEMENT (revd.
fourth ptg. 1966)
- Gourley, Police Discipline, 41 J. Crim. L.C. & P.S. 85 (1950)
- Graham, Action and Exhaustion: The Problem of Denial of Constitu-
tional Defense Because of Failure to Exhaust Remedies,
44 Wash. L. Rev. 547 (1969)
- Gunther, Reflections on Robel: Its Not What the Court Did, But
The Way That It Did It, 20 Stan. L. Rev. 1140 (1968)
- Gusfield, On Legislating Morals: The Symbolic Process of Designating
Deviance, 56 Cal. L. Rev. 54 (1968)
- Hale, Unconstitutional Conditions and Constitutional Rights,
35 Colum. L. Rev. 321 (1935)
- Handler & Klein, The Defense of Privilege in Defamation Suits
Against Executive Officers, 74 Harv. L. Rev. 44 (1960)

Hazard Jr., Law Reforming in the Anti-Poverty Effort,
37 U. Chi. L. Rev. 242 (1970)

Hearings on the Use of Polygraphs as "Lie Detectors" by the
Federal Government Before a Subcomm. of the House Comm.
on Govt. Ops., 88th Cong. 2d Sess. (1964), 89th Cong.,
1st Sess. (1965)

Hearings of Subcomm. on Const. Rts., Senate Comm. on Judic.,
Psychological Tests and Const. Rts., 89th Cong., 1st Sess.
(June 1965)

Hewitt, General Article Void for Vagueness, 34 Neb. L. Rev. 529
(1958)

Holmes, COLLECTED LEGAL PAPERS (1920)

Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1897)

Hyman, TO TRY MEN'S SOULS: LOYALTY OATHS IN AMERICAN HISTORY (1959)

Israel, Elfbrandt v. Russell: The Demise of the Oath?, 1966
Sup. Ct. Rev. 193 (1966)

Jackson, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941)

Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (abridged student
ed. 1965)

Jaffe, The Exhaustion of Administrative Remedies, 12 Buff. L. Rev.
327 (1963)

von Jhering, DER ZWECK IM RECHT (1877)

von Jhering, LAW AS A MEANS TO AN END (Husik trans. 1913)

Kadish & Paulsen, CRIMINAL LAW AND ITS PROCESSES (1969)

Kalven, Jr., THE NEGRO AND THE FIRST AMENDMENT (1965)

Kalven, Jr., Metaphysics and the Law of Obscenity, 1960 Sup.
Ct. Rev. 1 (1960)

Kalven, Jr., The New York Times Case: A Note On "The Central
Meaning of the First Amendment", 1964 Sup. Ct. Rev. 191 (1964)

Kalven, Jr., The Concept of the Public Forum? Cox v. Louisiana,
1965 Sup. Ct. Rev. 1 (1965)

Kalven, Jr., The Reasonable Man and the First Amendment: Hill,
Butts and Walker, 1967 Sup. Ct. Rev. 267 (1967)

Kalven, Jr., "Uninhibited, Robust, and Wide-Open"--A Note on
Free Speech and the Warren Court, 67 Mich. L. Rev. 289 (1968)

- Kenney & Pursuit, POLICE WORK WITH JUVENILES (1965)
- Kester, Soldiers Who Insult the President: An Uneasy Look at Art. 88 of the Uniform Code of Military Justice, 81 Harv. L. Rev. 1697 (1968)
- Kort, Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the Right to Counsel Cases, 51 Amer. Pol. Sci. Rev. 1 (1957)
- LaFave, Improving Police Performance through the Exclusionary Rule, 30 Mo. L. Rev. 391 & 566 (1965)
- Linde, Justice Douglas on Liberty in the Welfare State: Constitutional Rights in the Public Sector, 40 Wash. L. Rev. 10 (1965)
- Litwack, THE AMERICAN LABOR MOVEMENT (1962)
- Loevinger, Jurimetrics, The Next Step Forward, 33 Minn. L. Rev. 455 (1949)
- Loewenberg, Labor Relations for Policemen and Firefighters, Monthly Labor Review, May 1968
- McKay, The Preference for Freedom, 34 N.Y.U.L. Rev. 1182 (1959)
- McQuillin, MUNICIPAL CORPORATIONS (1968)
- Mead, The Psychology of Punitive Justice, 23 Am. Jrnl. of Soc. at 589 (1928)
- Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245 (1961)
- Mendelson, Clear and Present Danger--From Schenck to Dennis, 52 Colum. L. Rev. 313 (1952)
- Merrill, Unconstitutional Conditions, 77 U. Pa. L. Rev. 879 (1929)
- Miller, The Constitutional Law of the "Security State", 10 Stan. L. Rev. 620 (1958)
- Mirel, The Limits of Government Inquiry onto the Private Lives of Government Employees, 46 Bost. U. L. Rev. 1 (1966)
- Monaghan, First Amendment "Due Process", 83 Harv. L. Rev. 518 (1970)
- Myren, A Crisis in Police Management, 50 J. Crim. L.C. & P.S. 600 (1960)

- Nelson, Conduct Expected of an Officer and a Gentleman: Ambiguity, 12 AFJAG L. Rev. 124 (1970)
- Niederhofer, BEHIND THE SHIELD (1967)
- Noel, Defamation of Public Officers and Candidates, 49 Colum. L. Rev. 875 (1949)
- Note, Symbolic Conduct, 68 Colum. L. Rev. 1091 (1968)
- Note, The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 808 (1969)
- Note, Employment of Former Criminals, 55 Cornell L. Rev. 306 (1970)
- Note, The New York Times Rule and Society's Interest in Providing a Redress for Defamatory Statements, 36 Geo. Wash. L. Rev. 424 (1967)
- Note, Inseparability in Application of Statutes Impairing Civil Liberties, 61 Harv. L. Rev. 1208 (1948)
- Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960)
- Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730 (1967)
- Note, Developments in the Law--Equal Protection, 82 Harv. L. Rev. 1065 (1969)
- Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970)
- Note, Chilling Political Expression by Use of Police Intelligence Files: Anderson v. Sills, 5 Harv. C.R.-C.L. L. Rev. 71 (1970)
- Note, Constitutional Law, Void for Vagueness: An Escape from Statutory Interpretation, 23 Ind. L. L. 272 (1948)
- Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960)
- Note, The Public Employee and Political Activity, 3 Suffolk L. Rev. 380 (1969)
- Note, Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings, 72 Yale L. J. 574 (1963)
- Note, Dismissals of Public Employees for Petitioning Congress: Administrative Discipline and 5 U.S.C. Section 652(d), 74 Yale L. J. 1156 (1965)
- Note, The Scope of Immunity for Legislators and Their Employees, 77 Yale L. J. 366 (1967)

- Note, Loyalty Oaths, 77 Yale L. J. 739 (1968)
- Note, Less Drastic Means and the First Amendment, 78 Yale L. J. 464 (1969)
- Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970)
- O'Neil, Unconstitutional Conditions: Welfare Benefits with Strings Attached, 54 Calif. L. Rev. 443 (1966)
- O'Neil, Public Employment, Anti-War Protest and Preinduction Review, 17 U.C.L.A.L. Rev. 1028 (1970)
- Oppenheim, Unconstitutional Conditions and State Powers, 26 Mich. L. Rev. 176 (1927)
- Panel Discussion, Discovery in Criminal Cases, 44 F.R.D. 481 (1968)
- Pollack, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959)
- Preuss, Punishment by Analogy in National Socialist Penal Law, 26 J. Am. Inst. Crim. L. & Criminology 847 (1936)
- Project, The Computerization of Government Files: What Impact on the Individual?, 15 U.C.L.A.L. Rev. 1371 (1968)
- Prosser, HANDBOOK OF THE LAW OF TORTS (3d ed. 1964)
- Rehnquist, Public Dissent and the Public Employee, speech before the Federal Bar Association (Sept. 18, 1970)
- Reich, The New Property, 73 Yale L. J. 733 (1964)
- Reubhausen & Brim, Jr., Privacy and Behavioral Research, 65 Colum. L. Rev. 1184 (1965)
- Rinck, Career and Salary Features of the Police and Fire Services, Inst. of Pub. Admin. (1952)
- Rose, A Critical Look at the Hatch Act, 75 Harv. L. Rev. 510 (1962)
- Samuel, ed., TOWARDS A BETTER AMERICA (1968)
- Schaefer, PRECEDENT AND POLICY (1956)
- Schubert, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959)
- Schwartz & Skelnick, Two Studies of Legal Stigma, 10 Social Problems 133 (1962)
- Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962)

- Skolnick, JUSTICE WITHOUT TRIAL (1966)
- Smith, POLICE SYSTEMS IN THE UNITED STATES (1940)
- Smith, THE STATE POLICE (1969 ed.)
- Strong, Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg--and Beyond, 1969 Sup. Ct. Rev. 41 (1969)
- Taylor, Public Employment: Strikes or Procedures?, 20 Indust. and Lab. Rel. Rev. 617 (1967)
- Tefft, Neither Above the Law Nor Below It: A Note on Walker v. Birmingham, 1967 Sup. Ct. Rev. 181 (1967)
- Traynor, THE RIDDLE OF HARMLESS ERROR (1970)
- U.S. House of Reps. Comm. on Govt. Ops., Special Subcomm. on Invasion of Privacy. The Computer and Invasion of Privacy: Hearings before the Subcomm. 89th Cong., 2d Sess (July 1966)
- Van Allen, OUR HANDCUFFED POLICE (1968)
- Van Alstyne, The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes, 31 L. & C.P. 530 (1966)
- Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968)
- Van Alstyne, The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy, 16 U.C.L.A.L. Rev. 751 (1969)
- Walsh, ed., SORRY...NO GOVERNMENT TODAY (1969)
- Wechsler, Towards Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959)
- Weiner, Courts-Martial and the Bill of Rights: The Original Practice, 72 Harv. L. Rev. 1 & 266 (1958)
- Weiner, Are The General Military Articles Unconstitutionally Vague, 54 A.B.A.J. 357 (1968)
- Westley, THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY (Ph.D thesis, Dept. of Sociology, U. of Chicago, 1951)
- Westley, Violence and the Police, 59 Am. J. of Soc. 35 (1953)
- Westley, Secrecy and the Police, 34 Social Forces 254 (1956)
- Wilson, POLICE PLANNING (2d ed. 1958)

- Wisdom, The Frictionmaking, Exacerbating Political Role of
the Federal Courts, 21 So.W.L.J. 411 (1967)
- Woodworth & Peterson, COLLECTIVE NEGOTIATION FOR PUBLIC AND
PROFESSIONAL EMPLOYEES (1969)
- Wormuth & Mericin, The Doctrine of the Reasonable Alternative,
9 Utah L. Rev. 254 (1964)
- Wright, LAW OF FEDERAL COURTS (2d ed. 1970)

MICHIGAN STATE UNIVERSITY LIBRARIES



3 1293 03142 5212