# Cause In Fact Problems in the Public Employee Speech Cases

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## I. INTRODUCTION

Questions of cause in fact are central to many criminal and civil tort injury cases.[1] As it turns out, though, cause in fact issues in the context of public employee speech are distinctively important. And those issues, in that context, allow us to better understand the very idea of cause in fact, whatever the context. This Article briefly explores these latter claims.

The crucial case bearing upon the free speech rights of typical public employees is *Garcetti v. Ceballos*.[2] The *Garcetti* case has been widely cited and applied.[3] A recent Seventh Circuit case, however, focuses precisely on the crucial cause in fact discussion in *Garcetti* and provides a clear opportunity for considering the logic and implications of

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1. For brief introductions, see, e.g., Antony Honoré, *Causation in the Law*, STAN. ENCYC. OF PHIL. (Nov. 17, 2010) https://plato.stanford.edu/archives/win2010/entries/causation-law/ [https://perma.cc/RJS3-9T8V]; Michael Moore, *Causation in the Law*, STAN. ENCYC. OF PHIL. (Oct. 3, 2019) https://plato.stanford.edu/entries/causation-law [https://perma.cc/3KFB-NJ8J]. The classic text is H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985). Including, but extending far beyond, causation in a legal context is the influential J.L. MACKIE, THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION (1980).

2. Garcetti v. Ceballos, 547 U.S. 410 (2006). For a broad critical assessment of *Garcetti* in various respects, see R. George Wright, *A Democratic View of Public Employee Speech Rights*, 70 CATH. U. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3593599.

3. *See* Wright, *supra* note 2 (assessing the *Garcetti* case).

*Garcetti*'s approach to issues of cause in fact.[4]

This recent case, *Lett v. City of Chicago*, involved Lett contributing to an official investigative report on a police shooting of a civilian.[5] Lett refused to amend his contribution to the report to include the conclusion that police officers had planted a gun on the victim.[6] Lett was then officially disciplined and eventually filed suit on a § 1983 violation theory.[7]

The Seventh Circuit in *Lett* recognized *Garcetti* as the primary[8] controlling authority.[9] While *Garcetti* can sometimes involve as many as three distinct steps,[10] the court in *Lett* focused entirely on the crucial first step under *Garcetti*.[11] The first step is indeed broadly crucial in that it operates as a threshold or gatekeeping inquiry, with the speaker's failure at this stage absolutely barring any public employee free speech case.[12]

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4. Lett v. City of Chicago, 946 F.3d 398, 400 (7th Cir. 2020).

5. *Id.* at 399.

6. *Id.*

7. *Id.* at 399–400; *see generally* 42 U.S.C. § 1983 (2018). Section 1983 can also encompass claims of a government employer's restriction of an employee's political beliefs and associations. *See*, *e.g.*, Rodriguez v. City of Doral, 863 F.3d 1343, 1345 (11th Cir. 2017) (describing a wrongful termination and following suit under 42 U.S.C § 1983 for violation of Rodriquez's first amendment rights).

8. See also the *Lett* court's reluctance to expand the scope of *Lane v. Franks*, 573 U.S. 228 (2014), on the protection of truthful sworn testimony by a government employee where that speech does not fall within the scope of the employee's ordinary, or perhaps even nonordinary, job responsibilities. *See Lett*, 946 F.3d at 401. The *Lett* case also implicates the intriguing question of what, precisely, is necessary for speech that is disbelieved by the speaker to amount to a "lie." *See generally* R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. 1131 (2011) (providing general background on lying in the legal context); Alasdair MacIntyre, Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?, Address at Princeton University (April 6–7, 1994), *in* CAMBRIDGE UNIV. PRESS at 309; THOMAS L. CARSON, LYING AND DECEPTION: THEORY AND PRACTICE (2010).

9. *See Lett*, 946 F.3d at 400.

10. These include not only the initial gatekeeping step, but if that initial stage is passed, then there is a judicial inquiry into whether the public employee's speech addressed a subject of genuine public interest and concern, or instead, a subject of only personal or private interest and concern. If that second stage is also passed, the public employee's speech may be constitutionally protected, depending upon a balancing of supposedly conflicting interests as between the employee and employer, if not also the broader public. *See Lett*, 946 F.3d at 400 (citing Swetlik v. Crawford, 738 F.3d 818, 825 (7th Cir. 2013)).

11. *See id.* ("This appeal concerns [only] the first element [under *Garcetti*]: whether Lett spoke as a private citizen when he refused to amend the investigation report."). *Lett* then relies, as to this gatekeeper issue, on the factually similar case of *Davis v. City of Chicago*, 889 F.3d 842 (7th Cir. 2018). *See id.* at 400–01.

12. *See id.* (discussing the first step in the *Garcetti* analysis). *See generally* Wright, *supra* note 2 (exploring the complications of *Garcetti*'s initial gatekeeping element). The law then recognizes that not every government employer response to protected speech by an employee entitles that employee to a judicial remedy. In speech retaliation cases, the public employee must generally show, as well, some legally sufficiently adverse effect or deprivation imposed on the speaker by the government, and some sufficient causal relationship between the employee's protected speech

Bound, then, by *Garcetti*[13] and largely by recent Seventh Circuit precedent,[14] the court in *Lett* then focused on the dispositive issue in the case. As the court phrased this issue, "the key question is whether the employee [made] the relevant speech 'pursuant to his official duties.'"[15] The idea is that public employees may speak on a given occasion in either one of two distinct roles or capacities.[16] Such persons may speak, according to this binary classification, either in their role as a government employee or else in their role as a citizen.[17]

Whatever the coherence or the justifiability of the court's jurisprudence in this respect,[18] this question of speaker role will typically require inquiry into matters of cause in fact.[19] As the court in *Lett* declared in quoting *Garcetti*, "we ask whether the speech '*owes its existence* to a public employee's professional [job] responsibilities.'"[20] Whether any action or event "owes its existence" to anything else is the quintessential question of cause in fact.

Adopting the familiar idea of but-for causation[21] or of being a necessary condition[22] for some further action or event, the court then rightly observed that "Lett would have had neither occasion nor reason to refuse[23] the request [to amend his report] if not for his job."[24] Issues of cause in fact are thus clearly at the heart of the *Lett* case, even if *Garcetti*'s

and the adverse effect imposed by the employer. *See, e.g.*, DeMartini v. Town of Gulf Stream, 942 F.3d 1277, 1289 (11th Cir. 2019); Milliman v. County of McHenry, 893 F.3d 422, 430 (7th Cir. 2018) (citing Diadenko v. Folino, 741 F.3d 751, 755 (7th Cir. 2013)); Penley v. McDowell Cnty. Bd. of Educ., 876 F.3d 646, 654 (4th Cir. 2017); Thayer v. Chiczewski, 705 F.3d 237, 251 (7th Cir. 2012) (in turn citing Greene v. Doruff, 660 F.3d 975, 977–78 (7th Cir. 2011)).

13. *See supra* notes 10–11 (discussing the *Garcetti* analysis).

14. *Id.*

15. *Lett*, 946 F.3d at 400 (quoting *Garcetti*, 547 U.S. at 421).

16. In this case, "whether Lett spoke as a private citizen when he refused to amend the investigative report" rather than in his capacity as a public employee. *Id.*

17. For extended critique of the assumptions underlying this bifurcation, see Wright, *supra* note 2 at 25–28.

18. *See id.* at 25, 27 (discussing the binary classification of an employee versus a citizen).

19. For background, see the authorities cited *supra* note 1.

20. *Lett*, 946 F.3d at 400 (quoting *Garcetti*, 547 U.S. at 421) (emphasis added). *Lett* repeats the causal point as well at 401. *Id* at 401.

21. For discussion of but-for causation and some limits on its judicial use, see, e.g., DOUGLAS KUTACH, CAUSATION AND ITS BASICS IN FUNDAMENTAL PHYSICS 20–30 (2013); Hillel J. Bavli, *Counterfactual Causation*, 51 ARIZ. ST. L.J. 879 (2019); Richard Holton, *Causation and Responsibility, in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 237–52 (John Tasioulas ed., 2020); Eric A. Johnson, *Cause-in-Fact After* Burrage v. United States, 68 FLA. L. REV. 1727, 1771 (2016); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1775–80 (1985).

22. *See, e.g.*, sources cited *supra* note 21 (explaining how but-for causation is a necessary condition for establishing cause).

23. Or, of course, to comply or otherwise react in any way.

24. *Lett*, 946 F.3d at 401.

initial inquiry stage disposes of the case on the merits.

But as cases such as *Lett* illustrate, cause in fact issues can be remarkably difficult to manage.[25] The cause in fact issues involved in *Garcetti*'s speaker-role inquiry,[26] and in public employee protected speech retaliation cases more generally,[27] are surprisingly complex both in theory and practice. The most relevant of such complications are briefly illustrated below.

## II. CAUSE IN FACT PROBLEMS IN THE INITIAL SPEAKER-ROLE INQUIRY

Setting aside the inevitable complications, there are two largely separable basic approaches to questions of cause in fact. On one side are those that take questions of cause in fact to be, as the term itself suggests, largely if not entirely inquiries into matters of fact. The focus is thus on matters, however complex, of empirical observation, science, evidence, and inferences as to facts and inferences drawn therefrom. Theory of some sort will necessarily be drawn upon. But first-order normative policy judgments and controversial matters of ethics and politics should, on this approach, to the extent possible be set aside.[28]

On the other side of this distinction are approaches that find overlap or inseparability of inquiries into cause in fact and issues of ethical responsibility, fairness, justice, and public policy.[29] Thus it has recently

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25. In the tort context, it has rightly been observed that "causation as the link between defendant's conduct and plaintiff's injuries has proved to be quite problematic." Larry Alexander & Kimberly Kessler Ferzan, *Confused Culpability, Contrived Causation, and the Collapse of Tort Theory*, at 19 (Univ. of San Diego Legal Rsch. Paper Ser. No. 13-114, 2013) http://ssrn.com/abstract=2240027 [https://perma.cc/C6CF-TQGE].

26. *See infra* Part II.

27. *See infra* Part III.

28. For discussion, see Moore, *supra* note 11, at 3 (comparing the "conventional wisdom" of a division between this sort of cause in fact inquiry and a distinguishable "proximate cause" inquiry that relies on normative judgments as to the fair or efficient imposition of legal responsibility); Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the* DES *Cases*, 68 VA. L. REV. 713, 713 (1982) (citing WILLIAM O. PROSSER, HANDBOOK OF THE LAW OF TORTS 237, 244 (4th ed. 1971)) ("[A]ctual causation typically has been regarded as predominantly a factual matter and proximate cause as predominantly a matter of public policy."); James E. Viator, *When Cause-in-Fact Is More Than a Fact: The Malone-Green Debate on the Role of Policy in Determining Factual Causation in Tort Law*, 44 LA. L. REV. 1519, 1523 (1984) (discussing the view of Professor Leon Green); Glanville Williams, *Causation in the Law*, 19 CAMBRIDGE L.J. 62, 65 (1961) ("Factual causation is a question of evidence, not of . . . legal value-judgment."); *see also* H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 266 (1959) (while courts do and should make normative judgments as to fairness and responsibility in causation contexts, there is also a sense of a policy-neutral causal inquiry).

29. This view would complicate questions of assigning cause in fact issues to either the trier of fact, thus perhaps to a jury, or instead to the court as the ascertainer of applicable public policy, as well as further questions of the appropriate standard of appellate review. For a controversially deferential standard of appellate review as to the degree of fortitude expected of "a person of ordinary firmness," see Bennie v. Munn, 822 F.3d 392, 400 (8th Cir. 2016).

been argued that cause in fact, however attuned to factually inferable connections of whatever sort between actions and outcomes,[30] also draws upon "deep-seated intuitions about causation and fairness in attributing responsibility."[31]

Perhaps the leading exponent of this latter family of approaches has been Professor Wex Malone.[32] Professor Malone recognized that "'[p]roximate' or 'legal' cause has claimed the lion's share of attention, while cause-in-fact, or 'simple' cause, is always regarded as though it raises only a question of fact."[33] But Malone ultimately concluded, to the contrary, that "policy may often be a factor when the issue of cause-in-fact is presented sharply for decision,"[34] as with issues of proximate cause.[35]

As cases such as *Lett v. City of Chicago* illustrate, *Garcetti*'s crucial gatekeeping inquiry into speaker role is clearly a matter of cause in fact.[36] The question of whether the speech was uttered in the role of public employee or instead in the role of a citizen[37] is a matter of to which of these two roles the speech owes its existence.[38] That is, which speaker role was the cause[39] or the necessary condition for the speech at issue.[40] Thus the court in *Lett* understandably focused on the undeniable causal fact that "Lett would have had neither occasion nor reason to refuse the request [to amend his report][41] if not for his job."[42]

The initial problem, though, is that Lett's speech, or his refusal to speak as ordered, has an indefinite number of other but-for causes or necessary

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30. *See* Bavli, *supra* note 21 at 880 (reviewing factual causation).

31. *Id.* (internal quotation marks omitted).

32. *See generally* Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956). For commentary, see Viator, *supra* note 28, at 1525 ("Wex Malone and others believe that factual causation entails policy considerations.").

33. Malone, *supra* note 32, at 60. For one attempt to account for the prominence of this view, see Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579, 633 (1984).

34. Malone, *supra* note 32 at 61.

35. *Id.*

36. *See supra* notes 19–24 and accompanying text.

37. *See supra* notes 15–17 and accompanying text.

38. *See supra* note 20 and accompanying text.

39. *See supra* note 21 and accompanying text.

40. *See supra* note 22 and accompanying text.

41. So, *Lett*, unlike the most typical public employee speech discipline cases, involved employer discipline, not for voluntary and freely made speech; instead, more precisely, it involved employee speech that is allegedly not made freely, but rather under employer coercion or compulsion. Among the leading compelled noncommercial speech cases by citizens in general, beyond the government employee context, are Wooley v. Maynard, 430 U.S. 705 (1977), and W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). There seems no obvious reason why the *Garcetti* threshold inquiry into speaker-role status should vary as between freely made employee speech that is punished and employee speech at the same stage that is compelled by the government employer.

42. Lett v. City of Chicago, 946 F.3d 398, 401 (7th Cir. 2020).

causal antecedents. Having learned the alphabet as a child was clearly a necessary condition of Lett's speech. Having developed a basic vocabulary was similarly a necessary cause of the speech. Having applied for the job in the first place was, as well, a but-for cause of Lett's speech. So was Lett's being conscious at the precise time of the speech.

The latter but-for causes were not themselves any part of Lett's ordinary job responsibilities. That is, Lett's job responsibilities plainly did not include doing any of the latter activities. Lett's job itself did not require any learning of the alphabet or learning some common words or applying for his job. Applying for a job is not an ordinary responsibility within the course and scope of performing that job. Yet, these but-for causes of his speech were no less causally essential for Lett's speech than were any of his actual job responsibilities.[43] Some theory, at least partly normative or policy-driven, must be introduced in order to account for why the courts focus on some necessary causes rather than others.[44]

So while Lett's job responsibilities were doubtless a but-for cause of his speech, so were many acts, events, and circumstances, some with no relation to any of Lett's job responsibilities. A but-for causation test at this stage of *Garcetti*'s inquiry thus tells us little.

After all, Lett's job, and his job responsibilities would doubtless also be a but-for cause of Lett's counterfactually speaking, instead, and in a fully constitutionally protected way, first and only through an op-ed column in a major newspaper. Without his job experiences, Lett would have had nothing relevant to say to even a general public audience.[45]

We should also notice that Lett's job experiences and responsibilities could not amount to a sufficient, as opposed to a necessary, cause of the relevant speech. One's job duties and responsibilities do not in themselves ordinarily supply sufficient motivation to speak up on a controversial public issue in any forum. One's job requirements may include, for example, reading all official e-mails from one's supervisors. But that requirement, and any disciplinary threats for noncompliance, do not ensure that compliance. They cannot themselves be a sufficient cause for employee compliance or noncompliance. Required also would be the

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43. For this, we need not rely on the broader claim that there are no degrees of actual causal necessity, though some necessary causes will doubtless be of far greater judicial interest than others. *See, e.g.*, Matthew Braham & Martin van Hees, *Degrees of Causation*, 71 ERKENNTNIS 323, 325 (2009) (citing HART & HONORÉ, *supra* note 28, at 233).

44. Note that while many of the but-for causes of Lett's speech point us toward the past, perhaps in a causal chain to the distant past, some of the but-for causes we judge to be unimportant, such as the speaker's consciousness or the ability to breathe, operate at the precise time and place of the relevant speech.

45. The prototype of such protected public employee speech cases, where the speech would not have been made but-for the speaker's public employee status, is Pickering v. Bd. of Educ. of Twp. High Sch. Dist., 391 U.S. 563 (1968).

employee's partly independent sense of values, priorities among legal and moral responsibilities, attitudes toward risk, degree of fortitude, sense of citizenship or civic role, and some development of personal conscience.

More concretely, the most fundamental problem with *Garcetti*'s speaker-role inquiry lies in its implied assumptions as to judgments of cause in fact. The idea is again that under *Garcetti*, government employee critics of alleged agency corruption, malfeasance, or gross inefficiency must be speaking either in their role as government employees, or else in their role as citizens or, presumably, alien noncitizens.[46]

The legal tests applied in an attempt to draw this distinction in particular cases are rich in their variety and complexity.[47] But all such tests are tainted by *Garcetti*'s initial binary assumption as to the motivation and other causation of the speech at issue. Realistically, in practice, most public employees are at least partly motivated by their desire to be productive and to achieve and display technical competence, perhaps along with considerations of "income, wealth, ease, tenure, seniority, leisure and comfort,"[48] if not also of "discretionary power and deference."[49]

But public employees may also, precisely and specifically in their roles as public employees, be motivated to one degree or another by a desire to promote responsible bureaucratic agency, transparency, and openness to the public. Additionally, they may be called to promote the agency's democratic public accountability with respect to important matters of agency corruption, gross incompetence, and grievous inefficiency.[50]

So, in order to determine the causal relations underlying an instance of speech, the courts thus find themselves committed to one controversial view, as opposed to another, as to what motivates a public employee precisely in their role as a public employee, as distinct from as a citizen. But this causal inquiry requires the courts, whether the courts recognize this inevitability or not, to choose among controversial accounts of public employee motivations, largely on normative and public policy-driven grounds.

Specifically, courts must at least implicitly decide whether, or to what

46. *See supra* notes 15–17 and accompanying text (referring to Garcetti v. Ceballos, 547 U.S. 410, 424–26 (2006)).

47. *See, e.g.*, Haddad v. Gregg, 910 F.3d 237, 246–47 (6th Cir. 2018) (highlighting, among other non-exhaustive considerations, the impetus, setting, audience, and content or subject matter, as to "who, where, what, when, why, and how" considerations).

48. EAMONN BUTLER, PUBLIC CHOICE – A PRIMER 88–89 (2012).

49. *Id.*

50. For a classic vision of public service, see MARCUS TULLIUS CICERO, ON OBLIGATIONS BOOK I § 74 at 26 (P.G. Walsh trans., 2000) (~44 BCE); MARCUS TULLIUS CICERO, ON THE COMMONWEALTH BOOK I § XX at 126 (George Holland Sabine & Stanley Barney Smith trans., reprint ed., 1929) (~44 BCE).

extent, or with what priority, a public employee's job can encompass either in-house or external public audience-focused speech on matters of civic importance as to which the speaker has access, and perhaps special expertise,[51] only through the performance of their ordinary job responsibilities. Is public disclosure of significant administrative corruption something one does only as a public-minded citizen? Or do at least some public jobs allow for, or require, such public disclosure?[52]

The crucial point here is not that one approach to the cause in fact issues raised by *Garcetti*'s speaker-role inquiry is better than another. That is an obviously important but distinct question. Our point here is instead that the necessary speaker-role judgments are not confined largely to matters of factual investigation, empirical evidence, and court testimony. The line between speaking as a public employee and speaking wholly—or perhaps partly—as a citizen importantly requires normative justice and fairness-oriented judgments. And those judgments must address not only the best placement in general of that dividing line between speaker roles, but also the normatively best binary characterization of the speaker role in the individual case.[53]

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51. Suppose a clear indication of a significant public scandal is overhead by both a working colleague and by a public employee who happens to be refilling the nearby snack machines. Should the latter employee, who was merely randomly and arbitrarily present, really have greater free speech rights, even though both the working colleague and the snack machine filling-employee were at the time both working within the scope of their job responsibilities? That is the likely implication of *Garcetti*.

52. Under *Garcetti*, it is entirely likely that a speaker whose job requires public disclosure of scandal would have less free speech protection at this crucial initial stage than a colleague whose job description forbids such disclosure or says nothing about such matters. This is merely one of the paradoxical and counterintuitive results generated by *Garcetti*. *See, e.g.*, Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1329–30 (10th Cir. 2007) (noting that the plaintiff initially stated that she had a duty as the Executive Director of the school's Head Start program to report a wrongdoing; however, after *Garcetti*, she began asserting that she reported the violation merely as a private citizen, not as an employee).

53. This discussion has, in strict accordance with the case law, been confined to a discussion of necessary causes and sufficient causes. But the same inevitability of normative policy judgments in making speaker-role cause in fact judgments would present itself if the courts were to focus instead on some interesting combination of causal necessity and sufficiency. *See* Wright, *supra* note 21, at 1778–1802 (using a hypothetical to specifically illustrate the limitations of a "minute-detail approach" to establish sufficiency). In the alternative, courts might supplement or replace concerns for necessary and sufficient causes with an inquiry into one or more "substantial factors" in producing some outcome. For discussion, see *id.* at 1781–84. Whatever the value of "substantial factor" causation in other contexts, substantial factor analysis hardly allows cause in fact inquiries to eliminate normative judgments as to what should count as "substantial" or as significant, on policy grounds. *See id.* (introducing the background and limitations of the substantial factor formula). The substantial factor approach to causation plays a larger role at the later stages of public employee free speech retaliation cases. See the cases cited *supra* note 12 and *infra* Part III.

## III. Cause In Fact Problems in the Broader Public Employee Free Speech Realm

Let us now assume that the public employee speaker has somehow shown that the speech in question causally owes its existence to the speaker's role as a citizen, rather than as an employee. Let us assume as well that the speaker has also shown that the speech addresses a matter of public interest and concern.[54] And let us finally assume that the speech has passed as well the judicially required balancing of various interests.[55]

At this point, the speaker has established what we might call the free speech protection-worthiness of that speech, as uttered in its context. But that showing, by itself, does not show any cognizable injury to anyone's free speech rights. If the speech causes only mild, unexpressed distaste on the part of the government employer, a constitutional speech rights violation is not yet shown.[56] And even if the speech in question was followed by some adverse action by the employer, such as a suspension without pay or dismissal, there may be issues as to whether the adverse action was, in some decisive sense, actually caused by the speech in question, rather than by some other circumstances. Perhaps the employee would have been thus disciplined on entirely separate grounds.

What, then, constitutes an action by the employer that can rightly be deemed sufficiently adverse?[57] In typical cases, "firing, failing to promote, reassignment with sufficiently different responsibilities, or a decision causing a significant change in benefits"[58] may suffice. Depriving the speaker of the "rights and prerogatives"[59] of governmental office may also suffice.[60] And while "minor changes in working

54. *See supra* note 12 and accompanying text (demonstrating why this assumption fulfills a critical factor in the *Garcetti* gatekeeping inquiry).

55. *See id.* (deriving originally from Pickering v. Bd. of Educ. of Twp. High Sch. Dist., 391 U.S. 563, 568 (1968).

56. *See, e.g.*, Delaney v. Town of Abington, 890 F.3d 1, 6 (1st Cir. 2018) ("[I]t is important to emphasize that not every action that an employer takes that a public employee may dislike constitutes the kind of adverse employment action that can ground a First Amendment retaliation claim.").

57. For the basic burden-shifting framework with respect to linking the employee's speech and the employer's adverse action, see Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1977).

58. *Delaney*, 890 F.3d at 6 (quoting the private sector Title VII sexual harassment case Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1988)). See also the private employer Title VII case Monaghan v. Wordplay U.S., Inc., 955 F.3d 855, 860–61 (11th Cir. 2020).

59. *See* Holloway v. Clackamas River Water, 739 F. App'x 868, 869–70 (9th Cir. 2018) (mem.) (unpublished opinion).

60. *See id.*

conditions"[61] will likely not suffice,[62] the overall cumulative effect of individually minor employer reactions may be sufficiently adverse.[63]

Perhaps the most interesting causal question arising in the cases at this point focuses on the employee's future willingness, or unwillingness, to speak, in one forum or another, on the same, similar, or different topics. The employer's action must reach some sufficient level of deterrence, intimidation, or chilling effect in order for the plaintiff-speaker to prevail at this stage.[64]

This judicial inquiry into a sufficient speech-deterrence effect is thought, interestingly, not to refer to the actual speaker, in her subjectivity. After all, some persons may be easily deterred from future speaking, and others almost undeterrable. Some speakers are easily, perhaps too easily, intimidated. Others may be unmoved by even the most grievous threats and punishment. Thus, this sufficient speech-deterrence inquiry is proclaimed to be objective, rather than subjective.[65]

But on the other hand, what the law deems sufficiently adverse does factor in, for example, whether the free speech claimants are ordinary citizens, government employees, or current prisoners.[66] Whether public employees at all hierarchical levels, from retirement-age senior officials with vested pensions and junior staff and current at-will employees, should all be treated as having the same reasonable response to some given adverse action ought to be controversial.[67]

One might imagine that the courts have already made this test objective

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61. Charleston v. McCarthy, 926 F.3d 982, 989 (8th Cir. 2018). By itself, a reprimand will likely not count as sufficiently adverse. *See id.* at 990 ("[A] reprimand constitutes an adverse employment action 'only when the employer uses it as a basis for changing the terms or conditions of the employee's job for the worse.'" (quoting Wagner v. Campbell, 779 F.3d 761, 767 (8th Cir. 2015))).

62. *Id.* at 989 (quoting Spears v. Mo. Dep't of Corr. & Human Res., 210 F.3d 850, 853 (8th Cir. 2000).

63. *Id.* (quoting Shockency v. Ramsey Cty., 493 F.3d 941, 948 (8th Cir. 2007)).

64. There seems no overwhelming reason why this legal requirement must be considered as either a part of the adverse action inquiry, or else as somehow partly distinct therefrom. The adverse action and deterrence inquiries are treated as a single legal unity in, e.g., In re Kemp, 894 F.3d 900, 906 (8th Cir. 2018) (distinguishing the successive stages of engaging in protected speech activity, an adverse employer action "that would chill a person of ordinary firmness from continuing in the activity," and a sufficient showing of a causal link between the adverse action and the underlying speech (quoting Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004)).

65. *See* Holleman v. Zatecky, 951 F.3d 873, 880 (7th Cir. 2020) ("This is an objective standard; it does not hinge on the personal experience of the plaintiff."). For some doubts about the sustainability of the distinction between objective and subjective legal tests more generally, see R. George Wright, *Objective and Subjective Tests in the Law*, 16 U.N.H. L. REV. 121 (2017).

66. *See Holleman*, 951 F.3d at 880–81 (quoting Thaddeus-X v. Blatter, 175 F.3d 378, 398 (6th Cir. 1999)).

67. *See generally* Wright, *supra* note 65 at 144–46 (advocating for a "reasonableness test" grounded in the context of a person's circumstances—specifically one that promotes community).

in character by holding plaintiffs to either an "ordinary,"[68] or else to a "reasonable,"[69] degree of firmness in resisting adversity.[70] As it happens, free speech law sometimes declines to equate "ordinary" and "reasonable" persons.[71] Consider, for example, whether a court could ever responsibly assert that ordinary persons often fall short with respect to some relevant virtue or character trait, such as fortitude, courage, or personal integrity.[72] Could concededly entirely ordinary persons ever be judicially deemed deficient with respect to some relevant virtue or character trait?

The problem is that courts do not wish to improperly reward, or improperly punish, speakers who seem either hypersensitive,[73] or else who are exceptionally courageous, strong-willed, and thus undeterrable.[74] But any test of ordinary or reasonable fortitude must take into some consideration the distinctive circumstances, broadly understood, of the plaintiff-speaker.[75] What is reasonable to expect of an

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68. See, for example, the authorities cited *supra* note 64, as well as Javitz v. Cnty. of Luzerne, 940 F.3d 858, 863 (3d Cir. 2019); Baloga v. Pittson Area Sch. Dist., 927 F.3d 742, 752 (3d Cir. 2019), and Becker v. Kroll, 494 F.3d 904, 925 (10th Cir. 2007).

69. *See, e.g.*, Robertson v. Dep't of Health Servs., 949 F.3d 371, 382 (7th Cir. 2020) (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006)).

70. Some cases appear to equate ordinary or average person responses with those of a reasonable person, more or less objectively conceived. *See, e.g.*, Bennie v. Munn, 822 F.3d 392, 400–01 (8th Cir. 2016) (rejecting a subjective standard based on evidence of the plaintiff's extraordinary resilience and determination in favor of evaluating based on what a person of only ordinary firmness would have done).

71. For a classic example, see Chaplinsky v. New Hampshire, 315 U.S. 568, 571–74 (1942) (recognizing that ordinary or average persons, however conceived, might be provoked by insults to commit a battery, but that legally reasonable persons, as such, do not commit the tort or crime of battery).

72. Or consider attitudes toward personal risk. Could it be reasonable to be risk-averse? Could some ordinary persons be distinctly risk-averse? To what degree? *See generally* Sven Ove Hansson, *Risk*, STAN. ENCYC. OF PHIL., https://plato.stanford.edu/entries/risk [https://perma.cc/WX2U-WA6S] (last updated July 19, 2018) (discussing connections between risk studies and several philosophical subdisciplines). For broad background, including discussions of fortitude and responsible self-restraint, see CHRISTOPHER PETERSON & MARTIN E.P. SELIGMAN, CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION (2004).

73. Note the parallel concern over rewarding or incentivizing "hypersensitive" persons in the Establishment Clause cases. *See, e.g.*, Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S 753, 777–82 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("Conducting the review of government action required by the Establishment Clause is always a sensitive matter.").

74. The threat of being burned at the stake for her speech did not in fact deter Joan of Arc from continuing to speak, even though courts today would view any credible such official threat as sufficiently adverse with respect to speakers of either ordinary or reasonable fortitude. For background, see MARK TWAIN, JOAN OF ARC (Ignatius Press 1989) (1896).

75. Thus, the understandable legal rule to consider this element "from the perspective of a reasonable person in the plaintiff's position considering 'all the circumstances.'" Robertson v. Dep't of Health Servs., 949 F.3d 371, 382 (7th Cir. 2020) (quoting Burlington N. v. White, 548 U.S. 53, 71 (2006)) (in turn quoting Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 81 (1988)).

independently wealthy public employee speaker nearing retirement may not be a proper standard as well for a government employee with few resources and only quite limited alternative employment prospects. To ignore such obviously relevant considerations, whether we call them objective or subjective,[76] is no more reasonable than to ignore the race or other crucial characteristics of the plaintiff in other contexts of verbal provocation and response.[77]

Further complicating any inquiry into the adversity of some employer response to employee speech is the sheer variety of the content, venue, tone, timing, audience, and other circumstances of any potential future speech by the plaintiff. Whether any plaintiff would, would likely, or might be deterred by an employer's response to prior speech plainly depends upon all of these above undetermined circumstances. Suppose the government employer has responded to the employee's prior speech by changing some aspects of the employee's responsibilities. What, merely for starters, should the court assume that the plaintiff might now, or at some later point, actually wish to say?

Must the court focus on whether ordinary or reasonable firmness would allow the speaker to repeat what she has already clearly said,[78] but in new circumstances? Should the court focus, at the opposite extreme, on the speaker's ability to discuss a broad range of topics and viewpoints?[79] Or should the court take a middle-ground position and focus on the possible or likely deterring of at least somewhat similar speech under somewhat similar circumstances? How is the court supposed to address the inevitable questions of what counts as sufficient similarity?

The causation issues involved in such judgments cannot be made purely, or even largely, through any sort of investigation into facts, testimony as to fact, and finding as to fact. The degree to which, say, the virtue of fortitude is to be judicially encouraged, or required, is not a

76. *See generally* Wright, *supra* note 65 at 145–46 (arguing that defining the reasonableness standard by "objective" or "subjective" results in fruitless parsing; legal tests should instead be designed to promote equality and, more specifically, community).

77. Consider, for example, a hypothetical, racially themed fighting words variant of the Chaplinsky v. New Hampshire, 315 U.S. 568, 572–74 (1942).

78. *See, e.g.*, Becker v. Kroll, 494 F.3d 904, 925 (10th Cir. 2007) (holding that the plaintiff must plead and prove "that a defendant's action caused her to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity" as a prima facie element of her claim); Cowley v. W. Valley City, 782 F. App'x 712, 720 (10th Cir. 2019) (unpublished opinion) (citing the same rule as *Becker*); Dye v. Office of the Racing Comm'n, 702 F.3d 286, 294 (6th Cir. 2012) (stating a similar rule to *Becker* and *Cowley*—that the plaintiff must make a prima facie case including providing evidence that "an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct").

79. *See, e.g.*, Javitz v. City of Luzerne, 940 F.3d 858, 863 (3d Cir. 2019) (quoting Baloga v. Pittson Area Sch. Dist., 927 F.3d 742, 752 (3d Cir. 2019)).

question of fact. Various normative judgments must inevitably be crucial to such an assessment, even if their crucial role is not acknowledged. Or consider the question of which of the many alternative future speech scenarios should be taken into judicial account, to one degree or another. This kind of inevitably speculative judicial inquiry also involves value judgments, as suggested, incidentally, by what contemporary philosophers call "possible worlds" analysis.[80]

At this late stage of the public employee speech cases, judgments as to legally sufficient firmness of character on the part of the plaintiff-speaker must, in effect, refer to what are thought of as reasonably close alternative possible worlds rather than to alternative worlds that are judged to be either factually, or normatively, "far" from our own.[81] Judges' determinations, in particular, as to whether a person of either ordinary or reasonable firmness would likely be deterred from conveying one message or another, in one venue or another, by some specified adverse action by the employer are not solely, or even primarily, a question of fact. Some set of normative policy judgments must, crucially, be built into any such legal judgments. And these essential normative or policy judgments as to causation will, equally clearly, often themselves be normatively controversial.

These conclusions as to public employee speech cause in fact issues certainly apply to other areas of the law as well. In general, our judgments as to matters of legal duty, reasonable care, and negligence are inseparable from, and may actually contribute to, our judgments as to cause in fact. Cultural standards of cause in fact, even as supposedly distinct from judgments as to proximate cause,[82] are crucially dependent on normative standards.[83] This will be true, as well, in many tort and

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80. *See* David Lewis, *Causation*, 70 J. PHIL. 556, 559 (1973) ("We may say that one [possible alternative] world is closer to actuality than another if the first resembles our actual world more than the second does, taking account of all the respects of similarity and difference and balancing them off one against another."). *See also* Cindy D. Stern, *Lewis' Counterfactual Analysis of Causation*, 48 SYNTHESE 333, 333 (1981) ("The truth value of a counterfactual is determined by the truth value of its consequent in those possible worlds in which the antecedent is true which are most similar over-all to the actual world."); Note, *Rethinking Actual Causation in Tort Law*, 130 HARV. L. REV. 2163, 2168 (2017) ("[C]ounterfactual [but-for] propositions . . . describe how things would have been if the world had been different, *but not that different*, from the way that it actually is.") (emphasis in the original).

81. *See* authorities cited *supra* note 80 (providing insight into the appropriate scope of a "possible worlds" analysis).

82. For discussion of the idea of proximate cause, and its contested relationship to cause in fact, see the authorities cited *supra* note 1 as well as William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369 (1950) and Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471 (1950).

83. *See, e.g.*, M.P. Golding, *Causation in the Law*, 59 J. PHIL. 85, 93 (1961) ("But I think it may still be true, as the late Felix Cohen maintained, that the more reprehensible the conduct, the

criminal legal contexts.

This conclusion may still sound somewhat counterintuitive. But it has long been argued that "the more reprehensible the conduct, the more readily will judges find a causal connection between the conduct and the injury complained of."[84] And there is some intriguing recent social science experimental evidence linking a person's norm-violating conduct with popular judgments of that person's conduct even as to cause in fact as well as to responsibility.[85]

Consider a simplified version of what we might call the hypothetical case scenario of No Available Pen.[86] In a law school office workspace, according to this hypothetical, there is a widely understood rule that faculty assistants, but not faculty members, may take a pen from the receptionist's desk. While this rule is widely known, widely understood, and not objected to, it is also violated in practice by faculty members. Thus, in practice, both faculty members and faculty assistants take pens. But the relevant rule is violated, again, only when faculty members take a pen.

On the day in question, the removal of pens from the receptionist's desk has left the receptionist, who is now in significant need of a pen, with no actually available pens. The number of pens taken by faculty and by faculty assistants can, if we wish, be varied, as can the question of who took the last pen. The key idea is that both faculty and faculty assistants are necessary, or but-for, causes, of the receptionist's current penlessness. Both groups are necessary, but, we assume, as separate groups not also sufficient causes of this penlessness. Only together, or jointly, are the two groups' pen-taking actions sufficient to cause the current unfortunate penlessness.

For several variations of this scenario, some experimental subjects are asked by the study's investigators whether the faculty members, in particular, have caused the problem. Of course, most typical respondents

more readily will judges find a causal connection between the conduct and the injury complained of."); Justin Sytsma, Causation, Responsibility, and Typicality 1 (Jan. 6, 2020) (preprint manuscript) (on file with University of Pittsburgh PhilSci Archive) [hereinafter Sytsma, Causation] (arguing "[t]here is ample evidence that violations of injunctive norms impact ordinary causal attributions"); Justin Sytsma, Structure and Norms: Investigating the Pattern of Effects for Causal Attributions (Nov. 9, 2019) (preprint manuscript) (on file with University of Pittsburg PhilSci Archive) [hereinafter Sytsma, Structure and Norms] (reporting that "[a]cross a range of cases in which two agents jointly bring about an outcome by performing symmetric actions, but with one violating a norm while the other does not, causal ratings are higher for the norm-violating agent.").

84. Golding, *supra* note 83 at 93.

85. As in the work of Justin Sytsma, Sytsma, Causation, *supra* note 83; Sytsma, Structure and Norms, *supra* note 83, and his colleagues cited therein, including Joshua Knobe & Ben Fraser, who wrote *Causal Judgment and Moral Judgment: Two Experiments, in* MORAL PSYCHOLOGY (Walter Sinnott-Armstrong ed.) (forthcoming).

86. Sytsma, Causation, *supra* note 83; Sytsma, Structure and Norms, *supra* note 83.

do not attempt to carefully distinguish between cause in fact and proximate cause. But importantly, typical experimental subject respondents do, as it turns out, tend to ascribe greater causal influence to faculty members than to faculty assistants.[87] One obvious possible explanation for this popular judgment is that the respondents tend to allow the faculty members' norm-violations—again, faculty members, but not faculty assistants, are barred from taking a pen—to influence their judgments as to actual causal efficacy.[88] Thus faculty members are typically thought of as more causally responsible for the outcome, beyond what their sheer numbers might suggest.

Any such experiment is doubtless open to variant interpretation. But, again, at a general level, it is certainly plausible that judgments as to cause in fact crucially depend on normative social judgments that may be stable, or that may change on normative grounds, over time.[89] To broadly extend our focus and concerns above, for example, it could certainly be argued that our attitudes toward child-raising and child safety have evolved over time and, crucially, that our judgments as to cause in fact in cases of child safety and related gun accidents have evolved,[90] at least to some degree, as well.[91]

## IV. CONCLUSION

It is fair to say that in the public employee speech cases, and in other contexts as well, questions of cause in fact are more complex, and more

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87. Sytsma, Causation, *supra* note 83; Sytsma, Structure and Norms, *supra* note 83.

88. Sytsma, Causation, *supra* note 83; Sytsma, Structure and Norms, *supra* note 83.

89. *See* Jane Stapleton, *Choosing What We Mean by "Causation" in the Law*, 73 MO. L. REV. 433, 464 (2008) (noting the adaptability of Wittgensteinian language games); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 11–12 (G.E.M. Anscombe trans.) (3d ed., 1968) (explaining that language and language-games evolve over time, pointing to changes in mathematics as a "rough picture" of this evolution).

90. *See, e.g.*, Glanville Williams, *Causation in the Law*, 19 CAMBRIDGE L.J. 62, 65, 83 (1961) (assuming what are now more controversial causal judgments); Philippa Foot, *Hart and Honoré: Causation in the Law*, 72 PHIL. REV. 505, 505–06 (1963) (arguing a gun sale as not a cause in fact of a future gunshot). We hereby set aside the particular complications of strict products liability, or liability without any fault.

91. Consider in particular the hypothetical posed by Professor Williams: "D owns a pistol. He is a bachelor, living alone, and leaves the pistol with some cartridges on his table. X, a small boy, enters and takes the pistol to play with. He fires and accidentally injures his companion P. It is clear that D is not liable, because he has not been negligent." Williams, *supra* note 28 at 83. One can, roughly sixty years later and in a culture with different normative judgments as to child safety, gun safety, and even gun possession, as well to physical risks and hazards in general, imagine a jury finding in such a case not only of D's negligence, but of D's cause in fact responsibility. *See, e.g.*, Brakkton Booker, *Democrats Introduce Bill Allowing Shooting Victims to Sue Gun Industry*, NPR (June 11, 2019 5:22 PM) https://www.npr.org/2019/06/11/731650947/democrats-introduce-bill-allowing-shooting-victims-to-sue-gun-industry [https://perma.cc/2NXT-QXL8]. In our own area of primary concern, that of public employee speech, public conceptions of and attitudes toward the virtue of fortitude can vary significantly over time.

deeply normatively infused, than is typically recognized by the courts and commentators. The initial gatekeeping cause in fact issue in *Garcetti*, bearing upon the genesis of the speech in question, turns out to be as much normatively charged and normatively contestable as it is a matter of anything like empirical investigation. Later-stage inquiries into whether some adverse act by the public employer would have deterred speech, of whatever sort and context, by a public employee of some specified degree of firmness and fortitude, are also essentially normative and similarly deeply contestable. And in these respects, the cause in fact issues presented by the public employee speech cases both reflect, and shed light upon, cause in fact determinations throughout tort and criminal law more generally.