RETALIATION AND THE RULE OF LAW IN TODAY'S WORKPLACE

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I. INTRODUCTION

The primary aim of this Article is to justify revising and expanding today's law of workplace retaliation. The argument emphasizes, in particular, the meaning and value of the rule of law, in a broad sense, in workplace retaliation cases. As it turns out, based on the rule of law and other values, the case law, on balance, under-protects employees against retaliation by both private and public employers. This holds in typical status-based civil rights and non-discriminatory contexts[1] and in the area of public employee freedom of speech as well.[2]

Retaliation claims brought by employees against their employers are a substantial and increasing component of the broad civil rights docket.[3] Specifically, retaliation claims brought under the statutes administered by the federal Equal Employment Opportunity Commission nearly doubled between 1997 and 2009.[4] Retaliation claims have steadily increased as a percentage of all claims, over the same time frame, from 22.6 percent to 36.0 percent.[5] Yet there are reasonable grounds to conclude that such claims are still, on balance, under filed.[6]

More generally, claims of retaliation can be brought pursuant to a variety of federal civil rights statutes against employers and non-employers alike. Such statutes include, prominently, Title VII of the Civil Rights Act of 1964.[7] Among other relevant federal statutes are

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1. *See* discussion *infra* Part II(B).

2. *See* discussion *infra* Part III. Secondarily, our inquiry may shed light on the admittedly vague idea of the rule of law itself. *See* discussion *infra* Part II(A) in particular.

3. *See Charge Statistics, FY 1997 Through FY 2009*, US. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Nov. 12, 2010).

4. *See id.*

5. *See id.*

6. *See* discussion *infra* Part II(B), in the context of Part II(A).

7. 42 U.S.C. §§ 2000e to 2000e-17 (1991). *See, e.g.*, Freitag v. Ayers, 468 F.3d 528, 541 (9th Cir. 2006) (quoting "a plaintiff may meet his burden of proof for a claim of retaliation under Title VII by showing, by a preponderance of the evidence, (1) involvement in protected activity opposing an unlawful employment practice, (2) an adverse employment action, and (3) a causal link between the protected activity and the adverse

Section 504 of the Rehabilitation Act of 1973,[8] the Americans With Disabilities Act of 1990,[9] Title IX of the Education Amendments Act of 1972,[10] Title 42 Section 1981 on racial discrimination in contracting,[11] Title 42 Section 1982 on racial discrimination with regard to property,[12] and the federal-sector provision of the Age Discrimination in Employment Act of 1967.[13] Retaliation claims, particularly against an employer, are thus widely available, whether the potential remedy is exclusively equitable or not.[14]

Courts have also focused on possible underlying purposes for allowing retaliation claims, whether such claims are expressly provided for by a particular statute or not.[15] In explaining the value of retaliation claims against an employer, courts have pointed to several considerations, some partly independent of the substantive focus of the particular civil rights or anti-discrimination statute in question. The Supreme Court explained:

> Thus in the context of Title VII, but with broader applicability, the Supreme Court of the United States has distinguished the underlying substantive anti-discrimination aim from that of the anti-retaliation provision in the following terms: The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of

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action") (citation omitted). *See also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006) (providing a somewhat broader approach to these requirements).

8. 29 U.S.C. § 794 (1973). *See, e.g.*, Reinhardt v. Albuquerque Pub. Schools Bd. of Educ., 595 F.3d 1126, 1132-33 (10th Cir. 2010).

9. 42 U.S.C. § 12101 (1990). *See Reinhardt*, 595 F.3d at 1131 (explicitly applying similar standards for retaliation claims under the Rehabilitation Act and the Americans With Disabilities Act). *But cf.* Alvarado v. Cajun Operating Co., 588 F.3d 1261, 1270 (9th Cir. 2009) (ADA retaliation claims, like certain other statutory claims, are eligible only for equitable relief, and not for compensatory or punitive damages) (citation omitted). For further discussion of third-party retaliation claims against an employer under both the Rehabilitation Act and Title II of the ADA, see *Barker v. Riverside County Office of Education*, 584 F.3d 821 (9th Cir. 2009).

10. 20 U.S.C §§ 1681-88 (2006). *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173-76 (2005); *see also* CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 1958 (2008).

11. 42 U.S.C. § 1981 (1991). *See CBOCS West Inc.*, 128 S. Ct. at 1954-55.

12. 42 U.S.C. § 1982 (1990). *See CBOCS West Inc.*, 128 S. Ct at 1955 (citing *Jackson*, 544 U.S. at 176; Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969)). *See also* Gomez-Perez v. Potter, 128 S. Ct. 1931, 1936 (2008).

13. 29 U.S.C. § 633a (2006). *See Gomez-Perez*, 128 S. Ct. at 1936-37. This statutory area is among those in which a cause of action for retaliation has been judicially inferred, rather than unequivocally created by an explicit statutory textual provision. *See id.* For discussion of retaliation claims under statutes administered by the Equal Employment Opportunity Commission, see the persuasive, but not necessarily binding, EEOC COMPLIANCE MANUAL, SECTION 8: RETALIATION, http://www.eeoc.gov/policy/docs/retal.html (last visited Dec. 28, 2010). On the persuasive status of the EEOC Compliance Manual in general, see *Alvarado*, 588 F.3d at 1270 n.7.

14. See the broad discussion in *Alvarado*, 588 F.3d at 1264-70.

15. For discussion, see, e.g., *Gomez-Perez*, 128 S. Ct. at 1936-37.

> their racial, ethnic, religious, or gender-based status . . . . The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.[16]

The United States Supreme Court reformulated the basic purpose of the anti-retaliation provision as that of "[m]aintaining unfettered access to statutory remedial mechanisms,"[17] and "to ensure that employees are 'completely free from coercion against reporting' unlawful practices."[18] More concretely, the Court has also observed that if "an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others."[19]

This Article has no objection to thinking of anti-retaliation provisions in civil rights and other statutes as indirectly promoting the particular substantive non-discrimination aims of the statute in question. This Article's major thesis, however, is that anti-retaliation provisions, whether express or judicially inferred, often reflect an important additional value. This Article refers to this broad, fundamental, and unavoidably hazily expressed value as the "integrity of the rule of law."

In this context, the idea of the integrity of the rule of law applies to both private and public employers when any official formal or informal mechanism or channel authorizes, or requires, an employee to answer questions in good faith or to present the employee's thoughts on any matter implicating a protected civil right. The official mechanism may be as formal and as generally available as grand jury, trial, or legislative testimony; discovery; or administrative proceedings. Or, the official mechanism may be as informal as authorized channels for internally investigating, reporting, or discussing matters related to possible civil rights violations.

In such cases, the integrity of the rule of law value requires restraint, openness, consistency, and responsibility, particularly on the part of the employer. There must be fidelity and respect for the sus-

16. *Burlington N.*, 548 U.S. at 63.

17. *Id.* at 64 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)) (adding, in consequence, that "the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment").

18. *Burlington N.*, 548 U.S. at 67 (quoting NLRB v. Scrivener, 405 U.S. 117, 121-22 (1972)). For discussion, see *The Supreme Court, 2005 Term Leading Cases: Standard For Retaliatory Conduct*, 120 HARV. L. REV. 312, 313 (2006) (referring in connection with *Burlington Northern* to "reducing deterrents to employee claims").

19. Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846, 852 (2009).

tained operation and integrity of the channels in question. This is true whether those channels are largely independent of the employer's own commitments, as in the case of most legal or administrative hearings, or are largely internally designated channels for the good faith discussion of matters such as sexual harassment.

This Article's main thesis is that properly providing for retaliation claims, under any appropriate civil rights-oriented or other anti-discrimination statute or constitutional provision, promotes the integrity of the rule of law as described herein.[20] This, in itself, is an important, and in fact fundamental, value. And in general, any employer retaliation or threat of retaliation, whatever its nature and severity (or lack thereof), amounts to an attack on that integrity.

But even more crucially, from the standpoint of the immediate parties, a proper focus on the integrity of the rule of law provides a better general perspective on retaliation cases. In particular, focusing on the rule of law's integrity exhibits how anti-retaliation values are being unjustifiably under-enforced in both private[21] and public[22] employer cases. These cases include not only what is thought of as typical status-based civil rights and anti-discrimination cases,[23] but public employee freedom of speech cases as well.[24] The integrity of the rule of law will often require an appropriate judicial response to any act or threat of intentional retaliation, regardless of whether the employee suffered material harm from, should have resisted, or did resist any threatened or actual retaliation however apparently minimal that retaliation might have been.[25]

II. RULE OF LAW INTEGRITY AND THE PRIVATE EMPLOYER CASES

A. THE IDEA OF THE RULE OF LAW

It is not immediately easy to work with the idea of the rule of law. The idea in general lacks clarity,[26] perhaps even internal consistency.[27] Some formulations of the idea are too narrow for this Article's purposes, focusing merely on formal laws publicly made and

20. *See* discussion *infra* Parts II(A), II(B), III.
21. *See* discussion *infra* Part II(B).
22. *See* discussion *infra* Part III.
23. *See* discussion *infra* Part II(B).
24. *See* discussion *infra* Part III.
25. *See* discussion *infra* Parts II(A), II(B), III.
26. *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2004); *see also* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997).
27. *See* Fallon, *supra* note 26, at 1.

publicly administered by judicial bodies.[28] Some classic formulations elaborate on more dimensions of the rule of law than are realistically required for this Article's purposes.[29]

Perhaps no standard treatment of the rule of law, of the sort typically focusing on constitutions, statutes, and their implementation and interpretation by courts and other public officials, precisely fits this Article's concern. This Article's context is that of private and public employers and employees, various sorts of workplaces and disputes, as well as various formal and informal means of investigating and processing relevant claims.

But at least some flavor of the integrity of the rule of law value is conveyed in the thoroughly familiar formula of the rule of law as distinguished from the rule of persons, or of men. This general idea recurs throughout the case law.[30] In particular, Professor Brian Tamanaha has recently written of "the primacy of the rule of law as distinct from the rule of persons"[31] as important to the idea of the rule of law.[32]

In itself, and as fairly adapted to private and public work place-process contexts, this sense of the rule of law suggests that the integrity of any officially recognized relevant process requires consistent and meaningful employer respect for that process. Such respect cru-

28. *See* TOM BINGHAM, THE RULE OF LAW 8, 37 (2010).

29. *See* LON FULLER, THE MORALITY OF LAW 33-94 (rev. ed. 1969) (the eight principles of legality as encompassing operation through general norms; promulgation to those bound by the law; general prospectivity of application; clarity as opposed to unintelligibility; mutual consistency and joint fulfillability of legal requirements; realistic possibility of compliance by those bound; sufficient continuity in the law to allow for general familiarity; and a general congruence between the law's formal norms and the law's norms as actually practiced). For discussion, see, e.g., MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 101-186 (2007). As appropriately interpreted, "Fuller's theoretical framework compendiously summarizes all the essential properties of the rule of law." *Id.* at 185. See also the classic discussion in A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION part II, ch. IV (8th ed. 1915). See also the contemporary treatments in N.E. SIMMONDS, LAW AS A MORAL IDEA (2007) and Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 55 (2008) ("[a] philosophy of law is impoverished as a general theory if it pays no attention to the formalized procedural aspects of courts and hearings or to more elementary features of natural justice . . . ."). For judicial insight into something like an integrity of administrative process value, see *Crowell v. Benson*, 285 U.S. 22, 93, 94 (1932) (Brandeis, J., dissenting) (emphasizing several practical benefits of a well-respected administrative adjudication process).

30. *See, e.g.,* Carey v. Musladin, 549 U.S. 70, 80 (2006); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 293, 295 n.3 (1998) (Steven, J., dissenting): Franklin v. Gwinett Cnty. Pub. Schools, 503 U.S. 60, 66 (1992); Cox v. Louisiana, 379 U.S. 559, 562 (1965); and the classic opinion of Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

31. TAMANAHA, *supra* note 26, at 140.

32. Professor Tamanaha actually detects three "clusters of meaning" of the rule of law. *Id.* at 137. These clusters include, beyond the above, that the government is limited by law and that a rule-based formal legality exists. *Id.* at 139.

cially requires refraining from imposing, somehow threatening, or condoning any degree of retaliation for the good faith participation by an employee, voluntarily or otherwise, in the processes in question. If an employer establishes or recognizes such processes but later imposes or validates any degree of retaliation based on an employee's good faith cooperation with such processes, the employer has hypocritically engaged in the civilized processing of disputes and potential disputes. The employer thus has failed to appropriately respect rule of law integrity values.

Merely for the sake of one concrete example of such a process, consider the case of *Weger v. City of Ladue*[33] discussing a police department sexual harassment policy.[34] Under the policy in question, all employees were "required to report observed acts of harassment to a supervisor and failure to do so [was] grounds for discipline."[35] The policy in question detailed "a comprehensive complaint procedure,"[36] and concluded by prohibiting "retaliation against complainants and those participating in complaint investigations."[37]

Particularly, though, when the employer makes the reporting of observed harassment mandatory,[38] and expressly forswears at least some degrees or forms of retaliation,[39] the employer makes an even stronger representation that an employee need not, or even must not, attempt a standard cost-benefit analysis in deciding whether to utilize the officially authorized process.[40] In this Article's view, any degree or form of intentional retaliation amounts to a form of contempt for the employees concerned and more generally for the rule of law's integrity.

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33. 500 F.3d 710 (8th Cir. 2007).

34. Weger v. City of Ladue, 500 F.3d 710, 715-17 (8th Cir. 2007).

35. *Weger*, 500 F.3d at 715.

36. *Id.* at 715.

37. *Id.*

38. *See supra* note 35 and accompanying text.

39. *See supra* note 37 and accompanying text.

40. It has been argued that "[d]ecisions about whether to challenge discrimination rest on a careful balancing of the costs and benefits of doing so." Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 36 (2005). While some of the risks or costs of such reporting may be quite accurately assessed by typical employees, others may not, or perhaps cannot possibly be, under the state of the law. Even with legal counsel, it may be almost entirely unclear, for example, whether there is a sufficient objectively reasonable basis for an employee's claim of retaliation, or whether the employee has suffered a sufficient material deprivation to bring a successful retaliation claim. *See, e.g.*, Burlington N. & Santa Fe Ry. Co.v. White, 548 U.S. 53, 67-68 (2006). Potential complainants may, for various entirely understandable reasons, delay in reporting harassment or other discrimination, without realizing that such delay in reporting may be used against them. *See, e.g., Weger*, 500 F.3d at 715. See also the employer's affirmative defense established in *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998).

Before these theses in the context of the case law are considered, several clarifications should be offered. First, it should be recognized that the idea of employer "retaliation" against an employee can be ambiguous. This Article's main focus will be on employer retaliation in the sense of actual or threatened punishment in connection with an employee's involvement in some authorized process associated with an underlying civil rights claim. The word "retaliation" can also refer to when an employer punishes employee speech on any subject, spoken outside of any official channel or process used for addressing underlying civil rights-related grievances, such as when a government employer disciplines a public employee for speaking in any forum from a viewpoint disfavored by the government employer.[41]

This Article's narrow emphasis on the employer's alleged retaliation for an employee participating in some sort of official process or mechanism should also be clarified. This Article's concern for the integrity of the rule of law in this process-emphasizing sense leads, in Title VII terms, to a focus mainly on what are called "participation" claims as distinguished from "opposition" claims.[42] The basic idea here is that an employee has many ways to oppose alleged discrimination other than by participating in some sort of official process, and that participating in such a process need not involve opposing alleged discrimination.[43] This is, of course, not to deny the possibility that "participation" claims and "opposition" claims can, in practical terms, overlap.[44]

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41. This distinction is recognized and discussed by Judge Easterbrook in *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009), a free speech case brought under Section 1983 and subject to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which nevertheless involved alleged attempts to deter formal testimony. For a survey of free speech "retaliation" claims, see, for example, Elizabeth Bohn, *Put On Your Coat, A Chill Wind Blows: Embracing the Expansion of the Adverse Employment Action Factor in Tenth Circuit First Amendment Retaliation Claims*, 83 DENV. U. L. REV. 867 (2006).

42. For this statutory distinction, see Title VII of the Civil Rights Act of 1964, 78 Stat. 253, codified as amended at 42 U.S.C. 2000e-3(a) (2006).

43. For one particular context, see *Crawford v. Metropolitan Government of Nashville*, 129 S. Ct. 846, 852 (2009). *Crawford* held that the "opposition" clause of Title VII extends to an employee's answering the employer's investigatory questions concerning a complaint brought by a co-worker, where the employee in question did not take the initiative with regard to her participation. *Id.*

44. For example, "participation" and "opposition" claims may overlap in a case like *Crawford*. *Crawford*, 129 S. Ct. at 852. *See* Megan E. Mowrey, *Discriminatory Retaliation: Title VII Protection for the Cooperating Employee*, 29 PACE L. REV. 689, 691 (2009) (arguing that Title VII protects workers in Crawford's position under both the "participation and "opposition" clauses). The relevant statutory language in question reads as follows: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has *opposed* any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter." *Id.* at 690 (quoting the statutory section cited *supra* note 42) (emphasis added to highlight the distinction in question).

Finally, it should be specifically emphasized that contrary to established case law, the limits of what should be protected against employer retaliation should be set primarily by the employee's good faith in the employee's underlying "participation," and not by the employee's judicially-determined objective reasonableness in so acting. As the law stands, generally a retaliation plaintiff "must show that he had a good faith, reasonable belief that the underlying challenged actions of the employer violated the law."[45] This involves an ultimately unfortunate objective reasonableness element.

The law as it stands thus requires both good faith and the objective reasonableness of the employee's belief in the illegality, which is presumably under some relevant civil rights statute, of the employer's conduct.[46] Of course, it is possible for an employer to retaliate against employee testimony that does not, in the slightest, imply that the employer has engaged in illegal conduct, or that the employee believes that the employer engaged in illegal conduct. However, this Article will set such cases aside as an unnecessary complication.

The issue at this point is whether a good faith requirement should have been supplemented with a reasonableness-of-belief test. And in a sense, it is admittedly hard to reasonably argue against "reasonableness." Nevertheless, in this context, realistically understood, the aim of promoting respect for the integrity of the rule of law is likely better served by omitting an objective reasonableness requirement of the employee's belief that the employer has relevantly violated the law.

This may seem odd, however, in that the Section 1983 qualified immunity defense cases have a somewhat similar idea of requiring a showing that the government defendants' belief in the legality of their own conduct was objectively reasonable.[47] The qualified immunity defense for government actors focuses on whether, at the time of their actions, a reasonable person in the position of the government actor defendant would or would not have known that his conduct, described at a specific level, violated clearly established, if not technically controlling, case law.[48]

The *Harlow v. Fitzgerald*[49] objective reasonableness test for such cases is indeed judicially quite familiar. In fact, since 1982, the *Fitzgerald* case has attracted a total of 57,876 West Keycite references as

45. Riscilli v. Gibson Guitar Co., 605 F. Supp. 2d 558, 565 (S.D.N.Y. 2009).

46. *Riscilli*, 605 F. Supp. 2d at 565.

47. The central case in this regard is *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). *See also* Anderson v. Creighton, 483 U.S. 635 (1987).

48. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Anderson v. Creighton, 483 U.S. 635 (1987).

49. 457 U.S. 800 (1982).

of June 2, 2010.[50] By contrast, the legendarily frequently cited case of *Chevron v. NRDC*[51] has been cited 56,569 times on the same metric.[52] One question is whether the enormous number of *Fitzgerald* citations, confined to government defendants sued in their personal capacity, necessarily means that the law is actually working well. Mountainous stacks of case law applications might instead indicate lack of clarity in an important area of the law.

And when courts and practitioners try to apply an objective reasonableness test to a fast food worker's belief that the employer's conduct violates the intricate law of, say, sexual harassment, or age or disability discrimination, the obvious risk of entirely losing any realistic sensitivity to the actors, their capacities, and the situation arises. Private sector employees at various levels of literacy, language fluency, age or experience, and cultural familiarity may be unfamiliar with and have only a modest grasp, at best, on what violates, for instance, a statute on disability discrimination. The potentially misleading form of supervisor inquiries may even prompt or discourage these employees' actions.[53]

To expect, for example, private fast food workers or most other groups of workers to be able to apply the objective reasonableness test for a half-dozen potentially relevant statutes departs dramatically from common sense and arbitrarily burdens employees whose jobs are possibly at stake. The law of retaliation should instead protect employees who speak in good faith, who do not willfully abuse a reporting system or act with malice, or who repeatedly bring the same complaint for the same alleged act. In any event, such a rule seems to most realistically and reasonably accommodate the various interests at stake, including the public interest of employer respect for the integrity of the rule of law.

B. Private Employer Retaliation Under *Burlington Northern* and Related Case Law

The standards adopted by the Supreme Court of the United States for retaliation claims under Title VII[54] are set forth largely in *Burlington Northern & Santa Fe Railway v. White*.[55] To simplify for

50. *See* the citing references under the Westlaw Keycite system to the *Harlow* case.
51. 467 U.S. 837 (1984).
52. *See* the citing references under the Westlaw Keycite system to *Chevron*. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Of course, *Chevron*, decided two years after *Fitzgerald*, has been cited more frequently on a per-year basis.
53. *See, e.g.*, Riscili v. Gibson Guitar Corp., 605 F. Supp. 2d 558, 565-67 (2009).
54. 42 U.S.C. §§ 2000e to 2000e-17 (1991).
55. 548 U.S. 53 (2006).

this Article's purposes, Sheila White brought an underlying claim of sex discrimination in employment and several allegedly causally related claims of prohibited retaliation.[56] As found by the trial jury and upheld by the Supreme Court, the specific forms of retaliation involved were a particular reassignment to purportedly less desirable work and a thirty-seven-day suspension without pay, where the sum in question was only later recovered by White as back pay.[57]

The Supreme Court in *Burlington Northern* rejected the idea that employer retaliation involving no cognizable harm to the victim, or harm only below a certain threshold level, could be actionable as a Title VII retaliation claim.[58] The Court specified that a plaintiff claiming retaliation "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[59]

The Court then explained that the point of the "materiality" requirement was to distinguish and screen out "trivial" from "significant" harms.[60] Title VII, the Court emphasized, did not attempt to promulgate "a general civility code for the American workplace."[61] Additionally, the point of the "reasonable" employee standard was to implement the Court's belief that "the . . . standard for judging harm must be objective."[62] The value of an objective standard, in turn, was said to lie in its relative ease of judicial administrability,[63] and its

56. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 58-59 (2006).

57. *See Burlington N.*, 548 U.S. at 67-68.

58. *See id.*

59. *Id.* at 68 (internal quotation marks omitted) (citations omitted). There may appear to be some internal tension in the Court's formulation, which here employs both the stronger "would" and the weaker "might." But there is technically no necessary inconsistency here. The idea may be that a reasonable worker would (definitely) have found that, under the circumstances, he or she might (not would) have been deterred or dissuaded from complaining (perhaps retroactively). The logic, though a bit delicate, may be akin to someone's confidently saying that he or she definitely would, under the circumstances, have found that the threat might, or might well, have had a real deterrent effect. In general, we can sometimes say for certain that we would be uncertain under specified circumstances. Or so one could interpret the Court's "materially adverse" effect standard.

60. *Id.*

61. *Id.* (quoting Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998)). Related, a hostile environment sufficient to amount to discrimination in the terms and conditions of employment must be more substantial than a mere breach of a "general civility code." Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998). *See also* Courtney J. Anderson DaCosta, *Stitching Together the Patchwork:* Burlington Northern's *Lessons for State Whistleblower Law*, 96 GEO. L. J. 951, 966-67 (2008). For a broader discussion, see B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 480-81 (2008); Jordan v. Alt. Res. Corp., 458 F.3d 332, 355 n.5 (4th Cir. 2006) (King, J., dissenting).

62. *Burlington N.*, 548 U.S. at 68.

63. *See id.* at 68. *But see supra* notes 50-52 and accompanying text.

avoidance of uncertainties and unfair discrepancies that may result from judicial inquiries into "unusual subjective feelings."[64]

On the other hand, the Court's emphasis on objectivity[65] was complicated by a concern for particularity, circumstances, and specific context.[66] The reasonableness standard was then further characterized—subjectivized, actually—as focusing on "the perspective of a reasonable person *in the plaintiff's position*."[67] The Court's concern thus extended to an act's "real social impact,"[68] given the subtleties of circumstances, expectations, and actual, testified-to workplace relationships.[69] Quite realistically, the Court observed, or conceded, that a particular work schedule change might be inconsequential to many workers, but can be construed as retaliatory, inconvenient, expensive, punitive, and an effective deterrent—retroactively or prospectively—to a parent with substantial child-care responsibilities.[70]

Taken together, the *Burlington Northern* test for a material adverse harm in alleged retaliation cases sought to somehow combine, in some largely unclarified way, the supposed virtues of an objective standard—low cost and avoidance of unduly broad anti-retaliation rules that might reward employee hypersensitivity—with a more costly and judicially demanding individualized, testimony-based inquiry into particular workplace circumstances, for the sake of sensitivity.

Even as best and most generously interpreted, however, the *Burlington Northern* "material adversity" standard for Title VII retaliation claims does not appropriately accommodate the integrity of the rule of law value.[71] Nor is the test likely, in practice, to prove sufficiently sensitive to the often unprovable, but quite genuine, risks and costs often faced by vulnerable workers considering retaliation claims. Hence, again, this Article's recommended focus is on good faith, rather

64. *Burlington N.*, 548 U.S. at 68-69.
65. *See id.* at 69.
66. *See id.*
67. *See id.* at 69-70 (emphasis added).
68. *See id.* at 69.
69. *See id.*
70. *See id.* Work schedule changes of as little as a half hour might also sabotage a disfavored employee's chances of taking a class or pursuing a degree. Greater or lesser numbers of assigned work hours can of course also be significant. *See generally* JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE (1993). For criticism of *Burlington Northern*'s consideration of significant realistic differences among employee circumstances, on grounds of a loss of uniformity in the law, undue breadth, unpredictability, arbitrariness, and unnecessary cost, see Julia S. Lee, *Walking On Eggshells: The Effect of the* United *States Supreme Court's Ruling in* Burlington Northern Santa Fe Ry. Co. v. White, 41 LOY. L.A. L. REV. 683, 697-99 (2008); Yvette K. Schultz, *Runaway Train: The Retaliation Scene After* Burlington Northern v. White, 68 LA. L. REV. 1025, 1026-27 (2008).
71. *See* discussion *supra* Part II(A).

than on the hopeless and entirely unrealistic quest for objectivity, in limiting retaliation claims. Additionally, this Article's focus is on some legal response to any intended retaliation of any degree, rather than seeking to distinguish, in a federal courthouse, between materially adverse consequences of retaliation and the consequences of retaliation that the court does not recognize at all or fails to recognize as being materially adverse.

It is useful to remember that the working lives and circumstances of those who rule, administratively or judicially, on retaliation claims tend to differ from those of the workers who file the retaliation complaints. At an even greater distance are those workers who are intimidated from or otherwise unwilling to file any such complaint, whatever its validity. Under any labor market conditions, the circumstances of work can vary enormously, along dimensions that may not even be recognized.

By way of illustrating this point, consider one supermarket box boy quoted by noted author Studs Terkel: "You were supposed to get a ten-minute break every two hours. I lived for that break. You'd go outside, take your shoes off, and be human again. You had to request it. And when you took it, they'd make you feel guilty."[72] Worker frustrations more generally can be internalized,[73] or re-directed against lower status co-workers.[74] Legal rules can be undermined in their effectiveness by workplace rules justified on independent grounds.[75] Punishments can come in innumerable degrees of severity, informality, cumulativeness, indirectness, and duration.[76] Rules solemnly adopted by the Supreme Court can be variously bypassed, minimized, or ignored at the expense of unusually vulnerable workers.[77] Case law principles and tests should modestly seek to take some account of the differences in working worlds between say, Article III[78] judges, and more typical workers in inhospitable labor markets.

The case law illustrates how the cumulative effect of even micro-aggressive employer retaliations can be demoralizing to a reasonable

72. STUDS TERKEL, WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO 281 (2004 ed. 1972).

73. *See id.*

74. *See id.*

75. It has been observed, for example, that "[r]ules against 'gossip,' or even 'talking,' make it harder to air your grievances to peers." BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 209 (2008 ed. 2001).

76. *See id.*

77. *See id.* at 207 (noting that "it is illegal to punish people for revealing their wages to one another, but [that] the practice is likely to persist until rooted out by lawsuits, company by company"). *See also* DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 137 (2004) ("[s]ome firms even reject people who had sued former employers for racial discrimination or sexual harassment").

78. U.S. CONST. art. III.

employee, especially given the crucially social nature of many workplaces and many forms of work. Each such element of retaliation, though, can always be otherwise justified on some pretext, or dismissed as trivial rather than materially adverse, even in combination.[79] A series of petty, vaguely demeaning, and isolating impositions on workers with any underlying grievances can send a clear and unmistakable message to the aggrieved workers and their potential allies, even if not to a reviewing court,[80] and even if the underlying grievances are themselves processed fairly.

As well, courts should be more alert to the retaliatory intent and impact of what might be called workplace "collective punishments." In some cases, the employer may retaliate by burdening or sanctioning many or all employees in the same way, thus blurring the retaliatory issues of intent and causation.[81] The problem is that many "innocent" employees may blame the newly imposed burdens and petty inconveniences on the complaining employees, or on their fellow employees, along with the employer.

Relatedly, an employer may retaliate not directly against any complaining worker, but against the complaining worker's allies, friends, or relatives, some of who may not have engaged in any statutorily protected activity.[82] The retaliatory point and impact, however, could still be clear to the affected parties, if not also to a reviewing court.

Given this Article's emphasis on the integrity of the rule of law value, the courts should be willing to address any form and degree of retaliation in which the employee, having the burden of proof, can show the employer's intent to retaliate and sufficient evidence of causation.[83] On a standard any more demanding, courts undermine rule of law values and run a serious risk of misunderstanding the social interactive dynamics of many workplaces—underestimating the subtle, but actually quite significant, effects of what may strike a reviewing court as relatively superficial, avoidable, or trivial.[84]

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79. *See, e.g.*, Weger v. City of Ladue, 500 F.3d 710, 716-17 (8th Cir. 2007).

80. *See Weger*, 500 F.3d at 726-27 (seeking to sort out "significant from trivial harms").

81. *See id.* at 726.

82. *See, e.g.*, Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011) (expanding the scope of protected emloyees to include a fiance).

83. *See, e.g.*, Barrett v. Whirlpool Corp., 556 F.3d 502, 519 (6th Cir. 2009) (a complaint of employer retaliation that relies on guesswork, speculation, subjective belief, or unsubstantiated intuition as insufficient, on the causation issue, to withstand the employer's motion for summary judgment) (citation omitted).

84. See, for example, the retaliation standard set forth in the Rehabilitation Act case of *Reinhardt v. Albuquerque Pub. Schools*, 595 F.3d 1126, 1133 (10th Cir. 2010) (seeking to distinguish in practice, under a "material adversity" standard, alleged retaliatory acts carrying "a significant risk of humiliation, damage to reputation, and a con-

Even if the rule of law integrity concerns are set aside, the law as it stands under-recognizes the extent and degree to which workers, and young workers in particular, value the often subtle social dimensions of work, including a subjective sense of collegiality, connectivity, mutual respect, informality, open communication, and congeniality in the workplace.[85] Workers often desire employers or supervisors not undermine these social dimensions of work. But workers certainly also can have a strong reluctance to jeopardize these social dimensions of work by filing a retaliation claim, or otherwise rocking the proverbial boat, even in tight labor markets, given the possible consequences noted above.[86]

III. THE RULE OF LAW IN PUBLIC EMPLOYER FREE SPEECH CASES: *GARCETTI* AS TRAVESTY

Commonly, the many *Garcetti v. Ceballos*[87] public employee free speech cases do not involve the form of retaliation on which this Article has concentrated above. Typically, the plaintiffs in such cases do not allege that they were punished for utilizing some officially established channel or mechanism to raise or otherwise address some broadly civil-rights-oriented employment grievance. The disfavored speech could take any subject and could occur in any medium. The *Garcetti* case itself involved a government-employed deputy district attorney who alleged he was sanctioned for officially disfavored speech when he recommended a criminal case of alleged government misconduct be dismissed in a case disposition memorandum.[88]

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comitant harm to future employment prospects" from "a mere inconvenience or an alteration of job responsibilities") (citation omitted). We might have more confidence in the theory of this distinction if alteration of job responsibilities were not so frequently vulnerable to abuse as a method of constraint, penalty, or humiliation.

85. *See, e.g.*, Lauren Leader-Chivee, et al., *Networking the Way to Success,* ENTREPRENEUR, June 6, 2010, http://www.entrepreneur.com/tradejournals/article/200784523.html (last visited March 13, 2011); Richard J. Harmer & Bruce N. Findlay, *The Effect of Workplace Relationships on Employee Job Satisfaction For 25-33 Year Olds* (SWINBURNE RESEARCH BANK CONFERENCE PAPER), http://www.google.com/url?sa=t&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fimages.sistercherry.multiply.multiplycontent.com%2Fattachment%2F0%2FS4-MOAooCqgAAHEsL8M1%2FJob%2520satisfaction%2520and%2520workplace%2520relationships.pdf%3Fnmid%3D321676020&rct=j&q=the%20Effect%20of%20Workplace%20Relationships%20on%20Employee%20Job%20Satisfaction%20For%2025-33%20Year%20Olds%20&ei=ERKATdWRN8ma0QGUl6SACQ&usg=AFQjCNF05E05qypRGrnecZdJ67O549vefQ&cad=rja (last visited March 13, 2011).

86. *See supra* notes 73-82 and accompanying text. It is also possible that a coworker might resent even a justified claim of retaliation, independent of any likely reaction by the employer. But this kind of case may be hard to sort out from those in which other employees fear that even a legitimate retaliation complaint may make things harder—more tedious, more formal, more structured and rule-bound—for others.

87. 547 U.S. 410 (2006).

88. *See* Garcetti v. Ceballos, 547 U.S. 410, 413-16 (2006).

At the most general level, a public employee bringing a free speech claim against a government employer must show at a minimum that the speech was constitutionally protected, that "adverse employment action" was taken, and that the protected speech was a substantial or motivating factor underlying the adverse reaction.[89] The government employer then has the opportunity to show that the adverse employment action would have been taken against the employee, even in the absence of the protected speech.[90]

This broad formulation, however, thus far leaves open the question of when and on what theory the underlying public employee speech is constitutionally protected. The *Garcetti* case is at this point decisive. *Garcetti* reaffirmed previous cases that had required that in order to be protected, the speech in question must have been on a subject matter of public interest and concern.[91] In the case at issue, the interests of the public employee in speaking out on that matter of public interest outweighed the government's interests as an employer in the workplace efficiency and operational functioning of the government agency.[92]

What the Supreme Court of the United States in *Garcetti* crucially clarified, if not simply added, was a preliminary requirement. Specifically, the government employee must show that her speech was not uttered pursuant to or in the course and scope of her actual government job responsibilities or duties.[93] Vitally, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[94]

Public employee speech conveyed as a matter of one's genuine employment responsibilities is thus constitutionally unprotected from governmental retaliatory discipline. This is true regardless of the gravity, significance, insider perspective, or indispensability to any meaningful public discussion of a crucial public issue, and regardless of the degree to which the interests of the employee in speaking, or of

89. *See* Marable v. Nitchman, 511 F.3d 924, 929-30 (9th Cir. 2007) (developing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

90. *See Mt. Healthy*, 429 U.S. at 287; Chavez-Rodriguez v. City of Santa Fe, 596 F.3d 708, 713 (10th Cir. 2010).

91. *See Garcetti*, 547 U.S. at 418 (citing Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968)).

92. *See id.* at 417 (citing *Pickering*, 391 U.S. at 568); *see also* Rankin v. McPherson, 483 U.S. 378, 384 (1987).

93. *See Garcetti*, 547 U.S. at 421.

94. *Id.*

the public in hearing the speech in question, might outweigh the interest in governmental workplace effectiveness.[95]

For this Article's purposes, the most crucial question is thus whether the public employee "speaks as a citizen rather than pursuant to his official duties."[96] The focus in such cases is said to not be merely on the formal, official duties of an employee as expressed in a formal written job description or manual, but on "the employer's real rules and expectations . . . ."[97] As Judge Michael McConnell expressed the limitation, "employee speech that is 'pursuant' to the [public] employee's professional duties is not accorded First Amendment protection under *Garcetti*."[98]

Not surprisingly, *Garcetti* has created uncertainties, from its possible applicability to cases involving academic freedom,[99] to the current circuit split over whether the complainant's speech falling or not falling within her job responsibilities is a pure question of law for the courts or a mixed question of law and fact.[100]

But the immediate problem, from this Article's perspective, is that *Garcetti*'s distinction between speaking as a public employee and speaking as a citizen, with free speech protection even potentially available only in the latter cases, creates the possibility not only for arbitrariness, but also for sheer travesty. The *Garcetti* test, in this respect, will often fail to properly consider constitutionally protecting responsible public employee speech from obvious retaliation by the employer, where such protection would clearly promote important rule of law values.

It is necessary to emphasize that this Article's concern is not primarily with the outcome itself in the many *Garcetti*-type cases. The *Garcetti* cases, as this Article noted,[101] involved multiple steps and requirements. For example, a government employee alleging retaliation based on speech must show a causal link between the speech in

95. *See supra* notes 91-94 and accompanying text.

96. *Chavez-Rodriguez*, 596 F.3d at 713.

97. *See* Fairley v. Andrews, 578 F.3d 518, 522 (7th Cir. 2009) (describing *Garcetti* as holding that "the first amendment does not protect statements made as a part of one's job."); *Garcetti*, 547 U.S. at 424-25.

98. Thomas v. City of Blanchard, 548 F.3d 1317, 1323 (10th Cir. 2008) (citing *Garcetti*, 547 U.S. at 420-21) (emphasis added). For merely one example of the developing law review literature, see, e.g., Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 561-62 (2008).

99. *See Garcetti*, 547 U.S. at 425 (holding open the academic freedom issue); *id.* at 427, 428-29 (Souter, J., dissenting) (noting the possible adverse effects on academic freedom of the majority approach).

100. *See, e.g.*, Posey v. Lake Pend Oreille Sch. Dist., 546 F.3d 1121, 1127-29 (9th Cir. 2008) (documenting the circuit split on this issue).

101. *See supra* notes 89-92 and accompanying text.

question and the retaliation.[102] As well, government employee speech that does not address a matter of public interest and concern is also generally not constitutionally protected.[103] The government may also restrict public employee speech that cannot be justified in light of its adverse effects on the government workplace's efficiency.[104] All of these restrictions seem defensible, if not without their problems.[105]

This Article's concern is instead with ignoring or bypassing all of the above considerations, based on the doubtful categorical distinction between speech uttered within, or not within, the scope of one's actual government work responsibilities.[106] This inquiry may indeed lead to oddly counterintuitive results, but this Article's concern is primarily with the indifference to rule of law values that government retaliation against the government employee-speaker in such cases can display.[107]

Consider, merely as examples, several recent federal appellate cases, which raised this threshold issue in *Garcetti*. In *Weintraub v. Board of Education of the City School District of New York*,[108] a public school teacher was terminated, allegedly for filing a union grievance with regard to a student throwing books at the teacher in class on two occasions, with no apparent discipline against the student allegedly being taken.[109] Without reaching any further issue, the United States Court of Appeals for the Second Circuit held that David Weintraub, "by filing a grievance with his union to complain about his supervisor's failure to discipline a child in his classroom, was speaking pursuant to

102. *See supra* notes 89-90 and accompanying text.

103. *See supra* note 91 and accompanying text.

104. *See supra* note 92 and accompanying text.

105. *See, e.g.*, R. George Wright, *Speech On Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1987).

106. *See supra* notes 93-98 and accompanying text.

107. Non-employment cases in which government retaliation is excused on the grounds that retaliation would not deter a "person of ordinary firmness" from exercising some related constitutional right should also give us concern. However "ordinary firmness" is measured in non-employment cases, the broader and subtler question of how to take into account the particular circumstances of such a hypothetical plaintiff must still somehow be answered. Nor is non-employment related retaliation for otherwise protection-worthy speech any less contemptuous of rule of law values because a court deems such intended retaliation to be of only minimal severity. For discussion in a variety of contexts, see, for example, Couch v. Bd. of Tr. of Mem'l Hosp. of Carbon Cnty., 587 F.3d 1223 (10th Cir. 2009); Corales v. Bennett, 567 F.3d 554 (9th Cir. 2009); Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009); Holman v. City of York, 564 F.3d 225 (3d Cir. 2009); Espinal v. Goord, 558 F.3d 119 (2d Cir. 2009).

108. 593 F.3d 196 (2d Cir. 2009).

109. *See* Weintraub v. Bd. of Educ. of the City Sch. Dist. of New York, 593 F.3d 196, 198-99 (2d Cir. 2010).

his official duties and thus not as a citizen."[110] Weintraub's speech was for that reason alone constitutionally unprotected.[111]

Again, this is not a matter of arguing over the result in the case. There might have been issues in *Weintraub* of causation,[112] or of whether the plaintiff's speech addressed a matter of public concern,[113] or of interest balancing.[114] But to hold the public employee's speech was constitutionally unprotected from retaliation, on the grounds simply that it was uttered through channels the retaliating government employer had officially authorized and that were not available to ordinary citizens, is distinctly odd.

It may be assumed that filing such a union grievance is indeed a part of one's job, within one's realistic job description, or within the scope of one's employment, as authoritatively determined or at least recognized by the government employer. But if so, that fact makes any retaliation for good faith speech through those authorized channels more, and not less, objectionable. This would hold whether or not the employer required any such speech, initially, and then penalized the employee. To officially endorse, and then penalize, the assumedly appropriate and good faith use of a particular speech channel is to that extent contrary to the integrity of the rule of law.[115]

The implications of *Garcetti* would be objectionable even if cases generally like *Weintraub* were rare. But they are not.[116] *Garcetti*, in

110. *Weintraub*, 593 F.3d at 201.

111. *See id.* Judge Calabresi, dissenting in *id.* at 205, would have sought to narrowly construe the scope of the *Garcetti* holding. *See also* McLaughlin v. Pezzolla, No. 06-CV-0376, 2010 WL 826952 (N.D.N.Y. Mar. 4, 2010) (seeking to distinguish *Weintraub* based on the presumed greater breadth and scope of the employee allegations in *McLaughlin*).

112. *See supra* note 102 and accompanying text.

113. *See supra* note 103 and accompanying text.

114. *See supra* note 104 and accompanying text.

115. *See generally* FULLER, *supra* note 29, at 33-94.

116. *See, e.g.*, Boyce v. Andrew, 510 F.3d 1333 (11th Cir. 2007) (per curiam) (social worker's speech retaliation claim, based on personal and public interest concerns over size of case load, as expressed through office e-mails and "Assignment Despite Objection" forms provided by union to avoid insubordination, *id.* at 1337, must fail as speech of employees rather than as citizens); Huppert v. City of Pittsburg, 574 F.3d 696 (9th Cir. 2009) (police officers' investigation, as supervised by county attorney, of allegedly improper conduct by fellow officers, as resulting in speech that was in furtherance of official duties and for that reason unprotected under *Garcetti*). *But cf.* Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008) (police officers' truthful court testimony regarding alleged criminal wrongdoing within police department held to be speech as a citizen rather than speech pursuant to official police duties). Along the general lines of *Boyce, supra*, and *Huppert, supra*, see *Huth v. Haslun*, 598 F.3d 70 (2d Cir. 2010) (public employee plaintiff did not engage in citizen speech protectable against retaliation in discussing her subordinate's comments about their co-workers in plaintiff's meeting with supervisors); *Bivens v. Trent*, 591 F.3d 555 (7th Cir. 2010) (police officer's speech was not protected against retaliation when officer complained directly and through union grievance process about allegedly unsafe lead levels at a state police firing range

this respect, accommodates government employer hypocrisy in many cases in which the employer seeks to penalize or deter good faith, job-generated employee speech through officially authorized or even required channels. In such cases, questions of the weight of the interests involved are, oddly, not even considered.[117]

IV. CONCLUSION

The result of this Article's consideration of employer retaliation under non-discrimination statutes and in government employee speech cases under *Garcetti v. Ceballos*[118] is that the rules tend, on balance, to under-protect workers from unjustified employer retaliation for good faith use of authorized channels of communication. In some cases, this may be a matter of a court's, perhaps understandable, insensitivity to the real weight in context of explicit or implicit threats of retaliation. But the very idea of any penalty being imposed on the good faith use of an officially authorized or required channel of communication is, more fundamentally, an affront to the basic norms of the integrity of the rule of law.

In some cases, of course, one sort or another type of "whistleblower" protection or related labor statute may be available at the state[119] or federal[120] level to assist some victims of employer retaliation for the use of authorized channels of communication.[121] The obvious problem with such whistleblower and labor code provisions, however, is their inevitably patchwork-like, incomplete, piecemeal,

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that was then closed for environmental remediation); *Winder v. Erste*, 566 F.3d 209 (D.C. Cir. 2009) (D.C. school employee's speech to departmental officials, to a judicially appointed Special Master, in testimony before the D.C. City Council, and also to the D.C. Inspector General was all within the scope of his official responsibilities and thus unprotected from retaliation). *See also* Tamayo v. Blagojevich, 526 F.3d 1074, 1091-92 (7th Cir. 2008) (citing cases). *But cf.* Morales v. Jones, 494 F.3d 590, 598 (7th Cir. 2007) (while some speech instances were unprotected against retaliation, "[b]eing deposed in a [job-related] civil suit pursuant to subpoena was unquestionably not one of [plaintiff's] job duties because it was not part of what he was employed to do").

117. *See supra* notes 93-94 and accompanying text.

118. 547 U.S. 410 (2006).

119. For a survey of such state-level statutes, see the NATIONAL WHISTLEBLOWERS CENTER website materials, http://www.whistleblowers.org/index (last visited Dec. 30, 2010).

120. For a collection of relevant statutory provisions at the federal level, see the citations and commentary at THE UNITED STATES DEPARTMENT OF LABOR http://www.dol.gov/compliance/guide/whistle.htm (last visited June 10, 2010). For a District of Columbia Code reference, see *Winder*, 566 F.3d at 213.

121. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (referring to "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing"). *See also* Huppert v. City of Pittsburg, 574 F.3d 696, 710 (9th Cir. 2009); Wilburn v. Robinson, 480 F.3d 1140, 1150 n.14 (D.C. Cir. 2007) (quoting *Garcetti*).

hit-or-miss quality.[122] But this is not the most basic problem. The less obvious and more crucial problem is that, as the argument above illustrates, the hit-or-miss solutions of whistleblower and labor statutes often do not appreciate the utterly fundamental challenges that the many private and public employer retaliation cases pose to the rule of law itself. Thus with the employer undermining the integrity of the rule of law, the legal community needs to rethink the law of private and public employer workplace retaliation, largely with an eye toward better protecting plainly fundamental rule of law values.

122. *See, e.g., Garcetti*, 547 U.S. at 440-41 (Souter, J., dissenting) (citing, e.g., D. WESTMAN & N. MODESITT, WHISTLEBLOWING: LAW OF RETALIATORY DISCHARGE 67-75, 281-307 (2d ed. 2004)) (discussing a number of crucial limits and restrictions on the scope of several such statutes). For some important limitations even of an ambitious such federal statute, see Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 3-4 (2005). For a sense of some of the gaps, incompleteness, and insufficiency of state-level whistleblower and related legislation and adjudication, see Courtney J. Anderson DaCosta, *Stitching Together the Patchwork:* Burlington Northern's *Lessons For State Whistleblower Law*, 96 GEO. L. J. 951, 952-58 (2008).