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Anjoli Terhune

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Redressing the Balance: An Examination of the Scope First Amendment Protections, Prosecutorial Discretion and Probable Cause in the Wake of *Hartman v. Moore*

By Anjoli Terhune *

“If our democracy is devolving into a manipulated nation of inattentive spectators, we have the responsibility to speak honestly about our national choices, and to do so even if we feel hesitant or scared.”¹

I. INTRODUCTION

Imagine that you represent a group of individuals whose skills and expertise have enabled them to recognize that a government organization’s initiative to employ the use of certain technology could result in widespread inefficiency and induce a substantial and recurring economic burden upon the government. You have a decision to make. Do you promulgate your concerns? Or do you keep quiet knowing that the aforementioned option renders you vulnerable to the possibility of retaliatory action?

Considering the long-held belief that “the public’s best protection against [potential harms emanating from agencies or companies that have an affect upon society] is the insider who is willing to speak up and shed light on her colleague’s improprieties,” assume that you decide to publicly voice your concerns.² Subsequently however, your concerns over possible retaliation are realized when you are

* J.D. Candidate at Pepperdine University School of Law; B.A. Sociology, Minor Classical Civilization, 2004, University of California, Los Angeles.

1. Paul Loeb, *Reclaiming Our Courage: True victory for the right is impossible as long as we keep fighting*, Working for Change, Dec. 18, 2002, <http://www.workingforchange.com/article.cfm?ItemID=14257>.

2. See *Spiegla v. Hull*, 371 F.3d 928, 937 (7th Cir. 2004).

subjected to criminal charges purporting that you have been involved in unlawful activities. You have an educated suspicion that those behind the imposition of the charges are they very same as those whose initiatives you publicly criticized. You are eventually cleared of the charges, but left with a tarnished reputation and seriously questioned credibility. Do you have any recompense for your decision to inform the public of your opinions other than the personal knowledge that you did your best to warn the public against a potential peril to society?

The First Amendment of the United States Constitution provides that your speech is subject to protection, and furthermore, that you are protected from retaliatory actions taken in response to your protected speech.

Before you go charging into the courts - constitution in hand – you must meet additional hurdles imposed by the judiciary. Imagine after demonstrating: (1) that your speech was constitutionally protected; (2) the defendant's retaliation was that which would generally discourage an ordinary person from engaging in similar speech; *and* (3) the defendant's actions were motivated against the public opinion you expressed, you are told that there may be one more element you need to demonstrate.

The court knows that your personal and professional reputation suffered from the actions taken against you, that that this could have detrimental economic effects upon you for years to come *and* that you have already demonstrated three other ways in which your rights were infringed; but they are still debating on whether you be required to prove one more thing. The question is: should a plaintiff in a retaliatory prosecution suit be required to plead and prove an absence of probable cause for pressing the underlying criminal charges in order to establish a First Amendment violation?

Prior to the Supreme Court's ruling in *Hartman v. Moore*, the answer to this question depended upon which circuit the appellate challenge to the plaintiff's claim was brought in.³

Where retaliatory action takes the form of criminal prosecution, all circuits have agreed that a plaintiff must illustrate: (1) that they were engaged in a constitutionally protected activity; (2) the

3. See *Hartman v. Moore*, 547 U.S. 250 (2006); see also *Keenan v. Tejada*, 290 F. 3d 252, 258 n.7 (5th Cir. 2002) (noting the split among the circuit courts as to the exact elements a retaliatory prosecution plaintiff need plead).

defendant's actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendant's adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct.⁴ What the circuits could *not* agree on was whether or not a fourth element need be applied.⁵ A review of the appellate challenges brought in the Court of Appeals for the Second, Third, Fifth, Eighth and Eleventh circuits prior to 2006 illustrates that plaintiffs are required to demonstrate an absence of probable cause in addition to the three aforementioned elements.⁶ Challenges in the Court of Appeals for the Sixth, Seventh and Tenth circuits meanwhile demonstrate a showing of a lack of probable cause is not required.⁷

On April 26, 2006 the *Hartman* Court settled the ongoing debates between the circuits.⁸ There, the Court concluded that an actionable violation of the First Amendment arising from retaliatory prosecution is found *only* where the plaintiff demonstrates there was no probable cause for their prosecution.⁹

After publicly criticizing the United States Postal Service's initiative to employ the use of single line rather than multiline scanners, Williman G. Moore, Jr. – then Chief Executive of Recognition Equipment Inc. (“REI”) – and REI were subjected to investigations for inappropriate compensation from a public relations firm, and an improper role in the search for a new Postmaster General.¹⁰ Though these investigations culminated in criminal

4. *Tejeda*, 290 F.3d at 258.

5. *See infra* note 58 and accompanying text.

6. *Tejeda*, 290 F.3d at 258.

7. *See id.* (holding all circuits recognize plaintiffs charging an unlawful retaliatory criminal prosecution must establish three elements: (1) they were engaged in constitutionally protected activity; (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct). *Id.* The requirement that a plaintiff demonstrate an absence of probable cause is an element considered in addition to the three elements all circuits require a plaintiff in a retaliatory criminal prosecution case to demonstrate.

8. *Hartman*, 547 U.S. at 265-66.

9. *Id.* at 266.

10. *Id.* at 252-55.

charges being brought by the Assistant United States Attorney, Moore and REI were eventually granted a motion for acquittal.¹¹

Following their acquittal, Moore and REI raised multiple causes of action under the Federal Tort Claims Act.¹² The defendants in the action were the postal inspectors who had investigated Moore and REI, and the federal prosecutor who had brought the criminal charge against them.¹³ Among the plaintiff's claims was the allegation that they had been subject to retaliatory prosecution in violation of their First Amendment rights.¹⁴ While several of their other claims were dismissed, the charge of a First Amendment violation was permitted to move forward in the district court.¹⁵

After both the district court and circuit court of appeals denied the defendants qualified immunity, the circuit court of appeals remained divided on the issue of exactly what a plaintiff in a retaliatory prosecution action must plead and prove.¹⁶ Specifically they debated over whether or not such a plaintiff need demonstrate a lack of probable cause for their prosecution.¹⁷ The court ultimately held that the elements of a retaliatory prosecution claim should include proof of a lack of probable cause.¹⁸

Hartman is the latest in a long line of Supreme Court precedent addressing how closely courts will review exercises of prosecutorial discretion for unconstitutional motives, and what the elements of a retaliatory prosecution claim should be in light of the Court's recognition of the broad discretion given to prosecutors.¹⁹ In those

11. *Id.* at 254 (referencing *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 596 (D.C. Cir. 1989)). The district court found insufficient evidence to support the claims against Moore and REI. *Id.* at 266.

12. *Id.* at 254; *see also* 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), and 2671-2680, where the provisions of the Federal Tort Claim Act ("FTCA") can be found. The FTCA is a legislative scheme whereby civil suits for actions arising out of negligent acts of agents of the United States are permitted to be brought against the United States. *Id.*

13. *Hartman*, 547 U.S. at 254.

14. *Id.*

15. *Id.* at 255.

16. *Id.* at 255-56.

17. *Id.* at 255.

18. *Id.* at 265-66.

19. *See* John Bash, *Tomorrow's Argument in Hartman v. Moore*, Scotusblog, Jan. 9, 2006,

regards, *Hartman* does not differ from the long line of First Amendment violation cases preceding it. Where *Hartman* stands apart from precedent, however, lies in the fact that it draws a bright line through what once was an ongoing dispute as to what a plaintiff needs to plead in a prima facie retaliatory prosecution claim, as the court resolutely added a fourth element to the previously established three elements required of such a plaintiff.²⁰

This note examines the *Hartman* decision and addresses the legal and societal implications it carries. Part II of this Note describes the history of the First Amendment and the underlying structure of retaliatory prosecution claims prior and up to the *Hartman* decision.²¹ Part III presents the facts of *Hartman*.²² Part IV presents and analyzes the Court's majority and dissenting opinions.²³ Part V assesses the legal and societal impact and significance of the *Hartman* Court's decision.²⁴ Part VI concludes this note.²⁵

II. HISTORICAL BACKGROUND

The First Amendment provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances”²⁶

http://www.scotusblog.com/movabletype/archives/2006/01/tomorrows_argum_28.html (discussing *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) and *United States v. Armstrong*, 517 U.S. 456, 464-66 (1996)).

20. *See infra*, notes 65 and accompanying text.

21. *See infra* notes 21-69 and accompanying text.

22. *See infra* notes 70-89 and accompanying text.

23. *See infra* notes 90-130 and accompanying text.

24. *See infra* notes 131-47 and accompanying text.

25. *See infra* notes 148-60 and accompanying text.

26. U.S. CONST. amend. I. Though the span of the First Amendment is inclusive of rights for free press, religion and assembly in addition to free speech, for the purposes of this note I will restrict its discussion to its applicability in violations of the free speech guarantee.

On its face, the First Amendment guarantees the people of the United States freedom to express themselves without the interference or constraint of Congress.²⁷ Over time the Supreme Court has interpreted the First Amendment as providing a check not only on Congress, but the federal government in its entirety.²⁸

Following the 1791 ratification of the Bill of Rights, courts held fast to the protection of civil liberties it afforded.²⁹

Generally, the First Amendment is considered to prohibit not only direct limitations on speech, but also adverse government action

27. U.S. CONST. amend. I.

28. *See* *Gitlow v. New York*, 268 U.S. 652 (1925) (holding rights protected by the First Amendment are not only protected from abridgement by congress, but also from impairment by the states as well); *see also* *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). The government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech.” *Id.* at 597.

29. *See e.g.* *City of Long Beach v. Bozek*, 1 Cal. 3d 527 (Cal. 1982). “The right of petition, like the other rights contained in the First Amendment . . . is accorded ‘a paramount and preferred place in our democratic system’” *Id.* The Supreme Court has stated that “the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press.” *Id.* (citing *A.C.L.U. v. Bd. of Educ.*, 55 Cal.2d 167, 178 (1961); *see also* *Mine Workers v. Ill. Bar Ass’n.*, 389 U.S. 217 (1967) (holding that the First Amendment would be “a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such”); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (holding it violated the constitution to restrain a citizen’s rights of free speech and assembly). .

The case confronts us again with the duty our system places on this Court to say where the individual’s freedom ends and the State’s power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . [T]hat priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice . . . or these reasons any attempt to restrict those liberties must be justified by clear public interest . . . [t]hese rights rest on fir[m] foundation.

Id.; *see also*, *De Jonge v. Oregon*, 299 U.S. 353 (1937)

against an individual because of their exercise of First Amendment freedoms.³⁰ For example, in accord with the First Amendment, the government may not place conditions on public benefits, including jobs which penalize applicants for their speech, beliefs, or association.³¹

In acknowledgement of the Fourteenth Amendment, which prohibits states from infringing upon the rights of any American citizen, many courts have inferred that in addition to Congress, state and local governments are prohibited from infringing on First Amendment rights as well.³² Due to the fact that the First Amendment itself, however, does not expressly provide protection for those whose rights were violated under state laws and actors, it was not until eighty years after the ratification of the First Amendment that a cause of action was firmly extended enabling

30. See *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999), *supra* notes 45-49 and accompanying text.

31. See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (holding impermissible under the First Amendment the dismissal of a high school teacher for speaking on "issues of public importance"); *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963) (holding that unemployment compensation may not be withheld on the condition that a person accept Saturday employment contrary to her religious faith); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961) (holding that a citizen cannot be refused a public office for failure to declare his belief in God); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (prohibiting on First Amendment grounds the limiting of state tax exemptions to only those who take a loyalty oath); *cf. Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 898 (1961) (recognizing that the government cannot deny employment because of previous membership in a particular political party). This is true even where the person has no contractual or property right in the benefit withheld. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977) (holding that an untenured public school teacher may not be discharged if he shows that constitutionally protected conduct was a "substantial" or "motivating" factor in the decision not to rehire him and the employer fails to demonstrate that it would have reached the same decision even in the absence of the protected conduct); *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that an untenured teacher's lack of formal contractual or tenure security in his job was irrelevant to his First Amendment claim that his employer, a state college, refused to renew his contract because of his protected speech).

32. U.S. CONST. amend. XIV. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Id.*

plaintiffs to recover for First Amendment violations by state actors.³³ This remedy came with the 1871 enactment of Section 1983 of Title 42 of the United States Code.³⁴ Section 1983 (“section 1983”) provided a civil action for the deprivation constitutional rights.³⁵ In light of the fact that § 1983 was a part of the Civil Rights Act of 1871, it did not just protect against violations of the First Amendment, but all constitutional violations.³⁶ Additionally, section 1983 opened a new forum for claims of constitutional violations.³⁷

33. See U.S. CONST. amend. I; see Ian Forsythe, *A Guide to Civil Rights Liability Under 42 U.S.C. § 1983: An Overview of Supreme Court and Eleventh Circuit Precedent*, http://www.constitution.org/brief/forsythe_42-1983.htm. (“Section 1983 was enacted on April 20, 1871, as a part of the Civil Rights Act of 1871.”).

34. Forsythe, *A Guide to Civil Rights Liability Under 42 U.S.C. § 1983*. See also 42 U.S.C. § 1983 providing:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1983.

35. See *Memphis Cmty Sch. Dist. v. Stachura*, 477 U.S. 299, 315-16 (1986) (holding compensatory damages are available under a § 1983 action because “deprivation of constitutional rights . . . constitutes compensable injuries”).

36. See section 1983 (“ . . . any rights . . . secured by the constitution . . . ”).. See also *Maine v. Thiboutot*, 448 U.S. 1, 10 (1980) (holding “section 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights”).

37. See *Terry v. Kolski*, 78 Wis. 2d 475 (Wis. 1977) (holding a § 1983 action may be brought in a state or federal court). In addition to providing a remedy for constitutional violations inflicted at the hands of federal or local government, some courts have extended the applicability of §1983 to apply against private employers as well. See e.g. *Dossett v. First State Bank*, 399 F.3d 940 (8th Cir. 2005). In *Dossett* a bank employee sued her employer for conspiring to terminate her

The comprehensiveness of the protection afforded by the Civil Rights Act from which § 1983 stems, owes itself in part to the fact that it was enacted with the intent to “provide a remedy against the abuses that were being committed in the southern states.”³⁸ Because the Civil Rights Act provides for a private remedy for violations of federal law, it has been interpreted by many as creating a species of tort liability.³⁹

The expansion of First Amendment protection provided by section 1983 was notably upheld in the landmark 1968 Supreme Court case *Pickering v. Board of Education*.⁴⁰ The *Pickering* Court held that it was impermissible under the First Amendment for a high school teacher to be fired for exercising his right to free speech.⁴¹ The Court explained that terminating one’s employment because they engaged in public speech is a form of retaliation which offends the

employment in retaliation for exercising her First Amendment right of free speech after she spoke out against her local school district in a public meeting. *Id.* at 944. The court held “there was no reason to preclude a plaintiff from bringing suit against a private actor who actively conspired with a public entity to violate another’s Constitutional rights.” *Id.* at 950. Specifically, the court noted that, “[u]nder section 1983, a plaintiff may establish not only that a private actor caused the deprivation of constitutional right, but that the private actor willfully participated with state officials and reached a mutual understanding concerning the unlawful objective of a conspiracy.” *Id.* at 951.

38. Specifically § 1983 was aimed at those acts carried out by the Ku Klux Klan; which is why the Civil Rights Act is also referred to as the “Ku Klux Klan Act.” As previously stated, though the expanse of the Civil Rights Act is all inclusive of constitutional rights, for the purposes of this note I will restrict its discussion to its applicability in violations of the First Amendment. *See also*, Forsythe *supra* note 33.

39. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986). “42 U. S. C. § 1983 n8 creates ‘a species of tort liability’ in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution” (quoting *Carey v. Phipus*, 435 U.S. 247, 253 (1978)). *Id.*

40. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). In *Pickering* a school teacher was fired after he wrote a letter criticizing the School Board, and the letter was published in a local newspaper. *Id.* at 564-65. The School Board claimed the letter was detrimental to school interests, and terminated *Pickering* in accord with a state statute. *Id.* *Pickering* claimed that the termination infringed upon his First Amendment rights to free speech and brought suit against his former employers. *Id.* at 565.

41. *Pickering*, 391 U.S. at 565.

First Amendment because it threatens to inhibit or abridge exercise of the protected right.⁴²

Pickering firmly established a cause of action for those whose First Amendment rights had been deprived by retaliatory dismissal or penalties.⁴³ Additionally, it confirmed that such claims could be brought against not only the federal government and states for the legislation of laws infringing upon constitutional rights, but also, under section 1983, against those acting under the color of state law.⁴⁴

Retaliatory prosecution cases arising in the wake of *Pickering* serve to illustrate the seminal nature of the *Pickering* decision and its application of section 1983.⁴⁵ For example, the Tenth Circuit elaborated on the *Pickering* Court's reasoning in *Smith v. Plati*.⁴⁶ There, the court stated that any form of retaliation for one's exercise of free speech – whether it be prosecution, threatened or actual, bad faith investigations, or legal harassment – constitutes an infringement of the First Amendment freedom of speech guarantee for the very reasons discussed in *Pickering*.⁴⁷

Following *Plati*, the court in *Colson v. Grohman* expatiated on the reasons why mere retaliation against the exercise of First Amendment rights should be considered a violation of the

42. Crawford-El v. Britton, 523 US 574, 589 (1997) (quoting *Pickering*, 391 U.S. at 574); see also Perry v. Sindermann, 408 U.S. 593, 597.

43. See *infra* cases cited in note 58.

44. See cases cited *supra* notes 3 and 9.

45. See *supra* notes 38-43.

46. *Smith v. Plati*, 258 F.3d 1167 (10th Cir. 2001). In *Plati*, a cause of action was brought under section 1983 after the plaintiff launched a website discussing athletic teams at the University of Colorado at Boulder, and he was allegedly subsequently subjected to harassment by the University Assistant Athletic Director for Media Relations in a manner that inhibited his First Amendment rights of free speech, newsgathering and equal access via retaliatory actions and false arrest. *Id.* at 1175-79.

47. *Plati*, 258 F.3d at 1176 (quoting *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)); see also *Izen v. Catalina*, 398 F.3d 22, 36 (5th Cir. 2005) (“The First Amendment prohibits not only direct limitations on speech but also adverse government action against an individual because of her exercise of First Amendment freedoms”); see also *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999). “Subjecting an attorney to criminal investigation and prosecution with the substantial motivation of dissuading him from associating with and representing clients opposing the IRS would violate the First Amendment.” *Id.* at 508.

Constitution.⁴⁸ In *Colson*, the plaintiff (an elected official) alleged that city officials falsely accused her of criminal acts, urged prosecutors to investigate her, and instigated a recall election against her because she publicly expressed political views with which they disagreed.⁴⁹ Particularly, the *Colson* court noted that retaliation or the imposition of any penalty for speech, belief, or other First Amendment guaranteed freedom is an indirect manner in which one unlawfully interferes with constitutional rights.⁵⁰ *Colson* articulated that retaliatory actions taken against one for having exercised First Amendment freedoms have the very effect of chilling the exercise of those freedoms; and for this reason, such actions, should render the retaliating person liable for injuries suffered in the wake of their retaliatory acts.⁵¹

Despite the broadening protection of citizen's rights that was taking place in the courts following the enactment of section 1983, there were still retaliatory actions from which one could not recover: those instigated by a federal official or agent.⁵² This was resolved, however, three years after *Pickering* in 1971 in *Bivens v. Six Unknown Federal Narcotics Agents*.⁵³

48. *Colson*, 174 F.3d at 508. "[I]f government officials were permitted to impose serious penalties in retaliation for an individual's speech, then the government would be able to stymie or inhibit his exercise of rights in the future and thus obtain indirectly a result that it could not command directly." *Id.* at 509-10.

49. *Id.* at 499-505.

50. *Id.* at 510.

51. *Id.* at 510; see also *City of Long Beach v. Bozek*, 1 Cal. 3d 527, 530 (Cal. 1982).

Maintenance of malicious prosecution actions by governmental entities would generate a potentially chilling effect of considerable dimension upon the exercise of the right to petition the government through the courts for redress of grievances. Therefore, constitutional principles and tort principles combine to make the existence of a malicious prosecution action inappropriate.

Id.

52. See *Bell v. Hood*, 327 U.S. 678 (1946) (reserving the question whether violation of the First Amendment by a federal agent acting under color of law gives rights to a cause of action for damages).

53. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

In *Bivens*, the Federal Bureau of Narcotics carried out a warrantless search of the petitioner's home for alleged narcotics violations.⁵⁴ Afterwards, *Bivens* was taken into custody, interrogated, and subjected to a strip search.⁵⁵ The Court established a cause of action for those whose First Amendment rights had been violated by federal agents.⁵⁶ Furthermore, *Bivens* also provided damages for those whose constitutional violations occurred at the hands of federal agents.⁵⁷

When it comes to government and state actors, if the plaintiff could point to a law or guideline imposed by the government or state actor which directly hinders, limits or prevents ones' abilities to carry out or engage in constitutionally protected freedoms, it could be incontestably argued that such an actor had infringed upon First Amendment rights of the plaintiff.⁵⁸ A claim that the government or state actor merely retaliated in some way against one who exercised their First Amendment rights, however, needs to be proven with more particularity.⁵⁹

The starting point for inquiries into claims for retaliatory actions was the common law of torts because the earliest cases in which public employees claimed that they were fired for speech did not specifically address what the plaintiff needed to prove and plead.⁶⁰ Generally, it was held that the plaintiff must be able to show that the government or state actor took retaliatory action against them in

54. *Bivens*, 403 U.S. at 388.

55. *Id.*

56. *Id.* at 397. "When vengeful officer is federal, he is subject to action for damages on the authority of *Bivens*." *Id.*

57. *Id.* at 397.

58. *Maine v. Thiboutot*, 448 U.S. 1, 10 (1980).

59. *See Boger v. Wayne County*, 950 F.2d 316 (6th Cir. 1991) (discussing the *prima facie* elements a plaintiff must allege in a retaliatory action).

60. *Heck v. Humphrey*, 512 U.S. 477 (1994) (quoting *Carey v. Phipus*, 435 U.S. 247, 257-58 (1978)).

Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under section 1983 as well.

Id. at 483.

direct response to their exercise of constitutional rights.⁶¹ Specifically, to establish a prima facie case for a claim alleging such a retaliatory action the plaintiff must prove: (1) the speech in question is related to a matter of public concern; (2) their interest in making the statement outweighs their employer's interest in promoting efficiency in its operations; and (3) the protected speech was a substantial or motivating factor in the decision to penalize the plaintiff.⁶² If the alleged retaliation is said to take the form of a malicious prosecution, then the plaintiff must allege a deprivation of a constitutional right in addition to these common-law elements.⁶³

In a context where retaliatory action takes the form of criminal prosecution, all circuits have established that the plaintiff must demonstrate at least the three following elements to complete their prima facie case: (1) they were engaged in a constitutionally protected activity; (2) the defendant's actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendant's adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct.⁶⁴

Retaliation causes of action were also considered subject to recovery pending demonstration of a causal connection between the official action offending the Constitution, and the resulting deprivation of a constitutional right.⁶⁵ In *Mt. Healthy City Board of Education v. Doyle*, the Supreme Court articulated that a plaintiff must prove a causal connection between the defendant's retaliatory animus and the subsequent injury in any retaliation action.⁶⁶ In

61. *Id.* at 322.

62. *Id.*

63. *Johnson v. La. Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994) (holding "if the First Amendment protects against malicious prosecution, [the plaintiff] must not only allege a deprivation of a constitutional right, but must also establish all of the elements of the common law tort action"). *Id.*

64. *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002); *see also Crawford-El v. Britton*, 523 US 574 (1997) (prohibiting government officials from subjecting an individual to retaliatory actions, including criminal prosecutions for speaking out).

65. *See Crawford*, 523 U.S. at 588. "Bare allegations of malice would not suffice to establish a constitutional claim . . . there must also be evidence of causation." *Id.*

66. *Doyle*, 429 U.S. at 274.

Doyle, a teacher sent a copy of the school board's dress code for teachers to a local radio station.⁶⁷ When the school board subsequently refused to renew his contract, he claimed their actions violated his rights under the First and Fourteenth Amendments to the United States Constitution.⁶⁸ The school board defended their actions claiming they had valid reasons to dismiss the teacher despite his exercise of free speech – namely, because the teacher not only demonstrated bad tact in sending the memorandum to the radio station, but also because he had been witnessed making obscene gestures to students.⁶⁹

The Court stated that once the plaintiff was able to establish the common-law elements of a retaliatory action or prosecution claim, the burden shifts to the defendant to demonstrate that there were other reasons for its adverse action and that it would have taken the same action even if the employee had not spoken.⁷⁰ Thus, if the school board could demonstrate that they indeed had a valid reason for not renewing *Doyle's* contract (that there was probable cause), it

67. *Id.* at 276.

68. *Id.*

69. *Id.* at 283.

“That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking “a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

Id. at 284 (citing *Pickering*, 391 U.S. at 568 (1968)).

70. *Doyle*, 429 U.S. at 287. (holding that causation must be established under the “but-for” test demonstrating but for the free speech, the retaliatory action would not have been taken); *see also* *Scott v. Coughlin*, 344 F.3d 282 (2nd Cir. 2003) (Illustrating the burden shifting framework that applies to First Amendment claims for retaliatory actions). In *Coughlin*, a prisoner alleged that correctional officers “violated his civil rights and retaliated against him in violation of his First Amendment rights by filing false disciplinary infraction charges against him.” *Id.* at 287-88. Summary judgment was given to the officers upon the court’s finding that “even if [the prisoner] established a prima facie case of retaliation with respect to [one of the officers], his cause of action would [have] fail[ed] because the retaliatory action, a disciplinary hearing and possible physical assault, would have occurred regardless of the existence of a possible retaliatory motive.” *Id.* at 288. In other words, the court recognized that the defendants (officers) had demonstrated probable cause for their actions and thus met the burden upon them to defeat a prima facie retaliatory prosecution claim.

does not matter if they were partially motivated by his speaking out against the school dress code to the radio station, the plaintiff would still not be able to make a prima facie case for retaliatory action against the school board because his exercise of his First Amendment rights was not the direct cause of the school board's actions.⁷¹

Though the path leading up to the *Hartman* decision was a winding one, from the onset of the Court's consideration in the *Hartman* case, it was firmly agreed upon by all circuits that the common law elements articulated in *Tejeda* must be established in a context where retaliatory action takes the form of criminal prosecution.⁷² However, because there has been a division among those same courts on the issue of whether or not a showing of a lack of probable cause needs to be demonstrated as well, it was left unclear if the common law elements were all that a plaintiff needed to establish in order to have a complete prima facie case.⁷³ The Second, Third, Fifth, Eighth and Eleventh circuits mandate that the plaintiff prove an additional fourth requirement: an absence of probable cause to prosecute.⁷⁴ The Sixth, Seventh and Tenth Circuits in addition to the D.C. Circuit, do not require a lack of probable cause to prosecute in a claim for retaliatory criminal prosecution.⁷⁵

In *Kerr v. Lyford*, the Fifth Circuit defined probable cause as "the existence of such facts and circumstances as would excite the belief that the person charged was guilty of the crime for which he was prosecuted."⁷⁶ The belief must be in the mind of a reasonable person

71. *Doyle*, 429 U.S. at 286-87.

72. *See supra* note 36 and accompanying text.

73. *Doyle*, 429 U.S. at 286-87; *see also Tejeda*, 290 F.3d at 260-61 (holding the absence of probable cause is an element that must be demonstrated by a plaintiff claiming retaliatory prosecution violated his constitutional rights).

74. 1 STETON HALL CIR. REV 147, 161 (Spring 2005) (discussing elements of a retaliatory prosecution claim).

75. *Id.* at 161. This split among the circuits illuminates the inquiry: "exactly what instructions would the USPS give to its inspectors under these circumstances? And would they be required to conduct their investigations differently in each Circuit? At the very least this illustrates the need for direction from the Supreme Court." Miles Norton, *Legal Information Institute Bulletin: Supreme Court Oral Argument Previews*, available at: <http://www.law.cornell.edu/supct/cert/04-1495.html>.

76. *Kerr v. Lyford*, 171 F.3d 330, 340 (5th Cir. 1999) (quoting *Moore v. McDonald*, 30 F.3d 616, 620 n.2 (5th Cir. 1994)).

who would act on the facts within the knowledge of the prosecutor in a fashion similar to, if not identical to, the manner in which the given prosecutor acted.⁷⁷

As of the date of the *Hartman* decision - January 10, 2006 - the law applicable to establishing a cause of action for retaliatory prosecution was that a plaintiff must illustrate: (1) they were engaged in a constitutionally protected activity; (2) the defendant's actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; (3) the defendant's adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct.⁷⁸ A fourth element, (4) that the defendant acted with a lack of probable cause, was sometimes included depending upon which jurisdiction the claim was initiated in.⁷⁹

III. FACTS

During the 1980's, Williman G. Moore, Jr. served as the chief executive of Recognition Equipment Inc. ("REI").⁸⁰ REI manufactured a multiline optical character reader for interpreting multiple lines of text, which the United States Postal Service ("USPS") intended to utilize for reading and sorting mail.⁸¹ The USPS paid REI approximately fifty million to develop this technology, meanwhile urging mailers to utilize full nine-digit zip codes (instead of five-digit zip codes) that would permit REI's machines to sort mail based on single-line scanning.⁸²

Members of Congress, Government research officers, and even Moore himself voiced reservations about the nine-digit zip code policy and the single-line reading method proposed.⁸³ Specifically,

77. *Id.*

78. *Id.*

79. *See supra* notes 36 and 45.

80. *Hartman v. Moore*, 547 U.S. 250, 252 (2006).

81. *Id.*

82. *Id.*

83. *Id.* at 252-53; *see, e.g.,* Seaberry, *Durenberger Begins Campaign Against Nine-Digit Zip Code*, WASHINGTON POST, Feb. 24, 1981, at E4 (describing Senator David Durenberger's reference to the Zip + 4 campaign as "'a mnemonic plague of contagious digitous'").

they noted the burden put upon mailers to memorize a nine-digit zip code and the estimation that it would cost the USPS an extra one million a day to operate the single-line scanners as opposed to multiline scanners.⁸⁴

Though Moore was among those who stood to gain financially from adoption of the new technology, he sought to convince the USPS that the incorporation of multiline scanners would be better.⁸⁵ His efforts included actively opposing the nine-digit policies enacted by USPS to support the single-line readers, lobbying Congress to oppose the policies by testifying before congressional committees, and supporting a "Buy American" rider to the Postal Service's 1985 appropriations bill.⁸⁶ Despite alleged requests from the Postmaster General to be quiet, Moore pushed forward with anti-nine-digit zip code efforts.⁸⁷

In July of 1985, Moore's efforts saw success, as the USPS embraced multiline rather than single-line technology.⁸⁸ Instead of accepting the multiline equipment from REI however, the USPS ordered between \$ 250,000 and \$400,000,000 of equipment from a competing firm.⁸⁹

Shortly thereafter, Moore and REI were subject to two investigations by Postal Service inspectors.⁹⁰ Despite extremely limited evidence linking Moore and REI to any wrongdoing, the Assistant U.S. Attorney brought criminal charges against them in 1988.⁹¹ Following a six week trial, the district court concluded there

84. *Id.* at 253.

85. *Id.*

86. *Id.*

87. *Id.* Based on a recommendation by one of the Postal Service governors, Peter Voss, Moore hired a public-relations firm for REI, Gnaou and Associates, Inc. ("GAI") for REI. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* The first investigator looked into purported kickback payments by GAI to Governor Voss for Voss's recommendations of their services and the second investigator sought to document REI's possible improper role in the search for a new Postmaster General. *Id.*

91. *Id.* at 253-54.

was a “complete lack of direct evidence” and granted the REI defendants’ motion for judgment of acquittal.⁹²

Once acquitted, Moore and REI filed a civil liability suit against the prosecutor, who initiated the charges against them, and five postal inspectors.⁹³ Within his claims Moore asserted the defendants engineered his criminal prosecution in retaliation for his lobbying activities and public opposition to the USPS’s proposed policies and single-line equipment; retaliation which violates the First Amendment.⁹⁴ Moreover, Moore alleged the defendants pressured the United States Attorney’s office to have him indicted.⁹⁵

Though Moore’s claims against the prosecutor were ultimately dismissed, his claims against the postal inspectors survived the defendant’s motions for summary judgment before both the district court and court of appeals.⁹⁶ While the court of appeals was certain in their ruling that the inspectors were not subject to qualified immunity from a retaliatory prosecution suit, it was divided on the issue of whether or not a lack of probable cause need be proven in a claim brought under section 1983 (considered analogous to a *Bivens* action).⁹⁷

92. *Id.* (citing *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 596 (D.C. Cir. 1989).).

93. *Id.* . Moore filed his claims under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

94. *Hartman*, 547 U.S. 250, 254 (2006).

95. *Id.*

96. *Id.* at 255. The District Court for the Northern District of Texas ultimately dismissed the claims against the Assistant U.S. Attorney granting him absolute immunity for prosecutorial judgment, in addition to rejecting abuse-of-process claims against the prosecutors. *Id.* at 254-55. The remaining claims were transferred to the District court for the District of Columbia where Moore’s suit was entirely dismissed. *Id.* at 255. Moore’s retaliatory-prosecution claim was later reinstated by the Court of Appeals for the District of Columbia Circuit. *Id.* Upon reinstatement of the claims, limited discovery was permitted as to the claims against the postal inspectors; meanwhile charges against the United States and prosecutor were again dismissed on grounds of absolute immunity. *Id.* Ultimately the District of Columbia Circuit conclusively afforded the prosecutor immunity and dismissed him from the case, while reinstating the claims against the United States, and maintaining the claims against the postal inspectors. *Id.*

97. *Id.*; *see also* *Wilson v. Layne*, 526 U.S. 603 (1999) holding [B]oth *Bivens* and § 1983 allow a plaintiff to seek money damages from government officials who have violated [their

Historically, some circuits have required the plaintiff to prove a lack of probable cause in a retaliatory prosecution claim.⁹⁸ Meanwhile, other circuits have imposed no such burden.⁹⁹ To resolve the split the Supreme Court granted certiorari and reversed the lower court's ruling, holding that a plaintiff bringing a section 1983 claim under a *Bivens* action, must plead and prove a lack of probable cause as a *prima facie* element of their claim.¹⁰⁰

IV. ANALYSIS OF OPINION

A. Justice Souter's Majority Opinion

Presenting the majority opinion, Justice Souter's argument first illuminates the facts of the case, briefly addresses the lower court's decisions, and then recognizes the underlying constitutional issues forming the basis of a retaliatory prosecution claim.¹⁰¹ Second, he highlights the division among the lower courts as to the necessary elements of a retaliatory prosecution claim and acknowledges the

constitutional] rights. But government officials performing discretionary functions generally are granted a qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 609.

98. *Hartman*, 547 U.S. at 255-56; *see, e.g.*, *Izen v. Catalina*, 398 F.3d 363 (5th Cir. 2005) (*per curiam*); *Wood v. Kesler*, 323 F.3d 872, 883 (11th Cir. 2003); *Keenan v. Tejada*, 290 F.3d 252, 260 (5th Cir. 2002); *Singer v. Fulton County Sheriff*, 63 F.3d 110 (2nd Cir. 1995); *Post v. Fort Lauderdale*, 7 F.3d 1552 (11th Cir. 1993); *Mozzochi v. Borden*, 959 F.2d 1174, 1179-80 (2nd Cir. 1992); *Magnotti v. Kuntz*, 918 F.2d 364 (2nd Cir. 1990); *Kerr v. Lyford*, 171 F.3d 330, 340 (5th Cir. 1999); *Johnson v. La. Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994).

99. *Hartman*, 547 U.S. at 255-56; *see, e.g.*, *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001); *Haynesworth v. Miller*, 820 F.2d 1245, 1256-57 (D.C. Cir. 1987); *Heck v. Humphrey*, 512 U.S. 477 (1994).

100. *Hartman*, 547 U.S. at 255-66.

101. *Id.* at 252-60. The court noted the divide among the circuits with respect to the pleading requirements of retaliatory prosecution suits. *See supra* notes 66-67 and accompanying text.

precedent leading up to the *Hartman* decision.¹⁰² Third, he discusses the issues present in *Hartman* that have not been resolved in the Court's previous decisions regarding what needs to be pleaded by a plaintiff bringing a retaliatory prosecution claim of any sort, specifically, what a plaintiff needs to plead when bringing a retaliatory prosecution claim in response to criminal charges.¹⁰³ Lastly, after briefly addressing the absolute immunity given to prosecutors, Justice Souter elaborates on the significance of a plaintiff being able to demonstrate the absence of probable cause when bringing a retaliatory prosecution cause of action.¹⁰⁴

Justice Souter first notes the rights provided by the First Amendment serve as the underlying foundation for the prohibition of retaliatory actions – including criminal prosecutions – imposed upon individuals by government officials.¹⁰⁵ Specifically, he notes that the First Amendment prohibits government officials from subjecting individuals to retaliatory actions for exercising their constitutionally protected right to free speech.¹⁰⁶

For centuries courts have enforced the protection of First Amendment rights, holding that adverse action against government employee's exercise of First Amendment freedoms, i.e. speech, is impermissible.¹⁰⁷ Furthermore, he notes "when the vengeful officer is federal, he [has been] subject to an action for damages on the authority of *Bivens*" since 1971.¹⁰⁸

Despite the well-established fact that retaliatory actions taken by both federal and state officials are subject to constitutional scrutiny,

102. *Id.* at 258-59.

103. *Id.* at 258-65.

104. *Id.* at 260-66.

105. *Id.* at 256 (citing *Crawford-E v. Britton*, 523 US at 574, 593 (1998) (holding retaliation is subject to recovery as the but-for cause of official action offending the Constitution)). See *supra* notes 17-20 and accompanying text.

106. *Id.*

107. *Id.* (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 247, 283-84(1998)); see also Stephen L. Hayford, *First Amendment Rights of Government Employees: A Primer for Public Officials*, 45 PUB. ADMIN. REV. 240, 241-48 (Jan. - Feb. 1985) (addressing the fact that the Supreme Court decisions have consistently established personnel actions in government organizations must be "fashioned in a manner which respects [the] First Amendment rights of public employees").

108. *Hartman*, 547 U.S. at 256 (citing *Bivens*, 403 U.S. at 397).

Justice Souter notes that the issue of what a plaintiff, in bringing such a cause of action, must plead when the retaliatory action includes the pressing of underlying criminal charges, is one that had yet to be settled prior to *Hartman*.¹⁰⁹ While Moore and REI argued that the issue of probable cause was an evidentiary matter, the defendants argued: (1) there needed to be an “objective” burden imposed on the plaintiff to prevent the filing of frivolous lawsuits; and (2) the traditional tort of malicious persecution illustrates what the “objective requirement” should be: a lack of probable cause for charging the crime to being with.¹¹⁰

While noting that there was some merit in the contention that an objective fact requirement should be included in cases involving retaliatory-criminal prosecutions, Justice Souter briefly turned to a discussion of the elements of common-law tort actions for constitutional violations.¹¹¹ Concluding the common law of torts

109. *Id.* at 255-57. In addition to noting the split among the circuits as to pleading requirements, Justice Souter pays particular attention to what each of the parties in *Hartman* argue, with respect to the necessary elements of a retaliatory-prosecution claim. *Id.* at 256-58. In *Hartman*, Moore and REI contended (in accord with the court of appeals) that the issue of probable cause was “an evidentiary matter going to entitlement in fact” while the defendant inspectors argued that an absence of probable cause should be considered an essential element. *Id.* at 257-58. Arguing the possibility of a slippery slope if cases were permitted to go forward without the additional element of probable cause having been established, the defendants noted the 2004 case of *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 175, which stated allegations of government misconduct are “easy to allege and hard to disprove.” *Id.* at 257 (citing Brief of Petitioners at 21-23).

110. *Id.* at 257-58.

111. *Id.* at 258. Though he agreed initially that it was a fair argument that there needs be an objective fact requirement in retaliatory-prosecution cases, Justice Souter also noted that the objective fact requirement suggested by the defendants was not conclusive. *Id.* The defendants suggested that “the traditional tort of malicious prosecution’s requirement that a plaintiff must show the criminal action in question was begun without probable cause for charging the crime in the first place.” *Id.* at 257-58. Justice Souter considered the arguments that the objective fact requirement applied in a retaliatory-prosecutions should reflect the traditional abuse of process case (and exclude an no-probable cause element). *Id.* at 258. While the defendants could point to precedent addressing the issue of what a plaintiff needs to prove in a retaliatory prosecution, Justice Souter noted “there is no disproportion of [precedent] the [does] not require showing an absence of probable cause. *Id.* 258-59.

were merely inspired examples rather than concrete components of what should comprise the components of retaliatory prosecution claim, he concluded it would be a futile debate to rely upon common-law parallels to justify a no-probable cause requirement.¹¹² Rather than reliance upon common-law principles, Justice Souter states it is the need to prove a chain of causation from animus to injury that provides the strongest justification for imposing a fourth, no-probable cause, element upon the plaintiff in a retaliatory prosecution case.¹¹³

Acknowledging that a causal connection between the defendant's animus and the plaintiff's injury necessarily be shown in any type of retaliation action, Justice Souter distinguishes the retaliation-prosecution action like that in *Hartman*, from other retaliatory actions. Justice Souter reasons that within retaliation-prosecution actions the animus harboring individual is not the individual allegedly taking the adverse action.¹¹⁴ Upon a showing of but-for

112. *Id.* at 258.

113. *Id.* at 259. Justice Souter argues that "details specific to retaliatory-prosecution cases" were necessary to establish the chain of causation sufficient to support a retaliatory-prosecution cause of action. *Id.*

114. *Id.* In ordinary retaliation claims the government agent "allegedly harboring animus is also the individual taking the adverse actions." *Id.* In the present case, Moore and REI allege the animus harboring individuals (the postal inspectors), while "enginee[r]ing his criminal prosecution," did not actually take the adverse action of bringing charges against him, but instead pressured the United States Attorney's office to have him indicted. *Id.* at 243-54. Thus the actual adverse action (criminal charges) were brought by the Assistant United States Attorney, and not animus harboring postal inspectors themselves. *Id.* at 259. Justice Souter notes that the causation requirement in a case like this one "presents an additional difficulty" in that there is a gap between the animus harboring individual, and the adversely acting individual. *Id.* Justice Souter states that causation in addition to proof of an improper motive is what needs to be proven to establish a constitutional violation. *Id.* at 259-60. (citing *Crawford-El*, 523 US at 593). Ultimately, Justice Souter says, the simple "action colored by some degree of bad motive" acceptable in cases like *Crawford* and *Doyle* is insufficient to constitute a constitutional violation if that action would have been taken anyway (if there was probable cause). *Id.* at 260. By acknowledging the gap between the animus harboring individual and the adversely acting individual in cases like *Hartman*, Justice Souter sets up the Court's discussion of the differences between regular retaliation claims and that which involves retaliation in the form of criminal charge for constitutionally protected conduct. Before getting to that discussion however Justice Souter discusses the *Pickering* decision at length; illustrating that precedent addressing retaliation claims does not address what a plaintiff explicitly

causation Justice Souter argues there has been a prima-facie showing of retaliatory harm that shifts the burden of proof to the defendant.¹¹⁵ It thus becomes the defendant's burden to illustrate that absent impetus to retaliate, the adverse action complained of would have been taken anyway.¹¹⁶ Absent a showing that the animus was the but-for cause of the adverse action complained of, there is an insufficient causal connection between the unconstitutional motive and resulting harm.¹¹⁷

Further distinguishing between regular retaliatory actions and actions where the retaliation for protected conduct arises from a criminal charge, Justice Souter finds that there are two main differences that set a retaliatory prosecution case (like *Hartman*) apart from a regular retaliation case.¹¹⁸ First, he says, "there will always be distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation" in a retaliatory prosecution case.¹¹⁹ By demonstrating an absence of probable cause for the underlying criminal charge, the plaintiff reinforces the retaliation evidence and illustrates a but-for basis for initiation of the prosecution which will support their prima-facie case.¹²⁰ In addition, if a defendant is able to illustrate the existence of probable cause, they are able to demonstrate that the adverse

needs to plead and prove in regards to a connection between the retaliatory animus and the discharge, "which will depend on the circumstances" he adds. *Id.* at 260.

115. *Id.* at 260.

116. *Id.*; see also *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 247, 287 (1998).

117. *Id.* at 260-61. "It may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful but an action colored by some degree of bad motive does not amount to an unconstitutional tort if that action would have been taken anyway." *Id.* at 260.

118. *Id.* at 260-61.

119. *Id.* at 261. "[N]amely, evidence showing whether there was or was not probable cause to bring the criminal charge" will be used to prove or disprove retaliatory causation in retaliatory-prosecution cases. *Id.*

120. *Id.* at 260-61. Furthermore, Justice Souter claims, an absence of probable cause "suggest[s] that prosecution would have occurred even without retaliatory motive." *Id.* at 261.

action (criminal prosecution) would have occurred despite animus - thus affirming the constitutionality of their actions.¹²¹

The second difference between regular retaliatory and retaliatory prosecution cases Justice Souter points out is that, considering the gap between the alleged person with animus and the actual actor who carries out the adverse action, the requisite causation between the animus and injury is more complex.¹²² Necessitating a showing of a lack of probable cause, Justice Souter argues, would better establish the causal connection between the animus and the injury needed to prove a constitutional violation against the non-acting, but animus-harboring individual and the one whom they influence into carrying out the adverse action complained of.¹²³ As Justice Souter briefly points out, to bridge the gap between the non-prosecuting, yet animus

121. *Id.* What Souter claims this first distinction between regular retaliatory, and retaliatory-prosecution claims indicates is that “litigating probable cause will be highly likely in any retaliatory-prosecution case, owing to its power evidentiary significance.” *Id.*

122. *Id.* “A *Bivens* (or section 1983) action for retaliatory prosecution will not be brought against the prosecutor (who is absolutely immune from liability for decisions for prosecute.”) *Id.* at 261-62. “Instead the defendant will be a non-prosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not he himself make it.” *Id.* at 262. As Justice Souter points out, when the defendant is a non-prosecutor who influenced the decision to prosecute, the cause of action brought will not only be for retaliatory prosecution, but also for the “successful retaliatory inducement to prosecute.” *Id.* It should be noted that though prosecutors are given absolute immunity for the decision to bring charges, if the charges brought against the prosecutor surround actions they carried out in their administrative capacities, absolute immunity is not extended. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 274-76 (1993) (holding no absolute immunity when prosecutor acts in administrative capacity); *see also Burns v. Reed*, 500 U.S. 478, pincite? (1991) (holding “absolute immunity does not attach when a prosecutor offers legal advice to the police”).

123. *Hartman*, 547 U.S. at 261-62. A signification point, only briefly addressed by Souter, is the fact that not only does the demonstration of a lack of probable cause help to fill in the causal gap, but it also circumvents the absolute immunity given to the prosecutor in a way, by enabling the victim of retaliatory-prosecution to bring a claim against the non-prosecutor, non-prosecution bringing, but animus harboring individual who induced the prosecutor to bring charges. Though the prosecutors themselves are given absolute immunity (based on the presumption that a prosecutor has grounds for bringing charges), where the causal gap is filled with a lack of probable cause on the part of the prosecution inducing individual, the plaintiff is at least assured the ability to recover for their injuries against the animus harboring individual.

harboring actor and the actual prosecutor, it is not merely sufficient to demonstrate that the “non-prosecuting official acted in retaliation,” but also that “he induced the prosecutor to bring charges that would not have been initiated without his urging.”¹²⁴ By analogizing the Court’s reasoning with *Barts v. Joyner*, *Dellums v. Powell*, and *Smiddy v. Varney*, Justice Souter illustrates precedent supporting the requirement of a causal connection between the retaliatory animus of one person and the actions of another.¹²⁵ He concludes that the differences presented in cases where the claimed retaliatory action is a criminal charge, as opposed to other forms of retaliation, support the argument that a lack of probable cause should be alleged and proven by the plaintiff.¹²⁶

124. *Hartman*, 547 U.S. at 262. “The causal connection required here is not merely between the retaliatory animus of one person and that person’s own injurious action, but between the retaliatory animus of one person and the action of another.” *Id.*; see also *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (giving absolute immunity to prosecutors).

125. *Hartman*, 547 U.S. at 262-63. “In order to find that a defendant procured a prosecution, the plaintiff must establish ‘a chain of causation’ linking the defendant’s actions with the initiation of criminal proceedings” *Id.* (citing *Moore v. Valder*, 213 F.3d 705, 710 (D.C. Cir. 2000)); see also *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989) (holding a plaintiff seeking damages incident to their criminal prosecution must show the police, who allegedly violated their constitutional rights, pressured or deceived prosecutors); *Dellums v. Powell*, 566 F.2d 167, 192-93 (D.C. Cir. 1977) (holding where allegations of misconduct are directed at police, a malicious-prosecution claim cannot stand if the decision made by the prosecutor to bring criminal charges was independent of any pressure exerted by the police in question . . . need to bridge the gap between the acting person and that harboring animus towards the plaintiff); *Smiddy v. Varney*, 665 F.2d 261, 267 (9th Cir. 1981) (“[W]here police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted.”).

126. *Hartman*, 547 U.S. at 262-63. “This discourse [in regard to the complexity of filling in the gap in retaliatory prosecution cases where the animus harboring individual is not the directly acting individual] appears to be consistent with the principles announced in the governmental and supervisory liability cases.” Sheldon H. Nahmod, Michael L. Wells & Thomas A. Eaton, *Constitutional Torts August 2006 Update*, available at: <http://www.lexisnexis.com/lawschool/study/texts/pdf/ConstitutionalTorts.doc>. See, e.g., *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (requiring that the official policy or custom of a local government must be “the moving force” behind its employee’s unconstitutional action); see also *City of*

Moving to the core of the issue presented, Justice Souter uses the remainder of the Court's opinion to elaborate on the significance of a plaintiff's ability to demonstrate an absence of probable cause in a retaliatory prosecution cause of action.¹²⁷ He adds, in addition to the fact that in the present case the plaintiff's evidence of an inspector's animus does not invariably imply the inspector induced the prosecutor's actions in bringing criminal charges, there remains an underlying presumption that a prosecutor has legitimate grounds for bringing criminal charges, and this presumption is one not lightly discarded.¹²⁸ Again, Justice Souter points to the plaintiff's

Canton, Ohio v. Harris, 489 U.S. 378 (1989); Board of Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997) (emphasizing plaintiffs must prove not only that a local government's training and hiring policies are deliberately indifferent to risk of violating the plaintiff's constitutional rights, but also that these deficient policies "actually caused" and were the "moving force" behind the individual officials' unconstitutional conduct – thus establishing a causal chain); Allen v. City of Muskogee, 119 F.3d 837 (10th Cir. 1997) (addressing causation in supervisory liability cases). The common thread between the aforementioned cases and the instant case (*Hartman*) is that in all these cases the defendant is alleged to have done something that caused someone else to violate the plaintiff's constitutional rights and the courts consistently held it is not enough for a plaintiff to prove that a defendant engaged in culpable conduct and a constitutional violation occurred; the plaintiff must also prove that the culpable conduct actually cause another else (i.e. prosecutor) to violate the plaintiff's constitutional rights.

127. *Hartman*, 547 U.S. at 262-66.

128. *Id.* at 263-64; *see, e.g.*, *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (holding prosecutorial discretion is broad, thus ill-suited to judicial review in light of such factors as "the prosecution's general deterrence value, the Government's enforcement priorities". . . the fact that "[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking [sic] to outside inquiry, and may undermine prosecutorial effectiveness"); *see also* *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 480-90 (1999). Given the judiciary's broad deference to a prosecutor's decision whether or not to bring charges, the question then becomes, how much deference is too much deference? The court wants to uphold the effectiveness of the prosecutor, but at the expense of the plaintiff's constitutional rights? Compare *Wayte*, 470 U.S. at 607-08; *Reno*, 525 U.S. at 480-90 and *Hartman*, 547 U.S. at 265-66 with *Lara Beth Sheer, Prosecutorial Discretion*, 86 Geo. L.J. 1353 (1998) (discussing the courts broad recognition of prosecutorial discretion). "There are other limits to a prosecutor's discretion, and the judiciary has a responsibility to protect individuals from prosecutorial conduct that violates constitutional rights. Such conduct usually involves either selective prosecution, which denies equal protection of the law, or vindictive prosecution, which violates due process," Sheer at 1356-57; *see also*

establishment of a lack of probable cause as sufficient to “address the presumption of prosecutorial regularity.”¹²⁹

Though Justice Souter advocates there is a necessity for a plaintiff’s showing of a lack of probable cause, he does acknowledge two possible but rare scenarios in which a plaintiff’s showing of a lack of probable cause would not be necessary.¹³⁰ First, he says, where there is evidence that a prosecutor was “nothing but a rubber stamp for his investigative staff or the police” that evidence would be sufficient to establish a causal connection between retaliatory thinking and the adverse act in question.¹³¹ Secondly, he notes that a

Sandra Caron George, *Current Development 2004-2005: Prosecutorial Discretion: What's Politics Got To Do with It?* 18 GEO. J. LEGAL ETHICS 739 (Summer 2005) (discussing the broad powers given prosecutors and the very real dangers of abuse of that discretion).

129. *Hartman*, 547 U.S. at 263 (arguing “at the trial stage, some evidence must link the allegedly retaliatory official to a prosecutor whose action has injured the plaintiff. The connection, to be alleged and shown, is the absence of probable cause.”) Justice Souter’s main argument for requiring a plaintiff to demonstrate a lack of probable cause, regardless of the circumstance he is expanding upon, centers around the fact that the gap between the adversely acting person and the one with the actual animus in retaliatory-prosecution cases, and there is a causation needed to bridge the gap, and rightly so, as this seems to be the foremost justification for sustaining a no-probable cause requirement. Souter’s opinion seems to be redundant in that the majority of it is a repeated elaboration on why requiring a demonstration of a lack of probable cause is necessary to cement the causal chain between animus and adverse action. Despite this redundancy however, Souter’s approach to give a constitutional background and thoroughly explain why the Supreme Court is setting this new precedent acts as a barriers to future appeals of the issue that Souter attempts to ensure is “well-settled” by the conclusion of the *Hartman* opinion. Compare *Hartman*, 547 U.S. 250 with *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (emphasizing “so long as the prosecutor has probable cause, the charging decision is generally discretionary” and sufficient “for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor’s decision to bring the charge”) “Only in rare cases can a court interfere with the government’s decision to prosecute. For example, where a decision to prosecute is based on a defendant’s race, religion, or decision to exercise a constitutional right, the courts must intercede.” *Gov’t of the Virgin Islands v. Charles*, 72 F.3d 401, 409-10 (3rd Cir. 1995). See, e.g., *Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (reversing a conviction due to retaliatory prosecution); *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974) (setting out the elements of a claim of discriminatory prosecution).

130. *Hartman*, 547 U.S. at 264.

131. *Id.*; see, e.g., *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 247, 281-83 (1998) (holding evidence that the board of education, which formally decided

prosecutor's own disclosure of retaliatory thinking on his part would be another significant factor in closing the gap between actor and animus without the plaintiff's need to demonstrate a lack of probable cause.¹³²

Justice Souter goes on to note, however, the likelihood of either of these scenarios ever arising measures very low to non-existent.¹³³ It is "unrealistic" to expect either a prosecutor to reveal they harbored animus in their minds when carrying out the prosecutions in question, or to expect overwhelming evidence linking the animus harboring individual with the adversely acting individual, such that causation could be extended without presentation of a lack of probable cause.¹³⁴ Because of the improbability of the aforementioned scenarios, Justice Souter concludes that this is further support for the

not to rehire a teacher, after his exercise of protected speech, was only nominally distinct from the school superintendent who was alleged to have bore the retaliatory animus).

132. *Hartman*, 547 U.S. at 264.

133. *Id.* To the *Hartman* plaintiff's arguments against a requirement of a non-probable cause showing, Justice Souter points out while the abovementioned two examples would indeed reduce if not eliminate the necessity for a plaintiff's ability to show lack of probable cause, the fact that the circumstances surrounding such examples are "likely to be rare" makes them "consequently poor guides in structuring a cause of action" around them. *Id.* Souter makes a strong point here in favor of the non-probable cause requirement by pointing out that the Supreme Court in *Hartman* is establishing precedent to be followed closely by lower courts. As such, it is important to establish a solid basis for the Court's ruling centered on the circumstantial fact patterns most likely to arise, thereby making the ruling of the Court most applicable. If the Court were to consider those rare instances in which: (1) the adversely acting individual readily admits animus; or (2) evidence is overwhelmingly substantial enough to infer a sufficient causal link, at the core of their considerations around the structuring of a retaliatory-prosecution cause of action, their holding would not be tailored in a manner rendering its applicability generally effective.

134. *Id.* Justice Souter again considers the complexity of retaliatory-prosecution in relation to other retaliation cases one factor lending to the determination that the plaintiff be required to prove a lack of probable cause because the complexity of retaliatory-prosecution cases further decreases the chances that there will be a substantial amount of evidence sufficient to create the required causal connection between animus and action without proof of non-probable cause. *Id.* at 264-65.

decision that proof of probable cause (or lack thereof), is essential to retaliatory prosecution claims.¹³⁵

Taking all of his arguments into consideration: first a rejection of the common law of torts as a guide to the Court's structuring of a retaliatory prosecution cause of action; second, the differences between other retaliation case and retaliatory prosecution cases justifying a demonstration of no probable cause; and finally, the need to structure a cause of action around likely scenarios so as to ensure the effectiveness of the Court's ruling, Justice Souter asserts "the significance of probable cause or the lack of it looms large, being a potential feature of every case with obvious evidentiary value."¹³⁶ It is this "very significance" or probative value of probable cause arising in "all cases", Justice Souter concludes, that necessitates the requirement that it be plead and proven.¹³⁷

B. Justice Ginsburg and Justice Breyer's Dissent

Recognizing that this case is now directed against the instigating postal inspectors alone, not the prosecutor, I would not assign to the plaintiff the burden of pleading and proving the absence of probable cause for the prosecution. Instead, in agreement with the Court of Appeals, I would assign to the postal inspectors who urged the prosecution the burden of showing that, had there been no retaliatory motive and

135. *Id.*; see also *id.* at 258-59. See *supra* notes 101-03 and accompanying text. *Contra infra* note 120 and accompanying text.

136. *Hartman*, 547 U.S. at 265. See *supra* notes 90-96 and accompanying text, notes 98-101 and accompanying text, and note 112.

137. *Hartman*, 547 U.S. at 265. Furthermore Justice Souter points out, because the requirement to plead and prove the absence of probable cause (1) will "usually be cost free by any incremental reckoning;" and (2) "can be made mandatory with little or no added cost", it "makes sense to require such a showing as an element of a plaintiff's case, and the court held that it must be pleaded and proven." *Id.* Justice Souter lastly adds that "the issue [of probable cause] is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense." *Id.*

importuning, the U. S. Attorney's Office nonetheless would have pursued the case.¹³⁸

Justices Ginsburg and Breyer, considering the record from the lower court and its finding that there was enough "evidence of retaliatory motive coming close to the proverbial smoking gun," dissented from the majority's holding that a plaintiff must demonstrate a lack of probable cause in a retaliatory prosecution claim.¹³⁹ In agreement with the court of appeals they argued the burden should shift to the defendants to show that they would have pursued the prosecution of the plaintiff even without a retaliatory motive.¹⁴⁰

Consequently, Ginsburg and Breyer articulate one severe consequence of the majority's decision is that the plaintiff - "alleged victim" - is unduly burdened; so much so, that "only entire baseless prosecutions" would be checked.¹⁴¹

Particularly, they argue the *Hartman* ruling implies that as long as the defendants in a retaliatory prosecution claim are able to demonstrate the smallest amount of probable cause, they may escape liability and the victim would find no compensation for the economic and reputational losses they have suffered.¹⁴²

Where the majority opinion recognized at least two instances in which there would be no necessity for a plaintiff to demonstrate a lack of probable cause, but concluded those two fact patterns were so

138. *Id.* at 266 (Ginsburg, J. dissenting) (internal quotations omitted).

139. *Id.* . Specifically Ginsburg noted that a review of the factual record revealed clear evidence of "unusual prodding" and urging on the part of the defendants in efforts to get a "reluctant U.S. Attorney's office to press charges against Moore." *Id.* Essentially the dissent argues that such conduct, clearly indicative of the defendant's influence in pressing charges, should not go unheeded. It is clear evidence of unconstitutional conduct on behalf of the defendants that should not be overridden by a small demonstration of probable cause, rather a greater demonstration some other larger justification for their actions (for example, a demonstration that there was in reality no retaliatory motive for their actions). *Id.*

140. *Id.*

141. *Id.* citing *Moore v. Hartman*, 388 F. 3d 871, 879 (D.C. Cir. 2004).

142. *Id.* In turn, the victim incurs "the cost entailed in mounting a defense" along a reputational loss . . .neither of which would be compensable under the federal law as defined by this decision in *Hartman*. *Id.*

“rare” and “unlikely” that they should not be considered guides in structuring a cause of action, Justices Ginsburg and Breyer in their dissent assert that even though the situations in which a discussion of probable cause would not be necessary are “likely to be rare,” it does not justify “structuring a cause of action that precludes relief when such instances] do arise.”¹⁴³

Concurring with both the Court of Appeals for the District of Columbia Circuit’s opinion, and notably the Supreme Court’s opinion in *Doyle*, Ginsburg and Breyer conclude that a proper balance between the burdens put on the plaintiff and defendant would be better served by requiring the defendant to demonstrate: (1) there was a lack of retaliatory motive; and (2) they would have pursued the prosecution regardless of the presence of any retaliatory motive, in order to successfully challenge a retaliatory prosecution cause of action.¹⁴⁴

V. IMPACT

A. Legal Impact of the Hartman Decision

The issue before the *Hartman* Court was very straightforward: whether a plaintiff in a *Bivens* action for retaliatory prosecution states an actionable violation of the First Amendment without alleging an absence of probable cause to support the underlying criminal charges against them.¹⁴⁵ If you are of the majority opinion, the answer to this inquiry would be “yes”, particularly in light of the probative value such a claim would have in establishing the requisite causation.¹⁴⁶

143. *Hartman*, 547 U.S. at 267.

Recovery remains possible . . . ‘in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the investigation and ensuing prosecution would not have occurred but for the defending officials’ retaliatory animus.’ That such situations ‘are likely to be rare,’ it seems to me, does not warrant ‘structuring a cause of action,’ that precludes relief when they do arise.

Id. (citing *Bivens*, 403 U.S. at 881); see also *supra* notes 109-13 and accompanying text.

144. *Hartman*, 547 U.S. at 266-67; see also *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 247, 287 (1998).

145. *Hartman*, 547 at 252.

146. *Id.* at 252, 262-266.

Legally speaking, the holding of the *Hartman* Court is significant for several reasons, the foremost being that it sets a new precedent in its solidification of a fourth element in the structuring of a retaliatory prosecution claim.¹⁴⁷ The *Hartman* Court recognized: (1) that they were engaged in a constitutionally protected activity; (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendant's adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct. Further the Court said a plaintiff must also demonstrate that the defendant acted with a lack of probable cause.¹⁴⁸

By adding an additional element to the prima facie case, the Court effectively raises the burden of proof for the plaintiff in retaliatory prosecution cases, thus making it harder to extend liability to government actions, even in the face of a constitutional violation.¹⁴⁹

The factual difficulty of divining the influence of an investigator or other law enforcement officer upon the prosecutor's mind provides an added legal obstacle in the longstanding presumption of immunity already accorded to prosecutorial decision making, thus effectively raising the burden of proof even higher.¹⁵⁰ Considering the complex causal chain that already exists in retaliatory prosecution claims, the holding of the *Hartman* Court piles one more hurdle upon several inherently existent ones.¹⁵¹

Because alleging ill-motive on the part of the prosecution is easy, the Court considers having multiple filters preventing frivolous

147. *See supra* notes 36 and 45.

148. *See supra* notes 36 and 45.

149. *Hartman*, 547 U.S. at 264-67.

150. *Id.* at 265-67. *See supra* notes 118-19 and accompanying text.

151 *Hartman*, 547 at 263-65. *See supra* notes 118-19 and accompanying text.

The fact that the causal connection isn't only between retaliatory animus of one person and their injurious action, but between the retaliatory animus of one person and the action of another makes the causal chain in a retaliatory-prosecution action an inherently complex one. *See supra* note 113 and accompanying text. The problem within retaliatory-prosecution cases that the *Hartman* court tired to specifically address is that evidence of an inspector's animus does not conclusively show he induced the prosecutor who would have not pressed charges but for the inducement, there needs to be more; and the *Hartman* court ruled a lack of probable cause is that "something more".

claims is essential to saving time and preventing unnecessary and unwarranted burden upon the court system.¹⁵² Requiring an absence of probable cause in the plaintiff's prima facie case would provide one such filter. Without such precautions, the Court has been concerned that any claim of retaliatory prosecution could essentially subject prosecutorial decision-making to extensive discovery, which the Supreme Court sought to avoid in cases like *Wayte v. United States* and *United States v. Armstrong*.¹⁵³

In *Wayte* the Court ruled that in a retaliatory prosecution claim the plaintiff must be able to demonstrate: "(i) others similarly situated generally had not been prosecuted for conduct similar to petitioner's and (ii) the Government's discriminatory selection was based on impermissible grounds such as race, religion, or exercise of First Amendment rights."¹⁵⁴

Similarly, in *Armstrong* the Court held that for a claim of prosecution violative of the constitution's equal protection clause, a plaintiff must show "the prosecutorial policy 'had a discriminatory effect and was motivated by a discriminatory purpose' . . . demonstrated when the claimant can show that similarly situated individuals of a different race were not prosecuted."¹⁵⁵ The Court concluded that one desired effect of these extra requirements imposed upon the plaintiffs was that it "adequately balance[d] the Government's interest in vigorous prosecution."¹⁵⁶

152. See *supra* note 115 and accompany text.

153. See *Wayte*, 470 U.S. 598 (1985); see also *United States v. Armstrong* 517 U.S. 456 (1996) (holding that an element of selective-prosecution claims includes the defendant's production of some evidence of differential treatment of similarly situated members of other races or protected classes [lack of probable cause]).

154. See *Wayte*, 470 U.S. at 605. These two requirements can be said to translate into a showing of a lack of probable cause. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.* at 607 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607.

155. *Armstrong*, 517 U.S. at 465 (citing *Wayte* 470 U.S. at 608).

156. *Id.* at 470. "The required threshold, a credible showing of different treatment of similarly situated persons, adequately balances the Government's

As the U.S. Supreme Court noted in *Wayte*, *Armstrong*, and now *Hartman*, the increased burden imposed upon plaintiff's in retaliatory prosecution cases provides increased thresholds intended to protect the presumption that prosecutors have legitimate grounds for their decisions to prosecute.¹⁵⁷

B. Social Impact of the Hartman Decision

As to social impact, the *Hartman* rulings increased burden on plaintiffs implies that it will be harder for individuals to successfully bring retaliatory prosecution causes of action – even in the face of constitutional violations. Though the constitution gives American people the right to seek compensation for wrongs carried out against them as a result of governmental action, that right becomes more and more limited as the plaintiffs evidentiary burden is confounded by multiple legal obstacles.¹⁵⁸

As noted by Justices Ginsburg and Bryer in their dissent, this could provide a windfall for prosecutors (not subject to immunity), or to those acting with retaliatory animus that are able to demonstrate even the smallest amount of probable cause, thus defeating the plaintiff's-now mandatory-claim of a complete lack of probable cause.¹⁵⁹ Such a high standard would preclude relief in those

interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution." *Id.*

157. *Hartman*, 547 U.S. at 263-65. See *supra* notes 107-08 and accompanying text.

158. Wex, First Amendment: An Overview, http://www.law.cornell.edu/wex/index.php/First_amendment.

The right to petition the government for a redress of grievances guarantees people the right to ask the government to provide relief for a wrong through the courts (litigation) or other governmental action. It works with the right of assembly by allowing people to join together and seek change from the government.

Id.

159. *Hartman*, 547 U.S. at 265-67. "Under the Court's proof burden allocation, which saddles plaintiff--the alleged victim--with the burden to plead and prove lack of probable cause, only *entirely* "baseless prosecutions" would be checked. So long as the retaliators present evidence barely sufficient to establish probable cause and persuade a prosecutor to act on their thin information, they

instances where the plaintiff is able to demonstrate a lack of probable cause as long as the defendant is able to claim some form of probable cause, even if it was coupled with animus and resulted in a constitutional violation.¹⁶⁰

Consequently, by increasing the evidentiary burdens placed upon the plaintiff in a retaliatory prosecution suit, animus harboring, government actors may be afforded protection from liability for their constitutional violations.¹⁶¹

VI. CONCLUSION

Ever since the ratification of the Bill of Rights, the First Amendment has stood to provide that people would be secure in their freedom to express themselves without interference or constraint from congress.¹⁶² Over time, the people's individual rights to freedom of expression, speech, religion etc., remained so highly regarded that liability for infringement of these freedoms was not only extended to Congress, but to the federal government in its entirety, as well as state and local governments.¹⁶³

From the government's perspective, expanding liability could threaten to inhibit the manner in which a government actor carries out their occupational duties, however, the Supreme Court early on has taken precautions to protect against this possible chilling effect.¹⁶⁴ Similarly, because retaliatory actions taken against one for having exercised First Amendment freedoms has the very effect of

could accomplish their mission cost free." *Id.* at 266-67 (quoting *Moore*, 388 F. 3d at 879).

160. *Hartman*, 547 U.S. at 266-67. Considering that the other three factors required of a plaintiff for a successful prima-facie retaliatory-prosecution case are arguably vague or subjective the plaintiff's hurdles to recovery in retaliatory-prosecution cases seems mounting and almost limitless. This makes "advocates of politically unpopular speech . . . susceptible to expressly retaliatory prosecution, provided the prosecutor could show some semblance of probable cause." Norton, Legal Information Institute Bulletin: Supreme Court Oral Argument Previews available at: <http://www.law.cornell.edu/supct/cert/04-1495.html>.

161. *Id.*; see *supra*, notes 118-19 and accompanying text.

162. U.S. CONST. amend. I

163. See *supra* notes 15, 19 and accompanying text.

164. See Sheer, *Prosecutorial Discretion*, 86 Geo. L.J. 1353, 1356-57 (1998).

chilling the people's exercise of those freedoms, courts have taken precautions against this possible chilling effect as well.¹⁶⁵

The Supreme Court in *Hartman* continued to pursue a balance between the burden of proof allocated to the plaintiff in retaliatory prosecution cases, alongside the check put on "baseless prosecutions."¹⁶⁶ Because the balance articulated by the *Hartman* Court resolved conflicts previously existing among the lower courts, the holding provides a "balancing" that will be felt both legally and socially – by the government, in its increased security from liability for First Amendment violating retaliatory prosecutions, and by the individual, specifically as the evidentiary burden already upon their shoulders has been increased.¹⁶⁷

To better understand the full effect of the *Hartman* decision, imagine a case reflecting factual circumstance similar to that found in *Colson* is sought post the *Hartman* decision: an elected official alleges city officials falsely accused her of criminal acts, urged prosecutors to investigate her, and took other retaliatory action against her because she has publicly expressed political views they contended with.¹⁶⁸ Prior to *Hartman*, courts considered only the following three elements: (1) whether the speech in question is

165. See *Colson*, 174 F.3d. at 510. See *supra* notes 30-32 and accompanying text; see also Sheer, 86 Geo. L.J at 1356-57. "There are other limits to a prosecutor's discretion, and the judiciary has a responsibility to protect individuals from prosecutorial conduct that violates constitutional rights." *Id.*; see, e.g., U.S. v. Redondo-Lemos, 27 F.3d 439, 444 (9th Cir. 1994) (holding the court has a duty to closely scrutinize evidence of invidious discrimination where there is a claim of retaliatory or vindictive prosecution); see also Phelps v. Hamilton, 59 F.3d 1058, 1063-64 (10th Cir. 1995) (authorizing the federal court to enjoin pending state criminal prosecutions under *Younger* abstention doctrine where prosecution was "[c]ommenced in bad faith or to harass, based on flagrantly and patently unconstitutional statute, or [related to] any other such extraordinary circumstance creating threat of irreparable injury both great and immediate") (quoting *Younger v. Harris*, 401 U.S. 37 (1971)).

166. *Hartman*, 547 U.S. at 266-67 (quoting *Moore*, 388 F. 3d at 879).

167. *Id.* The *Hartman* decision can be said to give governmental actors increased security in their actions considering that the balance put more weight on the plaintiff and less on the prosecution-seeking individual. Furthermore, even where a plaintiff is able to meet the high standards imposed upon them, government actors and other defendants are still able to avoid liability where they can demonstrate even the smallest amount of non-animus driven probable cause.

168. See *Colson*, 174 F.3d. at 499-510.

related to a matter of public concern; (2) whether the plaintiffs' interest in making the statement outweighs her employer's interest in promoting efficiency in its operations; and (3) whether the protected speech was a substantial or motivating factor in the decision to penalize the plaintiff.¹⁶⁹ Assuming the evidence indicates that the plaintiff's speech in question was indeed a matter of public concern, that the statements were not made in a manner that impeded the efficiency of the defendant's operation and the defendants admit they took retaliatory actions against the plaintiff largely because they disagreed with her political stance, then prior to *Hartman*, the plaintiff would have successfully made a prima facie case for retaliatory prosecution. If the fourth element articulated by *Hartman* were now added to the same fact pattern and the court required the plaintiff to demonstrate the defendants acted without probable cause in addition to animus, the chances of a successful prima facie retaliatory prosecution claim would be dramatically reduced because as the *Hartman* court articulated: it is only when a retaliatory motive (animus) is combined with an absence of probable cause that it is sufficient to give the claim of retaliation some vitality.¹⁷⁰

Though as the *Hartman* court notes that it is "easy to allege ill-motive against prosecution," it is similarly just as easy for retaliators to present just enough evidence sufficient to establish probable cause; and under the *Hartman* ruling, even if the plaintiff is able to demonstrate some animus on the part of the defendants, a demonstration of probable cause would be sufficient to overcome the fact that they also acted with animus, thus insulating the defendant from liability and giving the victim no compensation for the losses that they have suffered.¹⁷¹

169. *Pickering*, 391 U.S. at 569-73.

170. *Hartman*, 547 U.S. at 263-67. "[S]o long as the prosecutor has probable cause, the charging decision is generally discretionary, and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge." *Id.* at 263-65 (citing *Bordenkircher*, 434 U.S. at 364).

171. See *supra*, note 115 and accompany text. While considering deference to the legitimacy of a prosecutor's decision to bring charges, I would suggest consideration of the First Circuit's ruling in *Cox v. Hainey*, 391 F.3d 25 (1st Cir. 2004) where it was held: "when making a determination regarding qualified [or absolute] immunity [given to prosecutors], the totality of the circumstances must be evaluated." *Id.* at 33. In *Cox*, the plaintiff was arrested after police consulted with

While the Court concluded that preservation of the underlying presumption that a prosecutor has legitimate grounds to bring charges is a duty that court “do[es] not lightly discard,” it concurrently seems as though it lowered the Court’s duty to uphold the constitution and its provision that all persons should be free to redress the government of grievances.¹⁷²

Consequently, the court left open the question of whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation even in the face of a demonstration of probable cause. Where the courts in *Pickering*, *Colson* and *Plati* in 1968, 1999 and 2001 respectively articulated any form of retaliation for one’s exercise of their First Amendment rights constitutes an infringement of those constitutionally guaranteed freedoms, and because such an infringement directly contravenes the Constitution, courts should seek to compensate those injuries suffered wherever possible. By 2006, the *Hartman* Court had come to consider the need

the Assistant District Attorney to determine probable cause. *Id.* Essentially the officers there tried to claim they had probable cause to arrest the plaintiff because they had talked to the District Attorney, and where a prosecutor believes there is probable cause, others have reason to defer to their judgment. *See id.* The court cautioned that “a wave of the prosecutor’s wand cannot magically transform an unreasonable probable cause determination into a reasonable one.” *Id.* at 34. Thus the court noted that though prosecutor’s are given deference alongside a presumption of validity in their decisions to prosecute, this does not mean their decisions should always be taken at face value without deeper consideration.

172. *Hartman*, 547 U.S. at 263-66. *See supra* note 103 and accompanying text. It was the court’s position that concern for judicial intrusion into executive distraction was of such a high order, it should be minimal. *Id.* at 263-65; *see also* U.S. CONST. amend. I.; Lara Beth Sheer, *Prosecutorial Discretion*, 86 Geo. L.J. 1353 (1998) (discussing the court’s recognition of “a prosecutor’s broad discretion to initiate and conduct criminal prosecutions, in part out of regard for the separation of powers doctrine and in part because ‘the decision to prosecute is particularly ill-suited to judicial review’”) (quoting *Wayte v. U.S.*, 470 U.S. 598, 607 (1985)); *see also* *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (holding broad discretion is appropriate because prosecutors, not courts, must evaluate the strength of a case, allocation of resources, and enforcement priorities); *U.S. v. Tucker*, 78 F.3d 1313, 1316 (8th Cir. 1996) (Attorney General’s exercise of discretion to refer matters to Office of Independent Counsel for investigation and prosecution not subject to judicial review); *U.S. v. Bauer*, 75 F.3d 1366, 1376 (9th Cir. 1996) (discretion beyond judicial review unless defendants make prima facie showing that decision rested on impermissible basis).

to appropriately balance the constitutional rights of the individual with the need to protect the prosecutor's discretion in choosing to bring charges. Moreover the *Hartman* Court stopped adding a fourth element to retaliatory prosecution claims. Thus, only the future will tell if a redressing of the "balance" to once again recognize the need to compensate the harm an individual suffers when their constitutional rights are infringed is appropriate.¹⁷³

173. *Plati*, 258 F.3d at 1175-79 (citing *Henry*, 219 f.3d at 1212); *Colson*, 174 F.3d at 508; *Pickering*, 391 U.S. at 565.