NOTES

BETWEEN *HEALTHY* AND *HARTMAN*: PROBABLE CAUSE IN RETALIATORY ARREST CASES

John Koerner

This Note addresses a circuit split concerning retaliatory arrest claims. In most circuits, a defendant police officer cannot be held liable for retaliatory arrest if the arrest was made with probable cause. This is inconsistent with the Supreme Court's decision in Mt. Healthy City School District Board of Education v. Doyle*, which requires defendants in retaliation claims to show that they would have taken the same action in the absence of a retaliatory motive. But there are a number of exceptions to the* Mt. Healthy *rule, including the Supreme Court's recent decision in* Hartman v. Moore. *In* Hartman*, the Supreme Court ruled that a plaintiff in a retaliatory prosecution claim must prove that the prosecutor brought charges without probable cause. This Note argues that courts should follow* Hartman *and require a plaintiff to prove the absence of probable cause only in a subset of retaliatory arrest cases: cases involving complex causation and cases where the officer had probable cause to believe that the plaintiff had committed a felony offense. In all other retaliatory arrest cases, courts should follow* Mt. Healthy *and permit plaintiffs to bring suit even if the officer had probable cause. This nuanced approach strikes the appropriate balance between free speech rights and the needs of law enforcement.*

Introduction

On March 12, 1997, Anthony Greene walked into the Grand Rapids police department to retrieve his car, which had been towed from a no parking zone.[1] When he was told that he would have to pay a storage fee for the car, Mr. Greene started arguing loudly with Lieutenant Jack Barber and cursing at him.[2] The argument was loud enough that interns answering telephones nearby had to put their callers on hold.[3] Lieutenant Barber told Mr. Greene, "You can't talk to me like that in my building."[4] Greene responded that he was simply exercising his freedom of speech.[5] Barber replied, "Well, not in my building."[6] Greene said, "Well, if that's how you feel, you're really stupid."[7] At that point, Barber told Greene that he was under arrest.[8] Greene protested that the arrest

1. Greene v. Barber, 310 F.3d 889, 892–93 (6th Cir. 2002).
2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.

was illegal; as the officers struggled to subdue him, he was pepper sprayed.[9] Greene was charged with creating a disturbance and with hindering and opposing a police officer, but was acquitted of both charges.[10] He sued for retaliatory arrest.[11]

In the typical retaliation case, a plaintiff must show that the defendant took a significant adverse action against the plaintiff,[12] and that the action was "substantially motivated against the plaintiffs' exercise of constitutionally protected conduct."[13] The defendant can escape liability by showing that she "would have reached the same decision . . . even in the absence of the protected conduct."[14] The burden then shifts to the plaintiff to rebut the defendant's showing. This burden-shifting framework was established by the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*.[15] For Greene, meeting the standard would require convincing a jury that Lieutenant Barber would not have made the arrest if he had not felt personally insulted.

Notwithstanding the general applicability of *Mt. Healthy* to retaliation cases,[16] courts have carved out a number of exceptions to its pleading standards, based on various policy or evidentiary concerns. In retaliation cases brought by prisoners, for example, some courts leave the burden with the plaintiff prisoner to show that the defendant's actions would not have occurred in the absence of a retaliatory motive.[17] In the recent decision of *Hartman v. Moore*, the Supreme Court upheld another such exception to *Mt. Healthy*, ruling that a plaintiff must plead and prove the absence of probable cause to state a claim for retaliatory prosecution.[18] Some courts have extended this retaliatory prosecution exception into retaliatory arrest cases, requiring plaintiffs to prove that the defendant officer did not have "arguable probable cause" to make the arrest.[19] If Mr. Greene found himself in one of these circuits, he would be required

9. Id.

10. Id.

11. Id.

12. Specifically, this step requires plaintiffs to show that "(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." Keenan v. Tejeda, 290 F.3d 252, 258 (5th Cir. 2002).

13. Id.

14. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

15. Id.

16. See infra Part I.B.

17. See, e.g., Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995) (stating that prisoner must "establish that but for the retaliatory motive the complained of incident—such as the filing of disciplinary reports as in the case at bar—would not have occurred"); Goff v. Burton, 7 F.3d 734, 737 (8th Cir. 1993) (stating that in retaliation case brought by prisoner, plaintiff "must prove that retaliation was *the actual motivating factor* for the transfer").

18. 547 U.S. 250 (2006).

19. See, e.g., Phillips v. Irvin, 222 F. App'x 928, 929 (11th Cir. 2007) (denying retaliation claim where police officer had "arguable probable cause" to arrest plaintiff for disorderly conduct).

to show that Lieutenant Barber did not have arguable probable cause to make the arrest—a requirement that could easily have proved fatal to his claim.[20]

Given that a rule like *Hartman*'s, which allows defendants to defeat a retaliation claim based on probable cause, diverges from the Supreme Court's general burden-shifting framework in *Mt. Healthy*,[21] what approach should courts adopt when faced with a retaliatory arrest case? There are compelling arguments to support positions both for and against requiring plaintiffs to establish the absence of probable cause. On the one hand, the facts of *Greene v. Barber* strongly suggest retaliatory motive on Lieutenant Barber's part—the officer claimed to be immune from the First Amendment, made the arrest after Greene challenged his authority and called him "stupid," and arrested Greene on a minor violation without first trying to find another solution to the problem. It seems unjust to apply a pleading standard which would exclude Greene's claim based on the rather technical detail that Lieutenant Barber had probable cause to make the arrest. On the other hand, many cases will not involve such clear evidence of retaliatory motive. A bright-line rule that would dismiss claims on the basis of probable cause would be less burdensome both for police officers and for judges. Some cases involve complex chains of causation, where the plaintiff faces the difficult burden of proving that one official induced another official to make the arrest.[22] Other cases involve plaintiffs who have committed more serious offenses, where the arresting officer's retaliatory motive is less likely to have played an important role in the arrest decision.[23]

Currently, courts resolve this dilemma in retaliatory arrest cases by siding either with the *Mt. Healthy* rule, which never requires a specific showing of no probable cause, or the *Hartman* rule, which always requires such a showing.[24] This Note argues that an all-or-nothing rule that sides with one approach and rejects the other wholesale is misguided and will lead to an incoherent doctrine, as such a rule makes no attempt to properly fit the facts of individual cases. While many questionable retaliatory arrest cases warrant a departure from *Mt. Healthy* and a dismissal on a showing of probable cause, there are also many cases where such a departure will deny redress for a clear injury and allow a wrongdoer to escape

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20. The Sixth Circuit found that a "respectable argument" could be made that Barber had probable cause to make the arrest. Greene v. Barber, 310 F.3d 889, 895 (6th Cir. 2002).

21. See Colin P. Watson, Note, Limiting a Constitutional Tort Without Probable Cause: First Amendment Retaliatory Arrest After *Hartman*, 107 Mich. L. Rev. 111, 123 (2008) (summarizing argument that no-probable-cause rule is inconsistent with *Mt. Healthy*).

22. See, e.g., Curley v. Vill. of Suffern, 268 F.3d 65, 72–73 (2d Cir. 2001) (alleging that officers arrested plaintiff in retaliation for statements criticizing mayor during election campaign).

23. See id. at 69 (describing plaintiff's arrest for assault).

24. See Watson, supra note 21, at 115–16 (collecting cases).

punishment. This Note argues that a more nuanced approach is necessary, one that requires a showing of no probable cause only in certain retaliatory arrest cases.

This discussion has important implications that go well beyond the retaliatory arrest context. First Amendment retaliation doctrine has sparked numerous circuit splits,[25] creating incentives for forum shopping and undermining consistency and fairness in the application of the law.[26] Some of this inconsistency may arise from the courts' insistence on carving out categorical exceptions to *Mt. Healthy*, without analyzing the policy concerns that justify their divergence.[27] By crafting more narrowly honed exceptions that closely mirror underlying policy concerns, courts of appeals may be able to resolve some of the chaos that has characterized this area of law.

Part I discusses First Amendment retaliation doctrine and outlines the elements of a retaliatory arrest claim, with a special focus on the standard of causation set forth in *Mt. Healthy*. It systematically analyzes First Amendment retaliation law and examines several areas where courts have departed from *Mt. Healthy*. Part II focuses on the Supreme Court's recent departure in *Hartman* and concludes with an explanation of the circuit split with respect to retaliatory arrest cases in the wake of *Hartman*. Part III reviews the evidentiary and policy concerns that motivated the Supreme Court's departure from *Mt. Healthy* in *Hartman*—complex causation, presumption of regularity, and the evidentiary value of probable cause. It aligns these concerns with certain retaliatory arrest cases: cases involving complex causation and cases involving felony arrests. In these cases, and only in these cases, courts should depart from *Mt. Healthy* and require a plaintiff to plead and prove the absence of probable cause.

I. First Amendment Retaliation in Theory and Practice

The First Amendment prohibits government officials from retaliating against individuals on the basis of their protected speech.[28] This principle is founded on the notion that retaliation against protected speech threatens to discourage the exercise of First Amendment rights.[29]

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25. This Note identifies five current or past circuit splits. Only two have been resolved. See infra notes 71–72, 84–87, 89–90, 102–103, 138–139 and accompanying text.

26. See generally Ann Bartow, When Bias Is Bipartisan: Teaching About the Democratic Process in an Intellectual Property Law Republic, 52 St. Louis U. L.J. 715, 725 (2008) (discussing problems with circuit splits).

27. See, e.g., Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995) (creating categorical rule for retaliation cases brought by prisoners).

28. See Hartman v. Moore, 547 U.S. 250, 252 (2006) ("[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out."); Crawford-El v. Britton, 523 U.S. 574, 592 (1998) ("[T]he First Amendment bars retaliation for protected speech.").

29. See *Crawford-El*, 523 U.S. at 588 n.10 ("The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right."); cf. Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (noting that threat of discharge from

While cases about prior restraints on the freedom of speech tend to dominate First Amendment jurisprudence,[30] courts will not permit the government to use a regime of subsequent punishments to suppress protected speech that it could not otherwise reach through a prior restraint.[31] The Supreme Court has expressly recognized that the right to be free from retaliation is a long-established right.[32]

Retaliation can be difficult to identify,[33] and the courts have endeavored to structure a cause of action that strikes an appropriate balance between protecting First Amendment freedoms and shielding public officials from meritless or vindictive lawsuits. Part I.A describes the elements of a retaliatory claim. Part I.B provides a more detailed analysis of the causation element, and examines the Supreme Court's decision in *Mt. Healthy*,[34] which sets forth the predominant causation standard for retaliation cases. Part I.C catalogs and discusses departures from *Mt. Healthy*'s causation standard.

A. *The Elements of a Retaliation Claim*

To establish a prima facie claim of First Amendment retaliation, the plaintiff must prove three elements: (1) protected speech ("they were engaged in constitutionally protected activity"); (2) injury ("the defend-

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employment, while carrying different impact than criminal sanctions, is "nonetheless a potent means of inhibiting speech"). John Milton wrote that subjecting the authors of works "found mischievous and libelous" to punishment by "the fire and the executioner will be the timeliest and the most effectuall remedy that mans prevention can use." John Milton, Areopagitica 64 (Folcroft Press, Inc. 1969) (1644).

30. A prior restraint is a "governmental restriction on speech or publication before its actual expression." Black's Law Dictionary 1232 (8th ed. 2004). Retaliation thus differs from a prior restraint in that the speech in question has already occurred. The Supreme Court has drawn a "solidly grounded" distinction between "prior restraints and subsequent punishments." Alexander v. United States, 509 U.S. 544, 550 (1993). This is justified, in part, by the notion that a system of prior restraint is "in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place . . . [and it] allows less opportunity for public appraisal and criticism." Thomas I. Emerson, The System of Freedom of Expression 506 (1970). Some authors have critiqued this assumption. See, e.g., William T. Mayton, Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245, 246 (1982) ("[The] preference for subsequent punishment over injunctive relief diminishes the exercise of free speech.").

31. See Mayton, supra note 30, at 265 (arguing that prior restraint and subsequent punishment function alike in a "technical sense" by using "threat of punishment and litigation costs to instill compliance").

32. See *Crawford-El*, 523 U.S. at 592 ("[T]he general rule has long been clearly established . . . [that] the First Amendment bars retaliation for protected speech . . . ."). Since the right is clearly established, qualified immunity does not shield a defendant from a claim of retaliatory arrest. See infra notes 216–219 and accompanying text.

33. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 725 n.20 (1969) (stating that in claim for retaliation in criminal sentencing, "existence of a retaliatory motivation would . . . be extremely difficult to prove").

34. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

ants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"); and (3) causation ("the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct").[35] The defendant may rebut this prima facie case by proving "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[36]

1. *The First Element: Protected Speech.* — In the context of retaliatory arrest claims, the first prong is usually met. In a number of cases, the plaintiff's speech is nothing more than verbal abuse directed at the police officers,[37] and defendants frequently argue that the plaintiff's speech falls into the unprotected category of "fighting words."[38] "Fighting words" is a narrow exception,[39] however, and the Supreme Court has held that the First Amendment protects a significant amount of verbal criticism and challenge towards police officers, who are expected to exercise greater restraint in their response than the average citizen.[40] Accordingly, while the "fighting words" defense does occasionally succeed,[41] in most cases

35. Keenan v. Tejeda, 290 F.3d 252, 258 (5th Cir. 2002). Some circuits phrase the test somewhat differently. See Bennett v. Hendrix, 423 F.3d 1247, 1250 (11th Cir. 2005) (requiring plaintiff to show "defendant's retaliatory conduct adversely affected the protected speech" and "that there is a causal connection between the retaliatory actions and the adverse effect on speech"); Smith v. Campbell, 250 F.3d 1032, 1037 (6th Cir. 2001) (requiring plaintiff to prove "that this adverse action was taken at least in part because of the exercise of the protected conduct"). These distinctions are largely a matter of phrasing, and the Fifth Circuit's phrasing of the test most closely tracks the generally accepted standard. See *Smith*, 250 F.3d at 1037 (explaining that to meet "taken at least in part" standard, "plaintiff must be able to prove that the exercise of the protected right was a substantial or motivating factor in the defendant's alleged retaliatory conduct").

36. *Mt. Healthy*, 429 U.S. at 287.

37. See, e.g., Greene v. Barber, 310 F.3d 889, 892 (6th Cir. 2002) (calling police officer obscene name); Provost v. City of Newburgh, 262 F.3d 146, 151–52 (2d Cir. 2001) (same); Posr v. Court Officer Shield No. 207, 180 F.3d 409, 415 (2d Cir. 1999) (telling police officer "[o]ne day you're gonna get yours").

38. See, e.g., *Greene*, 310 F.3d at 895–97 (presenting "fighting words" defense); Pine Ridge Recycling, Inc. v. Butts County, 855 F. Supp. 1264, 1275 (M.D. Ga. 1994) (same); Elbrader v. Blevins, 757 F. Supp. 1174, 1182 (D. Kan. 1991) (arguing that plaintiff's speech was unprotected).

39. See Sandul v. Larion, 119 F.3d 1250, 1255 (6th Cir. 1997) (citing Texas v. Johnson, 491 U.S. 397, 408–09 (1989)) (stating that fighting words doctrine has become "very limited").

40. See City of Houston v. Hill, 482 U.S. 451, 462 (1986) (noting limited application of "fighting words" exception when words are addressed to police officers); Dawn Christine Egan, Case Note, "Fighting Words" Doctrine: Are Police Officers Held to a Higher Standard, or per *Bailey v. State*, Do We Expect No More from our Law Enforcement Officers than We Do from the Average Arkansan?, 52 Ark. L. Rev. 591, 597 (1999) (arguing that language directed at officer must be egregious to qualify as fighting words).

41. For examples of successful "fighting words" defenses, see Davis v. Twp. of Paulsboro, 421 F. Supp. 2d 835, 849 (D.N.J. 2006) (finding no protected speech where plaintiff yelled about how he was going to mess "somebody up"); McCormick v. City of Lawrence, 325 F. Supp. 2d 1191, 1201 (D. Kan. 2004) (dismissing retaliatory arrest claim after finding that repeated personal insults constituted "fighting words").

the plaintiff will have little difficulty convincing a federal court that the speech in question was protected.[42]

2. *The Second Element: Injury.* — Just as the first factor rarely decides a retaliatory arrest case, the second factor is rarely debated at all.[43] An arrest is certainly an injury that would chill a person of ordinary firmness from continuing to engage in protected speech.[44] Most of the cases contesting the injury requirement arise out of the Second Circuit, which has occasionally required the plaintiff to prove that the "defendants' actions effectively chilled the exercise of his First Amendment right."[45] This is a minority view,[46] and the Second Circuit itself has not always adhered to this subjective standard, recognizing that the fact that a plaintiff continued to engage in protected speech "should not constitute a free pass for alleged police conduct that was constitutionally odious."[47]

For the great majority of retaliatory arrest cases, therefore, liability will turn on whether the plaintiff can satisfy the third prong and, if so, whether the defendant officer can rebut the prima facie case by showing that she would have reached the same decision in the absence of the

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42. See, e.g., Barnes v. Wright, 449 F.3d 709, 717–18 (6th Cir. 2006) (holding that foul language and ranting did not rise to level of fighting words); *Provost*, 262 F.3d at 159–60 (holding that obscene and aggressive language was not fighting words); *Posr*, 180 F.3d at 415–16 (holding that stating "[o]ne day you're gonna get yours" could have "carried several plausible meanings that would not involve a threat of violence"). In state courts, the "fighting words" exception may be given a broader scope. See Burton Caine, The Trouble with "Fighting Words": *Chaplinsky v. New Hampshire* Is a Threat to First Amendment Values and Should Be Overruled, 88 Marq. L. Rev. 441, 445 (2004) (arguing that state courts have "stretched the fighting words doctrine beyond all recognition, primarily to protect the police from criticism, with all of the inherent dangers that such an approach presents"); Stephen W. Gard, Fighting Words as Free Speech, 58 Wash. U. L.Q. 531, 565–69 (1980) (arguing that in state courts fighting words doctrine "is invoked almost uniformly in circumstances in which its application is wholly inappropriate").

43. In the employment context, where the number of potential injuries, and hence the number of potential claims, is far greater, the injury requirement plays a larger role in screening minor claims. See Keenan v. Tejeda, 290 F.3d 252, 258 & n.4 (5th Cir. 2005) (noting injury requirement weeds out minor instances of retaliation). But even in that area, the Supreme Court has indicated that a slight injury can support a retaliation claim. See Rutan v. Republican Party of Ill., 497 U.S. 62, 75 n.8 (1990) (stating in dicta that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee" is actionable if intended to punish the employee for her speech (internal quotation marks omitted)).

44. See, e.g., Hansen v. Williamson, 440 F. Supp. 2d 663, 677–78 (E.D. Mich. 2006) (stating arrest would likely deter person of ordinary firmness). Indeed, a credible threat of arrest is enough to create standing for a First Amendment challenge. See Steffel v. Thompson, 415 U.S. 452, 459 (1974) (holding plaintiff need not expose self to arrest to challenge statute).

45. Curley v. Vill. of Suffern, 268 F.3d 65, 73 (2d Cir. 2001) (upholding summary judgment for defendant where plaintiff continued to engage in protected speech after arrest).

46. See cases cited supra note 35.

47. Estate of Morris v. Dapolito, 297 F. Supp. 2d 680, 694 (S.D.N.Y. 2004); see also Washington v. County of Rockland, 373 F.3d 310, 320 (2d Cir. 2004) (applying objective test).

protected conduct. These two questions turn on a single issue: causation. Fortunately, this crucial element has been squarely addressed by the Supreme Court in *Mt. Healthy*.[48]

B. *Causation: The* Mt. Healthy *Decision*

Mt. Healthy involved an untenured teacher who was fired by his school board after he conveyed the contents of an internal school memorandum to a radio station.[49] The Board had listed the radio station broadcast as one of the two reasons for firing the teacher.[50] The teacher sued, claiming, inter alia, that the school board's decision to fire him violated his rights under the First and Fourteenth Amendments.[51] The Supreme Court ruled that a plaintiff can establish a prima facie case of First Amendment retaliation by showing that her conduct was constitutionally protected, and that her conduct was "a substantial factor" or, in other words, "a motivating factor" in the decision to take adverse action.[52] But after a plaintiff established this prima facie case, the trial court must allow the defendant to prove "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[53] The Court noted that without this rebuttal, a retaliation claim could "place an employee in a better position as a result of

48. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

49. Id. at 274. The facts of *Mt. Healthy* did not exactly set the stage for a lax standard of causation. The plaintiff publicly criticized the school board over the radio, something he admitted to be wrongful. Brief for Respondent at 5, *Mt. Healthy*, 429 U.S. 274 (No. 75-1278). He had previously been reprimanded for obscene and confrontational language. Id. at 7. Yet while his actions did create cause for the termination, they were not personally antagonistic toward the school board members, who were apparently unaware of the specific content of the broadcast. Id. at 5. These facts may well have colored the Court's decision that a "borderline or marginal candidate" should not be able to "prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." *Mt. Healthy*, 429 U.S. at 286.

50. Examining the proffered reasons for the firing, the district court found that the school board was "faced with a situation in which there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure." *Mt. Healthy*, 429 U.S. at 285 (quoting Petition for Writ of Certiorari at 12a, *Mt. Healthy*, 429 U.S. 274 (No. 75-1278)). Concluding that the radio broadcast did "play a substantial part" in the decision to fire the teacher, the district court held that "even in the face of other permissible grounds the decision may not stand." Id. at 284. The court of appeals affirmed. Id. at 283.

51. The plaintiff also alleged violations of procedural due process, a claim easily disposed of after Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), a case involving strikingly similar facts.

52. *Mt. Healthy,* 429 U.S. at 287 (internal quotation marks omitted). In a footnote, the Court indicated that the phrase "motivating factor" was drawn from the racial discrimination case of Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270–71 (1977), which employed an identical burden-shifting framework. *Mt. Healthy*, 429 U.S. at 287 n.2.

53. *Mt. Healthy*, 429 U.S. at 287.

the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[54]

1. *The Prima Facie Case.* — While the precise quanta of proof required to state a prima facie case is somewhat unclear,[55] the *Mt. Healthy* opinion establishes several clear principles. First, a plaintiff is not required to show that the retaliatory motive "dwarfed all other factors."[56] The phrase "*a* substantial factor," as distinguished from "*the* substantial factor," "clearly contemplates that a decision may be the product of more than one substantial factor."[57] Second, a plaintiff is not required to prove but-for causation to state a prima facie claim.[58] Imposing such a requirement would essentially merge the plaintiff's prima facie case and the defendant's rebuttal.[59] Finally, the opinion suggests that a plaintiff can establish a prima facie case through either direct or circumstantial evidence.[60] The *Mt. Healthy* decision does not draw a distinction between

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54. Id. at 285.

55. The "substantial factor" test "is a variant of the but-for test that governs most cause-in-fact issues in the common law of torts, differing only in its allocation of the burden of proof." Michael Wells, Three Arguments Against *Mt. Healthy*: Tort Theory, Constitutional Torts, and Freedom of Speech, 51 Mercer L. Rev. 583, 584 (2000). The Court's use of the phrase "motivating factor" suggests a lower burden, however, and courts have split regarding the proper standard of proof. Compare Hughes v. Stottlemyre, 454 F.3d 791, 797 (8th Cir. 2006) (requiring plaintiff to show that "retaliatory motive played a part in the adverse employment action"), with Boldin v. Limestone County, 152 F. App'x 841, 845–46 (11th Cir. 2005).

56. Gierlinger v. Gleason, 160 F.3d 858, 868 (2d Cir. 1998); see also Price Waterhouse v. Hopkins, 490 U.S. 228, 259 (1989) (White, J., concurring) (stating plaintiff is "not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action"), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

57. Bowen v. Watkins, 669 F.2d 979, 984 (5th Cir. 1982).

58. See Spiegla v. Hull, 371 F.3d 928, 941–42 (7th Cir. 2004) (collecting cases). Only the Second Circuit requires plaintiffs to show that the adverse "action would not have been taken absent [their] protected speech." Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999). Even in the Second Circuit, a test of but-for causation is not always applied. Compare Gilligan v. Town of Moreau, 234 F.3d 1261, 2000 WL 1608907 (2d Cir. Oct. 25, 2000) (unpublished table decision) (applying but-for approach), with Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ., 444 F.3d 158, 162 (2d Cir. 2006) (not requiring but-for causation).

59. See *Spiegla*, 371 F.3d at 941 (stating that this "approach requires the plaintiff to carry so much of the burden that nothing remains to shift to the defendant to prove"); Martin J. Katz, The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law, 94 Geo. L.J. 489, 503 (2006) (stating that motivating factor test "was unambiguously designed to be less restrictive than the 'but for' test").

60. See Allen v. Iranon, 283 F.3d 1070, 1074–75 (9th Cir. 2002) (collecting cases). The Eighth Circuit departs from this rule, using the *Mt. Healthy* framework only if the plaintiff's prima facie case is built on direct evidence. See Graning v. Sherburne County, 172 F.3d 611, 615 n.3 (8th Cir. 1999) (stating that *Mt. Healthy* analysis applies only when plaintiff provides evidence that directly reflects improper motive).

the two forms of evidence, and it would be unreasonable to restrict a plaintiff to direct evidence, which is likely to be rare.[61]

2. *Defendant's Rebuttal.* — Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to prove "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[62] *Mt. Healthy* is clear that the defendant must prove that she would have reached the same decision in the absence of the plaintiff's conduct, not that she could have reached this decision—indeed, the plaintiff in *Mt. Healthy* was an untenured teacher, and the defendant could have fired him for no reason whatsoever.[63] Thus, *Mt. Healthy* requires proof that the defendant actually would have taken the challenged action, rather than mere proof that the action was justified.[64]

In practice, the defendant will attempt to prove this counterfactual with evidence showing that the decision was justifiable on independent grounds.[65] But the distinction remains—showing "'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'"[66]

C. *Exceptions to* Mt. Healthy

The burden-shifting standard that the Court established in *Mt. Healthy* has become the "standard method" of ascertaining retaliatory purpose in constitutional contexts.[67] As courts have adapted the *Mt.*

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61. See Meyer v. Bd. of County Comm'rs, 482 F.3d 1232, 1244 (10th Cir. 2007) (noting that direct evidence of retaliatory motive is rarely available, and courts must consider reasonable inferences that may be drawn from available evidence).

62. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); see also Michael S. Wolly, What Hath *Mt. Healthy* Wrought?, 41 Ohio St. L.J. 385, 393–94 (1980) (describing *Mt. Healthy*'s emphasis on proof that defendant would have reached same decision as "unequivocal").

63. *Mt. Healthy*, 429 U.S. at 283.

64. See, e.g., Webster v. Dep't of the Army, 911 F.2d 679, 697–98 (Fed. Cir. 1990) (rejecting argument that defendant can meet *Mt. Healthy* burden by showing that hypothetical supervisor would have taken same action); Fujiwara v. Clark, 703 F.2d 357, 361 (9th Cir. 1983) ("The mere existence of other grounds for firing does not suffice. What is necessary is that the school officials show that those grounds would have caused them to take the same action in the absence of the protected conduct.").

65. See, e.g., *Webster*, 911 F.2d at 681–85 (producing evidence that terminated employee was insubordinate and disrespectful).

66. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 416 (1979) (quoting Ayers v. W. Line Consol. Sch. Dist., 555 F.2d 1309, 1315 (5th Cir. 1977)).

67. Julian Cyril Zebot, Note, Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce, 86 Minn. L. Rev. 1063, 1067 (2002); see also Texas v. Lesage, 528 U.S. 18, 21 (1999) (per curiam) ("Our previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial."); Price Waterhouse v. Hopkins, 490 U.S. 228, 248–50 (1989) (applying *Mt. Healthy* to employment discrimination cases), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Wright Line, 251 N.L.R.B. 1083,

Healthy rule to a number of different settings, they have occasionally applied modified versions of the causation standard set forth in that case. The Supreme Court has rejected some of these changes,[68] but it has endorsed others as well.[69]

1. *Prisoner Cases.* — As in other areas of constitutional law,[70] some courts have been hesitant to apply the full protections of First Amendment retaliation doctrine to prisoners. There is currently a circuit split regarding the appropriate pleading standard for a retaliation case brought by a prisoner. In some circuits, the usual *Mt. Healthy* burden-shifting framework applies.[71] But in other circuits, the burden never shifts from the plaintiff prisoner to show that the defendant's retaliatory motive was a but-for cause for the adverse action.[72] These courts depart from the burden-shifting framework in *Mt. Healthy* and leave the burden with the plaintiff to show that the defendant's actions would not have occurred absent the retaliatory motive.[73] The Eighth and Ninth Circuits are particularly strict in their pleading standards, dismissing cases automatically if the allegedly retaliatory action arose from a disciplinary violation.[74]

1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981) (applying *Mt. Healthy* to cases of discharge in retaliation for union activity).

68. See *Lesage*, 528 U.S. at 20–21 (overturning lower court for failing to apply *Mt. Healthy*'s "but-for" causation rule).

69. See Hartman v. Moore, 547 U.S. 250, 261 (2006) (requiring plaintiffs to demonstrate prosecutor brought action without probable cause to state claim for retaliatory prosecution); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362–63 (1995) (allowing defendant to escape liability in part if, hypothetically, they would have fired plaintiff had they known of plaintiff's wrongdoing before claim was filed).

70. See, e.g., Sandin v. Conner, 515 U.S. 472, 483–84 (1995) (applying special "atypical and significant hardship" standard to due process claim by prisoner); Peter L. Strauss et al., Gellhorn & Byse's Administrative Law 828–32 (10th ed. 2003) (suggesting that Court might apply a special due process doctrine for prison cases); Susan N. Herman, Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue, 77 Or. L. Rev. 1229, 1252 (1998) (arguing that in *Sandin* the "Supreme Court took dramatic measures to impose a special burden on prisoners litigating due process claims").

71. See Rauser v. Horn, 241 F.3d 330, 333–34 (3d Cir. 2001) (adopting *Mt. Healthy* burden-shifting framework); Thaddeus-X v. Blatter, 175 F.3d 378, 399 (6th Cir. 1999) (same); Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996) (same); Graham v. Henderson, 89 F.3d 75, 80 (2d Cir. 1996) (same).

72. See McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979) (noting that plaintiff will face substantial burden to prove actual motivating factor for transfer was retaliatory); sources cited supra note 17.

73. See *McDonald*, 610 F.2d at 18 ("Plaintiff must prove that he would not have been transferred 'but for' the alleged reason.").

74. See Vance v. Barrett, 345 F.3d 1083, 1093 (9th Cir. 2003) (citing *Mt. Healthy* but stating that prison administrators cannot be held liable unless "retaliatory action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals" (quoting Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995))); Orebaugh v. Caspari, 910 F.2d 526, 528 (8th Cir. 1990) ("[N]o claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform.").

The courts that depart from *Mt. Healthy* justify their heightened pleading standards by referring to the deference accorded to prison officials[75] and the need to ensure that prisoners "do not inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around them."[76] Some of these courts also rely on the Supreme Court's decision in *Sandin v. Conner*,[77] which arguably established separate due process standards for claims filed by prisoners.[78]

2. *Retaliatory Counterclaims.* — Individuals have a First Amendment right of access to the judicial system,[79] and it is unlawful for a government official to retaliate against a plaintiff for exercising this right.[80] Difficult issues arise, however, when the government official's allegedly retaliatory action is the filing of a counterclaim against the plaintiff. Because filing a lawsuit in retaliation for protected activity is unlawful,[81] it stands to reason that filing a counterclaim should likewise be unlawful. But it is not clear how the government can meet its *Mt. Healthy* burden to show that it would have filed the counterclaim in the absence of the plaintiff's protected conduct, since a counterclaim is, by definition, a response to the plaintiff's filing a lawsuit.[82] Moreover, government officials also enjoy a constitutional right of access to the courts, and arguably cannot be prevented from bringing even a retaliatory counterclaim unless the counterclaim is baseless.[83]

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75. See *Vance*, 345 F.3d at 1093 (stressing need to grant deference and flexibility to prison officials).

76. Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995).

77. 515 U.S. 472 (1995). For a discussion of *Sandin*, see sources cited supra note 70.

78. See *Pratt*, 65 F.3d at 807 (noting that courts "should evaluate retaliation claims in light of these general concerns expressed in *Sandin*"); Thomas v. Walton, 461 F. Supp. 2d 786, 795 (S.D. Ill. 2006) (noting that courts should resolve retaliation cases "in light of the general tenor of *Sandin*").

79. See James F. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 Nw. U. L. Rev. 899 *passim* (1997) (detailing First Amendment right to seek judicial redress).

80. See, e.g., Farrow v. West, 320 F.3d 1235, 1248 (11th Cir. 2003) (retaliating against prisoner for filing lawsuits or grievances is unlawful).

81. See, e.g., Smith v. Garretto, 147 F.3d 91, 94–95 (2d Cir. 1998) (stating that government's retaliatory initiation of lawsuits violates First Amendment).

82. The Second Circuit has found this concern to be persuasive, reasoning that straightforward application of the *Mt. Healthy* standard would mean that the "filing of counterclaims by a governmental entity would subject that entity to strict liability." Greenwich Citizens Comm., Inc. v. Counties of Warren, 77 F.3d 26, 30–31 (2d Cir. 1996). This may be somewhat hyperbolic. A court could avoid a strict liability standard by asking whether the government would have filed the lawsuit for a purpose other than punishing the plaintiff. The government could meet this burden by showing a legitimate, nonretaliatory reason for the counterclaim, such as a desire to win monetary damages.

83. See BE & K Constr. Co. v. NLRB, 536 U.S. 516, 528–37 (2002) (discussing First Amendment problems in regulating lawsuits filed in retaliation for union activities); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741–43 (1983) (same); Darveau v. Detecon, Inc., 515 F.3d 334, 341 (4th Cir. 2008) (citing *BE & K* for principle that "only those lawsuits that are retaliatory in intent and baseless in fact or law do not implicate First Amendment and federalism concerns").

Once again, courts have split over the proper handling of this issue. The Second and Fourth Circuits add an intent element to the *Mt. Healthy* standard in these cases, requiring a plaintiff to show that the government "acted with retaliatory intent."[84] The Fifth Circuit denies such claims outright.[85] Other courts require proof that the counterclaim was without a reasonable basis.[86] No court applies an unmodified version of the *Mt. Healthy* standard.[87]

3. *Employment Cases Involving After-Acquired Evidence.* — Several forms of employment discrimination and retaliation are evaluated under the *Mt. Healthy* framework.[88] Under *Mt. Healthy*, an employer may not rebut the plaintiff's prima facie case with evidence that it has discovered only as a result of its decision to terminate the employee. Because the employer would never have discovered this evidence absent its unlawful motive, the employer can hardly argue that it "would have" fired the employee if it had acted in a lawful manner.[89] Nevertheless, some courts granted judgment for the employer in cases involving after-acquired evidence of résumé fraud,[90] embezzle-

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84. *Greenwich Citizens Comm., Inc.*, 77 F.3d at 30–31; see also *Darveau*, 515 F.3d at 341 (requiring proof that defendant acted with retaliatory motive).

85. See Venable v. Keever, 263 F.3d 162, 2001 WL 803565, at *2 (5th Cir. June 12, 2001) (unpublished table decision) (dismissing claim that counterclaim was act of First Amendment retaliation as frivolous).

86. See Harper v. Realmark Corp., No. 4:04-CV00040, 2004 WL 1795392, at *5 (S.D. Ind. July 29, 2004) (permitting retaliation claim where counterclaim was allegedly frivolous); Rosania v. Taco Bell of Am., Inc., 303 F. Supp. 2d 878, 886–87 (N.D. Ohio 2004) (retaliatory counterclaim must be objectively baseless).

87. It would arguably violate the First Amendment to apply an unmodified *Mt. Healthy* test. See supra note 83 and accompanying text.

88. See Wright Line, 251 N.L.R.B. 1083, 1091 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981) (applying *Mt. Healthy* causation standard to discrimination based on labor activities). In *NLRB v. Transportation Management Corp.*, the Supreme Court upheld this standard. 462 U.S. 393, 397 (1983); see also NLRB v. Brooks Cameras, Inc., 691 F.2d 912, 915 (9th Cir. 1982) (applying *Wright Line* test); Borel Rest. Corp. v. NLRB, 676 F.2d 190, 192 (6th Cir. 1982) (same); Leona Green, Mixed Motives and After-Acquired Evidence: Second Cousins Benefit from 20/20 Hindsight, 49 Ark. L. Rev. 211, 235–36 (1996) (describing NLRB's reliance on *Mt. Healthy* for labor discrimination cases).

89. See Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1179 (11th Cir. 1992) (arguing that permitting after-acquired evidence to defeat recovery would be inconsistent with *Mt. Healthy*), aff'd in part, rev'd in part, 62 F.3d 374 (11th Cir. 1995); James Newman, Note, Thou Shalt Not Lie to Your Employer: Employment Discrimination and the Affirmative Defense of "After Acquired Evidence," 30 Gonz. L. Rev. 365, 392–409 (1994–1995) (critiquing use of after-acquired evidence).

90. See Summers v. State Farm Mut. Auto Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988) ("The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company . . . thereafter discovers that the discharged employee was not a 'doctor.' . . . [T]he masquerading doctor would be entitled to no relief . . . ."); see also Milligan-Jensen v. Mich. Tech. Univ., 975 F.2d 302, 305 (6th Cir. 1992) (denying relief to employee who failed to disclose felony conviction); Washington v. Lake County, 969 F.2d 250, 253–56 (7th Cir. 1992) (same). But see McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995) (overruling *Summers*, *Milligan-Jensen*, and *Washington*).

ment,[91] or other serious forms of misconduct.[92] These courts reasoned that it would "'hardly make sense to order [the employee] reinstated to a job which he lied to get and from which he properly could be discharged for that lie.'"[93]

The Supreme Court overruled these cases in *McKennon v. Nashville Banner Publishing Co.,* holding that plaintiff employees in after-acquired evidence cases should be permitted to bring claims for back pay.[94] The Supreme Court recognized that it could not "require the employer to ignore the information," but suggested that courts should address this problem by limiting remedies to "backpay from the date of the unlawful discharge to the date the new information was discovered."[95] Although *McKennon* brings employment cases more closely in line with *Mt. Healthy*, the Court did not seem particularly concerned with the fact that the court below had strayed from the standard. Indeed, the Court held that *Mt. Healthy* did not apply at all in its ruling because there was no question that the employer's retaliatory motive was the only justification for the termination.[96]

II. EXCEPTIONS TO *MT. HEALTHY*

In principle, the application of *Mt. Healthy* to a retaliatory arrest case should be straightforward. After the plaintiff establishes a prima facie case, the defendant must show that they would have arrested the plaintiff even in the absence of the plaintiff's protected speech.[97] Because police officers do not invariably arrest suspects whenever they have probable cause,[98] evidence of probable cause is insufficient to meet this burden.

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91. See Paglio v. Chagrin Valley Hunt Club Corp., 966 F.2d 1453, 1992 WL 144674 (6th Cir. June 25, 1992) (unpublished table decision) (denying relief to employee who embezzled company funds). But see *McKennon*, 513 U.S. 352 (overruling *Paglio*).

92. See McKennon v. Nashville Banner Publ'g. Co., 9 F.3d 539, 541–43 (6th Cir. 1993) (denying relief to employee who copied confidential files), rev'd, 513 U.S. 352; Powers v. Chi. Transit Auth., 890 F.2d 1355, 1360 (7th Cir. 1989) (denying relief to attorney who violated ethical rules). But see *McKennon*, 513 U.S. 352 (overruling *Powers*).

93. *Washington*, 969 F.2d at 253 (quoting Smith v. General Scanning, Inc., 876 F.2d 1315, 1319 n.2 (7th Cir. 1989)).

94. 513 U.S. at 362–63.

95. Id. The Court also held that a court could deviate from this remedy based on equitable considerations. Id.

96. While it is true that *McKennon* came before the Court "on the express assumption that an unlawful motive was the sole basis for the firing," id. at 359, it is not entirely clear that the Court should have tossed *Mt. Healthy* aside. Under *Mt. Healthy*, the employer should be required to prove that they would have terminated the employee for a lawful reason if, hypothetically, they had known of the employee's misconduct at the time. The employee did not dispute this point in *McKennon*, but employees have raised the issue in other cases. See, e.g., O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 761–63 (9th Cir. 1996) (arguing that employer would not have terminated employee even if it had known of misconduct).

97. See supra Part I.B.2.

98. As a general rule, police officers are neither required nor expected to make arrests whenever they have probable cause to do so. See, e.g., Atwater v. City of Lago Vista,

Under *Mt. Healthy*, "[t]he presence of probable cause does not determine the action for retaliatory arrest because it simply provides one possible justification for the challenged arrest, and . . . the presence of an alternate, non-retaliatory justification for the challenged action does not, as a matter of law, defeat a retaliation claim."[99] There would seem to be no justification for requiring a plaintiff to prove that the arresting officer lacked arguable probable cause, a requirement the Second, Fifth, Eighth, and Eleventh Circuits currently impose.[100]

As the foregoing discussion has demonstrated, however, courts have carved out exceptions to *Mt. Healthy* in a variety of contexts, based on a number of evidentiary and policy concerns. In the recent case of *Hartman v. Moore*, the Supreme Court endorsed a similar exception to *Mt. Healthy* in retaliatory prosecution cases.[101] *Hartman*'s reasoning may justify such an exception for certain retaliatory arrest claims.

Part II.A analyzes the important Supreme Court case of *Hartman v. Moore*, which established an exception to *Mt. Healthy* in retaliatory prosecution cases. Because retaliatory prosecution cases are closely analogous to retaliatory arrest cases, *Hartman* is a useful starting point for a discussion of the proper pleading standard in retaliatory arrest cases. Part II.B examines the current circuit split surrounding retaliatory arrest cases in more detail. Part II.C identifies some problems with this circuit split.

A. Hartman v. Moore

Until 2006, courts were split over the proper application of *Mt. Healthy* to retaliatory prosecution cases. Some circuits required plaintiffs to prove that the prosecution was brought without probable cause;[102] others imposed no such requirement.[103] The Supreme Court resolved the split in *Hartman v. Moore*, siding with the courts that required plaintiffs to prove the absence of probable cause.[104]

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532 U.S. 318, 354 (2001) (stating that where probable cause exists, an officer is "accordingly authorized (not required, but authorized) to make a custodial arrest without balancing costs and benefits or determining whether or not . . . arrest was in some sense necessary"); Barbara K. Finesmith, Police Response to Battered Women: A Critique and Proposals for Reform, 14 Seton Hall L. Rev. 74, 75 (1983) (noting that many jurisdictions encourage nonarrest or mediation in cases of domestic violence).

99. Watson, supra note 21, at 123.

100. See infra Part II.C.

101. 547 U.S. 250, 256–57 (2006).

102. See Wood v. Kesler, 323 F.3d 872, 883 (11th Cir. 2003) (ruling that probable cause defeats retaliatory prosecution claim); Keenan v. Tejeda, 290 F.3d 252, 260 (5th Cir. 2002) (same); Mozzochi v. Borden, 959 F.2d 1174, 1179–80 (2d Cir. 1992) (same).

103. See Moore v. Hartman, 388 F.3d 871, 878 (D.C. Cir. 2004) (permitting retaliatory prosecution claim without regard to probable cause), rev'd 547 U.S. 250; Poole v. County of Otero, 271 F.3d 955, 961 (10th Cir. 2001) (same); Haynesworth v. Miller, 820 F.2d 1245, 1257 (D.C. Cir. 1987) (same). But see *Hartman*, 547 U.S. 250 (2006) (overruling *Poole* and *Haynesworth*).

104. 547 U.S. at 265–66.

1. *Background.* — *Hartman* involved a long-running dispute between a private company and the U.S. Postal Service. In 1983, the Postal Service announced that it would use single-line optical scanners to sort its mail.[105] The plaintiff, the CEO of a company that manufactured multiline optical scanners, successfully lobbied Congress and the public to pressure the Postal Service to switch to multiline scanners.[106] Shortly thereafter, the Postal Service investigated the plaintiff and his company, expressing concern that they may have been linked to an illegal kickback scheme.[107] Despite "very limited" evidence linking the plaintiff CEO to any wrongdoing, an Assistant U.S. Attorney filed charges.[108] The plaintiff CEO was indicted, but ultimately acquitted when the district court found that there was a "complete lack of direct evidence" to link the plaintiff to any wrongdoing.[109]

The CEO then filed suit. Since the prosecutor was absolutely immune from liability for his decision to file charges,[110] the plaintiff sued the Postal Service, arguing that high-ranking Postal Service officials had arranged the prosecution in retaliation for his lobbying activities.[111] The defendants motioned for summary judgment, arguing that the prosecution was supported by probable cause.[112]

2. *The* Hartman *Decision and Its Rationale.* — In an opinion by Justice Souter,[113] the Supreme Court held that pleading no probable cause should be a requirement for a retaliatory prosecution claim.[114] Although

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105. Brief for Respondent at 3, *Hartman*, 547 U.S. 250 (No. 04-1495).

106. Id. at 3–4. The use of single-line scanners, which can only sort mail when the sender uses a nine digit zip code, was found to be very inefficient. See S.J. Diamond, Boondoggle of Nine-Digit Zip Won't Go Away, L.A. Times, June 10, 1988, at D1.

107. *Hartman*, 547 U.S. at 250. The Postal Service also alleged that the plaintiff may have played an improper role in the selection of the Postmaster General.

108. Id. at 253–54.

109. Id. at 254 (quoting United States v. Recognition Equip. Inc., 725 F. Supp. 587, 596 (D.D.C. 1989)).

110. Id. at 262; see also Imbler v. Pachman, 424 U.S. 409, 431 (1976) (holding prosecutor immune for role in presenting and prosecuting case). A prosecutor may be held liable for actions taken in an administrative or investigative role. See, e.g., Burns v. Reed, 500 U.S. 478, 493 (1991) (declining to extend immunity to prosecutor who advised police in investigation of criminal case). In *Hartman*, the plaintiff initially attempted to pursue a claim against the prosecutor in his investigative capacity. 1 Joint Appendix at 45, *Hartman*, 547 U.S. 250 (No. 04-1495). Despite evidence that the prosecutor had pursued the investigation because he wanted to attract the attention of a law firm looking for a tough trial attorney, the plaintiff did not pursue this claim on appeal. *Hartman*, 547 U.S. at 262 n.8, 264. For a critique of prosecutorial immunity, see generally Douglas J. McNamara, *Buckley*, *Imbler*, and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolutist Means, 59 Alb. L. Rev. 1135 (1996).

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

112. Id. at 255.

113. The decision was 5-2. Justice Ginsburg filed a dissenting opinion, which Justice Breyer joined. See id. at 266–67 (Ginsburg, J., dissenting). Chief Justice Roberts and Justice Alito did not participate in the decision. Id. at 251 (majority opinion).

114. Id. at 258.

the ruling was a shift away from *Mt. Healthy*,[115] the Court did not signal that it was rejecting that standard in general.[116] Instead, the Court stressed three factors that supported a heightened pleading standard in retaliatory prosecution cases: complex causation, evidentiary concerns, and the presumption of prosecutorial regularity.

The Court first discussed the "need to prove a chain of causation from animus to injury" in a case of retaliatory prosecution.[117] Retaliatory prosecution differs from the typical retaliation case, "where the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action."[118] Because prosecutors are immune from suit for filing charges,[119] plaintiffs must sue other retaliating officials for inducing the prosecutor to bring suit.[120] The need to prove this complex causation supported a requirement that the absence of probable cause be proved and alleged.[121]

The Court next noted that evidence about probable cause (or its absence) is likely to serve as highly probative evidence of retaliatory motive.[122] Since evidence of probable cause will likely emerge in most cases anyway, requiring that it be pled by the plaintiff will impose little added cost.[123] Conversely, evidence of retaliatory motive other than the lack of probable cause is "likely to be rare and consequently [a] poor guide[ ] in structuring a cause of action."[124] Eliminating the no-probable-cause requirement would be a "little like proposing that retirement plans include the possibility of winning the lottery."[125]

Finally, the Court stated that prosecutors enjoy a longstanding presumption of regularity in their decisionmaking.[126] Though plaintiffs would not be suing prosecutors directly,[127] they would still have to prove

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115. The Court acknowledged that probable cause "does not guarantee that inducement [by the retaliatory official] was not the but-for fact in a prosecutor's decision." Id. at 265.

116. A recent decision in the Eighth Circuit, *Kilpatrick v. King*, suggests that *Hartman* requires the plaintiff to "show that the retaliatory motive was a but-for cause of the harm." 499 F.3d 759, 767 (8th Cir. 2007). While the Supreme Court did hold that "causation is understood to be but-for causation," it nowhere stated that the burden is on the plaintiff to establish but-for causation as part of the prima facie case, and it strongly suggested that the burden is instead on the defendant to demonstrate that the animus was not a but-for cause. *Hartman*, 547 U.S. at 260.

117. *Hartman*, 547 U.S. at 259.

118. Id.

119. See supra note 110.

120. *Hartman*, 547 U.S. at 261–62.

121. Id. at 261.

122. Id.

123. Id. at 265.

124. Id. at 264. In dissent, Justice Ginsburg argued that the rarity of alternative evidence did "not warrant 'structuring a cause of action,' that precludes relief when" such evidence does arise. Id. at 267 (Ginsburg, J., dissenting) (citation omitted).

125. Id. at 264 n.10 (majority opinion).

126. Id. at 263.

127. See supra note 110.

that the prosecutor would not have brought the case in the absence of the retaliating official's influence.[128] This would require some showing to overcome the presumption of regularity.

Taking these three hurdles together, the Court ruled that "it makes sense" to require a plaintiff to plead absence of probable cause as part of the prima facie case.[129] This blunt statement leaves little guidance for the lower courts, which have struggled to determine how broadly *Hartman* should sweep.[130] As a general rule, the Supreme Court tries to resolve only those constitutional questions that are necessary to the case at hand.[131] And the *Hartman* Court was very careful to focus on the specific features of retaliatory prosecution claims.[132] Noting this, several lower courts have declined to extend *Hartman* beyond retaliatory prosecution.[133]

However, the basic concern that the Court was enunciating—that proving causation in a retaliation case is difficult when the defendant can point to a possible legitimate reason for the decision—is not unique to retaliatory prosecution cases.[134] Moreover, the Court did not clearly indi-

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128. See supra Part I.B.

129. *Hartman*, 547 U.S. at 265–66. On remand from *Hartman*, the district court granted the government's motion to dismiss the claim on the grounds that Moore's indictment conclusively established probable cause—ending a controversy that began twenty-five years earlier. See Moore v. Hartman, 569 F. Supp. 2d 133, 141 (D.D.C. 2008) (dismissing plaintiff's claim).

130. Compare Carepartners, LLC v. Lashway, 545 F.3d 867, 877 n.7 (9th Cir. 2008) ("*Hartman* does not apply to this case because the Court made a clear distinction between retaliatory-prosecution actions to which the additional pleading and proof requirements apply, and 'ordinary' retaliation actions to which the requirements do not apply (i.e., where there is no independent prosecutorial action)."), with Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006) ("However, in its analysis, *Hartman* appears to acknowledge that its rule sweeps broadly . . . .").

131. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (stating that for constitutional issues, the Supreme Court "has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted"). This is not to say that the Court strictly follows this rule, or that it does not announce broad rules while nominally deciding the issue narrowly. As Professor Sunstein notes, the "'official story' of Anglo-American adjudication is a minimalist one, though the courts' actual practice is more complex, embodying, roughly speaking, a rebuttable presumption in favor of minimalism." Cass R. Sunstein, The Supreme Court, 1995 Term—-Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 33 (1996).

132. See *Hartman*, 547 U.S. at 259–65 (discussing presumption of prosecutorial regularity and complex causation as two ways in which retaliatory prosecution differs from ordinary retaliation claim).

133. See Skoog v. County of Clackamas, 469 F.3d 1221, 1233–35 (9th Cir. 2006) (reading *Hartman* to mean that "differences between retaliatory prosecution claims and other retaliation claims justified and necessitated the additional requirement in retaliatory prosecution claims"); Gullick v. Ott, 517 F. Supp. 2d 1063, 1071–72 (W.D. Wis. 2007) (declining to extend *Hartman* to retaliatory arrest claim).

134. See Crawford-El v. Britton, 523 U.S. 574, 584–85 (1998) (stating that "official's state of mind is easy to allege and hard to disprove" in context of retaliation claim against

cate that its opinion was to be confined to the prosecution context.[135] Some courts have accepted the invitation to extend *Hartman*'s holding to cases that do not involve retaliatory prosecution.[136] This conflict about the scope of *Hartman* has extended to the retaliatory arrest context, where courts are still split over the proper role of probable cause.

B. Hartman*'s Impact on the Circuit Split Concerning Retaliatory Arrest*

Before the Court's ruling in *Hartman*, the circuits were split about the role that probable cause should play in a retaliatory arrest claim. Though *Hartman* has not resolved this split, and courts continue to disagree over the significance of probable cause in retaliatory arrest claims, *Hartman* offers courts additional grounds and guidance for abandoning the burden-shifting framework articulated in *Mt. Healthy*. First, it provides another illustration of the ways in which courts deviate from *Mt. Healthy*. Second, because the Supreme Court ruled against the circuits that applied a traditional version of the *Mt. Healthy* causation standard, *Hartman* shows that the Supreme Court is not necessarily opposed to movement away from that standard. Finally, the Court's ruling in *Hartman* was based on concerns that are also present in many retaliatory arrest cases.[137]

The question remains, however, under what circumstances this departure is justified. Should courts adopt an all-or-nothing rule that either accepts or rejects *Mt. Healthy* across the board for all retaliatory arrest cases? And if not, when are divergences from *Mt. Healthy* appropriate?

1. *The Pre-*Hartman *Split.* — Even prior to *Hartman*, most courts departed from *Mt. Healthy* and allowed retaliatory arrest cases to go forward only if the plaintiff could prove that the arresting officer lacked probable cause. The Second, Fifth, Eighth, and Eleventh Circuits all dismissed claims for retaliatory arrest where the defendant police officer established "arguable probable cause."[138] Of the circuits that had considered

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prison official (internal quotation marks omitted)); North Carolina v. Pearce, 395 U.S. 711, 725 n.20 (1969) (stating that in claim for retaliation in criminal sentencing, "existence of a retaliatory motivation would . . . be extremely difficult to prove").

135. The Court certainly knows how to use limiting language when it intends to do so. See, e.g., Ashcroft v. ACLU, 535 U.S. 564, 585 (2002) (stating that "scope of our decision today is quite limited"); Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) (stating that Court's "consideration is limited to the present circumstances").

136. See Osborne v. Grussing, 477 F.3d 1002, 1006 (8th Cir. 2007) (reading *Hartman* to require specifically tailored pleading standards); Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006) ("[I]n its analysis, *Hartman* appears to acknowledge that its rule sweeps broadly; the Court noted that causation in retaliatory-prosecution cases is '*usually* more complex than it is in other retaliation cases.'" (quoting *Hartman*, 547 U.S. at 261)).

137. See infra Part III.

138. See Benigni v. Smith, 121 F. App'x 164, 165–66 (8th Cir. 2005) (dismissing retaliation claim where officer had "arguable probable cause" for arrest); Keenan v. Tejeda, 290 F.3d 252, 261–62 (5th Cir. 2002) (suggesting that officers would be exonerated from retaliation claim if probable cause existed for arrest); Redd v. City of Enterprise, 140 F.3d 1378, 1383 (11th Cir. 1998) (dismissing retaliation claim where officer had "arguable

the issue, only the Tenth and Sixth Circuits followed *Mt. Healthy* and treated probable cause (or its absence) as nothing more than evidence of the defendant officer's intent.[139]

The pre-*Hartman* decisions that imposed a heightened pleading standard did so without considering the specific problem of First Amendment retaliation, and instead looked to precedent dealing with Fourth Amendment claims.[140] In each of these precedent cases, the defendants had obtained qualified immunity upon a showing of "arguable probable cause."[141] Based on these precedents, the courts concluded that "[w]hen a police officer has probable cause to believe that a person is committing a particular public offense, he is justified in arresting that person, even if the offender may be speaking at the time that he is arrested."[142] Without any further explanation, the courts applied this Fourth Amendment standard to First Amendment retaliation claims, and dismissed them for failing to disprove probable cause.[143]

However, failure to meet the Fourth Amendment standard does not mean that the plaintiff has likewise failed to state a First Amendment retaliation case. Probable cause is a defense to a Fourth Amendment claim, but it does not immunize the officer from claims arising out of other constitutional provisions, such as claims under the Equal Protection Clause.[144] Accordingly, the courts should have examined First Amendment retaliation law, as set forth in *Mt. Healthy*, rather than dis-

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probable cause" for arrest); Singer v. Fulton County Sheriff, 63 F.3d 110, 120 (2d Cir. 1995) (dismissing suit "if the officer either had probable cause or . . . [had] an objectively reasonable belief that he had probable cause").

139. See Greene v. Barber, 310 F.3d 889, 895 (6th Cir. 2002) (holding that existence of probable cause was not determinative of First Amendment claim); DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990) (allowing retaliation claim to proceed despite presence of probable cause).

140. See *Benigni*, 121 F. App'x at 165 (citing Foster v. Metro. Airports Comm'n, 914 F.2d 1076, 1081–82 (8th Cir. 1990) (excessive force)); *Redd*, 140 F.3d at 1383 (citing United States v. Rubio, 727 F.2d 786, 791 (9th Cir. 1984) (unlawful search)); *Singer,* 63 F.3d 110 at 120 (citing Magnotti v. Kuntz, 918 F.2d 364 (2d Cir. 1990) (false arrest)). *Keenan* is an exception, relying instead on Fifth Circuit precedent on malicious prosecution. See *Keenan*, 290 F.3d at 260 (citing Johnson v. La. Dep't of Agric., 18 F.3d 318 (5th Cir. 1994)).

141. See, e.g., *Foster*, 914 F.2d at 1079 (noting that unlawful arrest claim turns on probable cause).

142. *Redd*, 140 F.3d at 1383.

143. To illustrate the brevity of this analysis, *Benigni*'s complete discussion of First Amendment retaliation is as follows: "Our holding that Smith has qualified immunity for the alleged unlawful arrest disposes of Begnini's [sic] argument that Smith arrested him in retaliation for the exercise of his First Amendment rights." 121 F. App'x at 166 (citing *Foster*, 914 F.2d at 1080).

144. See, e.g., Whren v. United States, 517 U.S. 806, 813 (1996) (stating that plaintiffs may challenge otherwise lawful search or seizure through Fourteenth Amendment Equal Protection Clause).

missing the retaliation claim on the basis of Fourth Amendment precedent.[145]

2. *The Post-*Hartman *Split.* — *Hartman*'s departure from *Mt. Healthy* in the context of retaliatory prosecutions demonstrates that the Supreme Court is not wedded to the traditional version of the *Mt. Healthy* causation standard, nor is it opposed to movement away from that standard. However, the Supreme Court's signal has evoked mixed interpretations among lower courts faced with retaliatory arrest cases. Retaliatory arrest case law is a mess, with some courts siding entirely with *Hartman*, others rejecting *Hartman* outright, and still others having yet to take a position. The Eighth and Eleventh Circuits continue to require a showing of no probable cause,[146] and one assumes that the Second and Fifth Circuits will continue to do so as well.[147] The Sixth Circuit, which had previously permitted plaintiffs to bring claims even if the arresting officer had probable cause,[148] initially held that *Hartman* required the contrary rule.[149] In a subsequent case, however, the circuit suggested that the matter might remain open, although it declined to directly address the issue.[150] And the Ninth Circuit, which had not previously ruled on the issue, decided to permit plaintiffs to bring claims despite the officer's probable cause, *Hartman* notwithstanding.[151] It remains to be seen whether *Hartman* will lead the Tenth Circuit to reexamine its decision to let plaintiffs bring claims against defendants with probable cause.[152] The remaining courts of appeals still have not addressed the issue.[153]

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145. See also Watson, supra note 21, at 126–28 (critiquing pre-*Hartman* rationale for no-probable-cause rule).

146. Phillips v. Irvin, 222 F. App'x 928, 929 (11th Cir. 2007) (applying no-probable-cause rule without reference to *Hartman*); Williams v. City of Carl Junction, 480 F.3d 871, 876 (8th Cir. 2007) (holding that *Hartman* is "broad enough" to apply to retaliatory arrest cases).

147. District courts in the Second Circuit continue to apply the no-probable-cause rule. See, e.g., Genia v. N.Y. State Troopers, No. 03-CV-0870, 2007 WL 869594, at *24 (E.D.N.Y. Mar. 20, 2007) (stating that probable cause defeats retaliatory arrest claim).

148. See Greene v. Barber, 310 F.3d 889, 895 (6th Cir. 2002) (declaring that existence of probable cause is not determinative of First Amendment question).

149. See Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006) (concluding that because defendants had "probable cause to seek an indictment and to arrest" the plaintiff, retaliatory arrest claim failed as a matter of law).

150. See Leonard v. Robinson, 477 F.3d 347, 355 (6th Cir. 2007) (suggesting that *Hartman* might overturn *Greene*, but declining to reach issue because facts demonstrated absence of probable cause). The majority in *Leonard* simply ignored the holding in *Barnes*, though a dissenting judge argued that the claim was foreclosed by that holding. See id. at 367 (Sutton, J., dissenting in part).

151. See Skoog v. County of Clackamas, 469 F.3d 1221, 1234 (9th Cir. 2006) (finding *Hartman* to be distinguishable from retaliatory arrest claim).

152. A district court opinion in the Tenth Circuit did not require a showing of no probable cause, though curiously it did so without citing either *Hartman* or Tenth Circuit precedent. See Garcia v. Jaramillo, No. CIV-05-1212, 2006 WL 4079681, at *11 (D.N.M. Nov. 27, 2006) (applying rule on basis of Sixth Circuit precedent).

153. District courts in the Seventh Circuit have split on the issue. Compare Gullick v. Ott, 517 F. Supp. 2d 1063, 1071–72 (W.D. Wis. 2007) (discussing *Hartman* and choosing

C. *Problems with the Current Approach*

Although the circuits have taken opposing views on the proper role of probable cause in a retaliatory arrest claim,[154] their decisions all share one common feature: They apply a uniform pleading standard to all retaliatory arrest cases within that circuit. In other words, each circuit has selected a uniform pleading standard that applies regardless of the specific facts of the retaliatory arrest case before it.[155]

This all-or-nothing approach is problematic. The rule in the majority of circuits, which requires a plaintiff to plead and prove the absence of probable cause for all retaliatory arrest cases, is too restrictive. It imposes a heightened pleading standard on plaintiffs even in cases where none of the concerns raised in *Hartman*—complex causation, the presumption of regularity, and the lack of alternative evidence[156]—is present. The Ninth Circuit's approach, by contrast, which never requires a showing of no probable cause,[157] is too permissive. It allows plaintiffs to bring claims in cases where one or more of the concerns raised in *Hartman* are present. The majority rule unduly impinges on speech rights;[158] the Ninth Circuit rule imposes an unjustifiable burden on law enforcement officials.[159]

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not to require showing of no probable cause), with Baldauf v. Davidson, No. 1:04-cv-1571, 2007 WL 2156065, at *2–*6 (S.D. Ind. Jul. 24, 2007) (discussing same, but reaching opposite conclusion), and Webb v. City of Joliet, No. 03 C 4436, 2006 WL 3692405, at *3–*4 (N.D. Ill. Dec. 11, 2006) (same). The First Circuit has declined to require a showing of probable cause, at least in certain circumstances. See Hrichak v. Kennebec County Sheriff, No. 06-59-B-W, 2007 WL 1229404, at *5–*7 (D. Me. Apr. 24, 2007) (holding that ruling applies to "arresting officers involved in a spur-of-the-moment, warrant-less arrest"). The Third Circuit follows the no-probable-cause rule. See Morales v. Taveras, No. 05-4032, 2007 WL 172392, at *7–*11 (E.D. Pa. Jan. 18, 2007) (concluding that plaintiff's rights were not violated because officer had probable cause); Gallis v. Borough of Dickson City, No. 3:05 CV 551, 2006 WL 2850633, at *4–*5 (M.D. Pa. Oct. 3, 2006) (denying summary judgment pending determination of whether officers had probable cause); Pomykacz v. Borough of W. Wildwood, 438 F. Supp. 2d 504, 513 (D.N.J. 2006) (denying motion for summary judgment where reasonable factfinder could find officer was without probable cause).

154. See supra Part II.B.

155. The majority of circuits consistently require a plaintiff to plead and prove the absence of probable cause. See supra notes 146–147 and accompanying text. The Ninth Circuit never requires a plaintiff to plead and prove the absence of probable cause. See supra note 151 and accompanying text.

156. See supra notes 117–128 and accompanying text.

157. See supra note 151.

158. See, e.g., Greene v. Barber, 310 F.3d 889, 895 (6th Cir. 2002) ("The law is well established that [a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." (alteration in original) (internal quotation marks omitted)); *Gullick*, 517 F. Supp. 2d at 1069 (explaining that no-probable-cause requirement is "troubling because it would permit unethical officers to target their enemies or critics with a litany of citations for petty violations that would be ignored if committed by anyone else").

159. See, e.g., Keenan v. Tejeda, 290 F.3d 252, 261–62 (5th Cir. 2002) (arguing that First Amendment rights should yield to needs of law enforcement); Morales v. Taveras, No. 05-4032, 2007 WL 172392, at *15 (E.D. Pa. Jan. 18, 2007) (arguing that probable-cause

Neither rule is appropriately tailored to reflect the reasoning behind the Supreme Court's holding in *Hartman* and the policy concerns that are implicated by retaliatory arrest claims. As a result, courts will either grant unwarranted leniency to certain retaliatory arrest cases[160] or scrutinize particular claims with excessive rigor,[161] and accordingly fail to balance the needs of law enforcement and the free speech rights of individual citizens.

This all-or-nothing approach is also problematic in that it perpetuates the current circuit split over retaliatory arrests. Requiring plaintiffs to prove no probable cause is appropriate in certain types of retaliatory arrest cases, but not others. It is entirely random as to whether the governing case in each jurisdiction will fall into the first or second category. Accordingly, a circuit split will naturally develop and worsen as long as each circuit takes an all-or-nothing approach to retaliatory arrest cases.

Even within a single circuit, an all-or-nothing approach will result in inconsistent doctrine and unprincipled vacillation between *Mt. Healthy* and *Hartman*. This process can be seen at work in the Sixth Circuit, where there is internal inconsistency in retaliatory arrest case law. In *Barnes v. Wright*, the Sixth Circuit was faced with a retaliatory arrest case with complex causation. Because *Hartman* was the more appropriate rule for the case before it, the court chose *Hartman* as the categorical rule for retaliatory arrest cases.[162] But less than a year later, the Sixth Circuit was faced with a retaliatory arrest claim without complex causation issues. The majority declined to apply *Hartman*, totally disregarding *Barnes*.[163] The Sixth Circuit's insistence on categorical rules for retaliatory arrest cases resulted in an internal split in authority. A similar phenomenon may explain some of the splits between circuits in First Amendment retaliation law.[164] A rule that more narrowly tailors pleading standards to reflect underlying fact patterns would resolve and avoid the chaos that has characterized this area of law.

III. The Proper Role of Probable Cause In Retaliatory Arrest Claims

This Part argues that *Hartman* and its requirement of no-probable-cause pleading should apply only to a subset of retaliatory arrest cases—cases of complex causation where a retaliating government official induces a police officer to arrest the plaintiff, and cases where the police officer had probable cause to suspect the plaintiff of a felony offense. In

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pleading requirement is justified because of "the ease of stating a retaliation claim" and "high price [society may pay] if officers do not take action when they should do so" (internal quotation marks omitted)).

160. See supra note 159.

161. See supra note 158.

162. 449 F.3d 709, 712 (6th Cir. 2006).

163. See supra note 150 and accompanying text.

164. This Note identifies three current and two past circuit splits. See supra note 25.

all other cases, *Hartman* and its concerns fail to justify departure from *Mt. Healthy*'s burden-shifting framework. This more nuanced standard would more closely reflect the policy concerns identified in *Hartman,* and would strike a reasonable accommodation between the needs of law enforcement[165] and the free speech rights of individual citizens.[166]

Part III.A lines up the rationales driving the *Hartman* decision with the considerations present in retaliatory arrest cases, and concludes that the justifications for *Hartman*'s heightened pleading standard extended to retaliatory arrest cases where there is complex causation and a presumption of regularity. Part III.B discusses another departure from the *Mt. Healthy* burden-shifting standard for felony arrest cases. It evaluates the probative value of requiring plaintiffs to plead probable cause in retaliatory arrest cases, with special attention to the pleading standards for probable cause and the role of police discretion. Part III.C discusses the availability of forms of evidence that do not relate to probable cause but can be used to prove retaliatory animus, and concludes that courts should limit departure from *Mt. Healthy* to these two exceptions only. Part III.D synthesizes these discussions into a clear pleading standard, and addresses some counterarguments to this Note's proposed framework.

A. *Aligning the* Hartman *Decision with Retaliatory Arrests*

In distinguishing retaliatory prosecution claims from ordinary First Amendment retaliation law, the *Hartman* Court focused on two important factors that make such claims more difficult to prove than the typical retaliation case: the presumption of prosecutorial regularity, and complex causation. *Hartman*'s pleading standard was built on the notion that a special sort of allegation is "needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity."[167] Where there is no gap between motive and action[168] and no heightened presumption of regularity,[169] these two justifications for *Hartman*'s heightened pleading standard vanish. A court could then turn to the standard pleading rules set forth in *Mt. Healthy*.[170]

1. *Complex Causation.* — In the typical retaliation case, the "government agent allegedly harboring the animus is also the individual allegedly taking the adverse action."[171] However, in complex causation cases, the defendant induces another party to take action against the plaintiff.[172]

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165. See supra note 159.

166. See supra note 158.

167. Hartman v. Moore, 547 U.S. 250, 263 (2006).

168. See infra Part III.A.1.

169. See infra Part III.A.2.

170. See supra Part I.B.

171. *Hartman,* 547 U.S. at 259.

172. In *Hartman*, the defendants induced a prosecutor to bring charges against the plaintiff. See supra Part II.A.1.

Accordingly, the plaintiff must shoulder a heavy burden to show a link between animus and action.[173] This is a more onerous burden than a plaintiff faces in an ordinary retaliation case, where courts have long taken proof of animus and adverse action as a "circumstantial demonstration" that the one caused the other.[174]

The majority of retaliatory arrest claims do not involve this complex causation, though there are exceptions. In the typical retaliatory arrest case, a police officer makes a warrantless arrest, and the plaintiff subsequently claims that the officer was acting out of retaliatory animus.[175] No intervening actor is present to break the chain of causation. In some cases, however, the alleged retaliation comes from public officials who pressure or conspire with police officers to arrest the plaintiff in retaliation for protected speech.[176] There are also cases where the defendant officers seek a warrant from a magistrate or an indictment from a grand jury before making the arrest.[177] These two categories of cases strongly implicate the complex causation concerns that the Court identified in *Hartman*. In these cases, where the retaliating official is not the official making the arrest,[178] *Hartman* is directly implicated, and courts should require a pleading of no probable cause, both as a matter of precedent and as a matter of policy. The plaintiff must create a link between one official's animus and another official's action, a difficult burden that justifies a heightened pleading standard.[179] Admittedly, this heightened standard might screen out some cases where the link between the retaliating

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173. The plaintiff in *Hartman* faced the difficult burden of showing that the defendants, acting out of retaliatory animus, had taken actions to influence the prosecutor, and that as a result the prosecutor had filed charges he would not otherwise have filed. This evidentiary hurdle played an important role in the *Hartman* decision. See supra notes 117–121 and accompanying text.

174. *Hartman,* 547 U.S. at 260.

175. For an example of the facts of a retaliatory arrest case, see supra notes 1–10 and accompanying text.

176. See, e.g., Williams v. City of Carl Junction, 480 F.3d 871, 876 (8th Cir. 2006) (alleging that officers issued citations to plaintiff, at prompting of city officials, in retaliation for criticism of city government); Curley v. Vill. of Suffern, 268 F.3d 65, 72–73 (2d Cir. 2001) (alleging that officers arrested plaintiff in retaliation for statements criticizing mayor during election campaign); Hansen v. Williamson, 440 F. Supp. 2d 663, 677–78 (E.D. Mich. 2006) (alleging that arrest was made for publication of newspapers critical of mayor); Pomykacz v. Borough of W. Wildwood, 438 F. Supp. 2d 504, 512–13 (D.N.J. 2006) (alleging that officers arrested plaintiff for criticism of mayor and police).

177. See, e.g., Barnes v. Wright, 449 F.3d 709, 712 (6th Cir. 2006) (describing allegation that officers tried to obtain warrant from county attorney). The presence of the grand jury in *Barnes* might explain the Sixth Circuit's hesitation to apply the holding of that case to subsequent retaliatory arrest cases. See supra notes 148–150 and accompanying text.

178. To paraphrase *Hartman*, this subcategory of cases does not involve retaliatory arrest, but rather retaliatory inducement to arrest. Cf. *Hartman*, 547 U.S. at 262 (describing plaintiffs' claim as one for retaliatory inducement to prosecute).

179. See supra notes 172–174 and accompanying text.

official and the arresting officer is clear.[180] But the same might be said about *Hartman*, where the plaintiff produced the "proverbial smoking gun" to show evidence of a causal link.[181]

2. *The Presumption of Validity.* — As the *Hartman* Court noted, absent clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties.[182] The decision to prosecute has "long been regarded as the special province of the Executive Branch," and courts have been hesitant to interfere with this core executive function.[183] Furthermore, the decision to prosecute involves policy concerns, such as the proper allocation of enforcement resources, that are not readily susceptible to judicial review.[184] For these reasons, the pleading standards for allegations of prosecutorial misconduct have always been strict.[185] Logically, a plaintiff seeking to show that a prosecu-

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180. See, e.g., *Hansen*, 440 F. Supp. 2d at 666 (describing government official's threatening to arrest plaintiff, and stating, "I'll show you how much authority I have," before calling police).

181. Moore v. Hartman, 388 F.3d 871, 881, 884 (D.C. Cir. 2004). This evidence included several Postal Service documents that listed the plaintiff's speech as a rationale for pressing prosecution; letters sent directly from the Postal Service to the U.S. Attorney's Office pressuring them to prosecute a case that senior prosecutors viewed as "questionable," "entirely circumstantial," "complicated," and likely to "consume significant resources"; and an admission from the prosecutor that he pursued the case not for its merits, but because he wanted to attract the interest of a law firm looking for a tough trial attorney. Id. at 881–85; see also *Hartman*, 547 U.S. at 258–89 & n.6 (noting plaintiff's compelling evidence). Nor is *Hartman* unique. Fewer than two dozen retaliatory prosecution claims have come before the courts of appeals in the past twenty-five years, *Hartman*, 547 U.S. at 264 & n.10, but several of these cases involved clear evidence of a causal link. See, e.g., Poole v. County of Otero, 271 F.3d 955, 958 (10th Cir. 2001) (presenting evidence that prosecutor withdrew careless driving charge and charged plaintiff with reckless driving and resisting arrest shortly after plaintiff's attorney contacted police about civil suit against them); Haynesworth v. Miller, 820 F.2d 1245, 1249–51 (D.C. Cir. 1987) (alleging that prosecutor expressly offered to drop disorderly conduct charge in exchange for plaintiff not filing civil suit against police officers).

182. *Hartman*, 547 U.S. at 263 (discussing "longstanding presumption of regularity accorded to prosecutorial decisionmaking"); United States v. Armstrong, 517 U.S. 456, 464 (1996); see also supra note 110 and accompanying text.

183. Heckler v. Chaney, 470 U.S. 821, 832, 838 (1985) (setting forth presumption that agency enforcement actions are unreviewable by analogy to prosecutorial decisionmaking).

184. See Wayte v. United States, 470 U.S. 598, 607 (1985) (stating that prosecutorial decisions, which involve "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan[,] are not readily susceptible to the kind of analysis the courts are competent to undertake").

185. In selective prosecution claims, for example, the plaintiff must show "clear evidence" to disprove the presumption that the prosecutor has acted lawfully. *Armstrong*, 517 U.S. at 463–65. Together with the other hurdles that a plaintiff faces in this area, this heightened standard of proof "disables most selective prosecution claims from succeeding, which they almost never do." Steven Alan Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1373 (1987).

tor's decision was tainted by the undue influence of another government official should similarly face a heightened pleading standard.[186]

To a certain extent, the same reasoning applies to retaliatory arrest cases. Courts grant all public officials, including police officers, a presumption of regularity in conducting their official duties.[187] Moreover, the decision to make an arrest, no less than the decision to prosecute, may involve competing policy concerns that are not well suited to judicial review.[188] Though these considerations might suggest that *Hartman*'s logic extends to all retaliatory arrest cases,[189] it is important to note that the *Hartman* decision focused specifically on the presumption of validity that attaches to prosecutorial decisions—it did not merely invoke the general presumption of validity accorded to all public officials.[190] After all, if the general presumption of validity were enough to defeat a retaliation claim, First Amendment retaliation doctrine would be reduced to practically nothing.[191] And in practice, courts rarely invoke a blanket presumption of validity on behalf of police officers.[192] Instead, courts

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186. *Hartman* was a suit not against the prosecutor, but against Postal Service officials who allegedly pressured the prosecutor to file suit. See supra notes 110–111 and accompanying text.

187. See Banks v. Dretke, 540 U.S. 668, 696 (2004) ("'Ordinarily, we presume that public officials have properly discharged their official duties.'" (quoting Bracy v. Gramley, 520 U.S. 889, 909 (1997))); U.S. v. Hellman, 556 F.2d 442, 446 n.1 (9th Cir. 1977) (Sneed, J., concurring) ("Absent proof of a substantial departure from official procedures, a presumption of regularity attaches to police action which allows the court to presume that the police in its actions has discharged its official duty and complied with any relevant regulations and procedures.").

188. See Atwater v. City of Lago Vista, 532 U.S. 318, 345–54 (2001) (outlining problems with judicial review of arrest decisions).

189. At least one court has found this argument to be convincing. See Saleh v. City of New York, No. 06 Civ. 1007, 2007 WL 4437167, at *8 (S.D.N.Y. Dec. 17, 2007) ("The reason that the absence of probable cause is required for claims of retaliatory arrest and prosecution, but not for other retaliation claims, is that the presumption of prosecutorial regularity attaches to arrests and prosecutions, but not necessarily to other police conduct.").

190. See Hartman v. Moore, 547 U.S. 250, 263 (2006) (discussing need to bridge gap between nonprosecuting agent's motive and prosecutor's action and to address presumption of regularity).

191. A plaintiff could no longer sue public officials for retaliation in the exercise of their official duties. This would leave only two avenues to state a retaliation claim. First, the plaintiff could sue a private party for inducing a public official to take retaliatory action. See Dennis v. Sparks, 449 U.S. 24, 27–29 (1980) (noting that private persons, if "jointly engaged with state officials in the challenged action," can be state actors for purposes of constitutional or statutory claim). Second, the plaintiff could sue a public official for retaliation that occurred outside the scope of their official duties. See *Saleh*, 2007 WL 4437167, at *8 (finding that reporting plaintiff to immigration officials was outside scope of duty of police officers).

192. Delaware v. Prouse, 440 U.S. 648 (1979), is an illustrative example. In *Prouse*, Justice Rehnquist wrote in dissent that "[f]or constitutional purposes, the action of an individual law enforcement officer is the action of the State itself, . . . and state acts are accompanied by a presumption of validity until shown otherwise." Id. at 667 (Rehnquist, J., dissenting). In theory, it should not have been necessary to indulge in this fiction of

generally accord varying degrees of deference to police searches and seizures, depending on such factors as whether a warrant was obtained or where the search or seizure took place.[193] For example, courts are willing to presume that an arrest made with a warrant was supported by probable cause,[194] but will apply greater scrutiny when the arrest is made without a warrant.[195] Without expressly repudiating the presumption of validity that nominally attaches to police actions, most courts remain sensitive enough to concerns about police misconduct to seriously evaluate the legality of the arrest.[196]

An arrest made pursuant to a warrant or a grand jury indictment enjoys a presumption of validity[197] and, in the spirit of *Hartman*, should justify a departure from *Mt. Healthy*'s approach. Courts presume that such arrests are legal,[198] a presumption that closely resembles the presumption of validity that attaches to prosecutorial activity.[199] In warrantless arrest cases, by contrast, police officers do not benefit from heightened judicial deference.[200] Courts should therefore follow *Hartman* and require plaintiffs to plead the absence of probable cause only in retaliatory arrest cases where the arrest is made pursuant to a warrant or grand

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state action—the actions of an individual police officer already benefit from a presumption of validity. That Justice Rehnquist found it necessary to do so, and that the majority opinion made no mention of any presumption of validity, underscores the infrequency with which courts grant police officers a presumption of regularity.

193. See, e.g., Payton v. New York, 445 U.S. 573, 586–87 (1980) (holding searches and seizures inside a home, without a warrant, are presumptively unreasonable, but seizure of property in plain view is presumptively reasonable, assuming there is probable cause to believe property is connected to criminal activity).

194. See Walcyzk v. Rio, 496 F.3d 139, 155–56 (2d Cir. 2007) ("Ordinarily, an arrest or search pursuant to a warrant issued by a neutral magistrate is presumed reasonable because such warrants may issue only upon a showing of probable cause."); United States v. Longmire, 761 F.2d 411, 417 (7th Cir. 1985) (noting that where police act pursuant to a warrant, arrest is presumably legal).

195. See United States v. Watson, 423 U.S. 411, 423 (1976) (suggesting that warrantless arrests may be less readily upheld than arrest supported by warrants). This principle is reflected in the general federal rule on burdens of proof: Where the police act pursuant to a warrant, the defendant bears the burden of proving illegality, but where the police act without a warrant, the prosecution must show that the arrest was legal. See 5 Wayne R. LaFave, Search and Seizure § 11.2, at 41 (3d ed. 1996).

196. Cf. Johnson v. United States, 333 U.S. 10, 14 (1948) (stating that purpose of enforcing warrant requirement is to ensure that judgments are made by "a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime").

197. See Bordeaux v. Lynch, 958 F. Supp. 77, 83 (N.D.N.Y. 1997) ("A grand jury's indictment 'establishe[s], at the very least, a presumption of probable cause.'" (quoting Woodard v. Hardenfelder, 845 F. Supp. 960, 967 (E.D.N.Y. 1994))); supra note 194.

198. See supra note 194.

199. See supra notes 182–185.

200. See, e.g., United States v. George, 883 F.2d 1407, 1411 (9th Cir. 1989) ("'[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.'" (quoting Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984))).

jury indictment. Since these cases also involve complex causation, this reinforces the argument that a heightened pleading standard is required for complex causation cases, and does not require a separate exception.

B. *The Evidentiary Value of Probable Cause*

As a matter of precedent, a court might reasonably leave the matter there, and conclude that *Hartman* does not apply to retaliatory arrest claims that do not involve complex causation or a heightened presumption of regularity.[201] A court could then turn to the standard pleading rules set forth in *Mt. Healthy*.[202]

Yet as noted above, courts do not always apply an unaltered version of *Mt. Healthy*, even in cases where the Supreme Court has not carved out a specific exception.[203] Moreover, in *Hartman*, the Court gave probable cause a special evidentiary role "[b]ecause showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost."[204] Even if not bound to do so by *Hartman*, a court might choose to require plaintiffs to show no probable cause in retaliatory arrest cases out of deference to the "high probative force" that probable cause carries. This section addresses this argument, and concludes that courts should only require a showing of no probable cause in felony arrest cases.

1. *The Standard for Probable Cause.* — For present purposes, the evidentiary value of probable cause depends on its usefulness in distinguishing between cases where the defendant acted out of retaliatory motive and cases where the defendant would have arrested the plaintiff in the absence of any retaliatory animus.[205] This question in turn depends on how easily a police officer can mask animus behind a screen of probable cause. There is reason to believe that probable cause is not well suited to the task of identifying unlawful retaliation in misdemeanor arrest cases,

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201. Excepting, of course, claims where some independent intervening actor has broken the chain of causation. See supra Part III.A.1. The pleading standard developed in *Hartman* was built on the notion that a special sort of allegation is "needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity." Hartman v. Moore, 547 U.S. 250, 263 (2006).

202. See supra Part I.B.

203. See supra Part II.A.2.

204. *Hartman*, 547 U.S. at 265.

205. If the police officer would not have made the arrest in the absence of plaintiff's protected speech, imposing liability on the officer places no burden on legitimate law enforcement purposes. And if the officer would have made the arrest even absent the protected speech, *Mt. Healthy* clearly holds that the plaintiff should not be made better off by the officer's illegitimate motive. See supra note 54 and accompanying text. The risk is that a court might confuse the two scenarios, and either discourage police officers from arresting disrespectful suspects or leave arrestees in worse positions than they would have been in, absent retaliatory motive.

because it "requires nothing more than a hypothetically rational basis for intrusions on individual liberty."[206]

Commentators argue that the standard does little more than to prevent irrational police action.[207] Probable cause is found where " 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[208] Probable cause does not "demand any showing that such a belief [is] correct or more likely true than false."[209] Courts emphasize practical considerations and reasonableness[210] in order to provide a workable standard to regulate day-to-day police activity.[211] But while probable cause is intended to protect individ-

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206. Maryland v. Wilson, 519 U.S. 408, 422 (1997) (Stevens, J., dissenting); see also United States v. Leon, 468 U.S. 897, 957–58 (1984) (Brennan, J., dissenting) ("The clear incentive that operated in the past to establish probable cause . . . has now been so completely vitiated that the police need only show that it was not 'entirely unreasonable' under the circumstances of a particular case for them to believe that the warrant they were issued was valid." (citations omitted)); Thomas Y. Davies, Denying a Right by Disregarding Doctrine: How *Illinois v. Rodriguez* Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error, 59 Tenn. L. Rev. 1, 52–53, 57 (1991) (arguing that reasonableness standard is "an invitation to reviewing courts to treat a police intrusion as 'reasonable' if any explanation for the police conduct can be given"). Given his skepticism about probable cause, it is somewhat surprising that Justice Stevens sided with the majority in *Hartman*. See supra note 113.

207. See Ronald J. Bacigal, Making the Right Gamble: The Odds on Probable Cause, 74 Miss. L.J. 279, 307 (2004) (arguing that reasonableness standard reduces Fourth Amendment protections to prohibition against irrational police actions).

208. Draper v. United States, 358 U.S. 307, 313 (1959) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

209. Texas v. Brown, 460 U.S. 730, 742 (1983); see also Brinegar v. United States, 338 U.S. 160, 175 (1949) (holding that probable cause " 'means less than evidence which would justify condemnation' or conviction [but] more than bare suspicion" (quoting Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813))). Professor Grano argues that this rule is justified because if the police can narrow the list of suspects to a small group, "we may reasonably expect—indeed, require—each suspect to sacrifice some liberty or privacy in order to unmask the offender." Joseph D. Grano, Probable Cause and Common Sense: A Reply to the Critics of *Illinois v. Gates*, 17 U. Mich. J.L. Reform 465, 496–97 (1984). For a critique of this argument, see Bacigal, supra note 207, at 319–20 (arguing that harm to innocent suspects outweighs benefit of catching the guilty).

210. Illinois v. Gates, 462 U.S. 213, 231 (1983) (describing probable cause as flexible standard, built around "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" (internal quotation marks omitted) (quoting *Brinegar*, 338 U.S. at 175)).

211. See id. at 238 n.11 (stating that there are "so many variables in the probable-cause equation that one determination will seldom be a useful 'precedent' for another"); Wayne R. LaFave, "Case-by-Case Adjudication Versus Standardized Procedures": The *Robinson* Dilemma, 1974 Sup. Ct. Rev. 127, 141 ("Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged." (footnotes omitted)).

uals from arbitrary or groundless arrests,[212] an officer can generally rely on the standard's flexibility to overcome any challenge to a determination of probable cause. The officer can point to any objective facts that might have justified the arrest,[213] and need only show that these facts would lead a reasonable person to have "more than bare suspicion" that an offense has been committed.[214] This has led some, including Justice Stevens, to argue that probable cause "requires nothing more than a hypothetically rational basis for intrusions on individual liberty."[215]

This already lax standard is further weakened in civil suits against police officers, where the doctrine of qualified immunity limits the probable cause standard. Under qualified immunity, police officers are immune from suit "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[216] For the purposes of qualified immunity, a right is only clearly established if a reasonable officer would understand that what she is doing violates that right.[217] The right to be free from retaliation for the exercise of First Amendment freedoms is one example of a clearly established right.[218] In effect, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[219] Since this burden of proof is relatively low, there is reason to doubt that probable cause will always be strong evidence of a legitimate motive in a retaliation case.

2. *The Evidentiary Problem of Police Discretion*. — Even laying these problems to the side, there is another reason to believe that probable cause will be of low evidentiary value. Proving that an officer had probable cause to make an arrest establishes a possible legitimate justification for the officer's action, but this is not the burden of proof that *Mt. Healthy* requires.[220] The defendant must show that she *would* have made the arrest absent her retaliatory motive, not that she had probable cause and *could* have made the arrest.

Probable cause is only one factor that may prompt a police officer to make an arrest, and it is often eclipsed by other factors. Police officers

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212. See *Brinegar*, 338 U.S. at 176 (stating that probable cause strikes balance between permitting effective law enforcement and protecting citizens from "officers' whim or caprice"); John W. Hall, 1 Search and Seizure 100 (3d ed. 2000) (arguing that historical purpose of Fourth Amendment was to guarantee that police intrusions were justified and not based on "mere suspicion or whim").

213. Probable cause is based on objective facts, not on an officer's good faith. See United States v. Ross, 456 U.S. 798, 808 (1982).

214. *Brinegar*, 338 U.S. at 175.

215. Maryland v. Wilson, 519 U.S. 408, 422 (1997) (Stevens, J., dissenting).

216. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

217. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

218. Crawford-El v. Britton, 523 U.S. 574, 592 (1998) (naming right to be free of retaliation for protected speech as right that is "clearly established").

219. Malley v. Briggs, 475 U.S. 335, 341 (1986).

220. See supra Part I.B.

enjoy significant discretion to refrain from arresting a suspect, even when they have probable cause to make the arrest.[221] In a world of limited resources, a police officer cannot arrest every suspect.[222] And even when it is possible to make the arrest, an officer might refrain from taking the suspect into custody for several reasons: to honor a victim's request for leniency,[223] to secure information from an informant,[224] or simply to let an offender go free where an arrest would be impractical.[225]

The discretion not to take a suspect into custody is so ingrained in the practice of law enforcement that it may exist despite statutory language to the contrary. Every state has longstanding statutes that require police officers to arrest suspects in certain circumstances.[226] In some states, these statutes impose a mandatory duty upon police officers to arrest anyone who has committed any crime,[227] while others are limited to enumerated offenses[228] or crimes of domestic violence.[229] Read literally,

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221. For judicial opinions recognizing this discretion, see, e.g., Atwater v. City of Lago Vista, 532 U.S. 318, 350 (2001) (holding police may exercise "judgment in choosing between the discretionary leniency of a summons in place of a clearly lawful arrest," and there is no legal basis to challenge this decision); John v. City of El Monte, 515 F.3d 936, 940 (9th Cir. 2007) ("[An] officer's subjective intention in exercising his discretion to arrest is immaterial in judging whether his actions were reasonable for Fourth Amendment purposes.").

222. See Joseph Goldstein, Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 Yale L.J. 543, 560–62 (1960) (noting that resource constraints force police to establish priorities of enforcement).

223. Allowing a victim to play a role in deciding whether or not the offender will be arrested can empower the victim and may reduce the incidence of future crime. See Linda G. Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 Harv. L. Rev. 550, 565–70 (1999) (arguing that mandatory arrest statutes disempower victims of domestic violence and lead to increased abuse).

224. The criminal justice system relies heavily on criminal informants. See Ian Weinstein, Regulating the Market for Snitches, 47 Buff. L. Rev. 563, 564 (1999) (arguing that current use of informant information is excessive).

225. See Wayne R. LaFave, Am. Bar Found., Arrest: The Decision to Take a Suspect into Custody *passim* (1965) (discussing various factors that bear on decision to make arrest).

226. 1 ABA Standards for Criminal Justice 1-4.5, cmt. at 1-124 (2d ed. 1980).

227. See, e.g., Cal. Gov't Code § 26601 (West 2007) ("[S]heriff shall arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense."); Me. Rev. Stat. Ann. tit. 15, § 704 (2007) ("Every sheriff, deputy sheriff, constable, city or deputy marshal, or police officer shall arrest and detain persons found violating any law of the State or any legal ordinance or bylaw of a town . . . ."). For a historical discussion of full-enforcement statutes, see Gregory Howard Williams, Police Rulemaking Revisited: Some New Thoughts on an Old Problem, Law & Contemp. Probs., Autumn 1984, at 123, 133–44.

228. See, e.g., Fla. Stat. § 947.22(3) (2007) ("If a law enforcement officer has probable cause to believe that a parolee has violated the terms and conditions of his or her parole, the officer shall arrest and take into custody the parolee . . . .").

229. See, e.g., Ariz. Rev. Stat. § 13-3601(B) (LexisNexis 2007) (stating that in cases of domestic violence involving physical injury, "[a] peace officer shall arrest a person, with or without a warrant, if the officer has probable cause to believe that the offense has been committed"); Minn. Stat. § 518B.01, subdiv. 14(e) (Supp. 2008) ("A peace officer shall

these statutes seem to significantly restrain police discretion. Nevertheless, the U.S. Supreme Court ruled in *Town of Castle Rock v. Gonzales* that even a statute providing that officers "shall arrest" anyone suspected of violating a restraining order was not truly mandatory.[230] In reaching this conclusion, the Court noted that a "well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."[231]

For minor offenses, releasing a suspect is not simply a legally permissible exercise of police discretion; it is a common practice. Studies of police behavior suggest that when it comes to minor offenses—such as disorderly conduct or public intoxication—a police officer views an arrest as "one resource among many that he may use to deal with disorder, but . . . not the only or even the most important."[232] It is a "rare exception that the law is invoked merely because" the offender has technically violated the statute, and an arrest is typically used only when other "means for controlling the troublesome aspects of some person's presence" are not available.[233] When an officer does choose to make an ar-

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arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated [a domestic protection order]."). For a discussion of mandatory arrest policies for domestic violence offenses, see Barbara Fedders, Note, Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement, 23 N.Y.U. Rev. L. & Soc. Change 281, 287–96 (1997).

230. 545 U.S. 748, 759–61 (2005). The statute provided that a "peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of" a person suspected of violating a restraining order. Colo. Rev. Stat. § 18-6-803.5(3) (1999) (emphasis added). One lawmaker described the effect of the bill as follows: "[T]he entire criminal justice system must act in a consistent manner . . . . [P]olice must make probable cause arrests." Gonzales v. City of Castle Rock, 366 F.3d 1093, 1107–08 (10th Cir. 2004) (quoting Hearing on H.B. 125 Before the Colo. H. Judiciary Comm., Feb. 15, 1994), rev'd on other grounds, *Castle Rock*, 545 U.S. 748.

231. *Castle Rock*, 545 U.S. at 760. This is in accord with the traditional approach to mandatory arrest statutes. The American Bar Association states that "for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally." See 1 ABA Standards for Criminal Justice, supra note 226, at 1-4.5, cmt. at 1-125. Most cases are in accord with this principle. See, e.g., Florence v. Town of Plainfield, 909 A.2d 587, 591 (Conn. Super. Ct. 2006) (listing discretionary judgments that police may make despite mandatory arrest statute); Cockerham-Ellerbee v. Town of Jonesville, 626 S.E.2d 685, 688 (N.C. Ct. App. 2006) (stating literal reading of mandatory arrest statute would be unreasonable). Some courts, however, break from this trend and hold that mandatory arrest statutes give rise to a duty to arrest. See, e.g., Matthews v. Pickett County, 996 S.W.2d 162, 164 (Tenn. 1999) (stating police officers had duty to arrest if there was reasonable cause to believe suspect had violated protective order).

232. James Q. Wilson, Varieties of Police Behavior 31 (1968); see also Martin v. Malhoyt, 830 F.2d 237, 268 (D.C. Cir. 1987) ("[E]veryday experience suggests that officers do (and should) limit themselves to a warning in many instances of relatively technical violations."); Nicole Stelle Garnett, Ordering (and Order in) the City, 57 Stan. L. Rev. 1, 7 (2004) (noting that in disorderly conduct situations, "arrests were not the primary means used by police officers to 'keep the peace' ").

233. Egon Bittner, The Police on Skid-Row: A Study of Peace Keeping, 32 Am. Soc. Rev. 699, 710 (1967); see also Brandt J. Goldstein, Panhandlers at Yale: A Case Study in the

rest for a minor offense, it is likely that some factor has led the officer to conclude that the exceptional solution of an arrest was needed.[234] To the extent these studies are true, then at least for minor offenses, probable cause is not particularly probative evidence of what the defendant officer would have done, absent the plaintiff's protected speech. And if other evidence suggests that the plaintiff's protected speech was what led the officer to make the arrest, the argument for allowing the plaintiff to take the case to the jury without a showing of probable cause is strong.

The case law supports the argument that probable cause for a misdemeanor offense is easy to allege, and that defendant officers use misdemeanor crimes as pretexts for retaliation. Retaliatory arrest cases abound with situations in which the plaintiff was arrested with probable cause, only to be acquitted on subsequent criminal charges.[235] Equally frequent are cases in which the plaintiff was arrested for offenses—such as disturbing the peace or a minor traffic violation—that do not usually result in arrest.[236] In these cases, the evidentiary value of probable cause is not

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Limits of Law, 27 Ind. L. Rev. 295, 337, 337–41, 350 (1993) (finding police generally refrain from using arrests when other means for controlling panhandler activity are available); Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 589 (1997) (noting arrest can actually interfere with officer's primary goal of maintaining order because it takes officer off beat for a time). The American Bar Association endorses this approach, stating that a "law enforcement officer having grounds for making an arrest should take the accused into custody or, already having done so, detain him further only when such action is required by the need to carry out legitimate functions." Am. Bar Ass'n, Project on Standards of Criminal Justice: Standards Relating to Pretrial Release § 2.1, at 31 (1980).

234. See Bittner, supra note 233, at 710 ("[C]ompliance with the law is merely the outward appearance of an intervention that is actually based on altogether different considerations."). Indeed, for better or for worse, one of the functions of ordinances prohibiting offenses such as loitering or vagrancy is to allow police officers to detain and investigate individuals whom they might not otherwise be able to detain. See Sanford H. Kadish, The Crisis of Overcriminalization, *in* Blame and Punishment: Essays in the Criminal Law 21, 30–31 (1987) (arguing that public order offenses "function as delegations of discretion to the police to act in ways which formally we decline to extend to them because it would be inconsistent with certain fundamental principles with respect to the administration of criminal justice").

235. See, e.g., Greene v. Barber, 310 F.3d 889, 893 (6th Cir. 2002) (explaining that plaintiff was acquitted after jury trial); Ellis v. City of New York, 243 F.R.D. 109, 110 (S.D.N.Y. 2007) (noting that criminal charges against plaintiff had been dismissed).

236. Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007), provides an excellent example. In *Leonard*, the plaintiff stood up at a town meeting, made a brief speech that included the words "God damn," and calmly sat back down, only to be arrested for disorderly conduct and obscene language. Id. at 352. The plaintiff's wife had recently sued the township chief of police. Id. at 351. For other examples of arrests for minor infractions, see Bennett v. Hendrix, 423 F.3d 1247, 1249 (11th Cir. 2005) (alleging that officer attempted to arrest plaintiff on "trumped-up environmental charges"); McCormick v. City of Lawrence, 325 F. Supp. 2d 1191, 1198 (D. Kan. 2004) (plaintiff arrested for obstruction of legal duty and interfering with duties of police officer after shouting at officer while officer was checking another individual's driver's license).

high enough to justify a departure from the *Mt. Healthy* pleading standards.[237]

3. *The Evidentiary Value of Probable Cause in Felony Cases.* — Although the foregoing discussion demonstrates that probable cause is of limited value in misdemeanor cases, this does not mean that probable cause can never play an important evidentiary role. If the offense is more severe—such as a felony—it will generally be more difficult for the officer to point to evidence that the plaintiff committed the unlawful act.[238] And if the officer did in fact have probable cause to arrest the plaintiff for a felony, it is much more likely that she would have arrested the plaintiff in any event.[239] For retaliation cases involving serious offenses or plaintiffs who are physically confrontational,[240] the likelihood that the officer would choose not to make an arrest is slight, and probable cause is of greater evidentiary value.

The challenge for a court is to sort out these cases, ex ante, from cases where probable cause does not play a strong evidentiary role. A court could do so by requiring plaintiffs to plead and prove the absence

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237. Of course, evidence of the absence of probable cause is a different matter entirely, and there is no inconsistency in arguing that the absence of probable cause is a powerful form of evidence that should be required to overcome the evidentiary hurdle of complex causation.

238. As discussed above, police officers routinely observe misdemeanor offenses. See supra notes 232–234 and accompanying text. Felony offenses are rarer, and thus police officers must identify some unusual conduct that gave rise to their suspicion of a felony offense. Moreover, an arrest for a felony will generally involve pretrial detention and the threat of lengthy imprisonment, and may require a greater showing of probable cause than would a citation or brief arrest for a misdemeanor. See Berger v. New York, 388 U.S. 41, 69 (1967) (Stewart, J., concurring) ("Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort."). On the other hand, courts may also be inclined to grant police officers greater leeway in arresting suspects for serious crimes, due to concerns about safety. See Llanguno v. Mingey, 763 F.2d 1560, 1564–66 (7th Cir. 1985) (holding police were allowed to seize plaintiffs and search house due to emergency situation). But see County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (overruling *Llanguno* on other grounds). But on the whole, it is easier to suspect a bystander of loitering than of murder.

239. See supra notes 232–234 and accompanying text. As evidence of this proposition, consider that when New York City implemented a mandatory arrest policy for domestic violence incidents, misdemeanor domestic violence arrests rose by 114%, but felony domestic violence arrests rose by only 33%. Emily J. Sack, Battered Women and the State: The Struggle for the Future of Domestic Violence Policy, 2004 Wis. L. Rev. 1657, 1672.

240. See Curley v. Vill. of Suffern, 268 F.3d 65, 69 (2d Cir. 2001) (plaintiff arrested for assault); Baldauf v. Davidson, No. 1:04-CV-1571-JDT-TAB, 2006 WL 3743819, at *8 (S.D. Ind. Dec. 18, 2006) (plaintiff arrested for battering police officer), vacated in part, 2007 WL 1202911 (S.D. Ind. Apr. 23, 2007). Lest one think that such serious offenses can never involve but-for retaliatory causation, the battery in *Baldauf* occurred when the plaintiff pushed the officer's finger out of her face during a verbal confrontation. The plaintiff had previously filed a complaint against the officer, and she repeatedly tried to end the argument peacefully. Ironically, she was arrested at the police station after she showed up to file a complaint against the officer, who did not initially choose to make the arrest. 2006 WL 3743819, at *7.

of probable cause only in felony cases. This standard would arguably fail to capture some serious offenses, such as misdemeanor assault, where probable cause also has high probative value.[241] But drawing the line at felonies would ensure that minor offenses would not be unjustifiably drawn into the no-probable-cause rule, while leaving courts free to deal with meritless misdemeanor cases through tools such as summary judgment.[242]

C. *The Availability of Alternative Evidence*

The limited value of probable cause is only one side of the argument, however. In *Hartman*, the Court also reasoned that a no-probable-cause rule would be essentially costless because a plaintiff would rarely be able to prove causation without resort to evidence about probable cause.[243] A brief survey of the retaliatory arrest case law reveals that this premise is unsound in the retaliatory arrest context. Plaintiffs in retaliatory arrest cases are often able to present compelling evidence of retaliatory animus, without resort to issues of probable cause. Thus, the lack of alternative evidence does not counsel for any further departure from the *Mt. Healthy* pleading standards beyond the retaliatory arrest cases that directly raise *Hartman*'s policy concerns and that involve an underlying felony.

1. *Direct Evidence.* — With some frequency, plaintiffs in retaliatory arrest cases are able to point to specific statements, made by the arresting officer, that clearly reveal retaliatory animus. Many of these cases involve police officers who threatened to arrest the plaintiffs if they did not desist from their speech activities.[244] In other cases, police officers, after making the arrest, explained that their actions were motivated by the plaintiffs' speech.[245] The case of *Torries v. Hebert* is an illustrative example of

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241. See supra notes 238–240.

242. The Supreme Court has indicated that courts should generally rely on tools such as summary judgment, rather than heightened pleading standards, to screen out meritless cases against public officials. See infra notes 289–291 and accompanying text.

243. See supra notes 122–125 and accompanying text.

244. See Alexis v. McDonald's Rests. of Mass., Inc., 67 F.3d 341, 346 (1st Cir. 1995) (describing officer's threat that "[y]ou better shut up your . . . mouth before I arrest you too"); *Baldauf*, 2006 WL 3743819, at *6 (describing officer stating "do you know I can arrest you for assault" and then stating that if plaintiff left the scene, no arrest would be made); King v. Ambs, No. 04-74867, 2006 WL 800751, at *2 (E.D. Mich. Mar. 28, 2006) (quoting officer as stating "[o]ne more word and I will arrest you"); cf. Torries v. Hebert, 111 F. Supp. 2d 806, 812 (W.D. La. 2000) (discussing allegation that officer, after arresting plaintiffs for contributing to delinquency of minor for playing rap music, threatened to arrest them again if they played music in the future).

245. See Holland v. City of Portland, 102 F.3d 6, 10 (1st Cir. 1996) (considering plaintiff's allegation that after plaintiff refused to answer questions about robbery, officer stated "well, then we can get him for not having a license or something or other"); Complaint at 7–8, Bridge v. City of New York, No. 07 CV 2102, 2007 WL 1368487 (S.D.N.Y. Mar. 12, 2007) (alleging that officer stated "[t]hat's it. [Your son]'s under arrest," and arrested plaintiff and her son after plaintiff refused to stop speaking to person on telephone). This sort of evidence is often found in cases where a state or local government

both forms of evidence.[246] In *Torries*, the plaintiffs owned a skating rink, and played "gangster rap" music for their customers.[247] When the police came to break up a fight at the rink, they seized the music and threatened to arrest the plaintiffs if they did not close the rink until further notice.[248] The plaintiffs were later arrested for contributing to the delinquency of a minor.[249] The defendant officer not only informed the plaintiffs that they were being arrested for the content of the music they played, but he also expressed as much in a letter to local members of the clergy.[250] The defendant officer also informed the plaintiffs that they would be re-arrested if they played this music again.[251] This sort of evidence leaves no doubt that the police officer was arresting the plaintiffs on the basis of their speech.[252]

2. *Circumstantial Evidence.* — Aside from this direct evidence, the plaintiff may be able to produce circumstantial evidence to prove retaliatory intent. One particularly strong form of circumstantial evidence is proof that the defendant had a motive to retaliate against the plaintiff. The plaintiff may be able to show that the defendant officer carried a grudge against her for her prior exercise of protected speech. A particularly dramatic example of this evidence is found in *Bennett v. Hendrix*, in which business owners supported a referendum to reduce the powers of the local sheriff's office.[253] In addition to threatening the plaintiffs with arrest and subjecting them to close police scrutiny,[254] the sheriff's office mailed "more than 35,000 campaign fliers defaming them as 'Convicted Criminals,' 'Real Criminals,' members of a 'Chain Gang' and the 'Same Type of Criminals That Terrorize Forsyth County.'"[255] In light of this

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official induces the police to make a retaliatory arrest. See Hansen v. Williamson, 440 F. Supp. 2d 663, 666 (E.D. Mich. 2006) (describing situation where plaintiff refused to stop delivering papers to city hall and mayor stated "I'll show you how much authority I have" and called police).

246. 111 F. Supp. 2d 806.

247. Id. at 810–12.

248. Id. at 811–12.

249. Id. at 812.

250. Id. The letter stated, in part, that the "music that is being played in this establishment is not what we in . . . this community want our minor children to be hearing." Id.

251. Id.

252. Of course, it is entirely proper to arrest a plaintiff if the speech in question is unprotected and constitutes a criminal offense. The plaintiff must first show that the speech in question was protected. See supra notes 37–42 and accompanying text. The defendant's conduct in *Torries* was objectionable because the "gangster rap" was protected speech. See 111 F. Supp. 2d at 817–22.

253. 423 F.3d 1247, 1248–49 (11th Cir. 2005).

254. One plaintiff was allegedly told that he "would end up going to jail" unless he opposed the referendum. Brief of Appellees Danny M. Bennett and Danny L. Reid at 8, *Bennett*, 423 F.3d 1247 (No. 02-11031-GG). One police officer was told that his job would be to "head up a 'Strike Force' that was going to 'investigate 50–75 residents of Forsyth County who might be opposed to Sheriff Hendrix's reelection.'" Id. at 11.

255. Id. at 13.

evidence, it is hard to believe that the referendum would not be a substantial factor on the defendant officers' minds at the time of an arrest.

Bennett is an unusual case, and it is rare to find such clear background evidence that the defendant officer was "brimming over with unconstitutional wrath" toward the plaintiff's speech.[256] It is not infrequent, however, to find something that would give the officer a strong motive to retaliate against the plaintiff—most commonly, a complaint or civil suit against the officer.[257] Many cases also involve personal insults directed at the officers.[258] Unlike direct evidence of retaliatory animus,[259] this evidence does not necessarily prove wrongdoing on the part of the officer, and courts should be careful not to impose liability on an officer simply because the plaintiff has said or done something provocative.[260] Evidence of motive may be sufficient, however, if the plaintiff can point to other forms of direct or circumstantial evidence.

Another form of circumstantial evidence is proof that the plaintiff was arrested while similar offenders were let free. Consider the case of *Bethel v. Escambia County*.[261] The plaintiffs in *Bethel* alleged that the sheriff's office had threatened to arrest them for preaching and panhandling without a permit.[262] They further alleged that the sheriff's office had permitted secular organizations to engage in similar demonstrations, without requiring permits or threatening the demonstrators with arrests.[263] The plaintiffs would have had strong evidence of retaliatory mo-

256. Button v. Harden, 814 F.2d 382, 383 (7th Cir. 1987).

257. See, e.g., Hinnenkamp v. City of St. Cloud, 178 F. App'x 620, 620 (8th Cir. 2006) (per curiam) (noting plaintiff's allegation that officers arrested her in retaliation for filing civil rights suit); Franklin v. City of Chi. Police Dep't, 175 F. App'x 740, 741 (7th Cir. 2005) (discussing plaintiff's allegation that officers arrested her in retaliation for filing false arrest claim).

258. See supra notes 37–38 and accompanying text.

259. Direct evidence is a statement or threat revealing that the arrest was motivated by the plaintiff's speech. See supra notes 244–252 and accompanying text.

260. Some cases suggest that retaliatory arrest actions will allow clever plaintiffs to escape liability by deliberately engaging in provocative speech immediately before the arrest. See, e.g., Rollerson v. Gonzalez, No. G-06-CV-246, 2007 WL 1729643, at *8 (S.D. Tex. June 13, 2007) (stating that plaintiff "cannot escape arrest or confrontation simply by engaging in protected speech once officers arrive on the scene"). Since a police officer can escape liability by showing that an arrest would have occurred in the absence of the protected speech, this should not be a problem. See supra Part I.B.2. In any case, it is unlikely that even the most creative suspects would think to use an obscure cause of action such as retaliatory arrest in such a manner, particularly since doing so would risk antagonizing an officer who might otherwise be inclined to let the plaintiff go free.

261. No. 3:06cv70/RV/EMT, 2006 WL 3780716 (N.D. Fla. Dec. 20, 2006).

262. Id. at *1. The plaintiffs ultimately lost their case for failure to show that they were "prohibited" from preaching because (rather ironically) they made a sworn statement in another case stating that they continued to preach in Escambia. Id. at *3–*4.

263. Amended Complaint and Prayer for Permanent Injunctive Relief Declaratory Judgment and Damages at 21, *Bethel*, No. 3:06CV70/RV/EMT, 2006 WL 3780716 (stating that officers "have not harassed others in Escambia County who engage in similarly situated First Amendment protected activities on the public right-of-ways," including furniture stores, car washes, and government fundraising organizations).

tive if the sheriff's office had carried out these threats. Standing alone, such evidence of disproportionate impact might not be enough to state a claim, since the Supreme Court has indicated that disproportionate impact alone does not prove improper intent.[264] But coupled with additional evidence of retaliatory intent, selective arrest can serve as highly probative evidence that the arrest was made in retaliation for protected speech.[265]

One final form of circumstantial evidence, relied upon heavily in employment cases, is evidence of temporal proximity between the protected action and the alleged retaliation. In employment cases, causation may be shown by proof that the protected activity was followed closely by the adverse action.[266] Temporal proximity is perhaps less fitting in the typical retaliatory arrest case. An officer investigating suspicious conduct will almost always make the arrest shortly after her initial interactions with the plaintiff, whether or not retaliatory motive is present. And some courts have suggested that allowing claims to proceed based solely on proof of temporal proximity would make retaliatory arrest cases too easy to plead.[267] But even in retaliatory arrest cases, courts have been willing to entertain evidence that the plaintiff was arrested immediately after an antagonistic statement as proof of retaliatory intent.[268] At a minimum, temporal proximity can be corroborative of other evidence of retaliatory intent.

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264. See Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact . . . [s]tanding alone . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (citation omitted)). For a discussion of the relationship between the *Mt. Healthy* framework and racial discrimination cases, see supra note 52.

265. While it is not sufficient to prove discriminatory intent, evidence of discriminatory impact is very important to such claims—indeed, it is often required to state a claim. See United States v. Armstrong, 517 U.S. 456, 465 (1996) (holding that in selective prosecution claim, plaintiff must prove that "prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" (quoting Wayte v. United States, 470 U.S. 598, 608 (1985))); Marshall v. Columbia Lea Reg'l Hosp., 345 F.3d 1157, 1167–71 (10th Cir. 2003) (holding that plaintiff challenging racially discriminatory arrest must show discriminatory purpose and effect); Chavez v. Ill. State Police, 251 F.3d 612, 635–36 (7th Cir. 2001) (holding that in challenging racially discriminatory traffic stops, plaintiff must prove discriminatory effect and purpose (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977))).

266. See Swanson v. Gen. Servs. Admin., 110 F.3d 1180, 1188 (5th Cir. 1997) (holding that "[c]lose timing between an employee's protected activity and an adverse action against him may provide" evidence for prima facie case).

267. See Morales v. Taveras, No. 05-4032, 2007 WL 172392, at *13–*15 (E.D. Pa. Jan. 18, 2007) (stating that probable cause is needed to prevent easy resort to retaliation claims based on temporal proximity).

268. See Sershen v. Cholish, No. 3:07-CV-1011, 2007 WL 3146357, at *8 (M.D. Pa. Oct. 26, 2007) (ruling that timing was "suggestive" of retaliatory motive where officer stated "that was enough" and arrested plaintiff immediately after she argued about trespass charges); cf. Leonard v. Robinson, No. 03-72199, 2005 WL 5352521, at *11 (E.D. Mich. May 4, 2005) (denying relief because plaintiff's protected speech occurred after officer began to detain plaintiff), rev'd on other grounds, 477 F.3d 347 (6th Cir 2007).

Taken together, these five forms of evidence—verbal threats, verbal statements of intent, motive to retaliate, disproportionate impact, and temporal proximity—create a large body of alternative evidence in retaliatory arrest cases. The lack of alternative evidence does not require any further departure from *Mt. Healthy*.

D. *Counterarguments*

Drawing these arguments together, courts should require a showing of no probable cause only in cases involving complex causation or felony arrests. This more nuanced standard would more closely reflect the policy concerns identified in *Hartman*, and would strike a reasonable balance between the needs of law enforcement and the rights of individual citizens.

The remainder of this section addresses counterarguments to this intermediate standard.

1. *Arguments in Favor of a Blanket* Hartman *Rule.* — The Second, Fifth, Eighth, and Eleventh Circuits currently apply *Hartman*'s no-probable-cause requirement to retaliatory arrest cases.[269] Although the argument that such a holding is required as a matter of precedent has already been rebutted,[270] one could argue that the *Hartman* rule nevertheless saves government officials the time and expense of defending against meritless claims.

A rule that allows most retaliation claims to be brought, despite probable cause, may burden government officials, because "[r]etaliation claims may be fabricated easily."[271] Although summary judgment may help to weed out some improper cases,[272] the *Mt. Healthy* framework is a highly fact-intensive standard that often requires a jury trial.[273] Even if the defendant wins at trial, the time and expense that must be expended to defend against the claim may be considerable. And while retaliatory arrest claims are relatively rare,[274] the risk of a retaliation claim might deter police officers from making valid arrests. To paraphrase the Fifth Circuit's observation about retaliation claims brought by prisoners, courts

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269. See supra notes 146–147 and accompanying text.

270. See supra Part III.A.

271. Brown v. Middaugh, 41 F. Supp. 2d 172, 191 (N.D.N.Y. 1999).

272. See Watson, supra note 21, at 130 ("[C]ourts can be aggressive in entering summary judgment based on qualified immunity to protect well-meaning defendant officers from harassing litigation and help courts to avoid the prospect of resource-sapping trials.").

273. See Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir. 2000) ("Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts.").

274. See Watson, supra note 21, at 129 ("In the last quarter-century, litigants have squarely presented only twenty-nine actions for retaliatory arrest to federal courts of appeals.").

should not allow suspects to "inappropriately insulate themselves from [arrests] by drawing the shield of retaliation around them."[275]

However, the argument that "the objectives of law enforcement take primacy over the citizen's right to avoid retaliation"[276] is largely a false dilemma. Retaliation doctrine does not prevent an officer from making any arrests that they would have made in the absence of protected speech.[277] And the purpose of retaliation doctrine is to prevent police officers from substituting personal animosity for legitimate law enforcement objectives.[278] If a police officer would not have made the arrest in the absence of the protected speech, there is no sound reason for a court to encourage the officer to instead make the arrest.

Additionally, by screening out cases involving complex causation or felony arrests, the courts can offer some protection for police officers facing meritless retaliatory arrest claims. In other situations, courts can rely on more traditional screening methods: qualified immunity,[279] motions for summary judgment, and sanctions for frivolous lawsuits.[280]

An across-the-board *Hartman* rule is particularly problematic because plaintiffs who cannot establish the absence of probable cause are those who need First Amendment retaliation doctrine the most. A plaintiff who has been arrested without probable cause may state a claim for false arrest, even without proof that the defendant officer was acting with retaliatory intent.[281] The Fourth Amendment, by constraining unreasonable police action, also provides protection against such violations of First Amendment freedoms.[282] But the Fourth Amendment cannot stop a police officer from abusing an otherwise reasonable arrest to crush First Amendment freedoms. Given the wide reach of many criminal statutes,[283] the potential for abuse is large.

2. *Arguments in Favor of a Blanket* Mt. Healthy *Rule.* — Some courts adhere to the *Mt. Healthy* decision and permit plaintiffs to bring claims

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275. Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995).

276. Keenan v. Tejeda, 290 F.3d 252, 261–62 (5th Cir. 2002).

277. See supra Part I.B.2.

278. See Duran v. City of Douglas, 904 F.2d 1372, 1378 (9th Cir. 1990) ("[G]overnment officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. Surely anyone who takes an oath of office knows—or should know—that much.").

279. For a discussion of qualified immunity, see supra notes 216–219 and accompanying text.

280. See Crawford-El v. Britton, 523 U.S. 574, 598–600 (1998) (advocating use of such pretrial screening mechanisms).

281. See supra note 212 and accompanying text.

282. Cf. United States v. Rubio, 727 F.2d 786, 791 (9th Cir. 2004) ("When activity protected by the First Amendment becomes the subject of a criminal investigation, the protections afforded by the Fourth Amendment come into play.").

283. "Everyone violates some aspect of the traffic code in some way during any short drive." David A. Harris, The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection, Law & Contemp. Probs., Summer 2003, at 71, 95.

without first showing that the defendant officer lacked probable cause. Perhaps the strongest argument in favor of this rule is that courts are "bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that Court."[284] Because probable cause does not demonstrate what the defendant officer would have done in the absence of the plaintiff's protected speech,[285] there is no justification for requiring plaintiffs to demonstrate its absence in complex causation or felony cases.[286] Any rule to the contrary would disregard *Mt. Healthy*, a binding Supreme Court precedent.

However, there are numerous exceptions to *Mt. Healthy*, some of which have been developed among the federal courts without any urging from the Supreme Court.[287] *Hartman* can be read to uphold these departures, since the Court affirmed a rule that carved out an exception to *Mt. Healthy*.[288] Although it is difficult to identify a clear rationale or legal principle to support these deviations from precedent, it is clear that a resort to *Mt. Healthy*'s precedential force is not sufficient to justify a categorical *Mt. Healthy* rule in the retaliatory arrest context.

Aside from this argument based on precedent, there is a concern that screening out felony cases or complex causation cases will unfairly deny plaintiffs a remedy. The Supreme Court has indicated that courts should rely on qualified immunity,[289] rather than heightened pleading standards, to protect public officials from the threat of meritless lawsuits.[290] Since qualified immunity already provides extensive protection to public officials, the need to further immunize public officials from liability cannot "justify a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved."[291]

While any heightened pleading standard has the potential to unjustly deny valid claims, these arguments have been rebutted by *Hartman*. In retaliatory arrest cases involving complex causation, courts are bound to follow *Hartman* as a matter of binding precedent.[292] And although felony cases are not controlled by *Hartman*, the *Hartman* Court made clear that a no-probable-cause requirement could be justified even if some legitimate

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284. United States v. Weiland, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005).

285. See supra notes 97–100 and accompanying text.

286. Complex causation cases are a different issue because these cases are governed by the Supreme Court's intervening decision in *Hartman v. Moore*. See supra Part III.A.

287. See supra Parts II.A–B.

288. See supra Part II.B.

289. For a discussion of qualified immunity, see supra notes 216–219 and accompanying text.

290. Crawford-El v. Britton, 523 U.S. 574, 589–91 (1998). In *Crawford-El*, the Court reviewed a D.C. Circuit rule requiring "clear and convincing evidence" of improper motive for claims against public officials, a rule touted as a way to reduce the social cost of subjecting these officials to discovery and trial. Id. at 580–86.

291. Id. at 593.

292. See supra Part III.A.

claims would be denied thereby.[293] Additionally, because it is unlikely that a plaintiff would be able to meet the *Mt. Healthy* burden of proof in a felony arrest case,[294] denying those claims ex ante will reduce a burden to police officers without imposing a concomitant burden on plaintiffs—a pragmatic form of balancing that the Supreme Court clearly approved in *Hartman*.

Conclusion

A standard of proof "'reflects the value society places on individual liberty.'"[295] This Note argues that a pleading standard in retaliatory arrest cases that only requires proof of no probable cause in complex causation cases and felony arrest cases strikes the appropriate balance between individual liberty and government efficiency. The circuits that categorically require plaintiffs to plead no probable cause unjustly deny plaintiffs a remedy, impinging on First Amendment freedoms and leaving injured parties without redress. The circuits which never require plaintiffs to prove no probable cause leave police officers exposed to liability to an unnecessary degree, making it too easy for arrestees to fabricate claims of retaliation. Neither approach is likely to resolve the current circuit split. The intermediate rule this Note suggests, by contrast, can be applied fairly to the overwhelming majority of retaliatory arrest claims, and may help the circuits to address the splits that have characterized First Amendment retaliation law.

293. See supra Part II.B.

294. See supra Part III.B.

295. Addington v. Texas, 441 U.S. 418, 425 (1979) (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobelof, J., concurring in part and dissenting in part)).