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Be a Liar or You're Fired! First Amendment Protection for Public Employees Who Object to Their Employer's Criminal Demands

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NOTES

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> There is something profoundly disturbing, almost schizophrenic, about our approach to human rights. We have fought wars, millions of us have served in the military, and several hundred thousand Americans have died, defending our country and protecting our freedom of speech and other rights. Yet we have created a legal system that leaves those rights in the wastebasket when we go to work.
>
> —Lewis Maltby[1]

I. WHAT HAPPENED TO THE PERKS OF GOVERNMENT WORK? PUBLIC EMPLOYEE FREE SPEECH IN THE ROBERTS COURT ERA

Public perception of the Roberts Court has been defined, to a significant degree, by its First Amendment jurisprudence.[2] Defending free speech has been hailed as one of the Court's "signature projects."[3] However, as some commentators have noted, once one looks beyond the high-profile cases, the Roberts Court has been decidedly less pro-speech.[4] Recent Supreme Court rulings have not looked kindly upon free speech claims raised by students,[5] humanitarian organizations,[6] and, most pertinent for this Note, public employees.[7] The apparent disparity between the treatment of corporate and financial interests, on the one hand, and the interests of labor, students, and humanitarian organizations, on the other, prompted one scholar to declare that "[t]he Roberts [C]ourt strongly protects speech that it likes, while allowing regulation of speech it disfavors."[8]

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1. LEWIS MALTBY, CAN THEY DO THAT? RETAKING OUR FUNDAMENTAL RIGHTS IN THE WORKPLACE 3 (2009).

2. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) (holding that video game content is protected free speech); Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (protesting at military funerals is protected free speech); Citizens United v. FEC, 558 U.S. 310, 368–71 (2010) (holding that independent corporate expenditures on elections are protected free speech).

3. Adam Liptak, *A Significant Term, with Bigger Cases Ahead*, N.Y. TIMES (June 28, 2011), http://www.nytimes.com/2011/06/29/us/29scotus.html?pagewanted=all&_r=0.

4. David Cole, *The Roberts Court's Free Speech Problem*, N.Y. REV. BOOKS BLOG (June 28, 2010, 10:55 AM), http://www.nybooks.com/blogs/nyrblog/2010/jun/28/roberts-courts-free-speech-problem; Monica Youn, *The Roberts Court's Free Speech Double Standard*, AM. CONST. SOC. BLOG (Nov. 29, 2011), http://www.acslaw.org/acsblog/the-roberts-court%E2%80%99s-free-speech-double-standard.

5. Morse v. Frederick, 551 U.S. 393, 409–10 (2007) (holding that schools may restrict student speech promoting drug use).

6. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724–26 (2010) (holding that government may prohibit providing nonviolent material support to terrorist organizations, including legal advice and services, without violating the Free Speech Clause).

7. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (rejecting public employee free speech protection for speech occurring within the scope of an employee's duties).

8. Greg Stohr, *Freedom of Speech is Buttressed as U.S. Supreme Court Concludes Term*, BLOOMBERG NEWS (June 27, 2011, 11:00 PM), http://www.bloomberg.com/news/2011-06-

Garcetti v. Ceballos, in particular, has drawn intense criticism.[9] In *Garcetti*, the Court held that the First Amendment does not protect the speech of public employees made "pursuant to their official duties."[10] In so doing, the Court clarified, and departed from, prior precedent governing public employee speech.[11] The scholarly reaction to *Garcetti* has been almost uniformly negative.[12] Some fear the Court's holding will limit academic freedom in public universities and deter whistleblowers from highlighting government failure; others object to the unpredictability of *Garcetti*'s inexact, case-by-case standard that categorizes employee activities as falling inside or outside the realm of "official duties."[13]

This Note addresses a significant, more recent problem: the federal circuits have split over whether a public employee may be fired for testifying truthfully in court or for refusing to falsify affidavits.[14] After the Court's inexorable command that all speech made pursuant to official duties garners no First Amendment protection, some lower

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28/speech-rights-triumph-as-u-s-high-court-limits-government-power.html (quoting Adam Winkler).

9. 547 U.S. at 410; *see, e.g.*, Paul M. Secunda, Garcetti's *Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 143–44 (2008) (advocating complete reversal of *Garcetti*).

10. 547 U.S. at 421.

11. *See infra* Part II (noting the apparent abandonment of prior precedent in the *Garcetti* decision).

12. *See, e.g.*, Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 562–63 (2008) (advocating return to *Pickering-Connick* balancing test); Elizabeth M. Ellis, Note, Garcetti v. Ceballos*: Public Employees Left to Decide "Your Conscience or Your Job,"* 41 IND. L. REV. 187, 188 (advocating narrow definition of job duties to limit impact of *Garcetti*); Christie S. Totten, Note, *Quieting Disruption: The Mistake of Curtailing Public Employees' Free Speech Under* Garcetti v. Ceballos, 12 LEWIS & CLARK L. REV. 233, 233 (2008) (arguing that *Garcetti* creates more problems than it solves).

13. *See, e.g.*, Robert E. Drechsel, *The Declining First Amendment Rights of Government News Sources: How* Garcetti v. Ceballos *Threatens the Flow of Newsworthy Information*, 16 COMM. L. & POL'Y 129, 139 (2011) (discussing the threat posed to whistleblowers by *Garcetti*); Sheldon Nahmod, *Academic Freedom and the Post-*Garcetti *Blues*, 7 FIRST AMEND. L. REV. 54, 56 (2008) (noting the problems posed by *Garcetti* to academic freedom within the context of higher education); Sarah F. Suma, Note, *Uncertainty and Loss in the Free Speech Rights of Public Employees Under* Garcetti v. Ceballos, 83 CHI.-KENT L. REV. 369, 379–80 (2008) (noting difficulty of consistently defining job duties).

14. *Compare* Bowie v. Maddox, 653 F.3d 45, 48 (D.C. Cir. 2011) (holding First Amendment does not protect public employee's refusal to sign affidavit because he acted pursuant to official duties), *and* Green v. Barrett, 226 F. App'x 883, 886 (11th Cir. 2007) (holding Free Speech Clause does not protect jailer's official testimony regarding substandard prison conditions), *with* Jackler v. Byrne, 658 F.3d 225, 241 (2d Cir. 2011) (extending First Amendment protection to employee's refusal to falsify an affidavit in order to conceal police brutality for his superiors), *and* Morales v. Jones, 494 F.3d 590, 598 (7th Cir. 2007) (holding speech of police officer in civil suit deposition is protected by the First Amendment).

courts have simply applied a straightforward "official duties" test.[15] By contrast, other lower courts distinguish giving subpoenaed testimony and filing affidavits from a public employee's official duties because these activities have a citizen analogue.[16] However, courts have not delineated the exact parameters of this "citizen-like activities" exception, nor have they identified a rationale solidly rooted in First Amendment jurisprudence that squares such an exception with *Garcetti*.

This Note intends to provide a coherent and practical solution to the problem of public employers threatening to fire employees for refusing to engage in speech that they find ethically objectionable. This Note does not intend to rehash the soundness of *Garcetti*'s central holding. The dissenting opinions in *Garcetti* and subsequent legal scholarship have rendered the perceived deficiencies of that decision clear.[17] For better or worse, the doctrine of stare decisis and the current membership of the Court make wholesale reversal of *Garcetti* unlikely. As such, this Note accepts *Garcetti*'s holding as it stands, while seeking to define its contours and round its rough edges of inequity. The difficulty is to discern how one can both embrace *Garcetti* and conclude that sound First Amendment principles bar the manifest injustice inflicted on a public employee who is fired for refusing to lie in order to cover up government abuse.

In Part II, this Note provides an overview of the Court's pre-*Garcetti* decisions that establish the normative principles underlying its free speech jurisprudence regarding public employees. Part II also examines the holding and rationale of *Garcetti* and identifies three interrelated post-*Garcetti* circuit splits: (1) the breadth of an employee's scope of employment; (2) whether an employee's subpoenaed testimony is protected; and (3) whether an employee's sworn affidavit is protected. For each circuit split, courts have applied one of two broad approaches: the citizen analogue test or the bright-line official duties test.[18] Part III analyzes the strengths and

15. *Bowie*, 653 F.3d at 47–48; *see infra* Part III.B (discussing the no-exceptions bright-line rule).

16. *Jackler*, 658 F.3d at 241; *see infra* Part III.A (discussing the citizen analogue test).

17. For a comprehensive overview of the perverse consequences and problems associated with *Garcetti*, particularly the failure of the decision to fulfill its own goal of clearly delineating unprotected versus protected employee speech, see generally, Thomas Keenan, Note, *Circuit Court Interpretations of* Garcetti v. Ceballos *and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841, 842–43 (2011) (providing overview of facts courts have emphasized to define official duties and proposing return to balancing test).

18. The courts themselves have not suggested that the three circuit splits can be broadly categorized into two different approaches that employ two different tests. This Note separates

weaknesses of each approach. Part IV proposes the creation of a "criminal liability safe harbor" for the official duties rule of *Garcetti*. Under this proposal, if the employee can prove, by a preponderance of the evidence, that compliance with the employer's directive would make the employee criminally liable, then the employee should be able to speak freely without fear of termination. Such a safe harbor would balance the public's right to an efficient, accountable bureaucracy with employees' freedom of conscience.

II. FROM CONFUSION, TO CLARITY, AND BACK AGAIN: *GARCETTI*'S INADEQUATE RESOLUTION OF PUBLIC EMPLOYEE FREE SPEECH CLAIMS

The Supreme Court's First Amendment jurisprudence governing public employees is guided by three baseline principles, against which the wisdom of any rule must be justified: (1) public knowledge about government affairs, (2) respect for the autonomy of public employees, and (3) efficient administration of the law. This Part identifies traditional First Amendment principles long protected within the public employee context, discusses *Garcetti* and its newfound emphasis on the principle of government efficiency, and provides an overview of the current circuit splits regarding the application of *Garcetti*. This doctrinal path—from the confusion of the pre-*Garcetti* balancing test to the purported clarity of *Garcetti*'s scope-of-employment rule, back to confusion—illustrates that the Court's contemporary jurisprudence is flawed.

A. Before Garcetti*: A Precarious Balancing Act*

Before *Garcetti*, the Court analyzed the free speech rights of public employees under a case-by-case balancing approach, known as the *Pickering-Connick* test.[19] In *Pickering v. Board of Education*, the plaintiff, a public school teacher, wrote a letter to the editor of the local newspaper.[20] The teacher excoriated the school board for lavishing money on the school's athletic department and criticized the superintendent for preventing teachers from opposing a recent bond issue.[21] In response, the school board fired the teacher for

federal case law into these categories as a useful, descriptive method for analyzing the conflicting post-*Garcetti* decisions.

19. *See* Connick v. Myers, 461 U.S. 138, 142 (1983) (applying balancing test); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (adopting balancing test).

20. 391 U.S. at 566.

21. *Id.*

insubordination.[22] The Court held that dismissal of the teacher for his comments in the newspaper violated the First Amendment because the teacher's letter addressed matters of public concern.[23] The Court adopted a balancing test weighing "the interests of the teacher, as a citizen, in commenting upon matters of public concern" against the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[24]

The *Pickering* decision highlights the competing values at play when courts assess the free speech rights of public employees. First, the Court acknowledged that public servants possess intimate and sometimes exclusive knowledge about government activities that voters deserve to know. "Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."[25] In other words, the Court enunciated a public policy rationale for protecting employee speech: a free marketplace of ideas is a necessary prerequisite to optimal policy outcomes. Second, the Court noted that public employees retain an independent interest in their autonomy.[26] The Court emphasized this sentiment by referencing *Keyishian v. Board of Regents*—a prior decision that prohibited public employers from forcing their employees to sign a pledge disavowing Communist party principles.[27] Third, the Court affirmed the importance of effectively administering public services. Had the comments of the teacher in *Pickering* been directed toward a co-worker with whom he must maintain a close working relationship, the Court implied that the case could have come out differently.[28] However, the Court also suggested that something more than efficiency was at stake. The Court emphasized that the teacher's speech did not disrupt the "*proper* performance of his daily duties,"[29] nor did his speech impede the school's "*proper* functioning."[30] The Court did not address whether an employee may speak freely about public issues involving internal office affairs.

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22. *Id.* at 564.

23. *Id.* at 574–75.

24. *Id.* at 568.

25. *Id.* at 572.

26. *See id.* at 568 (denying that public employment may be conditioned on the surrender of constitutional rights).

27. 385 U.S. 589, 605–08 (1967).

28. 391 U.S. at 570.

29. *Id.* at 572 (emphasis added).

30. *Id.* at 570 (emphasis added).

The Court came closer to answering this question in *Connick v. Meyers*.[31] In *Connick*, a district attorney—in order to protest a transfer order—circulated a questionnaire to other employees regarding various topics, including transfer policies, morale, confidence in supervisors, the need for a grievance committee, and whether co-workers were being pressured to work in political campaigns.[32] In response to the district attorney's intra-office political activity, her supervisor terminated her employment.[33] Writing for a five-member majority, Justice White concluded that the plaintiff was permissibly terminated because her speech was not protected by the First Amendment.[34] The Court applied the *Pickering* balancing test and attempted to clarify what constitutes a "public concern."[35] The threshold question in every case, the Court held, is whether the speech at issue can "be fairly considered as relating to any matter of political, social, or other concern to the community."[36] If not, the employee fails to speak as a "citizen" on a matter of "public concern," and the employer then retains full managerial control to impose an adverse employment action.[37] The Court provided little guidance, however, for other judges to determine what constitutes a matter of public concern; Justice White simply stated that the distinction "must be determined by the content, form, and context of a given statement, as revealed by the whole record."[38]

Applying this case-by-case standard, the Court found that the plaintiff's questions concerning trust in supervisors, morale, and the need for a grievance committee were not questions of "public import in evaluating the performance" of an elected district attorney and were thus not a matter of public concern.[39] However, the Court did hold that the questionnaire item regarding whether coworkers were ever pressured to work in political campaigns was a matter of public concern because there is a "demonstrated interest in this country" in employing civil servants based on merit, not political affiliation.[40] Nonetheless, the Court found that this public concern must still be weighed against the speech's effect on the "efficiency" and "integrity"

31. 461 U.S. 138, 142 (1983).
32. *Id.* at 141.
33. *Id.*
34. *Id.* at 154.
35. *Id.* at 142–43.
36. *Id.* at 146.
37. *Id.* at 147.
38. *Id.* at 147–48.
39. *Id.* at 148.
40. *Id.* at 149.

of the district attorneys' discharge of their public duties.[41] Accordingly, the Court held that the plaintiff's speech was not protected because the questionnaires amounted to an insurrection that undermined the personal relationships essential to effective operation of the office.[42]

Thus, before *Garcetti*, courts used a two-step process to determine whether public employees' speech was protected. A court first defined the amorphous line between matters of public and private concern, and then balanced public speech values and speaker-centered speech values against the effective and proper administration of the law. Public speech values included robust democratic debate and government accountability, while speaker-centered speech values included personal autonomy and moral self-fulfillment. The *Pickering-Connick* doctrine left the law opaque and unpredictable, on the one hand, but flexible enough to promote intuitively just outcomes, on the other.

B. Garcetti*: A Rough Day in the Office*

In *Garcetti*, the Court modified the *Pickering-Connick* test by significantly narrowing the scope of First Amendment protection in the workplace. The public employee in *Garcetti* was Richard Ceballos, a calendar deputy district attorney for the Los Angeles County District Attorney's Office ("LADA").[43] A defense attorney contacted Ceballos about a pending criminal matter, pointing out several inaccuracies in the affidavit that the police used to obtain a search warrant.[44] The defense attorney asked Ceballos to investigate the truthfulness of the affidavit. In response, Ceballos visited the area described by the affidavit and found what he believed were several serious misrepresentations of fact.[45] After personally viewing the scene and speaking to the warrant affiant, Ceballos concluded that the evidence about tire marks and roadways that the police had used to justify the search had been doctored by the investigators.[46] Disturbed by his findings, Ceballos prepared a memo for his superiors that explained his concerns about the falsity of the affidavit and recommended that the criminal case be dismissed.[47] In light of these

41. *Id.* at 150–51 (quoting *Ex parte* Curtis, 106 U.S. 371, 373 (1882)).
42. *Id.* at 151–54.
43. Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).
44. *Id.*
45. *Id.* at 414.
46. *Id.*
47. *Id.*

accusations, the sheriff's department contacted Ceballos's superiors and reprimanded him for meddling in the case.[48]

In spite of Ceballos's memo, the LADA decided to proceed with the criminal prosecution. At the suppression hearing, the defendant called Ceballos to the stand to impeach the affidavit based on his investigation.[49] The court ultimately rejected the defendant's challenge to the warrant.[50] Subsequently, the LADA reassigned Ceballos to another courthouse, denied him a promotion, and then demoted him.[51] In response, Ceballos filed a 42 U.S.C. § 1983 suit claiming that his public employer retaliated against him for speaking about matters that were protected free speech under the First Amendment.[52]

On appeal, the Ninth Circuit applied the two-part *Pickering-Connick* test, in accordance with the approach taken by the majority of other lower courts.[53] Because Ceballos was attempting to expose wrongdoing and to remedy perceived government misconduct, the Ninth Circuit found that he spoke "as a citizen upon matters of public concern."[54] Then, balancing this public concern against society's interest in effective administration, the court ruled that the facts weighed in Ceballos's favor because the government introduced no evidence showing that his memo disrupted the legitimate work of the office.[55]

Nevertheless, the Supreme Court reversed the decision of the Ninth Circuit and held that Ceballos's memo did not constitute protected speech because "his expressions were made pursuant to his duties."[56] Writing for a five-Justice majority, Justice Kennedy began his analysis by justifying the Court's decision as a mere continuation of the doctrine enunciated in *Pickering* and *Connick*.[57] He reiterated that courts must still determine whether the employee is speaking as a citizen upon a matter of public concern because a state may not arbitrarily deprive a citizen of fundamental constitutional rights.[58]

48. *Id.*
49. *Id.* at 414–15.
50. *Id.* at 415.
51. *Id.*
52. *Id.*
53. *Id.* at 415–16.
54. *Id.* at 416 (quoting Ceballos v. Garcetti, 361 F.3d 1168, 1174 (9th Cir. 2004)).
55. *Garcetti*, 547 U.S. at 416.
56. *Id.* at 421.
57. *See id.* at 417–19 (noting that the two-step inquiry utilized in *Pickering* and *Connick* remains the principal guide when interpreting the constitutional protections accorded to public employee speech).
58. *Id.* at 419.

Additionally, the public has an interest "in receiving the well-informed views of government employees engaging in civic discussion."[59] At the same time, Justice Kennedy affirmed that the Court must still give effect to concerns about the efficient administration of the workplace and the government's prerogatives as an employer.[60]

Justice Kennedy's articulation of the principles at stake in the case might suggest, at first glance, that the Court was maintaining the status quo in this area of First Amendment doctrine. However, the Court's application of the *Pickering-Connick* test to the facts of the case seemed to place a thumb on the scale in favor of employer control. The Court explained that the fundamental flaw in the Ninth Circuit's analysis resided in its misconception of the phrase "as a citizen on a matter of public concern": namely, its holding that the speech must press upon a matter of grave public importance related to state action.[61] The Court clarified that this phrase does not refer to the *subject matter* of the speech, but rather the *status* of the speaker.

The question then is whether public employees make statements "pursuant to their official duties," thus rendering their speech a creature of the state rather than the product of a citizen.[62] If an employee such as Ceballos writes a memo pursuant to his duties as a calendar deputy attorney, then he cannot be speaking as a citizen.[63] By contrast, the teacher in *Pickering* wrote a letter about the school as a concerned citizen, not as an employee performing duties for the school itself.[64] Whereas calendar deputy attorneys are hired to investigate the accuracy of affidavits, teachers are not hired to evaluate the wisdom of a school district's decisions about bonding and capital investment. Therefore, the Court reasoned that determining the free speech rights of public employees requires drawing a bright line between an individual's status as an employee and as a citizen.[65] "When a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." Moreover, the Court insisted that this demarcation is warranted because conducting the *Pickering-Connick* balancing test "sometimes has proved difficult." Therefore,

59. *Id.*

60. *Id.*

61. *See id.* at 418, 421–24 (arguing that the Ninth Circuit's holding would require courts to measure the public importance of employee speech, causing "permanent judicial intervention" inconsistent with federalism and separation of powers).

62. *Id.* at 421.

63. *Id.* at 424.

64. *Id.*

65. *Id.* at 421–24.

the Court intimated that limiting the judicial inquiry to the identification of employee duties would provide a more administrable judicial standard.

Applying the official duties test, the Court held that the memo written by Ceballos was merely a product of what he was "employed to do."[66] The memo was part and parcel of his duty as an attorney to investigate the veracity of affidavits and report this information to his superiors. His employer was then entitled to judge him based on this performance.[67] The Court stated that government employers need to retain the ability to discipline and control employees for speech made pursuant to their duties, and the judiciary—as a separate, coequal branch—should refrain from interference in the managerial discretion of executive branch officials.[68] In addition, employers have "heightened interests" in controlling government employees' speech: "Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."[69]

Ironically, despite its obvious concern with creating clear rules for judges and employers, the Court refrained from articulating a "comprehensive framework" for determining whether employee speech is made pursuant to employment duties. Instead, the Court summarily noted that the "proper inquiry is a practical one," and formal job descriptions should not be dispositive because they "often bear little resemblance to the duties an employee actually is expected to perform."[70]

Despite the apparent rigidity of the Court's public duties rule, *Garcetti* left some room for maneuvering by future judges and lawyers. The final paragraph of Justice Kennedy's opinion consists of a short, Delphic paragraph that creates more questions than it answers. First, the Court stated that Congress, as well as local and state legislatures, can and should enact statutory whistle-blower schemes that afford public employees a safe forum to expose wrongdoing.[71] Thus, the Court contemplated that legislative action would serve as a limiting force that softens the impact of its opinion. Additionally, the Court stated that several safeguards, such as professional rules of conduct and the

66. *Id.* at 421.
67. *Id.* at 422.
68. *Id.* at 422–23.
69. *Id.*
70. *Id.* at 424–25.
71. *Id.* at 425.

courts' longstanding respect for academic freedom, would limit the decision's impact.[72] Most importantly, the Court concluded by opaquely suggesting that "obligations arising from any other applicable constitutional provisions and the mandates of criminal and civil laws[] protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions."[73] Despite these cryptic, parting words about the extent of the public duties test, the Court appeared to establish clarity that no balancing test could provide: if speech is part of the job, it is not protected. Any lingering impression of clarity, however, did not last for long.

*C. The Post-*Garcetti *Splits: Scope of Employment, Subpoenaed Testimony, and Sworn Affidavits*

While the Court may have intended to stabilize public employee free speech doctrine by superimposing a bright-line refinement on the *Pickering-Connick* test, decisions by lower courts since 2006 have fatally undermined that goal. This Section provides an overview of the major areas of contention raised by the official duties rule and illustrates the doctrinal morass caused by *Garcetti*.

Broadly speaking, courts have split on three issues in resolving cases post-*Garcetti*: (1) the scope of a government employee's official duties,[74] (2) the testimony of public officials pursuant to the subpoena power,[75] and (3) the refusal of public employees to alter affidavits and other documents requiring sworn testimony.[76] The literature on *Garcetti* tends to treat each of these splits as a distinct issue requiring independent resolution.[77] Thus, scholars have sought to create refined tests for determining the scope of employment,[78] with specific

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72. *Id.*

73. *Id.* at 425–26.

74. *See infra* notes 80–94 and accompanying text.

75. *See infra* notes 95–113 and accompanying text.

76. *See infra* notes 114–28 and accompanying text.

77. *See, e.g.*, Parker Graham, Note, *Whistleblowers in the Workplace: The Government Employee's "Official Duty" to Tell the Truth*, 65 SMU L. REV. 685, 694–700 (2012) (focusing on employees' refusal to falsify affidavits); Adelaida Jasperse, Note, *Constitutional Law—Damned if You Do, Damned if You Don't: A Public Employee's Trilemma Regarding Truthful Testimony*, 33 W. NEW ENG. L. REV. 623, 651–56 (2011) (focusing only on compelled testimony); Keenan, *supra* note 17, at 842–43, 876–77 (analyzing only the scope-of-employment determination and proposing that courts examine "duties either plainly required by employers or so intertwined as to be nearly inseparable").

78. *See* Sarah L. Fabian, Note, Garcetti v. Ceballos*: Whether an Employee Speaks as a Citizen or as a Public Employee—Who Decides?*, 43 U.C. DAVIS L. REV. 1675, 1699 (2009) (proposing that scope-of-employment analysis should be left to juries as a question of fact, not law); Tyler Wiese, Note, *Seeing Through the Smoke: "Official Duties" in the Wake of* Garcetti v.

doctrinal exceptions for subpoenaed testimony or sworn affidavits.[79] However, this Section explains how the three circuit splits are attributable to the same source: the judiciary's uneasiness with condoning public employee punishment stemming from ethical objections to government misconduct. In other words, the three splits reflect the common underlying policy concern that the *Garcetti* public duties test inordinately emphasizes efficient governance at the expense of traditional free speech values. This point will be important later; since the three circuit splits stem from a single cause, they are amenable to a single solution.

1. Factors Defining the Scope of Employment

The first area of confusion among the federal appellate courts, which has engendered a plethora of circuit-specific rules, is how to define a government employee's scope of employment.[80] All circuits have adhered to the Supreme Court's directive that the scope-of-employment inquiry must be practical and all factors must be weighed. However, some circuits have found certain factors to be more dispositive than others, presumably in an attempt to give the scope-of-employment inquiry the bright-line status envisioned by the Court. The lower federal courts have not adopted definitive tests, but several broad approaches have emerged.

For instance, the Third, Seventh, and Eleventh Circuits emphasize the audience to which the speech is directed.[81] The Seventh Circuit has focused on whether the employee directed his or her speech to an employer within his or her "chain of command."[82] In *Bivens v. Trent*, a police officer told his superiors that a shooting range frequented by police officers was unsafe due to lead contamination.[83] Applying the chain-of-command test, the court found that the officer's speech was not protected because it was directed toward his

Ceballos, 25 A.B.A. J. LAB. & EMP. L. 509, 523 (2010) (arguing that courts should define scope of employment using an "assigned-responsibilities" analysis).

79. *See, e.g.*, Leslie Pope, Comment, Huppert v. City of Pittsburg: *The Contested Status of Police Officers' Subpoenaed Testimony After* Garcetti v. Ceballos, 119 YALE L.J. 2143, 2144 (2010) (asserting that courts should draw bright-line rule classifying subpoenaed testimony as protected speech).

80. For a particularly comprehensive discussion of the various tests and factors emphasized in different cases, see Keenan, *supra* note 17, at 847–60, 870–76 (providing overview of criteria courts have used to define official duties and then proposing return to a modified balancing test).

81. *Id.* at 848.

82. *See* Bivens v. Trent, 591 F.3d 555, 560 (7th Cir. 2010) (finding no protection for speech because employee spoke to superior in the chain of command).

83. *Id.* at 557.

superiors.[84] The *Bivens* decision stands in direct contrast to *Barclay v. Michalsky*.[85] In *Barclay*, a nurse complained to her superiors about other employees' misconduct, including sleeping on the job.[86] The District of Connecticut disregarded the chain-of-command test and held that the speech was protected because it fell beyond the employee's duties.[87] Though the speech was directed to superiors, the court focused on the fact that the nurse had received no training on filing reports and had been reprimanded by her supervisors for prior reports.[88] Thus, the weight accorded to the chain-of-command factor varies from court to court.

Furthermore, despite the Supreme Court's warning against relying solely on formal job descriptions to define duties, these descriptions have nonetheless played a critical role in the outcome of several cases in the Ninth and Tenth Circuits.[89] For instance, in *Rohrbough v. University of Colorado Hospital Authority*, the Tenth Circuit treated a hospital policy requiring medical staff to report inadequate care to supervisors as a defining feature of the transplant coordinator's duties.[90] The hospital's official policy was dispositive in spite of the plaintiff's evidence that she was not actually expected to provide such reports in practice.[91] By contrast, in *Williams v. Reilly*, a jail's policy manual required employees to report prisoner abuse to supervisors.[92] Because the employer adopted a tacit policy of discouraging these reports, the Fifth Circuit held that a genuine issue of material fact existed as to whether the report fell within the plaintiff's duties.[93] In short, courts are weighing very similar facts in sharply divergent ways.

Finally, the Sixth and Eighth Circuits have asked whether the speech at issue would not have existed but for a "public employee's professional responsibilities."[94] This but-for causation inquiry tends to

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84. *Id.* at 560.

85. 451 F. Supp. 2d 386 (D. Conn. 2006).

86. *Id.* at 390.

87. *Id.* at 395–96.

88. *Id.*

89. *See, e.g.*, Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 748 (10th Cir. 2010) (relying on policy requiring medical staff employees to report deficient care); Marable v. Nitchman, 511 F.3d 924, 933 (9th Cir. 2007) (relying on job manual as interpretive guide describing boundaries of employment).

90. 596 F.3d at 748–49.

91. *Id.*

92. 275 F. App'x 385, 387 (5th Cir. 2008).

93. *Id.* at 389.

94. Garcetti v. Ceballos, 547 U.S. 410, 438 (2006); *see, e.g.*, Fox v. Traverse City Area Pub. Schs. Bd. of Educ., 605 F.3d 345, 349 (6th Cir. 2010) (holding that teacher's complaint about

weaken free speech protection. To some extent, every case necessarily requires an inquiry into whether the speech is related to the employee's job. The but-for causation standard therefore errs in favor of the administrative efficiency rationale, rather than employee autonomy and disclosure of government misconduct.

Given the varying factors emphasized by lower courts, the scope-of-employment doctrine has not proven easy to apply. Some of the variability in the scope-of-employment inquiry is probably an inevitable consequence of applying a case-by-case standard. In the absence of concrete rules, some divergence is to be expected. More troubling, though, is the fact that there are few guidelines for courts to use when approaching the unique facts of each case. Thus, judges seeking to protect public speech in spite of *Garcetti* can simply construe the scope of an employee's duties broadly. Moving the scope-of-employment goalpost provides creative judges with an escape hatch to find First Amendment protection. While all legal tests are prone to judicial policymaking and such discretion may sometimes even be desirable, the rule of law requires at least a moderate degree of non-arbitrariness. The values of predictability and transparency demand more consistency than *Garcetti* can provide.

2. Testifying Under Oath

Courts have also split over whether testimony given by public employees pursuant to the subpoena power constitutes protected speech.[95] Some courts have adopted a hard-line pursuant-to-duties test, holding that an employee's subpoenaed testimony regarding work-related matters does not constitute protected First Amendment speech. For instance, in *Huppert v. Pittsburg*, the plaintiff was employed as a patrol officer and was asked to investigate corruption at a local public works yard.[96] Huppert claimed that subsequent to this assignment, his superiors at the police department treated him with derision. His employer denied his promotion, despite the fact that he scored highly on the requisite exams, and transferred him to a dilapidated building within the police department known as the

class size was unprotected because it would not have occurred but for her job as a teacher); Bradley v. James, 479 F.3d 536, 538 (8th Cir. 2007) (holding that police officer's statement that another officer was intoxicated, and which was made in response to an official investigation into misconduct, was unprotected because it would not have occurred but for his job as a policeman).

95. For an in-depth overview of this circuit split and its pre-*Garcetti* origins, see Jasperse, *supra* note 77, at 651–56 (arguing that truthful testimony at hearings should be protected by analogizing First Amendment protection to immunity for civil damages due to compelled testimony).

96. 574 F.3d 696, 699 (9th Cir. 2009).

"Penal Colony," where disfavored officers were routinely assigned.[97] Later, a grand jury subpoenaed Huppert to testify about the allegedly corrupt practices of the police department.[98] Due to his testimony, the department subjected Huppert to retaliatory measures meant to discourage others within the force from testifying about corruption.[99] Adopting a narrow, absolutist reading of *Garcetti*'s definition of employee duties, the Ninth Circuit held that the subpoenaed testimony was not protected under the First Amendment.[100] Under California law, it is the "duty" of police officers to disclose incriminating facts "and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury."[101] As such, the court rejected the contention that Huppert spoke as a citizen.[102]

The Eleventh Circuit adopted virtually the same reasoning in *Green v. Barret*, a case with startling facts that raise concerns about strict application of the pursuant-to-duties test.[103] In *Green*, the chief jailer testified in a hearing to determine whether a convicted murderer should be transferred from a local jail to a maximum security prison. Video showed the inmate regularly opening his cell door and wandering through the halls.[104] The jailer testified that because the locks often broke or could be jammed, leaving the inmate in the jail was unsafe.[105] The next day, the sheriff fired the jailer without providing a written explanation and, in a remarkable display of candor, the sheriff told the local newspaper, "I was so concerned about that testimony that the chief gave that she was terminated today."[106] Finding that the chief jailer was responsible for the conditions in the jail, the Court found his testimony unprotected because determining if an inmate should be transferred is necessarily part of his job.[107]

By contrast, in *Reilly v. Atlantic City*, the Third Circuit held that subpoenaed trial testimony by a police officer constitutes

97. *Id.*

98. *Id.* at 700.

99. *Id.*

100. *Id.* at 708.

101. *Id.* at 707 (quoting Christal v. Police Comm'n, 92 P.2d 416, 419 (Cal. Dist. Ct. App. 1939)).

102. *Id.* at 708.

103. 226 F. App'x 883, 886 (11th Cir. 2007) (holding that Free Speech Clause does not protect jailer's official testimony regarding substandard prison conditions).

104. *Id.* at 884.

105. *Id.*

106. *Id.*

107. *Id.* at 886.

protected speech under the *Garcetti* test.[108] In doing so, the court expressed great misgivings about the moral and policy issues at stake, suggesting that a strict reading of *Garcetti* creates outcomes simply too unjust for judges to condone.[109] A prosecutor summoned Reilly to testify against another police officer as part of a highly publicized investigation into the famously corrupt Atlantic City Police Department. In response, the Department retaliated against him.[110] Applying *Garcetti*, the Court reasoned that Reilly's testimony was protected speech because "every citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law."[111] Thus, the court stated that a "claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process."[112] Because truthful testimony involves performing a basic civic duty, the court held that Reilly did not speak simply as an employee.[113]

With regard to testifying under oath, the courts cannot agree on how strictly to apply the purportedly bright-line rule announced in *Garcetti*. Some courts appear to adopt the position that *Garcetti* completely limits their ability to fashion exceptions based on equitable principles. Other courts, as in *Reilly*, seem to believe that the Supreme Court could not possibly have intended for the scope-of-employment rule to undermine fundamental precepts of judicial integrity. These courts recognize, correctly, that *Garcetti* should be subject to narrow exceptions.

3. Falsifying Affidavits

Finally, the Second Circuit and D.C. Circuit have split regarding whether an employee may refuse to certify affidavits or other sworn statements that the employee reasonably believes to be false. In *Jackler v. Byrne*, a police officer alleged retaliatory discharge for his refusal to include false statements in a sworn affidavit about a

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108. 532 F.3d 216, 231–32 (3d Cir. 2008).

109. *Id.* at 231.

110. *Id.* at 220, 222.

111. *Id.* at 228 (quoting Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961) (upholding conviction of defendant for contempt of court due to refusal to give grand jury testimony)).

112. *Reilly*, 532 F.3d at 231 (quoting Garcetti v. Ceballos, 547 U.S. 410, 444 (2006) (Souter, J., dissenting)).

113. *Id.* at 231; *see also* Morales v. Jones, 494 F.3d 590, 598 (7th Cir. 2007) (holding that police officer's deposition testimony in a civil suit filed by a coworker against the police department did not constitute speech made pursuant to his duties, because the officer was not hired in order to provide testimony on behalf of fellow coworkers, even if he testified about events "made pursuant to his official duties").

civilian's complaint of excessive force.[114] The facts here are particularly troubling and illustrate why courts are so reluctant to read *Garcetti* literally. When called to assist with an arrest, Jackler witnessed a fellow police officer place a handcuffed suspect in a patrol car and then punch him across the face.[115] After the arrestee filed a complaint alleging excessive force, Jackler was directed to file a report detailing the incident.[116] After reviewing the report, Jackler's superiors requested that he omit any reference to excessive force.[117] He refused to change the report, and his supervisor subsequently terminated him.[118]

Though Jackler admitted that he wrote the report pursuant to his duties as a police officer, the Second Circuit held that his speech was nonetheless protected by the First Amendment because refusing to falsely testify about a matter of public concern has a citizen analogue.[119] A private citizen, the court argued, has a legal right to refuse to rescind a true accusation, to make a false one, or to file a false police report.[120] Because making truthful official statements is a right afforded to citizens independent of their status as public employees, such speech should be protected.[121] Thus, the court circled back to the *Pickering-Connick* test's respect for public employee autonomy and informed democratic accountability. Some speech is so integrated into the concept of citizenship that public employment cannot suspend First Amendment protection. To find support for this citizen analogue test, the court relied on a single line in *Garcetti*: "When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees."[122] The Second Circuit mollified the rigidity of the *Garcetti* rule by attributing the citizen analogue test to this language.

In *Bowie v. Maddox*, the D.C. Circuit took precisely the opposite tack and disparaged the Second Circuit for stretching *Garcetti* beyond any reasonable interpretation.[123] In a strikingly

114. 658 F.3d 225, 231–32, 242 (2d Cir. 2011).

115. *Id.* at 230.

116. *Id.* at 230–31.

117. *Id.* at 231.

118. *Id.* at 231–32.

119. *Id.* at 241–42.

120. *Id.* at 241.

121. *Id.* at 239.

122. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).

123. 653 F.3d 45, 47–48 (D.C. Cir. 2011) (holding First Amendment did not protect public employee's refusal to sign affidavit because he acted pursuant to official duties).

similar fact pattern, Assistant Inspector General Bowie was fired for refusing to sign an affidavit drafted by his employer that he believed contained false statements regarding an employment discrimination claim.[124] Rejecting the citizen analogue rationale of *Jackler*, the court held that Bowie's speech was not protected because testifying about discrimination claims fell within the parameters of his official duties. The court claimed that *Jackler* read *Garcetti* "backwards" because the thrust of Justice Kennedy's decision was that certain speech that would normally be protected for citizens under the First Amendment loses that protection when made pursuant to official duties.[125] Simply put, the Supreme Court intended that "the rules are different for government employees speaking in their official capacities."[126] Interestingly, the court in *Bowie* took the rare step of suggesting that the Second Circuit adopted its "dubious interpretation of *Garcetti*" purely for policy reasons.[127] While the D.C. Circuit sympathized with the employee's defiance of the employer's clearly illegal actions, "the illegality of a government employer's order does not necessarily mean the employee has a cause of action *under the First Amendment* when he contravenes that order."[128]

In this way, the D.C. Circuit explicitly stated the policy tension underlying many lower court interpretations of *Garcetti*. With regard to subpoenaed testimony and refusals to falsify official reports, courts have found the strict application of *Garcetti* unpalatable and are searching for ways to allay its sometimes outrageously unjust outcomes. Consequently, this area of First Amendment doctrine has remained stubbornly confused. The wide disparity in resolution of post-*Garcetti* cases suggests that many courts are repulsed by public employers who punish employees in order to salvage their reputations. Judges are arguably attempting to find cracks in the *Garcetti* edifice by emphasizing the importance of certain citizen-like conduct. Perhaps more surreptitiously, courts can practice a case-by-case doctrinal runaround by massaging which factors to emphasize in the scope-of-employment inquiry. A solution providing equity for public employees, while preserving fidelity to *Garcetti* and the Court's desire for administrable standards, is desperately needed. A successful resolution of the post-*Garcetti* circuit splits must meld protection for public employees from unseemly behavior with a definition of

124. *Id.* at 46.
125. *Id.* at 48.
126. *Id.*
127. *Id.*
128. *Id.*

unseemliness grounded in more than the whims and policy preferences of courts.

III. APPLYING *GARCETTI* WHEN AN EMPLOYEE RAISES AN ETHICAL OBJECTION

From the three circuit splits described above, one can identify two broad methods of judicial resolution: the citizen analogue test and the bright-line rule against job-duty exceptions (hereinafter, the "no-exceptions bright-line rule"). Ultimately, neither the citizen analogue test nor the no-exceptions bright-line rule provides a satisfactory resolution. Each approach swings the pendulum of protection too far in one direction or the other, without properly weighing the values of clarity and ease of administration against a respect for individual autonomy. This Part first analyzes the citizen analogue test, identifying both its strengths and weaknesses, and then explores the no-exceptions bright-line rule.

A. The Citizen Analogue Test

Although not all courts have used the "citizen analogue" terminology adopted in *Jackler v. Byrne*, the logic of that case has been applied by lower courts to find exceptions to *Garcetti*'s scope-of-employment doctrine.[129] In particular, courts have used the citizen analogue rationale to find First Amendment protection for employees who object to testifying untruthfully or disseminating false information. Ultimately, the citizen analogue test is an unsatisfactory solution to the circuit splits, as it is not firmly grounded in Supreme Court precedent and lacks a solid theoretical underpinning.

First, the test only finds textual support in one line of dicta from Justice Kennedy's opinion in *Garcetti*: "When a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees."[130] In the context of the opinion, Justice Kennedy was emphasizing that some activities, like writing letters to the local newspaper in *Pickering*, fall outside the scope of one's employment duties.[131] The Court's statement does *not* suggest that some employee activities are exempt, despite being performed pursuant to public duties.

129. 658 F.3d 225, 230–31 (2d Cir. 2011); Reilly v. Atlantic City, 532 F.3d 216, 231–32 (3d Cir. 2008); Morales v. Jones, 494 F.3d 590, 598 (7th Cir. 2007).

130. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).

131. *Id.* at 423.

By the same token, the citizen analogue test suffers doctrinally from the fact that it envisions a complete dichotomy between the duties of citizens and employees that simply does not exist.[132] For instance, in *Reilly* the court deployed Supreme Court precedent concerning the important, universal duty of all citizens to testify freely before duly constituted tribunals; the court concluded that this duty is independent from, and somehow breaks the continuity of, a public official testifying before a court in her official capacity.[133] Similarly, the *Jackler* court's reasoning suggested that the plaintiff's job duties were transformed into citizen duties.[134] However, in each case the courts overlooked the fact that under *Garcetti*, when a public employee refuses to falsify an affidavit, she is necessarily acting as both a public employee within her official duties *and* as a citizen. To pretend that an official duty is somehow exempt because that duty possesses a citizen analogue ignores this overlap.

Perhaps the most damning critique of the citizen analogue test is its unprincipled ambiguity; the general contours of citizen activities are too amorphous to constitute much of a test at all. As the D.C. Circuit vividly stated in *Bowie v. Maddox*, "A test that allows a First Amendment retaliation claim to proceed whenever the government employee can identify a civilian analogue for his speech is about as useful as a mosquito net made of chicken wire: All official speech, viewed at a sufficient level of abstraction, has a civilian analogue."[135] For example, the district attorney who wrote the memo in *Garcetti* is no different from a criminal defendant who testifies in order to refute the facts contained in an indictment; but only the criminal defendant's right to refute the indictment would certainly be subject to free speech protection.[136] For this reason, the citizen analogue test is not cabined by any identifiable doctrinal limitations and may consist of nothing more than a judge deciding that the employer's behavior was unjust.[137] For those who advocate for complete abrogation of *Garcetti*, the benefit of the citizen analogue test lies in the discretion given to judges to reach the "correct" policy outcome.[138] As a matter of creating

132. *See id.* at 427 (Stevens, J., dissenting) ("The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong.").

133. 532 F.3d at 223–31.

134. Jackler v. Byrne, 658 F.3d 225, 241–42 (2d Cir. 2011).

135. 653 F.3d 45, 48 (D.C. Cir. 2011).

136. *Id.*

137. *See* Graham, *supra* note 77, at 703–04 (arguing that the citizen analogue test "risks a wholesale renunciation of *Garcetti*" because, construed broadly enough, virtually any public employee activity can be likened to similar activity in the private sector).

138. *See* David L. Hudson, Jr., *2nd Circuit Ruling Offers Glimmer of Hope in Post*-Garcetti *World*, FIRST AMEND. CTR. (July 28, 2011), http://www.firstamendmentcenter.org/2nd-circuit-

a sound and predictable legal standard, however, the citizen analogue test leaves much to be desired.

B. The No-Exceptions Bright-Line Rule

By contrast, the second approach is a no-exceptions bright-line rule against protecting speech made pursuant to a public employee's duties. Despite the unjust outcomes that strict application of *Garcetti* might produce, several lower courts have taken these results in stride.[139] The no-exceptions approach purports to improve administrative efficiency, remove discretion from judges, and closely adhere to Supreme Court precedent. However, the approach fails to recognize the other First Amendment principles valued by the Court in *Garcetti* and its prior precedents. The benefits of the no-exceptions approach are largely illusory, and the rule undermines individual justice and the integrity of the judiciary.

The primary doctrinal advantage of the no-exceptions rule is its purported fidelity to *Garcetti*. By focusing solely on the central holding of the case—that free speech rights do not protect statements or acts made pursuant to public duties—lower courts give effect to the Court's emphasis on efficient governance.[140] However, this focus is misplaced for two reasons. First, reading *Garcetti* in such a strict fashion ignores the decision's final paragraphs, which discuss possible limitations to the doctrine.[141] Second, the rule gives no credence to the Court's emphasis on the other First Amendment values reflected in its prior precedents; speaker-centered and public discussion values remain integral to the proper resolution of public employment disputes.[142]

Another purported advantage of the no-exceptions rule is its ease of administration. Along the same lines, the approach may reduce judicial discretion and thus avoid democratically unaccountable policymaking. However, as some critics have noted, determining an employee's scope of employment is no simple matter, as evinced by circuit splits over which factors should predominate.[143] Moreover, because judges define the scope of an employee's duties through the

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ruling-offers-glimmer-of-hope-in-post-garcetti-world (celebrating *Jackler*'s citizen analogue analysis as a welcome retreat from the overbearing *Garcetti* doctrine).

139. *See supra* Section II.C (describing cases where courts did not find First Amendment protection).

140. *Bowie*, 653 F.3d at 46 (quoting Garcetti v. Ceballos, 547 U.S. 410, 419 (2006)); Huppert v. Pittsburg, 574 F.3d 696, 699 (9th Cir. 2009).

141. *Garcetti*, 547 U.S. at 424; *see supra* notes 71–73 and accompanying text.

142. 547 U.S. at 419.

143. Keenan, *supra* note 17, at 847–60, 870–76.

application of a standardless, totality-of-the-circumstances inquiry, the no-exceptions bright-line rule is not a true check on judicial discretion. *Garcetti* supplies creative jurists with the leeway to obliquely emphasize certain factors here, and other factors there, to produce the desired policy outcome.

In the end, though, the no-exceptions bright-line rule suffers from the most basic of doctrinal flaws: its inability to cope with factual scenarios that invoke strong feelings of injustice, like the police brutality in *Jackler*[144] or the allegations of police corruption in *Huppert*.[145] Injustice has harmful consequences, not only for fired employees, but also for the public's faith in good government.

IV. A CRIMINAL LIABILITY SAFE HARBOR: ENFORCING THE DEMOCRATICALLY ENACTED DEFINITION OF GOOD GOVERNMENT

Because neither of the dominant approaches applied by lower courts effectively resolves the post-*Garcetti* circuit splits, an alternative solution is required. For the sake of stare decisis, government efficiency, and separation of powers, the solution should consist of more than wishing away *Garcetti* and returning to the *Pickering-Connick* balancing test. Courts should create a criminal liability safe harbor for public employees under the First Amendment. Under this safe harbor, if an employer directs an employee to speak in a manner that would subject the employee to criminal liability, the speech would not fall within the scope of employment. The issue in each case, then, is whether the employee can prove by a preponderance of the evidence that compliance with the employer's directive would make the employee criminally liable. This Part delineates the parameters of this proposed solution and outlines its theoretical and practical merits.

A. Mechanics of the Criminal Liability Safe Harbor

The mechanics of the proposed solution are relatively straightforward. The first major issue concerns *when* the criminal liability rule is triggered. Must the employee actually violate a criminal statute in order to invoke his First Amendment rights? If not, at what point can the employee legitimately claim that his recalcitrance was motivated by potential criminal liability? Requiring the employee to actually violate a criminal statute would be

144. Jackler v. Byrne, 658 F.3d 225, 231–32 (2d Cir. 2011).

145. 574 F.3d at 699.

anomalous, given that the nature of a *right* to free speech implies the ability to object to unseemly conduct without suffering adverse consequences. Risking criminal liability is not a superior alternative to being fired. Therefore, the inquiry should focus on whether the employer actually requested that the employee commit a crime and whether the employee's failure to comply with that request caused retaliatory action. These two elements—the criminal request and causation—do not depend on the employee's subsequent conduct.

The second major issue concerns how the plaintiff meets the evidentiary burden to trigger the criminal liability safe harbor. Because public employees typically challenge speech restrictions under 42 U.S.C. § 1983, and because the solution proposed in this Note is merely a slight modification of current First Amendment doctrine, courts should apply the preponderance-of-the-evidence standard.[146] Unanimous and longstanding judicial interpretations of § 1983 make this clear:

> [A] plaintiff making a First Amendment retaliation claim . . . must initially demonstrate by a preponderance of the evidence that: (1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination.[147]

To establish the first element of this test—that the speech is constitutionally protected—the proposed solution would place the burden on the employee (the plaintiff) to prove by a preponderance of the evidence that fulfilling the employer's directive would require the violation of a criminal statute. Importantly, the inquiry would be totally objective, without regard to whether the plaintiff mistakenly believed that the employer demanded a criminal violation. This objective approach is consistent with traditional § 1983 jurisprudence, which requires proof of an *actual*, not merely *believed*, constitutional violation. To hold otherwise would expand or contract constitutional protections based on each plaintiff's ignorance of the law. For example, under this proposed evidentiary framework, the plaintiff in *Jackler* could have introduced evidence proving, by a preponderance of the evidence, that (1) his observations about excessive force were true and (2) filing a false report with the department would have violated a

146. 42 U.S.C. § 1983 (2012) ("Every person who . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .").

147. *See* Gorman-Bakos v. Cornell Coop. Extension of Schenectady Cnty., 252 F.3d 545, 553 (2d Cir. 2001) (quoting Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999)).

criminal statute.[148] Indeed, New York state law provided that a "person is guilty of offering a false instrument for filing in the second degree when, knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant."[149] Then, Jackler would have needed to prove retaliatory action and causation. Under the test proposed here, Jackler would have prevailed on his § 1983 claim if discovery confirmed the facts alleged within his complaint.

The third issue concerns federalism and the relationship between federal and state statutes. To maintain fidelity to the constitutional doctrines of anti-commandeering and preemption, the safe harbor would, in some cases, treat employee speech differently depending on whether the employee is a state or federal official. Federal employees could claim the exception on the basis that their employer asked them to violate federal law, but not state law.[150] This requirement comes from the Supremacy Clause.[151] The Court has held that a federal official is immune from state law if his acts were "authorized by controlling federal law."[152] Thus, if a federal official acts pursuant to federal law, but in contravention of state law, then that act would not constitute a criminal violation. As such, the criminal liability safe harbor proposed here would not apply. However, the typical case, involving an employee retaliated against for giving subpoenaed testimony or refusing to falsify information, would trigger the safe harbor irrespective of state law. For instance, 18 U.S.C. § 1621 criminalizes giving false testimony before a competent tribunal or in any official "declaration, certificate, verification, or statement."[153]

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148. *See* 658 F.3d at 230–31 (discussing the request of the employer to falsify the affidavit).

149. N.Y PENAL LAW § 175.30 (McKinney 2010).

150. The Supreme Court has held that federal officials acting pursuant to their official duties are immune from state prosecution:

> [I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California. This is the font of Supremacy Clause immunity.

Cunningham v. Neagle, 135 U.S. 1, 75 (1890). However, federal employees could claim a safe harbor under state law if Congress explicitly chose to allow the prosecution of federal officials pursuant to state criminal law. In that scenario, Congress would effectively affirm the state prosecution, which would avoid preemption under the Supremacy Clause. *See* Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2243 (2003) (noting that under the Federal Tort Claims Act the federal government has consented to the prosecution of state law claims against federal officials acting within the scope of their duties).

151. U.S. CONST. art. VI, cl. 2.

152. Butz v. Economou, 438 U.S. 478, 490 (1978).

153. 18 U.S.C. § 1621 (2012).

Likewise, 18 U.S.C. § 401 criminalizes "disobedience or resistance to . . . [a federal court's] lawful writ, process, order, rule, decree, or command."[154] Therefore, an employee who suffered retaliation because he or she resisted an order not to testify before a court or administrative agency would qualify under the criminal liability safe harbor.

As for state public employees, they could prevail under the safe harbor for requested violations of state law and most federal laws. Under the preemption doctrine, the federal government can prohibit conduct that is authorized under state law and prosecute state officials for violations of federal law.[155] However, under the anti-commandeering doctrine enunciated in *Printz v. United States* and *New York v. United States*, the federal government may not enact laws forcing state executive officials to take affirmative actions.[156] A federal criminal provision imposing an affirmative duty requiring state officials to testify in court in their official capacity would therefore likely violate the anti-commandeering doctrine. These federalism concerns undoubtedly add an extra level of complexity to the solution proposed in this Note. Such concerns, though, already affect virtually every area of constitutional law, and federal and state courts already understand how to apply these doctrines. Thus, the federalism hurdle presented by the Supremacy Clause does not undercut the administrative efficiency or predictability of a criminal liability safe harbor.

B. Justifications for the Criminal Liability Safe Harbor

Adoption of the criminal liability safe harbor, as described above, offers several theoretical and practical advantages to the prevailing citizen analogue and no-exceptions bright-line approaches; at the same time, the proposal maintains fidelity to the language and spirit of *Garcetti*. The goal, as the Court's jurisprudence suggests, is to find an appropriate balance between competing values. The government's interest in the efficient administration of the law must

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154. *Id.* § 401; *see also id.* § 6004 (authorizing administrative agencies to seek orders requiring individuals to testify).

155. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 37 (1824) (holding state laws that directly conflict with federal laws are preempted); McCulloch v. Maryland 17 U.S. (4 Wheat) 316, 436 (1819) (holding that state law may not invalidate constitutional exercises of power by the federal government).

156. *See* Printz v. United States, 521 U.S. 898, 932 (1997) (holding that federal laws may not commandeer state executive officials to take affirmative actions); New York v. United States, 505 U.S. 144, 166 (1992) (holding that federal laws may not commandeer state legislative officials to take affirmative actions).

be weighed against both the employee's interest in speaker-centered autonomy and society's interest in the free dissemination of information regarding government misconduct.[157]

A criminal liability safe harbor is desirable because it creates automatic symmetry between governmental and individual interests. A public employer is obligated to fulfill its statutorily defined mission, but that mission, by virtue of the limits imposed by criminal law, may only be achieved through legal means. This is what it means to be a democratic government under the rule of law. Simply put, achieving a government objective via means that violate criminal law is not a proper function of an agency; therefore, the safe harbor cannot, by definition, impede the efficient administration of executive officials. In fact, affording constitutional protection to public employees in this context will *improve* the administration of law. Should a government employer seek to violate criminal law, its public employees may internally resist such an infraction. As Professor Paul H. Robinson has argued, a criminal code is a normative expression of the conduct that society deems to be just and draws its ability to influence behavior from this moral authority.[158] The criminal liability safe harbor would create a constitutionally enforceable rule of good governance.

The safe harbor proposed here, however, would only provide protection from criminal liability, not civil liability. The rationale for this distinction is rooted in the differing purposes of civil and criminal sanctions. The civil-criminal distinction separates conduct that society seeks to price from conduct that society seeks to prohibit.[159] Civil fines are levied to force actors to internalize the costs of behavior (e.g., polluting) that cause externalities.[160] Such activity is not so morally blameworthy as to warrant a complete prohibition. Under the right conditions, it may be wise for an actor to engage in the activity so long as the external costs do not exceed the internal benefits.[161] Applying this rationale to the free speech rights of public employees, the employer may ask the employee to subject himself to civil liability, but

157. *See supra* Part II.A (discussing the Court's treatment of traditional First Amendment principles in pre-*Garcetti* jurisprudence).

158. *See* Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1840 (2000) ("[T]he perception of a criminal code as doing justice is necessary for the code's moral credibility, which in turn is necessary for the effective crime control that the drafters seek.").

159. *See* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It*, 101 YALE L.J. 1875, 1876–77 (2002) (noting the distinction between pricing civil offenses and prohibiting criminal offenses); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 204 (1996) (same).

160. Coffee, *supra* note 159, at 1882.

161. *Id.* at 1883.

the act's benefits to the government may exceed the costs to the public. Therefore, the employee may not be acting in opposition to the agency's statutorily defined mission. By contrast, criminal penalties are imposed to totally prohibit an activity and to deny any benefit from it.[162] Criminal acts are considered so blameworthy that such behavior is never accepted, and every individual has a moral right to be free of the conduct.[163] Criminal acts committed by government agents cannot, by definition, produce benefits for the public that exceed the costs. Thus, a public employee who violates a criminal law is always acting in opposition to the agency's statutorily defined mission. Therefore, retaining the civil-criminal distinction in the safe harbor proposed here is crucial to maintaining the symmetry between the government's and public employee's interests.

A second theoretical advantage of the criminal liability safe harbor is the provision of a single, easily applied solution to the three separate circuit splits regarding the scope of employment and the refusal of employees to cover up government abuse.[164] Rather than protecting discrete categories of speech (e.g., giving truthful testimony) on an ad hoc basis, the criminal liability safe harbor creates a high degree of certainty. Applying this rule is straightforward and not, as Chief Justice Roberts famously put it, like "looking out over a crowd and picking out your friends."[165]

Relatedly, the criminal liability safe harbor also preserves separation of powers by limiting judicial discretion. Criminal law is defined and enforced by the legislative and executive branches, which are responsive to the will of the people. This reality puts a natural, democratic constraint on the lengths to which courts may expand the safe harbor.[166] Similarly, if the polity disfavored the safe harbor—perhaps based on a desire for efficient government administration at almost any cost—criminal statutes could be rewritten to exempt their application to public employees fulfilling public duties. In essence, the rule proposed in this Note places the choice in the hands of the voters, asking them to think critically about whether they want public

162. *Id.* at 1884.

163. *Id.*

164. *See supra* Part II.C (describing how these disagreements among lower courts amount to a single concern regarding objections to unethical demands).

165. Sheryl Gay Stolberg & Adam Liptak, *Roberts Fields Questions on Privacy and Precedents*, N.Y. TIMES, Sept. 14, 2005, at A1 (quoting confirmation hearing testimony from Chief Justice Roberts concerning the undesirability of unlimited judicial discretion, particularly when citing international precedent).

166. *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980) (arguing that judicial review should be applied to reinforce participation and representation in the democratic process).

employees to disobey the law. Therefore, the criminal liability safe harbor fulfills the Court's goal of limiting the "intrusive role" of mandated "judicial oversight of communications between and among government employees and their superiors in the course of official business."[167]

Admittedly, the choice to protect public employees with a criminal liability safe harbor *already* rests in the hands of the voters; they could demand that their legislators pass various whistleblower statutes. However, the current default rule, which imposes punishment on employees in the absence of statutory protection, burdens individual employees rather than society writ large. Therefore, the public currently has little incentive to advocate for adequate whistleblower protections. By contrast, the proposed criminal liability default rule is superior because the burden of protecting employees falls on the government, which can broadly diffuse any negative effects across the electorate. This change would force the public to closely consider the costs and benefits of failing to protect public employee speech.[168]

From a practical standpoint, the criminal liability safe harbor is useful for several reasons. First, administration of the proposal will be straightforward because the safe harbor is, by its very nature, a categorical bright-line rule. Courts would only need to evaluate whether the directive from the public employer would force the employee to violate criminal law. Thus, in contrast to the citizen analogue test,[169] which requires an examination of public policy regarding the history and importance of particular conduct, or the *Pickering-Connick* balancing test, which requires an unguided weighing of nebulous factors,[170] the criminal liability safe harbor is relatively straightforward. The clarity of this safe harbor also provides clear notice to public employees. Under traditional principles of statutory construction, criminal statutes are interpreted in light of contemporary, ordinary public understanding in order to enhance the ability of the average citizen to understand them.[171] Therefore, the

167. Garcetti v. Ceballos, 547 U.S. 410, 423 (2006).

168. *Cf.* Tara Mikkilineni, Note, *Constitutional Default Rules and Interbranch Cooperation*, 82 N.Y.U. L. REV. 1403, 1411 (2007) (asserting that the Court "may spur a legislative response by announcing a rule that disfavors political majorities, prompting these majorities to take action to replace the default rule").

169. *See supra* Part III.A (describing the citizen analogue test).

170. *See supra* notes 31–42 and accompanying text (analyzing the Court's application of the balancing test).

171. *See* Muscarello v. United States, 524 U.S. 125, 138 (1998) (attempting to discern the ordinary, "generally accepted contemporary meaning" when interpreting an ambiguous criminal statute).

safe harbor would provide public employees with enough information ex ante to understand the scope of their First Amendment right to willfully disobey the orders of their superiors.

Moreover, the clarity of the criminal liability safe harbor may limit courts' tendency to surreptitiously massage the scope-of-employment inquiry.[172] Due to the highly flexible and undefined nature of the current scope-of-employment test, courts may be tempted to withdraw or expand this boundary in order to promote an equitable outcome. The criminal liability safe harbor provides a basis for protecting the free speech rights of employees that is rooted in criminal codes that have been refined through years of judicial interpretation. As such, courts would be less tempted to manipulate the scope-of-employment factors to reach a just result.

Finally, litigators should consider asking courts to recognize the criminal liability safe harbor proposed in this Note because lower court judges could be persuaded to adopt the safe harbor as a reasonable interpretation of *Garcetti*. This proposed rule is consistent with the language enunciated in *Garcetti* that suggests exceptions may be made pursuant to criminal law. As the Court stated, "[O]bligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions."[173] This language, at first glance, only appears to mean that governments may place criminal restrictions on employers themselves, but it also supports recognizing a criminal-liability exception for employees. Lower court judges and lawyers could cite this linguistic hook to justify mitigating the harshness of *Garcetti*.

Despite its advantages, the criminal liability safe harbor arguably possesses some flaws. One could contend, for instance, that one's constitutional rights should not fluctuate according to the dictates of various criminal laws. Constitutional limitations may be seen as legal rules that are separate from and superior to ordinary legislative enactments.[174] However, this criticism fails to recognize that there are other areas of constitutional law in which one's rights do, in fact, depend on legislative definitions. For instance, one's right to procedural due process for the deprivation of property fluctuates

172. *See supra* Part II.C.1 (describing the scope-of-employment test circuit split).

173. 547 U.S. 410, 425–26 (2006); *see supra* notes 71–73.

174. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 401–08 (1819) (providing the classic justification of constitutional law as a permanent limitation on ordinary statutory authority).

according to the common law and legislative enactments that establish property entitlements.[175]

Additionally, the criminal liability safe harbor could be criticized for granting more rights to public employees than employees in the private sector. As Professor Kermit Roosevelt III has noted, an at-will private employee is not afforded constitutional protection against termination for speech an employer dislikes.[176] Due to the state action doctrine, an accountant who fails to fulfill his boss's order to cover up tax evasion (a clearly criminal act) has no constitutional defense against being fired.[177] A private employee's only choice in such a situation is to resign, an option that is also available to public employees.[178] However, this objection fails to note the additional First Amendment value—beyond speaker-centered autonomy—that is implicated in the public employment context: the public's interest in learning about government misconduct.[179] Public employees deserve extra protection precisely because they occupy a special place in society as the guarantors of good government. Therefore, the benefits of a criminal liability safe harbor outweigh any perceived disadvantages.

V. CONCLUSION

The Supreme Court's decision in *Garcetti* has been subject to consistent and withering scrutiny.[180] By purporting to eliminate First Amendment protection for all speech made pursuant to an employee's official conduct, the Court sharply limited the ability of public employees to refuse criminal demands made by their employers. As a consequence, employees continue to be subjected to retaliatory action that is unjustified and even works against the public interest. Something is amiss when the Constitution no longer protects an

175. Bd. of Regents v. Roth, 408 U.S. 564, 570, 576 (1972) (holding that due process rights derive not from "assessing and balancing the weights of the particular interests involved," but rather from individual claims of "entitlement" granted by state and federal law); *see also* Goldberg v. Kelly, 397 U.S. 254, 261–63 (1970) (noting that exact contours of one's due process rights vary with the type of entitlement at issue).

176. *See* Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 637 (2012) (noting the symmetry that *Garcetti* creates between the constitutional rights of private and public employees).

177. *See* The Civil Rights Cases, 109 U.S. 3, 13 (1883) (holding that constitutional rights are infringed only through state action, not private conduct).

178. *See* Roosevelt, *supra* note 176, at 637.

179. Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

180. *See supra* note 9 and accompanying text (highlighting the negative reaction to *Garcetti*).

employee who refuses to conceal police brutality.[181] For this reason, an absolutist reading of *Garcetti* that leaves no room for protected speech within the scope of public employment is fundamentally unfair, especially as the number of public employees in the United States continues to increase.[182] At the same time, the citizen analogue test utilized by some lower courts finds no support in the text of *Garcetti*, and it appears to be limited by nothing more than the policy preferences of judges.[183] However, the lower courts' inability to propose workable alternatives does not counsel in favor of rejecting *Garcetti* and its concern with government efficiency. The Court correctly noted that unaccountable judges applying First Amendment doctrine are not suited to making sensitive judgments about job performance.[184] Therefore, *Garcetti* should be retained and lower courts should recognize a criminal liability safe harbor for public employees. By doing so, courts can promote government efficiency and give effect to society's democratically enacted understanding of legitimate conduct. A criminal liability safe harbor is grounded in the logic and text of *Garcetti* and blunts the rough edges of its impact. This solution would optimally balance managerial efficiency with respect for freedom of expression. In a democracy, the First Amendment should protect an employee whose speech promotes the public interest.

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181. Jackler v. Byrne, 658 F.3d 225, 230–31 (2d Cir. 2011).

182. *See* Elizabeth McNichol, *Some Basic Facts on State and Local Government Workers*, CTR. ON BUDGET & POL'Y PRIORITIES, http://www.cbpp.org/cms/index.cfm?fa=view&id=3410 (last updated June 15, 2012) (noting that from 1980 to 2011 the "number of state and local workers grew modestly relative to the overall population").

183. *See supra* Part III.A (discussing the inadequacy of the citizen analogue test).

184. *See* Roosevelt, *supra* note 176, at 659 (defending *Garcetti* on the basis of speaker-centered and public-centered rationales and offering alternative formulations such as the work-product doctrine or a limited number of safe harbors for public employees).

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