

UNCERTAINTY AND LOSS IN THE FREE SPEECH RIGHTS OF
PUBLIC EMPLOYEES UNDER *GARCETTI V. CEBALLOS*

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INTRODUCTION

The Supreme Court has long recognized that citizens retain First Amendment rights during periods of public employment.¹ When the government, acting as an employer, restricts an employee's speech that is made as a citizen on a matter of public concern, courts have applied a balancing test to determine whether the government is justified in treating the employee differently from any other member of the public.² However, in 2006 the Supreme Court held in *Garcetti v. Ceballos* that the First Amendment does not protect speech made pursuant to a public employee's official duties.³ Under the bright-line rule established by *Garcetti*, the government, as employer, does not need to justify its restrictions or retaliatory acts based on its employees' speech made pursuant to their job duties.⁴

Four justices dissented in *Garcetti*.⁵ Justice Souter objected to the majority's new rule and argued that the Court should retain a balancing approach for speech made pursuant to job duties.⁶ While recognizing that "necessary judicial line-drawing sometimes looks arbitrary," Justice Souter asserted that there was "no adequate justification" for the majority's cate-

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1. *E.g.*, *Shelton v. Tucker*, 364 U.S. 479 (1960) (striking down a statute requiring disclosure of prior organization memberships as violative of public employees' right to freedom of association); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (striking down a statute requiring a loyalty oath that would preclude from public employment those innocently associating with certain subversive organizations).

2. *E.g.*, *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

3. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006). *Garcetti's* holding does not affect other legal claims that may be available to public employees that suffer workplace retaliation based on their speech, including claims brought under whistleblower protection statutes, tort claims for retaliatory discharge, or claims based on breach of an employment contract. Such claims are beyond the scope of this comment.

4. *Id.*

5. *Id.* at 1962–76 (Justices Breyer, Ginsburg, Souter, and Stevens dissented).

6. *Id.* at 1965–68 (Souter, J., dissenting).

gorical rule excluding job-required speech from protection.⁷ Justice Stevens also found the distinction arbitrary: “it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description.”⁸ In addition to these principled objections to the bright-line rule, the dissenting justices also raised practical concerns about the results of the majority’s new approach, such as increased litigation over the scope of “job duties” and the new incentive for public employees to air their grievances through improper channels.⁹

This comment considers these challenges to the majority’s approach. The first section describes judicial review of First Amendment claims in the public employment context prior to *Garcetti*. The second section briefly outlines the *Garcetti* majority and dissenting opinions. The third section considers the liberty interests at stake in speech made pursuant to public employment, and asserts that the majority’s bright-line rule arbitrarily restricts First Amendment rights and is inconsistent with relevant First Amendment theory. The fourth section considers practical and policy objections to the bright-line rule and concludes that *Garcetti* may prompt litigation, discourage internal reporting, and preclude protection for the most valuable forms of public employee speech. At the same time, section four examines these practical objections in light of recent cases interpreting *Garcetti* and proposes guidelines for how *Garcetti* should be interpreted and applied in order to mitigate these practical drawbacks.

I. PRE-GARCETTI PRECEDENT

Public employees¹⁰ were once thought to have waived certain constitutional protections by accepting the terms of public employment.¹¹ However, beginning in the 1950s and 1960s, the Supreme Court acknowledged that citizens retain First Amendment rights during public employment.¹² At the same time, the Court affirmed that the government has an undeniable interest in regulating the speech of its employees and that the First Amendment must be interpreted in light of that interest within the context of public employment.¹³

7. *Id.* at 1965 (Souter, J., dissenting).

8. *Id.* at 1963 (Stevens, J., dissenting).

9. *Id.* (Stevens, J., dissenting), 1968 (Souter, J., dissenting).

10. This comment refers to local, state, and federal employees as “public employees.”

11. In *McAuliffe v. Mayor of New Bedford*, Justice Holmes famously wrote that a police officer “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” 29 N.E. 517, 517 (Mass. 1892).

12. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (citing cases).

13. *See id.*

In *Pickering v. Board of Education*, the Supreme Court evaluated a public school teacher's First Amendment claim against his employer, who terminated his employment because of a letter he sent to a local newspaper criticizing school board officials.¹⁴ The Court sought to "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹⁵ The Court found that these interests weighed in favor of the teacher, since he spoke on a matter of legitimate public concern and in a manner that did not interfere with his regular duties or the operations of the school.¹⁶ Although the teacher's letter included false statements, the Court also emphasized the public's interest in the teacher's ability to publish his opinions.¹⁷ The Court characterized this protection of free expression as a matter of democratic necessity.¹⁸ It described the electing public's interest in becoming informed through "free and unhindered debate" as the "core value" of the Free Speech Clause.¹⁹

Later, in *Connick v. Myers*, the Supreme Court clarified that the government's conduct will be scrutinized under the *Pickering* balancing test only when the employee speech at stake is speech made as a citizen on a matter of public interest.²⁰ The Court held that when an individual speaks "as an employee upon matters only of personal interest," federal courts are "not the appropriate forum" to review government disciplinary action.²¹ In *Connick*, as in *Pickering*, the Court grounded its First Amendment analysis on the need of a self-governing society to be informed through open debate on matters of public concern.²² The speech at issue in *Connick* included a questionnaire distributed by the plaintiff to other staff members regarding internal work conditions and policies.²³ In the Court's view, only one question on the plaintiff's questionnaire touched upon a matter of public con-

14. *Id.* at 564.

15. *Id.* at 568.

16. *Id.* at 572-73.

17. *Id.* at 571-72.

18. *Id.* ("On [questions left to popular vote] free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

19. *Id.* at 573.

20. 461 U.S. 138, 147 (1983).

21. *Id.*

22. *Id.* at 145.

23. *Id.* at 141.

cern.²⁴ The other questions were not protected under the First Amendment because they did not relate to matters of public concern.²⁵ In other words, they did not serve the purpose of informing the electing public of government ineffectiveness or abuse.²⁶

While the Court in *Connick* held that the *Pickering* test applies only when speech is made “as a citizen upon matters of public concern,” it emphasized and explained only the “matter of public concern” part of this requirement.²⁷ Nevertheless, some circuit courts interpreted *Pickering* and *Connick* as creating an independent requirement that speech be made “as a citizen” and not “as an employee.”²⁸ The Fourth Circuit concluded that speech made pursuant to job duties was not protected speech because it was not speech made “as a citizen.”²⁹ By contrast, the Ninth Circuit expressly rejected a per se rule that would preclude protection for speech made pursuant to job duties and concentrated on the “matter of public concern” requirement.³⁰ The approach of other circuits was less clear. Generally, courts in other circuits considered whether speech was related to an employee’s job duties, but only occasionally found such a relationship determinative.³¹

II. THE *GARCETTI* DECISIONS

Ceballos v. Garcetti was one of the cases in which the Ninth Circuit rejected the argument that speech made as an employee could not be constitutionally protected.³² The plaintiff, Richard Ceballos, served as calendar deputy for the Los Angeles County District Attorney’s Office, where his duties included the supervision of other lawyers.³³ A defense attorney informed Ceballos that a case being handled by the District Attorney’s Office involved a search warrant obtained with a questionable affidavit.³⁴ Ceballos investigated the affidavit and concluded that some of the sworn state-

24. *Id.* at 149 (concluding that the question regarding whether employees felt “pressured to work in political campaigns on behalf of office supported candidates” touched upon a matter of public concern).

25. *Id.* at 148–49.

26. *Id.* at 148.

27. *Id.* at 146–49.

28. *See, e.g.,* *Urofsky v. Gilmore*, 216 F.3d 401, 407–08 (4th Cir. 2000).

29. *Id.*

30. *Ceballos v. Garcetti*, 361 F.3d 1168, 1178 (9th Cir. 2004); *Roth v. Veteran’s Admin.*, 856 F.2d 1401, 1406 (9th Cir. 1988).

31. *Ceballos*, 361 F.3d at 1177, 1177 n.7 (describing conflicting precedent in other circuits).

32. *Id.* at 1178.

33. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1955 (2006).

34. *Id.*

ments made by a deputy sheriff were misrepresentations.³⁵ Ceballos submitted two memos to his supervisor regarding his investigation of the affidavit.³⁶ Ceballos claimed that his supervisors violated his free speech rights when they retaliated against him based on the content of the first of those memos.³⁷

The district court granted the defendants' motion for summary judgment on grounds that the defendants were protected by qualified immunity.³⁸ The Ninth Circuit reversed the decision of the district court.³⁹ The Ninth Circuit followed circuit precedent and rejected the idea that the First Amendment never protects speech made pursuant to public work duties.⁴⁰ Applying the *Pickering* balancing test, the court concluded that the interests supporting protection of Ceballos's speech outweighed the government's interest in disciplining him, since his speech would not disrupt the efficiency of the District Attorney's Office.⁴¹ One judge specially concurred, stating that although circuit precedent did support the majority's decision, that precedent should be revisited since "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right."⁴²

The Supreme Court reversed the decision of the Ninth Circuit and held that Ceballos's speech, made pursuant to his official duties, was not constitutionally protected.⁴³ The Court reasoned that speech made pursuant to work duties is not speech made "as a private citizen" and that it can never be protected under the First Amendment.⁴⁴ Thus, under *Garcetti*, speech made pursuant to a public employee's job duties is unprotected—regardless of the government's interest in controlling it or the public's interest in hearing it.⁴⁵

Writing for the majority, Justice Kennedy asserted that the holding was consistent with earlier precedent because it acknowledged the deference due to the government in managing its operations and because it did

35. *Id.*

36. *Id.* at 1955–56.

37. *Id.* at 1956.

38. *See* Ceballos v. Garcetti, 361 F.3d 1168, 1172 (9th Cir. 2004).

39. *Id.* at 1185.

40. *Id.* at 1174–75 (citing Roth v. Veteran's Admin., 856 F.2d 1401, 1406 (9th Cir. 1988)).

41. *Id.* at 1180.

42. *Id.* at 1185–89 (O'Scannlain, J., concurring).

43. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

44. *Id.*

45. *See id.* at 1961.

not preclude employees from participating in public debate.⁴⁶ Justice Kennedy criticized the Ninth Circuit's proposed rule, which would "commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."⁴⁷ Under Justice Kennedy's reasoning, protection of speech made pursuant to work duties would be inappropriate because "there is no relevant analogue to speech by citizens who are not government employees."⁴⁸

In dissent, Justice Stevens asserted that 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."⁴⁹ The result of such a distinction would be arbitrary: "it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description."⁵⁰ As a practical matter, Justice Stevens wrote that the new rule would create a perverse incentive for employees to "voice their concerns publicly before talking frankly to their superiors."⁵¹

In a dissenting opinion joined by Justices Stevens and Ginsburg, Justice Souter also rejected the majority's use of a categorical exclusion.⁵² In earlier cases "the Court realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job . . . even when the speech is not addressed to the public at large."⁵³ Justice Souter asserted that even though the government's interests in managing speech pursuant to job duties would generally be great, a balancing test was still necessary because "the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties."⁵⁴ Justice Souter proposed a modified balancing test for speech made pursuant to work duties with a presumption in favor of the government that could be overcome only by a showing that the employee "speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it."⁵⁵

46. *Id.* at 1960.

47. *Id.* at 1961.

48. *Id.*

49. *Id.* at 1963 (Stevens, J., dissenting).

50. *Id.*

51. *Id.*

52. *Id.* at 1963 (Souter, J., dissenting).

53. *Id.* at 1964.

54. *Id.* at 1965.

55. *Id.* at 1967.

Justice Breyer also dissented.⁵⁶ He noted the unique circumstances prompting Ceballos's speech—Ceballos was bound, as an attorney, to comport with professional canons and was required, as a prosecutor, to share impeachment evidence with the defense.⁵⁷ Justice Breyer asserted that when such professional and special constitutional obligations require a public employee to speak, the government likely has limited justification for interfering with that speech.⁵⁸ In such cases, Justice Breyer would apply the *Pickering* balancing test.⁵⁹

III. GOVERNMENT, PUBLIC, AND INDIVIDUAL INTERESTS IN SPEECH MADE PURSUANT TO PUBLIC EMPLOYMENT

Justices Souter and Stevens both contended that the majority's bright-line rule arbitrarily circumscribes First Amendment protection. The fundamental disagreement between the dissenting justices and the majority stems from their differing conclusions about whether the public or government employees have any liberty interest in speech made pursuant to public job duties, and whether those interests can ever outweigh the government's significant interests in effective management. In evaluating the majority's bright-line approach, it is helpful to review the underlying assumptions that Justices Kennedy and Stevens make about the liberty interests at stake in speech made pursuant to work duties.

Justice Kennedy emphasized the government's "heightened interests in controlling speech made by an employee in his or her professional capacity."⁶⁰ On the other side of the scale, Justice Kennedy gave little, if any, credence to the employee's liberty interest in job-required speech.⁶¹ He recognized that public employees retain the liberties they enjoy as private citizens, but asserted that there was no fundamental right under the First Amendment to "perform their jobs however they see fit."⁶² Justice Kennedy also gave minimal weight to the public's interest in constitutional protection of speech made pursuant to work duties. He recognized the "public's interest in receiving the well-informed views of government employees engaging in civic discussion."⁶³ However, because that interest could be satisfied where public employees engage in public discourse out-

56. *Id.* at 1973 (Breyer, J., dissenting).

57. *Id.* at 1974.

58. *Id.* at 1975.

59. *Id.*

60. *Id.* at 1960 (majority opinion).

61. *See id.*

62. *Id.* at 1958, 1960.

63. *Id.* at 1958.

side of their work duties, Justice Kennedy saw little societal value in protecting work-required speech.⁶⁴

Justice Souter agreed with Justice Kennedy that the government's interest was likely heightened when speech is made pursuant to job duties.⁶⁵ However, Justice Souter disputed whether the fact that speech is job-required diminishes the other interests balanced under *Pickering*.⁶⁶

With regard to the employee's interests, Justice Souter argued that an employee's interest in his work-required speech can be significant, since "a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day."⁶⁷ Justice Souter pointed out that government entities, including Ceballos's own district attorney's office, attempt to attract public employees who will bring personal conviction to their roles by emphasizing the personal satisfaction that can stem from public service.⁶⁸

Thus, while Justice Kennedy viewed work-required speech simplistically—as stemming only from the fact of employment⁶⁹—Justice Souter acknowledged the actual predicament of the public employee as someone who arrives at work with multi-faceted interests and obligations. Public employees' roles in government administration do not supplant their interests as citizens in speaking out to promote safe, efficient, and honest government. Thus, public employees retain an interest in their speech whether or not it closely relates or falls within their job duties.

With regard to the public's interest, Justice Souter argued that there is a significant interest in receiving the job-required speech of public employees because such speech is likely to be well-informed.⁷⁰ Justice Souter did not address Justice Kennedy's contention that the public's interest can be satisfied regardless of whether job-required speech is protected, since public employees are not prevented from engaging in public discourse.⁷¹ Nevertheless, a specific public interest exists in the job-required speech of public employees.

64. *Id.* at 1960.

65. *Id.* at 1967 (Souter, J., dissenting).

66. *Id.* at 1965.

67. *Id.*

68. *Id.* at 1966 n.4.

69. Justice Kennedy asserted that public employees lack a liberty interest when they are "simply performing" their job duties, because such speech is not analogous to speech by citizens who are not government employees; however, Kennedy does not consider that even speech that is distinctly related to public employment may nevertheless stem in part from personal interests. *Id.* at 1961 (majority opinion).

70. *Id.* at 1966–67 (Souter, J., dissenting).

71. *See id.* at 1960 (majority opinion).

First, the public has an interest in any job-required speech of public employees that plays a role in government decisionmaking. As described in section four, it is undesirable as a practical matter to encourage public employees to publicize their grievances rather than present them through prescribed channels.⁷² The public's interest in efficient government operations would require some protection of proper avenues for internal communication.

Second, the public has an interest in job-required speech that facilitates informed decisionmaking by the voting public, and therefore implicates the Court's primary rationale for First Amendment protection of public employee speech. Job-required speech can directly contribute to public discourse. For example, when a public employee is required to speak at government meetings that are open to the public, job-required speech will include direct public speech. Even purely internal job-required communications may indirectly contribute to public discourse, because once an issue is raised internally it is more likely to become publicly known, especially where the government operates with transparency.

Third, the public has a significant interest in job-required speech that serves to check government abuse. For example, the public interest is served when a public employee internally exposes a supervisor or co-worker's fiscal mismanagement or fraud. Although the Court has primarily highlighted the self-government theory in its cases examining First Amendment protection of public employees, the "checking value" is an independent and highly relevant theory of the First Amendment.⁷³ If one adopts the theory that the Free Speech Clause serves as a vital check on potential abuses of government authority, one must conclude that the First Amendment should protect a public employee's efforts to expose government misconduct, regardless of whether the employee speaks pursuant to his job duty.⁷⁴

72. *Id.* at 1963 (Stevens, J., dissenting).

73. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 529–38 (presenting historical support for the proposition that the First Amendment was intended in part to provide a check on "the inherent tendency of government officials to abuse the power entrusted to them"); *id.* at 554–65 (comparing the checking value theory, which concentrates on abuse by government officials as a significant and foreseeable harm in a democracy and calls for heightened constitutional protection of speech that would curtail it, with Professor Alexander Meiklejohn's self-government theory, which accords absolute protection to a broader range of democracy-promoting speech, including all speech that serves to inform citizen-voters, such as education and discourse on public issues).

74. See *id.* at 634 ("Since under the checking value information about the conduct of government is accorded the highest possible valuation, speech critical of public officials by those persons in the best position to know what they are talking about—namely, government employees—would seem to deserve special protection. Thus, a proponent of the checking value should demand an extremely strong regula-

In sum, under Justice Kennedy's assumptions about the *Pickering* interests and work-required speech, the interests in protecting such speech could never outweigh the government's significant interests in efficient management, since Justice Kennedy recognized *no* interest of the individual or the public in work-required speech.⁷⁵ If the interests favoring protection of work-required speech can never outweigh the government's interests in controlling that speech, Justice Kennedy's bright-line rule is not arbitrarily drawn.

However, Justice Souter persuasively argued that the public and the employee both can have a significant interest in the employee's work-required speech.⁷⁶ Indeed, considerations of the relevant First Amendment theories suggest that the public has a particular interest in the informed opinions of public employees that relate to their job duties. As Justice Souter contended, a *Pickering* balance could weigh in favor of the employee even for speech made pursuant to an official duty where the government has a significant interest as an employer.⁷⁷ Thus, the majority's bright-line approach is not ideal. While the majority's approach could be defensible if it leads to other benefits that justify the use of an arbitrary (or at least imprecise) bright-line rule, this rule entails several practical drawbacks, which are discussed in the next section.

IV. PRACTICAL AND POLICY REPERCUSSIONS

The dissenting justices not only disagreed with the majority's underlying assumptions about the interests involved in speech made pursuant to work duties, but also raised practical and policy concerns about the result of the majority's new rule. Three of these concerns are substantiated by a review of recent decisions applying the *Garcetti* rule: (a) the scope of actual job duties is difficult to determine under *Garcetti*'s standard, and the malleable standard is easily manipulated by parties and applied inconsistently by courts; (b) courts are unlikely to afford First Amendment review to an employee's speech to a supervisor, and these decision will ultimately discourage internal complaints; and (c) the *Garcetti* rule may provide the most limited protection for those employees whose speech is most valuable to society, since employees in a position to obtain extensive information

tory justification before permitting public employees to be disciplined for criticizing their colleagues.") (citations omitted).

75. See *Garcetti*, 126 S. Ct. at 1960.

76. *Id.* at 1965–67 (Souter, J., dissenting).

77. *Id.* at 1967.

are likely to have broad job duties. These three concerns are discussed below along with proposed methods for minimizing the possible harms.

A. Courts Struggle to Consistently Define Job Duties

Ceballos did not dispute that he wrote the memos at issue pursuant to his job duties.⁷⁸ Because the scope of Ceballos's job duties was not at issue, Justice Kennedy's opinion gave little guidance for determining when speech is made pursuant to job duties.⁷⁹ Therefore, while Justice Kennedy's opinion established a bright-line exclusion from First Amendment protection of speech made pursuant to job duties, it did not clearly outline what an employee's job duties are "for First Amendment purposes."⁸⁰ Rather, Justice Kennedy's opinion invited courts to engage in a factually driven inquiry to discover what an employee "actually is expected" to do.⁸¹ He characterized the inquiry as a "practical one," where formal job descriptions are neither necessary nor sufficient to establish the scope of an employee's job duties.⁸²

This lack of clarity is a problem, since Justice Kennedy supported his bright-line approach as a way to limit judicial scrutiny of the relations between the government, as employer, and its employees.⁸³ As Justice Souter noted, the majority invites, rather than guards against, intrusive fact-bound litigation, since the issue of whether a public employee's statements were made pursuant to official duties is "apparently based on the totality of employment circumstances."⁸⁴ As one district judge writes, "[w]hether the water has been somewhat cleared or further muddied by *Garcetti* remains to be seen. Suffice it to say, many billable hours will likely be spent wrangling over the scope of every employee-plaintiff's 'official duties.'"⁸⁵ Justice Souter pointed out the uncertainty involved in such determinations by posing difficult hypotheticals: "Are prosecutors' discretionary statements about cases addressed to the press on the courthouse steps made 'pursuant to their official duties'? Are government nuclear scientists' complaints to

78. *Id.* at 1960 (majority opinion).

79. *Id.* at 1961.

80. *Id.* at 1962.

81. *Id.*

82. *Id.* at 1961–62.

83. *Id.* at 1961.

84. *Id.* at 1968 (Souter, J., dissenting).

85. *Price v. Macleish*, Nos. 04-956(GMS), 04-1207(GMS), 2006 WL 2346430, at *5 (D. Del. Aug. 14, 2006), *aff'd*, *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007).

their supervisors about a colleague's improper handling of radioactive materials made 'pursuant' to duties?"⁸⁶

1. Courts cannot rely on formal job expectations.

One reason that courts will struggle with finding the scope of an employee's job duties is that the most concrete, simple indicators are not determinative of a job duty—the *Garcetti* majority stated that job descriptions are neither necessary nor sufficient to establish a job duty.⁸⁷ Accordingly, courts have discounted job descriptions and formal policies that do not appear to fall under the employer's actual expectations of job performance.⁸⁸ For example, in *Barclay v. Michalsky*, a nurse was disciplined after she complained to supervisors about misconduct by other workers, including sleeping on the job and using excessive patient restraints.⁸⁹ All of the hospital employees were required by a work rule to report violations of work policies and procedures, as the nurse had done.⁹⁰ Nevertheless, the court denied the employer's motion for summary judgment, holding that the work rule did not establish that the nurse spoke pursuant to her job duties where she had not been trained to report violations and had repeatedly been told not to file reports and that no forms were available for such reports.⁹¹

Nor does the subject matter of speech establish whether it falls within the scope of an employee's job duties.⁹² Indeed, the *Garcetti* majority

86. *Garcetti*, 126 S. Ct. at 1968 (Souter, J., dissenting).

87. *Id.* at 1962 (majority opinion).

88. *See* *Skrutski v. Marut*, No. 3:CV-03-2280, 2006 WL 2660691, at *10 (M.D. Pa. Sept. 15, 2006); *Barclay v. Michalsky*, 451 F. Supp. 2d 386, 395–96 (D. Conn. 2006); *Batt v. City of Oakland*, No. C 02-04975 MHP, 2006 WL 1980401, at *4 (N.D. Cal. July 13, 2006); *see also* *Morales v. Jones*, 494 F.3d 590, 600–01 (7th Cir. 2007) (Rovner, J., dissenting) (while the majority concluded that a police officer's speech to an assistant district attorney was made pursuant to his specific duty to deliver a report and pursuant to a general department policy "to report all potential crimes," the dissenting judge noted evidence that actual police practice conflicted with general department policy).

89. *Barclay*, 451 F. Supp. 2d at 390.

90. *Id.* at 395.

91. *Id.* at 389, 395–96; *see also* *Batt*, 2006 WL 1980401, at **1, 4 (holding that police regulations requiring an officer to report misconduct did not establish a job duty, where the officer was repeatedly told not to report misconduct and threatened about the consequences of making such a report).

92. *Day v. Borough of Carlisle*, No. 1:CV-04-1040, 2006 WL 1892711, at *6 (M.D. Pa. July 10, 2006) (citing *Garcetti*, 126 S. Ct. at 1959). *But see* *Shuck v. Clark*, No. 8:05-CV-2042-T-30TBM, 2006 WL 2882702, at *1 (M.D. Fla. Oct. 6, 2006) (granting plaintiff's motion for reconsideration of an order dismissing her First Amendment claim, but opining that plaintiff acted within her job duties when she cooperated with an investigation of another government employee because she provided information that she obtained while performing her job duties); *Dillon v. Fermon*, No. 04-CV-2029, 2006 WL 2457516, at *4 (C.D. Ill. Aug. 23, 2006) (state police trooper's conversation with a prosecutor was made pursuant to his job duties because it "concerned an investigation and arrest in which Plaintiff had participated as part of his official duties" and because his job duties included working to obtain a just and successful prosecution).

clearly stated that Ceballos's memo "concerned the subject matter of [his] employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job."⁹³ Further, the *Garcetti* majority defended its holding on the grounds that public employees would "retain the prospect of constitutional protection for their contributions to the civic discourse," including contributions that relate to the subject of their employment.⁹⁴

Under *Garcetti*, courts must instead frame the inquiry around a more nebulous standard: what speech or conduct an employee "is expected to perform."⁹⁵ This inquiry would be easy to apply should employer and employee agree about what is expected. For example, a court found that two employees' complaints about unsafe conditions in the workplace were within their job duties because their supervisor praised them for identifying unsafe conditions, prior employees in the same role had made similar reports, and the plaintiffs admitted that they felt responsible for reporting unsafe conditions.⁹⁶

However, under the *Garcetti* rule it is unlikely that employers and employees will agree about the scope of job duties. The precise scope will often be open to debate and each party's success in litigation will hinge on whether or not the job duties include the speech at issue. In *Casey v. West Las Vegas Independent School District*, the Tenth Circuit noted that before *Garcetti* the defendants described the speech at issue as "ultra vires" and "disruptive," while the plaintiff argued that she "had a duty as Head Start's executive director" to engage in the speech at issue.⁹⁷ Not surprisingly, both parties "swap[ped] positions" after *Garcetti* to meet their objectives under the new rule.⁹⁸

Indeed, disagreement over what the employee is expected to do is not just a product of litigation. Often employment retaliation cases result from a legitimate disagreement between employee and employer about what conduct the employee should engage in. When the parties dispute what was expected, whose assertions should prevail? Further, neither party's precise expectations are easily discernible. An employee's expectations about job duties are often intermingled with more personal motivations that stem

93. *Garcetti*, 126 S.Ct. at 1959 (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)).

94. *Id.* at 1960.

95. *See id.* at 1962.

96. *Price v. Macleish*, Nos. 04-956(GMS), 04-1207(GMS), 2006 WL 2346430, at **6-8 (D. Del. Aug. 14, 2006), *aff'd*, *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007).

97. 473 F.3d 1323, 1329-30 (10th Cir. 2007).

98. *Id.* at 1330.

from ethics or personal ideologies. An employer's expectations can be ambiguous or even contradictory, such as when a supervisor actively discourages an employee from engaging in conduct that the organization requires.

2. Courts are inconsistent in their treatment of the employee's subjective motivations.

Courts will struggle to determine whether an employee's speech is made pursuant to job duties because an employee's sense of duty can stem not only from the employer's expectations, but from personal or professional duties. For example, in *U.S. ex rel. Battle v. Board of Regents*, the plaintiff worked as a financial aid officer at a public university.⁹⁹ The plaintiff suspected that members of her department, including her supervisor, were engaged in fraudulent mismanagement of federal work-study funds.¹⁰⁰ Although the plaintiff recorded suspicious activity and then confronted her supervisor and the university president, no one responded to her suspicions; within months the plaintiff received notice that her contract would not be renewed.¹⁰¹ The Eleventh Circuit affirmed summary judgment for the defendants on the First Amendment claim.¹⁰² The plaintiff's speech to her supervisor and the president was not protected under the First Amendment because she admitted she was under a duty as a financial aid officer to report inaccuracies and signs of fraud in student files.¹⁰³

Despite the outcome in *Battle*, it appears that the plaintiff acted not only to fulfill a job duty, but also out of a sense of personal obligation. She persevered in reporting the wrongdoing even though her supervisors did not support her conduct.¹⁰⁴ After receiving notice that her contract would not be renewed, the plaintiff conveyed her suspicions and documentation to the Department of Education.¹⁰⁵ The ensuing investigation confirmed the plaintiff's suspicions of inappropriate conduct and resulted in a \$2,167,941 settlement with the university.¹⁰⁶ Thus, although she reported misconduct to her supervisors "pursuant to her official employment responsibilities," it

99. 468 F.3d 755, 757 (11th Cir. 2006).

100. *Id.* at 758.

101. *Id.*

102. *Id.* at 761–62.

103. *Id.*; see also *Maras-Roberts v. Phillippe*, No. 1:05-CV-1148-SEB-JMS, 2007 WL 1239119, at *6 (S.D. Ind. Apr. 27, 2007) (plaintiff's possible "longstanding personal interest" in questioning the legality of a judge's probation practices did not impact the court's determination that she advocated for systemic change pursuant to her duties as a public defender in that judge's court).

104. *U.S. ex rel. Battle*, 468 F.3d at 759.

105. *Id.*

106. *Id.*

appears that the plaintiff was primarily motivated not by her employer's expectations of her but out of a personal sense of responsibility.¹⁰⁷

While the *Battle* court did not mention the financial aid officer's possible personal motivations, other courts have been more willing to consider the presence of other motivations to find that speech made according to personal or professional duties is not necessarily speech made pursuant to an actual job duty.¹⁰⁸ In *Shewbridge v. El Dorado Irrigation District*, an engineer complained internally and externally about the district's alleged mishandling of water resources, purportedly acting out of a sense of "personal and ethical obligation as a professional engineer."¹⁰⁹ The district asserted that the plaintiff's "obligation as a professional engineer is inseparable from his obligation as an employee of [the district] because he was hired by [the district] to work *as an engineer*."¹¹⁰ Nevertheless, the court reasoned that the plaintiff's testimony that he spoke pursuant to a professional obligation did not establish that he spoke pursuant to a job duty, and the open factual issues surrounding plaintiff's job duties precluded summary judgment for the defendants.¹¹¹

Similarly, the court in *Deluzio v. Monroe County* held that a case worker's statements to his superior were made as a citizen, and not as an employee, even though they related to the treatment of a child that was also the case worker's client.¹¹² The court recognized that the case worker, motivated by both "professionalism and ethics," reported concerns to his superior not because he was expected to do so as a case worker, but for the same reasons that any citizen might feel morally obligated to speak out when a child's welfare is at risk.¹¹³ The case worker also complained that proposed agency budget cuts would harm the children who relied on the agency's services; the court found this speech similarly motivated by moral obligation and analogized his reports to a citizen's speech at a city council meeting.¹¹⁴ Because a citizen's speech in a town meeting would be protected by the First Amendment, the court concluded that the case worker's

107. *See id.* at 759, 761.

108. *See Shewbridge v. El Dorado Irrigation Dist.*, No. S-05-0740 FCD EFB, 2006 WL 3741878, at *6 (E.D. Cal. Dec. 19, 2006); *Deluzio v. Monroe County*, No. 3:CV-00-1220, 2006 WL 3098033, at **6-7 (M.D. Pa. Oct. 30, 2006).

109. *Shewbridge*, 2006 WL 3741878, at **1, 3-4.

110. *Id.* at *6 (quoting from defendants' memorandum).

111. *Id.*

112. *Deluzio*, 2006 WL 3098033, at *7.

113. *Id.*

114. *Id.* at *6.

analogous speech should also be afforded protection from unjustified government retaliation.¹¹⁵

Another court has noted that employees' subjective motivations—even a subjective belief that their job required them to speak—do not establish such a job duty.¹¹⁶ The court in *Black v. Columbus Public Schools* cited *Garcetti* for the proposition that “the proper focus is on the employee’s official job duties, not necessarily on the employee’s motivations—whether based on perceived job duties or personal gratification.”¹¹⁷ An employee’s sense of duty is not conclusive because “[c]ertainly, any employee may feel obligated, morally and/or professionally, to report misconduct by a supervisor.”¹¹⁸

In sum, courts have adopted different approaches when considering (or refusing to consider) the employee’s subjective motivations in determining whether the employee spoke pursuant to a job duty. The principles articulated in *Shewbridge* and *Deluzio* are appealing.¹¹⁹ When employees act out of a sense of personal duty, their speech is more akin to a citizen’s speech than to pure employee speech. Nevertheless, sole reliance on subjective motivations to determine whether speech was made pursuant to a job duty would be inappropriate. Such a reliance on subjective motivations would not fulfill the factual inquiry required by *Garcetti*, and would allow plaintiffs to survive motions for summary judgment merely by alleging a sense of personal duty.

3. Courts are inconsistent in determining the scope of the employer’s expectations.

Courts have also adopted differing approaches to determining the precise scope of the employer’s expectations of job performance. An employer’s expectations often encompass an array of unarticulated

115. *See id.* at *9; *see also* *Skrutski v. Marut*, No. 3:CV-03-2280, 2006 WL 2660691, at *10 (M.D. Pa. Sept. 15, 2006) (reasoning that a police officer’s complaint that he was encouraged to falsify a report was not speech pursuant to his job duty because a citizen could bring an analogous complaint). *But see* *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 692–94 (5th Cir. 2007) (concluding that an athletic director’s memoranda to the school’s office manager and principal regarding mismanagement of athletic funds were written pursuant to his job duties, even though the director claimed to have acted as a “taxpayer” and a “father” and the defendant admitted that the athletic director was not required to write such memoranda).

116. *Black v. Columbus Pub. Schs.*, No. 2:96-CV-326, 2006 WL 2385359, at *5 (S.D. Ohio Aug. 17, 2006).

117. *Id.*

118. *Id.* at *5 n.6.

119. *See* *Shewbridge v. El Dorado Irrigation District*, No. S-05-0740 FCD EFB, 2006 WL3741878, at *6 (E.D. Cal. Dec. 19, 2006); *Deluzio*, 2006 WL 3098033, at **6–7.

assumptions. Because employer expectations are often nebulous, courts have the ability to construe them very broadly or very narrowly.

Perhaps the most sweeping interpretation of employer expectations in recent cases is that in *Springer v. City of Atlanta*.¹²⁰ The plaintiff in *Springer* served as executive director of the Atlanta Workforce Development Board, and his employers included the city and the Atlanta Workforce Development Agency.¹²¹ The plaintiff reported the Agency's fiscal mismanagement to the mayor and the city's legal staff.¹²² The plaintiff asserted that he was not required to report the fiscal mismanagement under his day-to-day job responsibilities, which included "policy and system building, member support, external relations, administration and compliance."¹²³ However, the court was persuaded by the defendant that the plaintiff's speech was made pursuant to his obligations as an employee, since "Georgia law imposes on employees 'a duty of loyalty, faithful service and regard for an employer's interest.'"¹²⁴ In reporting the financial mismanagement, the plaintiff "spoke out of 'regard for his employer's interest,'" and therefore acted pursuant to a job duty.¹²⁵

The *Springer* court's expansive reasoning would seem to preclude First Amendment protection for any whistleblower public employee in Georgia, since all employees are expected under state law to act to preserve their employer's interest. But this approach bears little resemblance to the "practical" inquiry prescribed by *Garcetti*.

Other courts have interpreted employer expectations more strictly. One court, in *Walters v. County of Maricopa*, expressly rejected *Springer*'s expansive approach to *Garcetti*'s exclusion.¹²⁶ The court emphasized that the inquiry is not just about work responsibilities: it is about job duties "as those duties are regarded by the First Amendment."¹²⁷ The court refused to find that the plaintiff's job duties included the obligation to report the misconduct of his fellow employees:

120. No. 1:05-CV-0713 GET, 2006 WL 2246188 (N.D. Ga. Aug. 4, 2006).

121. *Id.* at *1.

122. *Id.* at *2.

123. *Id.*

124. *Id.* at **3-4; *cf.* *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1242, 1242 n.2 (11th Cir. 2007) (holding that a city clerk acted pursuant to her job duties when she reported a former mayor's misconduct, including sexual harassment and personal use of city resources, because her job required her to inquire into and report any misuse of city funds, but declining to decide whether "all city employees owe a duty of loyalty to the city as a matter of Georgia state law").

125. *Springer*, 2006 WL 2246188, at *4.

126. No. 04-1920-PHX-NVW, 2006 WL 2456173, at *14 n.10 (D. Ariz. Aug. 22, 2006) (declining to follow *Mills v. City of Evansville*, 452 F.3d 646, 648 (7th Cir. 2006), and *Springer*, 2006 WL 2246188, at **3-4).

127. *Id.* at *14.

Walters was a police sergeant employed to investigate and assist in the prosecution of criminal drug offenders. Any attempt to inflate Walters' job description so as to include blowing the whistle on other officers would likely exceed the "practical inquiry" suggested by the Supreme Court. . . . [*Garcetti*] should not be read to overrule all First Amendment whistleblower protection cases by generally categorizing whistleblowing as part of employees' employment obligations.¹²⁸

Those courts that want to protect speech on matters of public concern can interpret job duties narrowly, looking to what the employer actually expects from the employee. By contrast, those courts that want to defer to the government's decisionmaking can interpret job duties broadly, without inquiring into what the employer actually expected from the employee in terms of their job duty.

In sum, the scope of public employees' job duties will continue to be debated in the courts. Courts face significant difficulties in determining the scope of job duties since formal job descriptions are not decisive, employees often have mixed motivations for speaking, and employers' expectations are often unstated or inconsistent. As courts work toward consistent application of the *Garcetti* standard, they should construe job duties narrowly, with reference to the specific, explicit requirements of the employer rather than broad, implicit obligations. Narrow construction of job duties allows courts to protect individual and public interests in an employee's speech, and these interests can be significant. Furthermore, limiting the reach of the *Garcetti* exception poses little risk of interfering with government management, since the government's interests are duly weighed under the *Pickering* balancing test.

B. Garcetti Creates an Incentive for Public Employees to Avoid Internal Complaints

Justice Stevens opined that the *Garcetti* rule would create an unwanted incentive for government employees to air grievances in the public forum instead of resolving them internally.¹²⁹ Given the outcome of recent litigation, this concern is legitimate. While the inquiry into what is expected of an employee is inevitably factually based, one generalization that can be drawn from recent cases is that when misconduct is exposed within the chain of command, speech is likely to be within the scope of one's job

128. *Id.*; see also *Drolett v. Demarco*, No. 3-05CV1335(JCH), 2007 WL 1851102, at *6 (D. Conn. June 26, 2007) (holding that a police department's general requirement that employees report "all matters 'of police interest'" did not conclusively establish a job duty because such a broad construction of job duties would improperly make the subject matter of the speech dispositive and would afford no First Amendment protection for any employee speech related to the subject matter of employment).

129. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1963 (2006) (Stevens, J., dissenting).

duty, but when misconduct is exposed outside the chain of command, speech likely exceeds the scope of one's job duty.

This generalization does not hold true for those jobs that specifically require an employee to speak to outside parties. For example, a county auditor in *Dunleavy v. Wayne County Commission* spoke pursuant to his job duties when he reported government corruption to the media and law enforcement, where he had testified that reporting findings to those individuals was "absolutely" part of his job duty.¹³⁰ In *Levy v. Office of the Legislative Auditor*, another auditor spoke pursuant to his job duties when he criticized department policies during a Toastmaster's speech that was a required part of his training.¹³¹

The *Garcetti* majority reaffirmed that the subject matter and place of speech is not determinative of whether that speech is protected under the First Amendment.¹³² Prior Supreme Court precedent, which was cited in *Garcetti*, established that an employee's speech may be protected under the First Amendment even when employees speak to their employer rather than the public.¹³³ In *Givhan v. Western Line Consolidated School District*, a schoolteacher was fired for complaining to her principal about school policies.¹³⁴ Although her speech was made privately to her supervisor—in contrast to the public letter in *Pickering*—the speech was nevertheless protected under the First Amendment.¹³⁵ Thus, in theory the intended audience of speech should not be determinative of whether speech is made pursuant to work duties and precluded from First Amendment protection. However, in practice the intended audience of speech appears to be a primary indicator of whether speech will be found to be made pursuant to work duties.

Indeed, speech made to other government agencies likely receives First Amendment review even if that speech relates to one's job duties.¹³⁶ For example, one court concluded that where the defendant claimed that

130. No. 04-CV-74670-DT, 2006 WL 2375679, at *4 (E.D. Mich. Aug. 16, 2006); see also *Ibarra v. Lexington-Fayette Urban County Gov't*, No. 06-5691, 2007 WL 579670, at *4 (6th Cir. Feb. 23, 2007) (plaintiff spoke pursuant to his job duties as Coordinator of Immigrant Services when he spoke to local government officials and a newspaper regarding problems facing the Hispanic community).

131. 459 F. Supp. 2d 494, 498 (M.D. La. 2006).

132. *Garcetti*, 126 S. Ct. at 1959.

133. *Id.* (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)).

134. *Givhan*, 439 U.S. at 411–12.

135. *Id.* at 414–16.

136. See *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) (corrections officer's speech to state senator and state office of the Inspector General regarding abusive working conditions was protected); *Barber v. Louisville & Jefferson County Metro. Sewer Dist.*, No. 3:05-CV-142-R, 2006 WL 3772206, at *4 (W.D. Ky. Dec. 20, 2006) (employee's report to Commonwealth Attorney General of coworker misconduct within county sewer district was protected); *Rohr v. Nehls*, No. 04-C-477, 2006 WL 2927657, at *7 (E.D. Wis. Oct. 11, 2006) (deputy sheriff's filing of complaint with county board chairman regarding sheriff's official conduct was protected).

the plaintiff exceeded his authority by using improper channels to bring a complaint, the plaintiff's speech was not made pursuant to his work duties, since the defendant could not claim that the plaintiff was expected to exceed his authority.¹³⁷

By contrast, a whistleblower who exposes corruption internally is less likely to receive First Amendment protection against retaliation. For example, in *Freitag v. Ayers*, a corrections officer complained to her superiors about the sexually hostile environment at the prison where she worked.¹³⁸ While her statements to superiors were not protected, her subsequent letters to a senator and the state's Inspector General's office were made as a citizen and were protected under the First Amendment.¹³⁹

Similarly, the Seventh Circuit in *Mills v. City of Evansville* held that a police sergeant spoke pursuant to her job duties when she complained about a new policy to her superiors.¹⁴⁰ The sergeant had attended a meeting regarding a new plan that impacted the sergeant's duties in supervising crime prevention officers. After the meeting, the sergeant told her superiors that she did not think the plan would work. The court held that the sergeant spoke pursuant to her job duties because she "was on duty, in uniform, and engaged in discussion with her superiors, all of whom had just emerged from [the meeting]."¹⁴¹ Had the sergeant complained about the new policy while off duty, not in uniform, and to the media, her speech would presumably be protected under the reasoning in *Mills*.

In sum, the fact that speech is made to a public employee's supervisor often leads to the conclusion that the speech was made pursuant to work duties. Under *Garcetti*, public employees have an incentive to raise complaints to other organizations or to the media rather than communicating them to their superiors. Such an incentive would seem to negate in part the benefits of the bright-line rule. The *Garcetti* rule may seem to allow for more effective management by making it easier to control employee speech internally. However, at the same time the *Garcetti* rule encourages external airing of grievances, which are likely to interfere with government operations by creating public backlash or initiating third-party investigation.¹⁴²

137. *Rohr*, 2006 WL 2927657, at *7. The *Rohr* court also noted that the employer would have difficulty prevailing under the *Pickering* balance test where its retaliation against the employee seemed largely unjustified—the employee's external whistleblowing (which was largely baseless) did little to disrupt the department's functions. *Id.*

138. 468 F.3d at 532.

139. *Id.* at 545–46.

140. 452 F.3d 646, 647–48 (7th Cir. 2006).

141. *Id.* at 648.

142. See *The Supreme Court, 2005 Term Leading Cases*, 120 HARV. L. REV. 125, 280 (2006).

Further, the stifling of internal dissenters runs contrary to the goal of promoting government efficiency in that it inhibits informed decisionmaking, which requires that members of an organization share ideas without fear of arbitrary reprisal.¹⁴³

C. *Garcetti Fails to Protect the Most Valuable Speakers*

As Justice Souter noted, speech pursuant to public employment may well be more valuable to the individual and the public than other speech by public employees, since the employee is likely to know more about the subject matter of his employment.¹⁴⁴ However, those public employees that are likely the most informed, and therefore more likely to engage in valuable speech, are also those who are least likely to be protected by the First Amendment under *Garcetti*. Indeed, the scope of one's job duties will often correlate to one's access to information within an organization. Thus, the more informed public employees are, the more likely their speech will be pursuant to their expansive job duties, and the less likely they will be to receive protection from retaliation under the First Amendment.

An individual in a high-level role may not even be protected in his or her speech made outside of the chain of command. For example, in *Casey v. West Las Vegas Independent School District*, a superintendent's speech was directed in part to an external regulatory body.¹⁴⁵ She advised another employee to report to federal authorities the district's failure to enforce Head Start eligibility requirements.¹⁴⁶ Her speech was nevertheless seen as part of her expansive duties as "chief overseer" of Head Start for the district.¹⁴⁷

At the same time, lower-level employees who speak on matters that are not within the purview of their authority will be more likely to satisfy *Garcetti*'s rule and receive First Amendment review of their claim¹⁴⁸—yet

143. *See id.* at 280–81. In addition, withholding protection from internal whistleblowers makes little sense in terms of First Amendment theory, as discussed in section three. Viewing the First Amendment as a necessary element of self-government, even internal whistleblowing should receive protection since it serves the goal of educating voters by exposing hidden facts and beginning the process of revealing them to the body politic. Viewing the First Amendment as a necessary check against government abuse, it is imperative to protect any attempt by public employees to expose official wrongdoing, including attempts to expose abuse to superiors within one's own department.

144. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1965 (Souter, J., dissenting).

145. 473 F.3d 1323, 1325–26 (10th Cir. 2007).

146. *Id.* at 1326.

147. *Id.* at 1331; *see also* *Green v. Barrett*, 226 F. App'x 883, 886 (11th Cir. 2007) (plaintiff's testimony regarding unsafe conditions at county jail was given pursuant to her duties as chief jailer).

148. *See, e.g., Lindsey v. City of Orrick*, 491 F.3d 892, 898 (8th Cir. 2007) (public works director's statements regarding sunshine law compliance, made during job-required attendance at city council meetings, were not made pursuant to his job duties where he was not responsible for ensuring compli-

their speech arguably has less value to the public, because it is less likely to be informed.

Employees who must speak out in order to comply with their professional canons or avoid personal criminal or civil liability are also more likely to provide speech with high value to themselves and to the public. Justice Breyer noted that although courts generally should not interfere with the government's management of its employees, there are some circumstances where such interference may be warranted.¹⁴⁹ He asserted that where an employee speaks pursuant to professional and constitutional obligations, such speech is deserving of greater protection and the government's interest in controlling speech is diminished.¹⁵⁰ Not only did the majority refuse to accept such an approach, but recent cases show that its bright-line rule may achieve precisely the opposite effect by affording less protection for those individuals that may most deserve First Amendment protection for their work-related speech.

Justice Breyer limited his assertion to the two special circumstances existing in the *Garcetti* case—professional canons and constitutionally required speech.¹⁵¹ Under the same reasoning, speech that is otherwise legally required may also present a special circumstance warranting First Amendment review.

Nevertheless, some courts have reacted to the existence of an affirmative legal duty to speak by denying First Amendment review under *Garcetti*.¹⁵² In *Casey v. West Las Vegas Independent School District*, discussed above, a superintendent brought a First Amendment claim against the school board members who demoted and then terminated her after she reported legal violations to the board and to other government entities.¹⁵³ One of the alleged bases for the board's retaliation was the superintendent's

ance with that law); *Harris v. Tunica County*, No. 2:05CV126, 2007 WL 397056, at *2 (N.D. Miss. Feb. 1, 2007) (employee's statements to Internal Affairs investigators were not made pursuant to work duties, where jailor "was simply a jailer" and her job description "did not entail supervision of other employees or monitoring the behavior of other employees"); *Kodrea v. City of Kokomo*, 458 F. Supp. 2d 857, 867–68 (S.D. Ind. 2006) (unresolved factual issue as to whether recreational programmer's complaints about accounting and timesheet irregularities were made pursuant to his work duties where he did not allege that he was responsible for overseeing those activities).

149. *Garcetti*, 126 S. Ct. at 1975 (Breyer, J., dissenting).

150. *Id.*; see also *The Supreme Court, 2005 Term Leading Cases*, *supra* note 143, at 281–83 (promoting similar rule affording First Amendment review for speech made pursuant to professional canons or constitutional requirements).

151. *Garcetti*, 126 S. Ct. at 1975 (Breyer, J., dissenting).

152. See *Casey*, 473 F.3d at 1329–31; *Khan v. Fernandez-Rundle*, No. 06-15259, 2007 WL 2859803, at **3–4 (11th Cir. Oct. 3, 2007) (assistant state attorney's truthful in-court statements were made pursuant to his job duties and were not protected speech although he spoke pursuant to his professional obligation as a member of the state bar to avoid misleading the court).

153. 473 F.3d at 1326–27.

speech in directing another Head Start employee to report to federal authorities the district's failure to enforce Head Start eligibility requirements.¹⁵⁴ Although the superintendent had directed the report to a third party, and "went very much around" her supervisors, the court held that the report was made pursuant to the superintendent's work duties.¹⁵⁵ The court reasoned that the superintendent was responsible for administering the Head Start program, and also noted that the superintendent "risked civil and criminal liability by remaining silent in the face of such knowledge."¹⁵⁶ The court characterized her obligation as "a federal regulatory obligation directly bearing on her by virtue of the office she held," and as more similar to a "senior executive acting pursuant to official duties than to that of an ordinary citizen speaking on his or her own time."¹⁵⁷

Thus, the result after *Garcetti* may be the exact opposite of what Justice Breyer proposed. In Justice Breyer's view, the intrusion of First Amendment review is justified where the employee has an affirmative obligation to speak that is guided by professional canons or by the Constitution.¹⁵⁸ However, the actual result from *Garcetti* may be the opposite—those who speak out of an affirmative professional or legal duty are less likely to receive First Amendment review.

CONCLUSION

The *Garcetti* rule rests on debatable assumptions about the potential individual and public interests in speech pursuant to public employment job duties. Despite Justice Kennedy's assertion, it is possible for public employees to have a significant personal interest in speech that is made pursuant to their work duties, since public employees often act out of a blend of personal and professional duties. The public has an interest in public employees' speech on matters of public concern whether it directly informs the public or indirectly brings issues to light. Further, the public may have an interest in informed and efficient government decisionmaking that stems from internal but not external expressions of employees. The public undoubtedly has an interest in retaining checks on government abuse, including the ability of public employees to report abuse relating to their job duties without fear of reprisal.

154. *Id.* at 1326.

155. *Id.* at 1329, 1331.

156. *Id.* at 1330.

157. *Id.* at 1331.

158. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1975 (2006) (Breyer, J., dissenting).

Beyond these principled objections, there are several viable practical concerns regarding the bright-line rule adopted in *Garcetti*. The first practical limitation of the *Garcetti* rule is that it limits litigation in the sense that it precludes *Pickering* balancing for speech made pursuant to job duties, but at the same time it increases litigation over the fact-intensive and uncertain issue of whether the speech at issue is made pursuant to job duties. Courts are faced with several difficulties when discerning the scope of an employee's job duties. Rigid formal policies and descriptions can provide a concrete indication of job responsibilities, but they are not sufficient by themselves to determine a job responsibility, and indeed may not accurately reflect actual expectations. Further, the employer and employee will inevitably express inconsistent expectations about what a job entails. Neither party's expectations will be free from ambiguity. Because the factual inquiry into job expectations is so imprecise, it allows courts substantial leeway to interpret the scope of job expectations very broadly or very narrowly, leading to inconsistent applications of the First Amendment.

A second practical drawback of the *Garcetti* rule is that it creates an incentive for public employees to raise concerns related to the subject of their employment externally rather than internally, where their concerns will more directly enhance the government's operations.

Finally, the *Garcetti* rule is least likely to afford First Amendment protection where it is arguably most warranted. Those employees who are most informed as to the topic of their employment are more likely to have expansive job duties, and are therefore less likely to receive First Amendment review for retaliation based on their informed speech. In addition, those personally liable for failing to speak may nevertheless be refused First Amendment review where they speak not only to avoid liability, but also to fulfill a work responsibility.

As courts continue to define the scope of job duties, the *Garcetti* standard will continue to be clarified. At the same time, some of the practical drawbacks of the new rule can be mitigated. Courts should fulfill the prescribed factual inquiry by adopting a narrow construction of job duties that is keyed to actual employer expectations rather than broadly-imposed or implied employee obligations. At the same time, courts should not oversimplify the inquiry by assuming that speech made to a supervisor is always speech made pursuant to a job duty, since protecting safe avenues for internal complaint will benefit government management and serve as an important check against government abuse. Finally, courts should recognize and protect the significant interests that the employee and the public

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can have in job-related speech that is highly informed or that is also made pursuant to legal or professional requirements.