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Compelled Investigatory and Testimonial Speech: An Overdue Clarification of the Public Employee Speech Doctrine that Rehabilitates "All of the Values at Stake"

*Molly K. Smith*

**INTRODUCTION**

In *Garcetti v. Ceballos* the Supreme Court declared that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." This categorical exemption blocks some of the most socially valuable speech from the possibility of constitutional protection. A recent circuit split between the D.C. and Second Circuits starkly illustrates the need for the Supreme Court to carve out an exception to the rule for precisely the type of speech involved in the case that generated it—speech that exposes governmental misconduct and is compelled by the employee’s official duties. For this type of speech, the operation of the *Garcetti* threshold question (Was the public employee speaking pursuant to an official duty?) enable government agencies to control and discriminate against content that is completely outside the scope of any legitimate managerial prerogative. Currently, testimonial or investigative speech compelled by one's official...
duties is lumped into a category of speech that is never protected by the First Amendment. This note argues that instead of suffering a categorical ban, the subcategory of compelled investigatory or testimonial speech should be afforded categorical constitutional protection. In the alternative, this note proposes a more nuanced change to the Garcetti formulation that would at least resolve the troubling discrepancy between Bowie v. Maddox and Jackler v. Byrne, two cases involving testimonial speech where the courts reached opposite outcomes on nearly the same facts.

Part I of this note will trace the background and development of the public employee speech doctrine. Part II discusses the institutional and normative reasons why the categorical rule in Garcetti is a bad fit for this area of First Amendment jurisprudence, particularly as applied to compelled investigatory or testimonial speech. As part of this discussion, Part II details poor applications of Garcetti. These poor applications include Jackler v. Byrne, where the Second Circuit engaged in legal gymnastics to evade Garcetti and reach a just result, and Bowie v. Maddox, a D.C. Circuit case illustrating how the rule operates undesirably even when applied on its terms. Part III justifies the need for treating compelled investigatory or

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7 See id. at 426 (Stevens, J., dissenting) (summarizing the Court's holding, which categorically bans speech made pursuant to one's official duties from First Amendment protection). Most categories of speech are afforded variable levels of protection, rather than receiving full protection or zero protection. See Joseph Blocher, Categoricalism and Balancing in First and Second Amendment Analysis, 84 N.Y.U. L. Rev. 375, 390-92 (2009) (explaining how various forms of intermediate scrutiny apply to nearly all of the First Amendment's major subcategories, from commercial speech to expressive conduct to time, place, and manner restrictions). The Supreme Court has said that the First Amendment does not protect the following categories of speech: (1) speech directed to inciting or producing imminent lawless action and that is likely to incite or produce such action, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); (2) child pornography so long as the applicable statute banning it explicitly restricts only works that visually portray children in a sexually explicit manner, New York v. Ferber, 458 U.S. 747, 764 (1982); (3) obscenity if the regulation passes the three-part test in Miller v. California, 413 U.S. 15, 24 (1973); (4) most libel, see N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that in order to comply with First Amendment freedoms, public officials alleging libel must prove actual malice to recover).

8 While many in the academy have had a strong negative reaction to the Garcetti decision and have called for a wholesale reversion back to categorical balancing, this note adds to the discussion by synthesizing the arguments for exempting compelled testimonial or investigatory speech and explaining what it is about this particular subset of public employee speech that uniquely warrants a move away from categorical exemption. Currently there exists a Catch-22 whereby an employee asked to give testimony can either make a false statement and risk criminal charges or risk retaliation by making a truthful statement or by refusing to make a statement at all. This note is the first scholarship to propose a narrow solution that would fix the problem more satisfactorily than a wholesale reversion back to balancing for all public employee speech.

9 Bowie, 642 F.3d 1122.
10 Jackler, 658 F.3d 225.
11 See id.
12 Bowie, 642 F.3d 1122.
testimonial speech differently under the law and offers both a narrow and a broad solution for ensuring that lower courts do not apply the Garcetti rule in a way that creates a barrier to open and honest testimony and reporting by government employees.

I. Development of the Public Employment Speech Doctrine

A. Emergence of Protection for Public Employee Speech

U.S. courts offered little protection for public employees' speech rights before 1968.\footnote{See Washington v. Clark, 84 F. Supp. 964, 966 (D.D.C. 1949); McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517-18 (Mass. 1892); Reagan v. Bichsel, 284 S.W.2d 935, 937 (Tex. Civ. App. 1955). See also Lawrence Rosenthal, Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee, 25 Hastings Const. L.Q. 529, 530 (1998) (describing the history of public employee free speech jurisprudence).} As the Supreme Court's decisions have noted, for many years, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights."\footnote{Connick v. Myers, 461 U.S. 138, 143 (1983).} The Holmesian view that government employees could be disciplined for exercising their First Amendment rights ruled the day for much of the twentieth century.\footnote{15 See, e.g., Adler v. Bd. of Educ. of N.Y., 342 U.S. 485 (1952); Garner v. Bd. of Pub. Works of L.A., 341 U.S. 716 (1951); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); United States v. Wurzbach, 280 U.S. 396 (1930); Ex parte Curtis, 106 U.S. 371 (1882). The Court steadily eroded Justice Holmes' view with a series of decisions that held that public employment cannot be denied because of an applicant's previous political affiliations. See, e.g., Cafeteria Workers Union Local 473 v. McElroy, 367 U.S. 886, 902 (1961) (Brennan, J., dissenting); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). In Shelton v. Tucker, 364 U.S. 479, 490 (1960), the Court went a step further by invalidating a requirement that public school teachers periodically disclose the organizations to which they belonged or had made a contribution. Finally, in Keyishian v. Bd. of Regents, 385 U.S. 589 (1967), the Court interred Holmes' view when it invalidated two statutes prohibiting hiring or retention of employees of educational institutions who belonged to identified "subversive" organizations or who make "treasonable or seditious" statements. See id. at 597-610. See generally Cynthia K.Y. Lee, Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement, 76 Cal. L. Rev. 1109, 1112-15 (1988).} Writing from the bench of the Supreme Judicial Court of Massachusetts in 1892, Justice Holmes noted that it was verboten to criticize one's employer: "[t]he [government employee] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."\footnote{16 McAuliffe, 29 N.E. at 517 (rejecting the right of employees to criticize their employers and maintain their employment).}

The United States Supreme Court did not have occasion to consider whether the First Amendment protected public employee speech critical of management until 1968, in Pickering v. Board of Education.\footnote{Pickering v. Bd. of Educ., 391 U.S. 563 (1968).} By that time,
“[t]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”\textsuperscript{18} Marvin Pickering was a public school teacher who was fired after writing a letter to a local newspaper criticizing the school board's spending on athletics.\textsuperscript{19} The Board argued that the letter was “detrimental to the efficient operation and administration of the schools of the district” and that these interests justified Pickering's dismissal.\textsuperscript{20} The Court took a standards-based approach in deciding Pickering's retaliation claim,\textsuperscript{21} balancing the interests of the Board as an employer and the interests of Mr. Pickering in participating in public debate:

\begin{quote}
[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is 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.\textsuperscript{22}
\end{quote}

The Court concluded that the Board could not provide an interest sufficient to overcome Mr. Pickering's interest in participating as an ordinary citizen in important public discussion and upheld Pickering's speech under the First Amendment.\textsuperscript{23} Underlying the decision in \textit{Pickering} is the recognition that public employees are the members of the community with the most intimate knowledge of the operations of public employers. Were public employees not able to speak on these matters, the community would be deprived of informed opinions on important public issues. Lessons from McCarthy-era repression also undergird \textit{Pickering}; the Court understood the dangers of allowing the government to leverage its power as an employer to control citizens' speech.\textsuperscript{24} Thus it wrote “[I]n a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by

\begin{itemize}
\item \textsuperscript{18} Id. at 568 (quoting \textit{Keyishian} 385 U.S. at 605-06).
\item \textsuperscript{19} Id. at 564-66.
\item \textsuperscript{20} Id. at 564-65 (citations omitted).
\item \textsuperscript{21} Balancing tests are prolific in First Amendment jurisprudence. See generally Blocher, \textit{supra} note 7, at 392.
\item \textsuperscript{22} \textit{Pickering}, 391 U.S. at 568.
\item \textsuperscript{23} Id. at 574-75 (“In sum ... in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter ... his dismissal for writing it cannot be upheld ...”).
\end{itemize}
a teacher... it is necessary to regard the teacher as the member of the
general public he seeks to be." Relatedly, *Picketing* stands for the notion
that while a government entity has broader discretion to restrict speech
when it acts in the role as employer, the restrictions it imposes must be
directed at speech that has some potential to affect the entity's operations.

The next two major public employee speech cases involved *Picketing-*
like facts; each plaintiff was allegedly punished for speaking in an external
medium to a public audience about the policies of his public employer. In *Givhan v. Western Line Consolidated School District*, however, the Supreme
Court clarified that neither location nor audience is dispositive when
determining whether speech is protected. Bessie Givhan was fired after
a series of private meetings with her school principal where she criticized
district policies she considered racially discriminatory. The Court wrote
that the fact the teacher had spoken not to the public at large was "largely
coincidental" and held that the First Amendment protected her speech.

The Court further clarified the government employee speech doctrine
in *Connick v. Myers*. Sheila Myers, an assistant district attorney, circulated
an intraoffice questionnaire precipitating the First Amendment retaliation
claim in this case. Disgruntled after learning that her employer was going
to switch her to a different division, Myers solicited her co-workers' views
on, inter alia, office transfer policy, office morale, the need for grievance
committees, the level of confidence in supervisors, and whether employees
felt pressured to work in political campaigns. Myers was subsequently
terminated. In deciding whether the questionnaire was protected speech,
the Court recapitulated *Picketing*'s language to emphasize that *Picketing*

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25 *Picketing*, 391 U.S. at 574.
28 *Id.* at 411-13.
29 The *Garcetti* Court purported to uphold *Givhan*: "Many citizens do much of their
talking inside their respective workplaces, and it would not serve the goal of treating public
employees like 'any member of the general public'... to hold that all speech within the of-
(quotting *Picketing*, 391 U.S. at 573). This fact is one of the main reasons that Scott Bauries and
Patrick Schacht's call for a narrow reading of "pursuant to official duties" is so persuasive. See
31 *Id.* at 140-41.
32 *Id.* at 141.
33 *Id.*
34 The *Picketing* Court articulated its balancing test in the following way: "The problem
in any case is to arrive at a balance between the interests of the [employee], 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." *Picketing*,
391 U.S. at 568. The *Connick* Court wrote:
had not held that any and all statements by public employees were entitled to balancing; instead, a court need only balance the employer's interests with the employee's if the employee establishes as a threshold matter that the speech "constitut[es] speech on a matter of public concern." This threshold question precedes Pickering balancing in all cases. In assessing whether an employee's speech addresses a matter of public concern, Connick directs courts to examine the "content, form, and context of a given statement, as revealed by the whole record." The Court found that all but one of Myers's questions dealt with internal workplace grievances, not matters of public concern, thus the Court did not resort to Pickering balancing before it concluded that Myers's speech was not protected. The majority wrote that to conclude otherwise would ignore the "common sense realization that government offices could not function if every employment decision became a constitutional matter." As the public employee speech doctrine evolved, certain drawbacks of the case-by-case approach of Connick-Pickering became apparent. Due to the fact that almost all speech made by public employees, viewed at some level of abstraction, can be said to encompass a matter of public concern,

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 147.

Connick, 461 U.S. at 146 ("Pickering, its antecedents and progeny, lead us to conclude that if Myers's questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.").

See id. at 146-47.

Id. at 147-48.

The court found the question regarding pressure on employees to work on political campaigns dealt with a matter of public concern. Id. at 148-49.

Id.

Id. at 143. Brennan dissented, reasoning that the entirety of the questionnaire circulated by the employee "discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which ... an elected official charged with managing a vital governmental agency, discharges his responsibilities." Id. at 163 (Brennan, J., dissenting) (alteration in original).

Professor Cynthia Estlund has written: "In ranking public employee speech rights somewhere between the oblivion of the old 'rights-privileges' doctrine and the expansive speech protections accorded 'to the citizenry in general,' Pickering guaranteed a steady flow of doctrinal disputes for decades to come." Estlund, supra note 24, at 119.

Garcetti v. Ceballos, 547 U.S. 410, 448 (Breyer, J., dissenting) ("There are, however, far too many issues of public concern, even if defined as 'matters of unusual importance,' for [Souter's proposed screen test in his dissent in Garcetti] to screen out very much. Government administration typically involves matters of public concern. Why else would the Government be involved? And 'public issues,' indeed, matters of 'unusual importance,' are often daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment."); accord
Pickering balancing was fairly easy for plaintiffs to access. This meant that government agencies had to divert time and money to defend rote adverse employment decisions that were, as often as not, both completely warranted and constitutionally sound. Further, the case-by-case approach led to some confusion. In United States v. National Treasury Employees Union (NTEU), the Court struck down a broad congressional ban on federal employees' acceptance of honoraria for making speeches or writing articles, regardless of the topic. The Court observed "[t]he speeches and articles for which [employees] received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment." However, the Pickering and Connick line of cases already made clear that neither audience nor subject nor location of the speech was dispositive of protection, obviating the need for this type of reasoning in NTEU. Some commentators perceived that the Court altered the "matter of public concern" test for off-duty speech that was not about the work or the employer. In reality, NTEU neither followed nor reconstructed the threshold question for Connick-Pickering. Rather, it established that employees who "speak or write on their own time on topics unrelated to their own employment" are not subject to Connick-Pickering at all. They enjoy both broader and stronger speech rights than those who speak at or about work, but still not the full-fledged protection of citizens at large.

Some lower courts interpreted NTEU to mean that it was never the business of public employers to regulate off-duty, non-work-related speech. The Supreme Court corrected this misconception in City of San

Gillum v. City of Kerryville, 3 F.3d 117, 121 (5th Cir. 1993) ("[O]ur focus on the hat worn by the employee when speaking rather than upon the 'importance' of the issue reflects the reality that at some level of generality almost all speech of state employees is of state concern.").

44 Id. at 466 (alteration in original).
46 Estlund, supra note 24, at 129 (discussing NTEU).
48 Estlund, supra note 24, at 132 & n.53.
49 See Roe v. City of San Diego, 356 F.3d 1108, 1117 (9th Cir. 2004) (quoting Tucker v. Cal. Dept. of Educ., 97 F.3d 1204 (9th Cir. 1996)), rev'd City of San Diego v. Roe, 543 U.S. 77 (2004) (per curiam). In the Ninth Circuit's view, the point of Connick's threshold test was simply to avoid entangling courts in the innumerable employment disputes that arose out of mundane personnel disputes and grievances. The court had sought to mitigate the genuine perils of the public concern test by converting it from a protected category that the employee has to get her speech to fall within, to a residual category that the employee has to avoid falling out of. See Cynthia Estlund, Speech on Matters of Public Concern: The Perils of an Emerging First
Diego v. Roe, holding that a police officer's self-starring pornographic videos, though made off-duty, were not protected speech. The Court took an expansive view of how Roe’s activities related to his employer. Though the uniform Roe wore in one of the videos was unidentifiable, "the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute." The Court did not reach the interest balancing tier of Connick-Pickering because it found that Roe’s speech “did not qualify as a matter of public concern under any view of the public concern test.” City of San Diego stands for the outer reach of the employment nexus.

Between the City of San Diego decision in 2004 and Garcetti in May 2006, the Supreme Court lost Justices O'Connor and Rehnquist and gained Justices Alito and Roberts. In the interim, the Court seemingly tired of the case-by-case approach. Apparent frustration with applying the two-tiered Connick-Pickering analysis led a majority of the Supreme Court in Garcetti to announce an over-inclusive rule that categorically denies constitutional protection to a vast, ill-defined subsection of public employee speech.

B. Categoricalism Returns to the Public Employee Speech Doctrine

In Garcetti v. Ceballos, the Court grappled with whether or not the First Amendment protected the speech of an assistant deputy attorney in Los


50 City of San Diego v. Roe, 543 U.S. 77, 84-85 (2004) (per curiam). In City of San Diego, the Court held that the First Amendment did not protect a city police officer who was fired after his department discovered that he was selling pornography on the adults-only section of eBay that depicted him masturbating after undressing from a fake police officer uniform. To reach this conclusion, the Court determined Pickering balancing was not warranted because the “matter of public concern” prerequisite—as clarified by the Connick Court and later decisions—was unmet:

The speech in question was detrimental to the mission and functions of the employer. There is no basis for finding that it was of concern to the community as the Court's cases have understood that term in the context of restrictions by governmental entities on the speech of their employees.

Id.

51 Id. at 81.

52 Id. at 84.

53 Estlund, supra note 24, at 135.

54 In Garcetti, there was no dispute about how to classify the employee's speech: he conceded that he had spoken pursuant to his duties as a prosecutor. As a result, the Court had no occasion to provide guidance regarding how to distinguish citizen speech from speech pursuant to official duties in contested cases. In subsequent cases, however, the lower courts have adopted disparate and conflicting approaches.

Angeles who recommended to his supervisors in a job-required disposition memo that a case the office was prosecuting should be dropped.55 Based on communications from the defense counsel and his subsequent investigation into the matter, Richard Ceballos believed the affidavits used to obtain a critical search warrant contained serious misrepresentations.56 The department disagreed, refused to drop the case, and Ceballos ended up testifying for the defense in its (unsuccessful) motion to traverse.57 The Los Angeles County District Attorney's Office subsequently terminated Ceballos, and the Supreme Court granted certiorari to hear his §1983 claim alleging retaliation in violation of the First Amendment.58

While the Garcetti Court acknowledged that there were important competing interests at stake,59 it articulated a rule that favors the government's managerial interest over all others in every instance,60 both in its plain language and in its susceptibility to being read in an overbroad manner: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their

56 Id. at 414.
57 Id. at 414-15.
58 The Ninth Circuit held Ceballos's speech in his disposition memorandum was protected under the First Amendment analysis in Pickering and Connick. Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004), rev'd Garcetti v. Ceballos, 547 U.S. 410 (2006). The Ninth Circuit's opinion noted:

It is unclear whether the defendants contend that Ceballos's memorandum is all that is relevant here or that the other speech [his discussions about the warrant with his supervisors, his testimony before the court in the motion to traverse, and his communications with the defense attorney] to which Ceballos refers did not occur. For the reasons set forth below, we hold that, for purposes of summary judgment, Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment; accordingly we need not determine here whether similar protection should be afforded to his other communications.

Id. at 1172-73. On certiorari, the only speech at issue was the memorandum. See Garcetti v. Ceballos, 547 U.S. 410, 415-16 (2006).
59 Garcetti, 547 U.S. at 420 ("The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.").
60 The Garcetti rule is of the same ilk that Justice Frankfurter used to warn about. Frankfurter surmised that balancing tests are better suited to deal with the complexities of the free speech doctrine:

Absolute rules ... inevitably lead to absolute exceptions, and such exceptions ... eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

communications from employer discipline." In essence, the Court afforded unprecedented importance to the phrase "as a citizen" in the Connick-Pickering analysis. The Court held that when a public employee speaks "pursuant to . . . official duties," he or she should never be regarded as a regular citizen, elaborating that, because the additional First Amendment values that citizen status entails are not implicated in employer-directed speech, complicated interest balancing is not required. This decision greatly inflates the power of the government to control the content of certain speech that it has no legitimate managerial authority to control.

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61 *Garcetti*, 547 U.S. at 421.

62 In articulating the standard that an employee must speak "as a citizen on a matter of public concern" as a prerequisite for the possibility of First Amendment protection of that speech, neither *Pickering* nor *Connick*, though the Courts gave word service to the phrase, explained on the meaning of, or gave any consideration to, the "as a citizen" half of the phrase. See *Connick* v. Myers, 461 U.S. 138, 143 (1983); *Pickering* v. Bd. of Educ., 391 U.S. 563 (1968); (supra discussion at note 34). The Court's use of the phrase "as a citizen" in *Pickering* is best explained as a rote reiteration of a related concept the Court recognized one year before in *Keyishian* v. Board of Regents, 385 U.S. 589 (1967). *Keyishian* held that a government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. See id. at 605-06 (quoted in *Pickering*, 391 U.S. at 568). Additionally, though the *Connick* Court observed that "[t]he repeated emphasis in *Pickering* on the right of the public employee 'as a citizen, in commenting on matters of public concern,' was not accidental." *Connick*, 461 U.S. at 143. After the Court announced its holding, id. at 146-48, it used the entire remainder of the opinion to flesh out the contours of the phrase "matter of public concern." See id. at 147-51.

63 *Garcetti*, 547 U.S. at 421.

64 Id. at 421-22. In his dissent in *Garcetti*, Justice Souter rejected the logic behind the majority's decision to set up a dichotomy whereby an employee speaks either as a citizen or 'pursuant to official duties,' i.e. as an employee:

"[P]ublic employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." This is not a whit less true when an employee's job duties require him to speak about such things when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a supervisor's order to violate constitutional rights he is sworn to protect. (The majority, however, places all these speakers beyond the reach of First Amendment protection against retaliation.).

Id. at 433 (Souter, J. dissenting).

65 See Lawrence Rosenthal, The Emerging First Amendment Law of Managerial Prerogative, 77 FORDHAM L. REV. 33, 57 (2008) ("The concept of managerial prerogative attaches to duty-related speech undertaken to advance the purposes of the public employer. This concept should therefore also guide future litigation over whether speech should be considered duty-related within the meaning of *Garcetti*; speech that an employer would have a legitimate reason to take into account when evaluating the quality of an employee's job performance is speech that falls within the scope of . . . managerial prerogative.") (alteration in original) (emphasis added).

This note urges that the content of compelled investigatory or testimonial speech is outside the scope of legitimate managerial prerogative; while the initial impetus for the speech might be an employer's command, independent duties exist that require an employee to re-
Exacerbating the problem, the majority refused to carefully delineate what it meant by "pursuant to . . . official duties," insisting instead that courts engage in a "practical [inquiry]"\(^6\) to determine which employee speech activities should be categorically denied constitutional protection.

II. \textbf{Public Employee Speech Doctrine in a Post-\textit{Garcetti} World}

\textit{A. Institutional Difficulties with the Current Rule}

Lower federal courts struggle to determine when employee speech is properly categorized as made "pursuant to [an] official duty."\(^6\)\(^7\) Compounding this general definitional problem, lower federal courts seem to have forgotten that the only speech at issue in \textit{Garcetti} was the memorandum—not the testimony Ceballos provided in the warrant challenge, and not the conversations he allegedly had with his employers describing the results of his investigation.\(^6\)\(^8\) Lower courts have further strayed from the spirit of \textit{Garcetti} by losing sight of the important fact that Ceballos’s duties \textit{required him} to write the disposition memorandum.\(^6\)\(^9\)

The indeterminacy of the category of speech excluded from \textit{Pickering–Connick} balancing, and the problems that come from not reading the \textit{Garcetti} rule in light of the facts before the Court when it announced

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\(^6\) Excerpts truthfully. If the investigation or testimony reveals government misconduct, the truthful report or testimony might upset the employer or put a superior's job security at risk, but would remain illegitimate grounds for "evaluating the quality of an employee's job performance." \textit{Id.}

\(^6\)\(^6\) \textit{Garcetti}, 547 U.S. at 424.

\(^6\)\(^7\) \textit{Id.} at 421. Scott Bauries and Patrick Schach point out that the opinion did not leave lower courts without any starting point. By referencing \textit{Pickering v. Board of Education}, 391 U.S. 563 (1968) and \textit{Givhan v. Western Consolidated School District}, 439 U.S. 410 (1979), the Court signaled it was not overturning precedent holding that statements about work, or made while at work, or made only to coworkers or superiors can still enjoy First Amendment protection. From the majority's references, it is clear that "it would be patently incorrect to interpret the words 'pursuant to' to mean 'related to' or 'in the course of,' as each of these interpretations is directly foreclosed by the Court's statements of what it was not holding," Bauries & Schach, \textit{supra} note 4, at 369.

\(^6\)\(^8\) \textit{See} Ceballos v. Garcetti, 361 F.3d 1168, 1172-73 (9th Cir. 2004) ("It is unclear whether the defendants contend that Ceballos’s memorandum is all that is relevant here or that the other speech to which Ceballos refers did not occur. For the reasons set forth below, we hold that, for purposes of summary judgment, Ceballos’s allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment; accordingly, we need not determine here whether protection should be afforded to his other communications."). rev’d \textit{Garcetti}, 547 U.S. 410 (2006).

\(^6\)\(^9\) \textit{See} Garcetti, 547 U.S. at 421 ("The controlling factor in Ceballos's case is that his expressions were made pursuant to his duties as a calendar deputy. That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with the pending case—distinguishes Ceballos’s case from those in which the First Amendment provides protection against discipline. . . . Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do.").
the rule, have led lower federal courts to exclude far more speech from
the possibility of First Amendment protection than the \textit{Garcetti} majority
probably intended.\footnote{Bauries \& Schach, \textit{supra} note 4, at 358 \& n.1 ("When the Supreme Court recognizes
an exemption from First Amendment protections, the lower courts have an important respon-
sibility to faithfully apply the exemption, a duty which includes the responsibility to read such
a rights-limiting rule strictly.").} A bevy of decisions illustrate how readily
\textit{Garcetti} can be misconstrued and interpreted too broadly. For example, in denying
constitutional protection to a teacher who alleged he was fired for filing a
complaint with the union about his school's unresponsiveness to persistent
behaviors problems, the Second Circuit reasoned that a duty does not have to be "required by" the employer to be "pursuant to" official duties: "[the
grievance was] 'pursuant to' [the teacher's] official duties because it was
'part-and-parcel of his concerns' about his ability to 'properly execute
his duties[.]")\footnote{Weintraub \textit{v. Bd. of Educ. of City Sch. Dist. of N.Y.C.}, 593 F.3d 196, 203 (2d Cir. 2010). The
\textit{Weintraub} court took dicta from \textit{Garcetti} and inverted its thrust to reach the following
conclusion:

\textit{The \textit{Garcetti} Court cautioned courts against construing a government employee's
official duties too narrowly, underscoring that "[f]ormal job descriptions often bear
little resemblance to the duties an employee actually is expected to perform, and
the listing of a given task in an employee's written job description is neither neces-
sary nor sufficient to demonstrate that conducting the task is within the scope of
the employee's professional duties for First Amendment purposes." Id. at 202 (quoting \textit{Garcetti}, 547 U.S. at 424-25). In fact, Kennedy's caution about the inquiry
being a practical one was in the context of an answer to Souter's concern that employers would rewrite employment manuals so that \textit{every} employee's job description would include speech
activities, therefore what was "pursuant to official duties" would be construed \textit{too broadly.}
\textit{Garcetti}, 547 U.S. at 424-25; \textit{id.} at 431 n.2 (Souter, J., dissenting).}

\textit{Garcetti}, 547 U.S. at 424-25; \textit{id.} at 431 n.2 (Souter, J., dissenting).

\textit{Williams v. Dall. Indep. Sch. Dist.}, 486 F.3d 689, 693-94 (5th Cir. 2007).

\textit{Id.} at 693.\footnote{\textit{Renken v. Gregory}, 541 F.3d 769, 775 (7th Cir. 2008).\textit{Id.} at 773.}
"pursuant to . . . official duties." was unfortunately not an aberration in this circuit. In *Mills v. City of Evansville*, the circuit denied constitutional protection to a public officer who made complaints after a meeting held to discuss plans for department reorganization. The court reasoned that the officer's criticisms constituted speech made pursuant to her official duties because she made them "on duty, in uniform . . . in her capacity as a public employee contributing to the formation and execution of official policy."

The Ninth, Tenth and Eleventh Circuits have also drawn conclusions that reflect that they do not regard public employees' duties as being limited "only to those tasks that are specifically designated [by an employment manual]." In *Freitag v. Ayers*, the Ninth Circuit held that a prison guard's internal complaints documenting her superiors' failure to respond to inmates' sexually explicit behavior toward her did not qualify for First Amendment protection from retaliation because the complaints were made "pursuant to her official duties." In *Brammer-Hoelter v. Twin Peaks Charter Academy*, the Tenth Circuit held that teachers spoke pursuant to their job duties when they discussed the school's expectations regarding student behavior, curriculum, pedagogy and classroom-related expenditures at an off-site, after-hours meeting. Finally, in *Battle v. Board of Regents*, the Eleventh Circuit construed "pursuant to official duties" to capture a university employee's report of alleged improprieties in the way her supervisor managed federal financial aid funds.

These differing outcomes across the circuit courts illustrate that *Garcetti*'s loosely articulated operational definition for the type of speech it categorically excludes can be very detrimental to public employees' speech rights. The fact that the post-facto inquiry into whether an employee spoke "pursuant to . . . official duties" has turned out to be just as fact-intensive as the *Connick-Pickering* interest-balancing test it

76 *Garcetti*, 547 U.S. at 421.
77 *Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006) (citing *Garcetti*, 547 U.S. at 421).
78 Id. at 648.
79 *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1242 (11th Cir. 2007).
80 *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006).
81 *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007).
82 *Battle v. Bd. of Regents*, 468 F.3d 755, 761 (11th Cir. 2006).
84 Justice Stevens predicted this problem in his dissent: "[T]he majority's position comes with no guarantee against factbound litigation over whether a public employee's statements were made 'pursuant to...official duties,' ante. In fact, the majority invites such litigation by describing g the enquiry as a 'practical one,' apparently based on the totality of employment circumstances." Id. at 436 (Stevens, J., dissenting) (internal references omitted). This confusion has come to fruition. See *Decotiis v. Whittemore*, 635 F.3d 22, 26 (1st Cir. 2011) ("[Despite its categorical rule,] navigating the shoals of the standard articulated by the Supreme Court in *Garcetti* . . . has proven to be tricky business . . ."); *Davis v. McKinney*, 518 F.3d 304, 311 (5th Cir. 2008) ("*Garcetti* changed this analysis in ways not yet fully determined.").
aimed to replace undermines one of the main justifications for instituting the Garcetti rule in the first place. The conflict among circuits regarding the proper treatment of compelled testimony or investigatory speech is symptomatic of the disparate, often inconsistent standards applied by the courts of appeal to determine whether a public employee speaks as a citizen or "pursuant to official duties."

B. Normative Reasons for Revising the Rule in the Context of Compelled Investigatory or Testimonial Speech

"Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employees' speech."

The circuit court decisions described above invert the thrust of Kennedy's admonition that the inquiry for deciding whether speech is excluded from the possibility of protection should be a "practical" one. Decisions for the employer in the context of compelled testimonial or investigatory speech like Deanna Freitag's or Lillie Battle's highlight the unfairness of Garcetti, under which "any duty-related speech of a public employee is denied constitutional protection, no matter how valuable its contribution to public discussion and debate, and no matter how unpersuaded a court may be of the employer's justification for suppressing that speech." 

In Bowie v. Maddox the D.C. Circuit applied Garcetti on its terms, illustrating just how unsatisfactorily the rule operates even under a narrow, disciplined reading. David Bowie, a former official of the District of Columbia Office of the Inspector General ("OIG"), alleged that he was fired in retaliation for his refusal to help sabotage his former subordinate Emanuel Johnson. Johnson lodged a race discrimination complaint with the EEOC after being terminated from the OIG. An attorney representing the OIG in Johnson's suit pre-drafted an EEOC-required affidavit for

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85 See Garcetti, 547 U.S. at 423 ("[To hold that an employee who alleges retaliation for speech is entitled to interest balancing even when that speech is made pursuant to his employment duties] would commit the 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 . . . to a degree inconsistent with sound principles of federalism and the separation of powers.")
86 See Petition for Writ for Certiorari, supra note 54, at 13-21.
88 Rosenthal, supra note 65, at 37 (emphasis added).
89 Id. at 1126.
Bowie to sign. This affidavit listed Johnson’s “failure to perform his duties in a satisfactory manner” in three investigations as the legitimate, non-discriminatory reason OIG fired him. Bowie refused to sign the document, citing “misstatements of fact” and “language that would convey impressions that [he] would not agree with.” Bowie proceeded to draft his own affidavit. This version retained mention of the problems with one of Johnson’s investigative reports and related his sense that Johnson “clearly did not yet understand” his role at OIG, but went on to note that he had advised management in a strategic planning meeting that he did not think Johnson should be fired. Bowie related that when his superiors notified him of their plans to terminate Johnson, he had recommended a performance improvement plan instead because in his mind, the harshest criticism leveled at Johnson during the managerial meeting was inconsonant with the views of Johnson’s immediate supervisors who praised him as a “model investigator.”

Bowie’s supervisors never filed his affidavit with the EEOC. They concluded Bowie’s version “included too much information that was not relevant to the issue at hand” which Bowie was unwilling to eliminate. When Bowie was terminated nearly a year and a half after Johnson filed his Title VII complaint, Bowie claimed he had been fired for refusing to sign the affidavit written for him and for drafting his own affidavit that implicitly criticized his supervisors’ decision to terminate Johnson.

The district court dismissed Bowie’s First Amendment claim on the first prong of a four-part test derived from the circuit’s holding in Wilburn v. Robinson; the court reasoned that Bowie’s speech regarded individual personnel disputes and grievances and therefore was not relevant to the public’s evaluation of the OIG’s performance. On appeal, Bowie argued that the D.C. Circuit had already rejected the proposition that a personnel

90 Id.
91 Id.
92 Id. at 1127.
93 Id.
94 Id.
95 Id.
96 Id. at 1133.
97 Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (“First, the public employee must have spoken as a citizen on a matter of public concern. Second, the court must consider whether the governmental interest in ‘promoting the efficiency of the public services it performs though its employees’ . . . outweighs the employee’s interest, ‘as a citizen, in commenting upon matters of public concern’. Third, the employee must show that her speech was a substantial or motivating factor in prompting the retaliatory or punitive act. Finally, the employee must refute the government employer’s showing, if made, that it would have reached the same decision in the absence of the protected speech.”).
The matter per se could not be a matter of public concern. Further, he argued that his affidavit did in fact contain a matter of public concern because he had composed it for the purpose of submitting it to the EEOC. The Court of Appeals rejected this argument, noting that Bowie's claim failed for another reason: Garcetti. The court wrote, "even if the draft affidavit and Bowie's revision of it were on a matter of public concern, he was not speaking 'as a citizen' when he refused to sign the former or when he composed the latter. In both instances, Bowie was acting "pursuant to [his] official duties . . . ."

Bowie's efforts to produce an affidavit were undertaken at the direction of his employer and in his capacity as Assistant Inspector General for Investigations and Johnson's superior. Bowie does not allege Defendants stymied any personal effort to submit his affidavit to the EEOC or to Johnson directly. Indeed, Bowie made no such effort. His affidavit, like the draft he refused to sign, identified him in the first paragraph and signature block as 'Assistant Inspector General for Investigations.' All the speech underlying Bowie's First Amendment claim occurred in his official capacity.

Having decided that Bowie's speech was made pursuant to an official duty to participate in EEOC's investigation, the D.C. Circuit ended the inquiry. The court did not peek behind the curtain to ask whether the employer's interest in suppressing Bowie's speech was justifiably high, or whether the societal value of Bowie's speech was weighty enough to merit protection regardless of the employer's interests.

One month after Bowie v. Maddox, the Second Circuit decided Jackler v. Byrne. Jackler was a parole police officer that arrived second on the scene of an arrest and saw the first responding officer use excessive force on the arrestee. After the arrestee filed a complaint against the offending officer naming Jackler as a witness, Jackler filed a supplemental report as required by the police by-laws. Jackler's report stated that he had seen the other officer engage in what he considered excessive force on the arrestee. Subsequently, Jackler's superiors on the squad pressured him to rescind his

99 Bowie, 642 F.3d at 1133 (citing LeFande v. District of Columbia, 613 F.3d 1155, 1161 (D.C. Cir. 2010)).
100 Id. at 1133 (citing Johnston v. Harris Cnty. Flood Control Dist., 869 F.2d 1565, 1578 (5th Cir. 1989).
101 Id. at 1133-34 (internal citations omitted).
102 Id. at 1134.
103 Id.
104 Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011).
105 Id. at 230.
106 Id. at 231.
107 Id.
truthful report and file a false one in order to exculpate his fellow officer. He refused and was eventually fired.

Conflating the *Garcetti* holding with its dicta, the Second Circuit recited the threshold test to state "when a public employee, pursuant to his official duties, makes statements that have no relevant analogue to speech by civilians who are not government employees, the government employee's speech is not protected by the First Amendment." To come to this formulation, the Second Circuit emphasized the holdings of pre-*Garcetti* chestnuts that were either implicitly or explicitly upheld by the majority. The court's reasoning proceeded as follows: (a) a citizen who works for the government is nonetheless a citizen and, when speaking on a matter of public concern, must face only those speech restrictions that are necessary for their employers to operate effectively; (b) speech exposing official misconduct, especially within the police department, is generally of great consequence to the public; (c) since citizens have the right to say only what they believe is true, there was a civilian analogue to Jackler's refusals to misrepresent the events he witnessed. By articulating a "civilian analogue" for Jackler's actions, the court was able to circumvent having the *Garcetti* threshold question end the possibility of protection for Jackler. There is no question that had *Garcetti* been applied in a straightforward manner on the facts, the court would have found that Jackler filed his supplemental report "pursuant to [an] official duty."

The Second Circuit attempted to justify its convoluted reasoning by highlighting *Garcetti*’s stated purpose in forging

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108 *Id.*

109 *Id.*

110 See *Garcetti* v. Ceballos, 547 U.S. 410, 423-24 (2006) ("The Court of Appeals based its holding in part on what it perceived as a doctrinal anomaly. The court suggested it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties. This objection misconceives the theoretical underpinnings of our decisions. Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, or discussing politics with a co-worker. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.") (emphasis added).

111 *Jackler*, 658 F.3d at 229 (emphasis added). Of note, the Second Circuit first fashioned this test in *Weintraub v. Board of Education of City School District. of New York*, 593 F.3d 196 (2d Cir. 2010). "Our conclusion that Weintraub spoke pursuant to his job duties is supported by the fact that his speech ultimately took the form of an employee grievance, for which there is no relevant citizen analogue." *Id.* at 203.

112 *Jackler*, 658 F.3d at 241.

113 *Id.*

114 *Garcetti*, 547 U.S. at 421. See also *Jackler*, 658 F.3d at 230-31. As Bauries and Schach would frame the "pursuant to" inquiry, Jackler would have been in breach of his employment contract if he had refused to speak on this occasion. See Bauries & Schach, *supra* note 4, at 370-71.
a categorical rule: to promote "integrity" in the government employer's operations by limiting constant judicial oversight, and to help further the "proper performance of governmental functions." The court concluded that "Jackler's refusal to comply with orders to retract his truthful report and file one that was false has a clear civilian analogue . . . [he] was not simply doing his job in refusing to obey those orders from the department's top administrative officers and chief of police." The defendants argued that Jackler's refusals were part of his job and that Garcetti required affirmance of the district court's (reluctant) dismissal of Jackler's claim for failure to state a claim on which relief could be granted. Respondents argued that otherwise, any employee who simply

Speech is "pursuant to" official duties if it "owes its existence to a public employee's professional responsibilities." Garcetti, 547 U.S. at 421. The speech need not be required by the employer; it is "pursuant to official duties" so long as the speech is in furtherance of such duties." Weintraub, 593 F.3d at 202. Jackler's refusal to alter his report was done in his capacity as a police officer, and that refusal only occurred because he was an officer. Ironically, it is because he was a public employee with a duty to tell the truth that his insistence on fulfilling that duty is unprotected. But because the Second Circuit made so clear in Weintraub that speech is pursuant to official duties where it is "part-and-parcel of [the employee's] concerns' about his ability to 'properly execute his duties,'" 593 F.3d at 203 (quoting Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007)), and that in determining whether an employee speaks as a citizen the focus must be on the role the speaker occupied when he spoke, see id. (same), and because it is so clear on the facts as alleged by Jackler that he refused to withdraw or alter his truthful report in the belief that the proper execution of his duties as a police officer required no less, I do not see how I can avoid the conclusion that he was speaking as an officer, not a citizen, when he did so.

Though the court ultimately dismissed Jackler's suit against the police department in accordance with binding precedent, Judge Seibel suggested in footnote 5, "Because this outcome is so troubling, I would encourage higher courts to consider whether Garcetti should apply at all when the employee speech concerns a matter of fact, rather than a matter of judgment, opinion, or policy, as in Garcetti." Id. at 324 n.5.

To state a prima facie claim of First Amendment retaliation under 42 U.S.C. § 1983, a plaintiff must demonstrate that: (1) the speech was constitutionally protected; (2) plaintiff suffered an adverse employment action; and (3) a causal connection exists between the speech and the adverse employment action so that it can be said that the speech was a motivating factor in the determination. See, e.g., Valentino v. Vill. of S. Chi. Heights, 575 F.3d 664, 670 (7th Cir. 2009).
files a truthful report and later suffers an adverse employment decision would be able to claim that his First Amendment rights were implicated because he did not file a false one.\textsuperscript{119} The Second Circuit was unconvinced: "In the context of the demands that Jackler retract his truthful statements and make statements that were false, we conclude that his refusals to accede to those demands constituted speech activity that was significantly different from the mere filing of his initial Report."\textsuperscript{120}

In response to Jackler's pronouncement, Bowie petitioned for a rehearing. The D.C. Circuit was not persuaded:

The Second Circuit gets Garcetti backwards. The critical question under Garcetti is not whether the speech at issue has a civilian analogue, but whether it was performed 'pursuant to ... official duties.' ... 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.\textsuperscript{121}

The D.C. Circuit also derided the persuasiveness of the Second Circuit's assertion that a police department cannot, consistent with the First Amendment, force a civilian to withdraw a complaint: "This begs the question. Under Garcetti, the rules are different for government employees speaking in their official capacities. An utterance made 'pursuant to employment responsibilities' is unprotected even if the same utterance would be protected were the employee to communicate it 'as a citizen.'"\textsuperscript{122} The D.C. Circuit further noted that all the dissents in Garcetti accepted what the Second Circuit seemed to gloss over--that the rule categorically denies recovery under the First Amendment to plaintiffs who speak "pursuant to ... official duties."\textsuperscript{123} All of these points are valid. However, the D.C. Circuit ends with a sentence that disturbs the sense of fairness of any reader already disgruntled with the categorical rule's displacement of interests and values formerly accounted for in the Connick-Pickering regime:

It is not difficult to sympathize with the Second Circuit's dubious interpretation of Garcetti. The police chief's instruction

\begin{footnotes}
\item[119] Jackler, 658 F.3d at 241. Because the department made an affirmative attempt to have Jackler refile, to which Jackler affirmatively refused, defendant's slippery slope argument is misused. In general, under this note's proposal, a plaintiff in Jackler's shoes will be able to survive the Garcetti threshold whether he affirmatively speaks or affirmatively refuses to speak. It is the employee's ability to prove that the character of the compelled speech he made (or did not make) was (or would have been) testimonial or investigatory in nature that will entitle him to constitutional protection. \textit{See} discussion infra Part III.B.4 and accompanying footnotes.
\item[120] Jackler, 658 F.3d at 241.
\item[121] Bowie v. Maddox, 653 F.3d 45, 48 (D.C. Cir. 2011) (citing Jackler, 658 F.3d at 238-40).
\item[122] Id. (quoting Garcetti v. Ceballos, 547 U.S. 410, 423-24 (2006)).
\item[123] Id.
\end{footnotes}
to Jackler and the actions he ordered Jackler to take were clearly illegal. But 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.124

The D.C. Circuit alludes here to the availability of whistleblower protections in cases like Bowie's, but the problems with relying on whistleblower causes of action are manifold125 and discussion of their shortcomings is outside of the scope of this paper. In any event, surely the Garcetti Court did not intend its categorical rule to operate as the D.C. Circuit sanctions.

III. PROPOSED SOLUTIONS

A. Narrow Tailoring

The paradigmatic situation where Garcetti's categorical rule should not apply is when the party whose managerial interests the rule was instituted to protect is found to be abusing its managerial authority. The phrase “pursuant to official duties” simply cannot encompass any “clearly illegal” order. If we want our public employees to always contravene “official” orders to lie—as we should—then we must always provide such courageous employees protection for their speech under the First Amendment when they do.127

The argument for managerial prerogative underlying Garcetti's categorical rule only retains its legitimacy as long as the prerogative is exercised within legal confines. Thus, as soon as the Supreme Court is able, it should clarify that while its rule is categorical, it is not meant to operate as a sanctuary for employers who retaliate against an employee's refusal to comply with an illegal order, such as to perjure oneself in a report required by police department by-laws or an EEOC-required affidavit. While this clarification would certainly render Jackler's (and probably Bowie's) speech protected, due to the reality that most facts will not be as clear as a chief of police ordering an officer to lie, the Court needs to make a more comprehensive clarification that will protect all compelled investigatory or testimonial speech.

124 Id. (citing Jackler, 658 F.3d at 238-40).

1. Oversight.—In shifting its focus from the content of the speech at issue to the role the employee occupied in pronouncing it, the Garcetti Court minimized the legal relevance of the fact that a government employee always occupies the dual role of citizen and employee. The majority implicitly rejected this "dual roles" argument, discussing its rule as if it reflected a logic that was beyond cavil: "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer has itself commissioned or created." 

The Garcetti majority's logic undervalues the variety of interests that were served by the delicate balances struck in Pickering and its progeny. It also oversimplifies the issue by narrowing down the relevant interests at stake to just two: the government's managerial prerogative and the employee's interest in contributing to the public debate. Throughout the opinion, the majority iterates the idea that self-actualization through contribution to civic discourse is all that needs to be accounted for on the employee's side of the balance. For example, when summarizing First Amendment doctrine in the public employee speech arena, the majority wrote, "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." Later, the Court recited the principle "[t]he interest at stake

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128 Criticizing the Second Circuit's holding in Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011), the D.C. Circuit wrote, "[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." Bowie v. Maddox, 653 F.3d 45, 48 (D.C. Cir. 2011).

129 See Bauries & Schach, supra note 4, at 387 ("A reasonable objection to the Garcetti rule is that it leaves categorically unprotected the speech of a public employee who is employed to audit the activities of [a] public entity . . . [such as] an academic ombudsman, an accounts auditor, or a professor with accounting responsibilities for an internal academic center or funded grant . . . . In each of these positions, the employee's official duties require the employee to engage in speech that has the potential to embarrass or upset the employer, making retaliation more likely.").

130 See generally Caroline Mala Corbin, Mixed Speech: When Speech is Both Private and Governmental, 83 N.Y.U. L. Rev. 605 (2008). See also Garcetti v. Ceballos, 547 U.S. 410, 430 (Souter, J., dissenting) ("[A] public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job, and Givhan stands for the same conclusion even when the speech is not addressed to the public at large.").


132 Id. at 419.
is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate." Finally, the Court's dictum about "civilian analogue[s]" arose in its discussion of how Marvin Pickering's protected speech was different from Richard Ceballos's, a point it made to assure that its decision was not intended to foreclose the possibility for employees to contribute to civic discussion.

Distilling the interests at stake was necessary for the majority to justify its decision. While one critique of the rule is that it blindly promotes the government employer's managerial interests above all others in every situation, the majority would defend its rule by refuting that either self-expression or rich public debate is ever at stake when an employee speaks "pursuant to an official duty":

Refusing to recognize First Amendment claims based on government employees' work product does not prevent [employees] from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.

Focusing so heavily on the fact that employees retain the ability to engage in public debate, the majority never thoughtfully accounted for how its rule would aid or impede the search for truth, one of the other main theories that impacts the scope of the Free Speech clause. Although

133 Id. at 420.
134 See id. at 422-24.
135 Id. at 422.
136 See Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 HARY. L. REV. 1765, 1785-86 (2004) ("Although any account of what the First Amendment 'is all about' will include some communicative acts and exclude others--and so too with accounts that recognize that the First Amendment has multiple explanations--none of the existing normative accounts appears to explain descriptively much of, let alone most of, the First Amendment's existing inclusions and exclusions. Theories based on self-government or democratic deliberation have a hard time explaining why (except as mistakes, of course) the doctrine now covers pornography, commercial advertising, and art, inter alia--none of which has much to do with political deliberation or self-governance, except under such an attenuated definition of 'political' that the justification's core loses much of its power. 'Search for truth' or 'marketplace of ideas' accounts are similarly at a loss to explain the coverage of utterances without much truth value, including self-expression generally and the self-expressive aspects of most art and literature in particular. Indeed, if we were concerned about actually increasing knowledge and exposing error, it is far from clear that we would so easily protect both communication that is largely emotive and communication that is demonstrably factually false. Personal autonomy and self-expression accounts of the First Amendment are also difficult to justify descriptively. For these theories, the inclusion of commercial speech and noncommercial corporate speech is problematic, since it is not clear whose autonomy or self-expression is fostered as a result; equally problematic is the inclusion of plainly harmful speech, for it is not normally thought that rights to autonomy and self-expression extend to the right to injure others.").
distilling the values at stake was convenient for justifying the rule it crafted, the majority’s oversimplified analysis led to a rule that illustrates how, “when a category does not align with underlying values, absurdities such as significant [overinclusion] can undermine the category’s legitimacy and stability.”

2. Overinclusion.—Perhaps the fact that Garcetti “represents the furthest the Court has been asked to reach inside the employment relationship to protect an employee from sanctions based upon speech” explains why the Court’s categorical exemption is undertheorized. Of course an employer has the ability to control its “work product” and to discipline an employee for “perform[ing] their jobs however they see fit.” No one could seriously argue against the assertion that “[w]hen someone who is paid a salary so that she will contribute to an agency’s effective operation begins to do or say things that detract from the agency’s effective operation, the government must have some power to restrain her.” Further, it is incontrovertible that the government gets to control the message when the government itself is the speaker. However, the amorphously defined

137 Blocher, supra note 7, at 383.
138 Estlund, supra note 24, at 129.
139 Even Lawrence Rosenthal, who supports Garcetti’s categorical rule, has observed that:

The breadth of Garcetti’s holding is remarkable. Under Garcetti, any duty-related speech of a public employee is denied constitutional protection, no matter how valuable its contribution to public discussion and debate, and no matter how unpersuaded a court may be of the employer’s justification for suppressing that speech. This outcome seems at odds with the Court’s usual insistence that First Amendment doctrine reflect the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

Rosenthal, supra note 65, at 37 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
140 Garcetti, 547 U.S. at 422.
141 Id.
143 See, e.g., Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467 (2009) (“A government entity has the right to ‘speak for itself.’”); Nat’l Endow. for Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) (“It is the very business of government to favor and disfavor points of view . . . .”); Rust v. Sullivan, 500 U.S. 173 (1991) (holding that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes, therefore it was not an unconstitutional condition to prohibit recipients of federal funds for family-planning services from providing counseling concerning the use of abortion as a method of family planning). Justice Souter’s dissent in Garcetti noted that it was a fallacy to conflate Ceballos’s speech with that of other government employees whose job it is to “hew to a substantive message” that is “prescribed by the government in advance”:

The fallacy of the majority’s reliance on Rosenberger’s understanding of Rust doctrine . . . . portends a bloated notion of controllable government speech going well beyond the circumstances of this case. Consider the breadth of the new formulation: ‘Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have
rule in *Garcetti* that excludes all speech made "pursuant to . . . official duties" from constitutional protection goes too far.\(^\text{144}\) It swallows too much. Its underlying logic is especially ill-suited for justifying why government employers should be allowed to retaliate, free of constitutional liability, against employees who are compelled to engage in investigatory or testimonial speech as part of their job duties.\(^\text{145}\)

Many government employees, as part of their official duties, are paid to audit their government employer, complete ad hoc reports that detail co-workers' misbehavior (*Jackler*), or comply with third party investigations of their employer (*Bowie*).\(^\text{146}\) In these situations, even though the employee might be creating "work product" or reporting what they uncovered in an investigation that they had an "official duty" to conduct, the government has no legitimate, defensible interest in dictating the viewpoints expressed therein.\(^\text{147}\) This speech is different from traditional work product. It is not

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\(^\text{144}\) *Garcetti*, 547 U.S. at 437-38 (Souter, J., dissenting).

\(^\text{145}\) *Id.* at 434 (Souter, J., dissenting) ("[The judgment in a public employee speech case] has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent. It is thus no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasionally irresponsible one from turning his job into a bully pulpit.").

\(^\text{146}\) See Bauries & Schach, *supra* note 4, at 386-88 (discussing how this subcategory of public employee speech would continue to pose problems even after instituting his proposed clarification to the *Garcetti* rule, designed to enable courts to apply the decision in a more disciplined way).

\(^\text{147}\) I do not suggest that an employer could not monitor the content of compelled investigatory or testimonial speech in a way that resembles a justifiable time/place/manner restriction. For instance, the Ninth Circuit noted in *Ceballos v. Garcetti*, 361 F.3d 1168, 1171 (9th Cir. 2004), that upon reading Ceballos's first draft, his supervisors asked him to revise it and tone down the accusatory language directed at the sheriff whom Ceballos believed had falsified an affidavit to obtain a search warrant. This sort of managerial control is legitimate. The edits Ceballos's supervisors ordered served the purpose of maintaining a professional relationship with a fellow governmental agency whose goodwill it was important to maintain in order to enable the D.A.'s office to perform its tasks efficiently. Lawrence Rosenthal has written:

> [P]ublic employees [like Ceballos] who are hired to speak (and write) are not hired to say just anything, but are hired to speak (and write) in the fashion desired by their superiors. To the extent that the District Attorney abuses this prerogative to run the office in a manner he finds optimal, in a republican system of government, it is the electorate that is entitled to correct that abuse, not Ceballos, and not the courts.

Rosenthal, *supra* note 65 at 45-46. While I disagree with Rosenthal that correction of abuses must wait until the next election cycle (a solution which assumes that employees will risk
the typical speech the "employer itself has commissioned or created"\textsuperscript{148} whose message the employer may legally control. The Court should create an exception to the category exempted from constitutional protection by \textit{Garcetti} for the subcategory of compelled investigatory or testimonial speech.

Aside from the lessened legitimate managerial prerogative in controlling compelled investigatory or testimonial speech, this subcategory is different from other duty-required speech because of the legal consequences at stake for the individual speaker. \textit{Garcetti} indulges the falsity that a speaker can speak \textit{either} as a citizen \textit{or} an employee by holding that the law should always treat the speaker as a controllable employee when he speaks "pursuant to [an] official dut[y]."\textsuperscript{149} But when a speech act constitutes compelled investigatory or testimonial speech, the individual speaker can be held liable\textsuperscript{150} for the contents of his/her speech even though it is deeply connected to their employment responsibilities.\textsuperscript{151} This reality implicates an additional long-held First Amendment maxim: truth is a defense.\textsuperscript{152} This additional consideration strengthens the argument for presumptive categorical protection for compelled investigatory or testimonial speech.

3. \textit{The Solution}.—While the general government employee speech doctrine now starts with a threshold question that focuses on the role of the employee when that employee spoke, I propose that a subcategory of public employee speech be exempted from this rule based on an inquiry into its

\begin{enumerate}
\item retaliation to inform the electorate of abuses), I agree with his carefully phrased contention that employers should be able to manage the "fashion" of an employee’s speech. This is distinguishable, though, from the content of an employee’s testimonial or investigatory speech, which this note argues should be categorically protected under the First Amendment.

\item \textit{Garcetti}, 547 U.S. at 411.

\item See discussion \textit{supra} Part I.B and note 62 (noting that the \textit{Garcetti} Court brought reinigorated focus to the "as a citizen" language of the \textit{Connick} threshold question and answered that the speaker never speaks "as a citizen" when they speak "pursuant to an official duty"); \textit{see also} Barachkov v. 41B Dist. Court, 311 F. App’x 863, 870 (6th Cir. 2009) ("In \textit{Garcetti} v. Ceballos . . . the Supreme Court clarified what it means to 'speak as a citizen' by holding that 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.'").

\item The more closely integrated with an investigation or trial, the more likely the employee will be held liable because prosecutors are more likely to seek punishment against those who make false statements in this context.

\item \textit{See} Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

\item Also, the greater the integration between the speech act and an investigation or trial, the more likely the employee will be held liable for any falsity that protects an employer because prosecutors are more likely to seek punishment against those who make false statements in this context. Without protection for truthful testimony, public employees face the Hobson’s choice of protecting an employer at the risk of prosecution, or risking unemployment by testifying to something potentially harmful to their employer.

\item \textit{See} Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
character and context. After an employer proves the employee’s speech is made pursuant to an official duty, the employee should be given the opportunity to prove that the content of her speech is fairly characterized as “testimonial” or “investigatory.” If this is demonstrated, then the First Amendment protects the employee’s speech and bars it from being used as the basis of an adverse employment decision unless the government employer can prove the contents are false or “imply a false assertion of fact.”

153 Under this reformulation of the public employee speech doctrine, an employer can still defend its employment decision by proving that it did not engage in viewpoint discrimination in its evaluation of the employee’s speech or that it would have fired the employee regardless of the speech.

This solution honors the object of most constitutional adjudication: “When constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.” It recognizes the search for truth as a viable First Amendment value that must be taken into account when deciding which public employee speech receives constitutional protection. It affords presumptive constitutional protection for the variety of speech that has the most personal ramifications though it is spoken on the job but respects the employer’s managerial prerogative and the fact the speech was made

153 Standing Comm. v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995). This is the same standard the Sixth Circuit applies when evaluating whether attorney speech that impugns the integrity of a judge receives constitutional protection. See Berry v. Schmitt, 688 F.3d 290, 302-05 (6th Cir. 2012) (“[A]n attorney’s ‘statements impugning the integrity of a judge may not be punished pursuant to a professional rule of ethical conduct prohibiting an attorney from making false statements about a judge, unless the attorney’s statements are capable of being proved true or false; that statements of opinion are protected by the First Amendment unless they imply a false assertion of fact.’ Even seemingly factual statements ‘are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target.’”)

154 This is known as the “Mt. Healthy defense.” See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (holding that after employee carried his burden of presenting sufficient evidence to create a genuine issue as to whether his speech was a substantial or motivating factor in the employer’s decision to discipline or dismiss, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent’s reemployment even in the absence of the protected conduct).

155 Garcetti v. Ceballos, 547 U.S. 410, 434 (Stevens, J., dissenting).

156 Schauer, supra note 136, at 1786-87 (recognizing that the search for truth, checking governmental abuse, democratic deliberation, self-expression, individual autonomy, dissent, and tolerance are each “historically recognized and judicially mentioned normative theories” that have been cited to explain the scope of the First Amendment’s protection, but professing “the most logical explanation of the actual boundaries of the First Amendment might come less from an underlying theory of the First Amendment and more from the political, sociological, cultural, historical, psychological, and economic milieu in which the First Amendment exists and out of which it has developed.”).
at the employer's behest by not affording the highly protective defamation standard to the speech.  

4. Mechanics of the Solution.—To receive presumptive constitutional protection, the plaintiff's speech must be compelled by some outside force; in other words, it must be made pursuant to an official employment duty (Jackler), in compliance with a third-party investigation (Bowie), or in satisfaction of an enforced external duty (such as the ethical obligation imposed on government attorneys by Brady v. Maryland that undergirded Ceballos's behavior). This solution is designed in light of the current trend among lower courts to read "pursuant to official duties" broadly.

The burden of proof would begin with the employer. If an employer proves there was an official duty to speak, the burden shifts and the employee is given the opportunity to demonstrate that her speech was investigatory or testimonial in nature, a variety of speech this note argues should be off-limits for viewpoint discrimination. If the employee is unable to demonstrate this, then the Garcetti threshold would still apply, and the speech would be treated as within the employer's prerogative to police free of constitutional liability. In anticipation of such a situation, the employer could cite Garcetti and win on a motion for summary judgment for failure to state a claim upon which relief can be granted.

157 See Berry v. Schmitt, 688 F.3d 290, 302 (6th Cir. 2012) (refusing to afford the defamation standard to an attorney who criticized a judicial panel's actions because there were professional duties at stake that meant that what was permissible speech for him is different than a random member of the public). This rule fits in the context of a public employee because just as an attorney can be punished (constitutionally) for more speech because of the existence of ethical rules, more speech of the government employee can be circumscribed because of the fact of government employment. It has long been held that "[a] government entity has broader discretion to restrict speech when it acts in its role as employer." Garcetti, 547 U.S. at 418.

158 See also Herts v. Smith, 345 F.3d 581, 586 (8th Cir. 2003) ("Subpoenaed testimony on a matter of public concern in ongoing litigation . . . can hardly be characterized as defeating the interests of the state . . . . Dr. Herts's speech therefore qualifies as protected speech.").

159 Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution's suppression of requested evidence that was favorable to the accused violates due process where the evidence was material to either guilt or punishment, irrespective of the good or bad faith of the prosecution).

160 In Garcetti, Justice Breyer discussed his reasons for contending that Ceballos should have been afforded Pickering balancing on the facts: "Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available." Garcetti, 547 U.S. at 446-47 (Breyer, J., dissenting).

161 This outcome reflects the notion that only the content of investigatory or testimonial speech is clearly outside of the manager's prerogative to control, and when the speech does not clearly fall within this category, even if it concerns a matter of public concern, the judiciary should not second-guess the public manager's employment decisions regarding that speech. Of note, this note's proposed solution affording presumptive constitutional protection to tes-
If, on the other hand, an employer refutes that an employee had an official duty to speak in the situation, the employee has the chance to rebut the employer's evidence by showing that her speech was, in fact, compelled. The burden would then remain with the employee to prove her speech was investigatory or testimonial in nature in order to receive protection under the First Amendment. In the case where the employer successfully denies the existence of an official duty to speak but the employee is able to prove her speech was investigatory or testimonial, the Connick-Pickering balance would still apply, affording the employee at least the possibility of protection under the First Amendment. This type of balancing is fitting for such a socially important variety of employee speech.

For this exemption to serve its purpose, the Court needs to carefully define the touchstone for deciding whether speech is testimonial or investigatory. This category cannot be defined too literally or the purpose of the exemption would be thwarted. For instance, it would not do to

timonial or investigatory speech wholly disregards whether that speech addresses a matter of public concern. Whether it does or does not (a) is a fact-intensive inquiry that has confused federal courts in the past and is best avoided where possible and (b) (most importantly) does not make it any less true that the government manager will not be considered the speaker for attribution purposes and therefore has no business controlling the content of the message. The fact that the employer or an external duty compels the speech act is proof that it is "important enough" to deserve protection. See discussion infra Part III.B.4 and corresponding footnotes.

162 An employee can rebut the employer's contention in a variety of ways. She could reference a duty in the actual employment contract, a clause in a governing ethics code (if applicable), or an outside law; establish an employment practice of requiring a report under certain circumstances; or point to a concrete email where a superior delegated an ad hoc duty that required the speech. Bauries and Schach proposed a formulation to narrow Garcetti's application and instructed employees on what they could use to disprove that their speech fell under any iteration of the "required by official duties" categorical ban:

In the vast majority of cases ... there will be several employees of the same rank in the same workplace who remained silent on the occasion in question, or under similar circumstances, and were not punished. In other cases, such as those involving upper-management employees with unique job ranks and responsibilities, the inquiry will be more difficult, but such employees will often have increased bargaining power at the initiation of the employment relationship to negotiate the speech required and permitted by their job duties, and these employees will therefore be better able to produce evidence of what was and was not understood to be required by their jobs.

Bauries & Schach, supra note 4, at 371 (internal citations omitted). The inverse of this type of evidence (employees who remained silent who were punished) could be used to prove that certain speech was required.

163 For the mechanics of Connick-Pickering balancing, see discussion supra Part I.A and corresponding footnotes.

164 See Reply Brief of Petitioner-Appellant at 3, Bowie v. Maddox, 642 F.3d 1122 (D.C. Cir.) (No. 08-5111) 2010 WL 4720599 at *3 (citing Ullmann v. United States, 350 U.S. 422 (1956) for the proposition that "every citizen has a duty to provide truthful testimony before a duly constituted tribunal unless he invokes a valid legal exemption in withholding it," and arguing that the EEOC is a duly constituted fact finding tribunal, therefore Bowie's notarized affidavit, prepared in response to EEOC's directive to his employer to compose a position
confer the appellation “testimonial” or “investigatory” only if charges have already been filed; this would exclude speech related to internal investigations. While speech made after charges are filed would trigger the characterization of “testimonial,” the term “investigatory” is intended to capture a broader swath of speech that includes any speech that relates to one of Jackler’s employment duties to file a witness report after an arrestee alleged excessive force, “his refusals to accede to [his supervisors’] demands constituted speech activity that was significantly different from the mere filing of his initial Report.” Id. at 241. In Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008), the Third Circuit afforded constitutional protection to a police officer who was fired after testifying at the criminal trial of a former colleague in a case he had investigated. Conceding that Reilly’s “official responsibilities provided the initial impetus to appear in court,” id. at 231, the court wrote that this impetus to appear is “immaterial to his/her independent obligation as a citizen to testify truthfully,” id., and held that “[w]hen a government testifies truthfully, s/he is not ‘simply performing his or her job duties,’ Garcetti, 547 U.S. at 423; rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence.” Id. The Seventh Circuit afforded First Amendment protection to a police officer that was demoted after giving a deposition in a case in which the Chief of Police was accused of transferring a police officer in violation of the officer’s First Amendment rights. Morales v. Jones, 494 F.3d 590, 595 (7th Cir. 2007). Morales, who was not otherwise involved in the case, was asked to testify about ongoing investigations he was conducting; his testimony proved harmful to the Chief’s litigation position. Id. The court acknowledged that “Morales testified about speech he made pursuant to his official duties,” and found that this fact would not “render[] his deposition unprotected.” Id. at 598. For the Seventh Circuit to conclude that Morales spoke as a citizen in his deposition, the dispositive factor was that “[b]eing deposed in a civil suit ... was not part of what he was employed to do.” Id. For decisions refusing to distinguish testimony from other speech made pursuant to official duties, thereby denying constitutional protection under Garcetti, see Bowie v. Maddox, 642 F.3d 1122 (D.C. Cir. 2011), discussed supra Part II.B; Huppert v. City of Pittsburgh, 574 F.3d 696 (6th Cir. 2009); Barachkov v. 41 B Dist. Court, 311 F. App’x 863, 869-70 (6th Cir. 2009) (citing Weisbarth v. Geauga Park Dist., 499 F.3d 538, 545 (6th Cir. 2007)).

This language is intentionally as broad as some of the lower federal courts’ readings of “pursuant to” have been. See discussion supra Part II.A and corresponding footnotes.

In other words, the speech could be an internal complaint, and it would not have to be sworn testimony. While this broad conception may seem to sweep the garden variety employee grievance back in to a category of presumptive constitutional protection, it is important to remember that this note’s proposed exemption is only afforded to speech the employer itself (or some external regulatory body) considers important enough to compel from the employee.

Branton v. City of Dall., 272 F.3d 730, 740 (5th Cir. 2001); see also Garcetti, 547 U.S. at...
incident reports, affidavits, and internal compliance reports or memoranda. The inquiry should focus on substance over form.

The backstop for this category is the requirement that the employee be compelled to engage in the speech. This requirement responds to the concern that "[g]overnment offices could not function if every employment decision became a constitutional matter" and should assuage "fears of department management by lawsuit." This requirement (a) backhandedly helps to ensure that the exemption protects only speech that the public would like or need to know about, and (b) eliminates the possibility that an employer can "have their cake and eat it too" when it comes to truthful reporting. As to the public interest purpose of this requirement, theoretically, if an employer (or outside agency, controlling law, or ethical obligation) considers the matter or occasion important enough to require that a person report on it, then there is a high probability that the speech concerns something that (deservedly) can lead to liability or censure. Employers should not be able to cover transgressions by retaliating against employees who perform their duties faithfully. Next, the backstop that speech must be compelled ensures that the only employers who will be affected by this exemption are those agencies who have no qualms recruiting civic-minded people and requiring truthful reporting for their own purposes and then retaliate against the truth when it concerns embarrassing, inconvenient, or politically harmful information.

Under my proposed framework, employees could not initiate their own investigations and receive the protection for testimonial or investigatory speech that this note urges. While this caveat may leave unprotected certain speech that deserves protection, in order for the proposed exemption to be administrable, respite for such employees must lie in whistle-blower protection laws. However, this note's proposed exemption would likely result in positive changes that would eventually trickle down to conscientious whistleblowers who do not have an official duty to report.

425 ("[G]overnmental... misconduct is a matter of considerable significance.").

169 Garcetti, 547 U.S. at 419 (internal citations omitted).
170 Id. at 446 (Breyer, J., dissenting).
171 Justice Souter echoed a similar sentiment in his dissent in Garcetti:

The need for balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that 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.

Id. at 430-31 (Souter, J., dissenting).

172 This restriction comports with the recognition that "[s]peech that, although touching on a topic of general importance, primarily concerns an issue that is 'personal in nature and generally related to [the speaker's] own situation,' such as his or her assignments, promotion, or salary, does not address matters of public concern." Jackler v. Byrne, 658 F.3d 225, 236 (2d Cir. 2011) (citing Ezekwo v. NYC Health & Hosps. Corp., 940 F.2d 775, 781 (2d Cir 1991)).
Namely, if the exemption this note proposes were adopted, it is foreseeable that employers will push to define employment duties more carefully and circumspectly. This would mean less employee speech would be restricted from *Pickering* interest balancing at *Garcetti*’s threshold question in the first place; individual employees who speak out on matters of public concern will retain the possibility of constitutional protection, eliminating the need to resort to whistle-blower actions. Additionally, if this note’s exemption were adopted, public officials would have greater incentive to be more receptive to constructive criticism offered by their employees, which would help to prevent costly litigation altogether in some cases.

One last note about the employee’s burden of production: it eliminates the need for the semantic battle between whether an employee was fired for writing a truthful report or fired for refusing to make a false one. As long as an employee had a duty to speak on the occasion in question and can show that the speech was created for testimonial or investigatory purposes, then her speech or refusal to speak can form the basis of a challenge to her employer’s action. While an opposite rule would arguably aid government efficiency by ensuring that all required reports and communications are actually made, sometimes the government agency simply ought to be disrupted because “its officials are corrupt or dangerously incompetent.”

**CONCLUSION**

In sum, when a government employee speaks truthfully under a compulsion to speak, either from an official duty, an external duty, or a combination of the two, and when that speech is testimonial or investigatory in nature, the legal calculus changes. When it comes to an employee’s version of the truth in a situation where she must speak to ensure that she keeps her job and must speak truthfully to avoid liability, no longer does it suffice to cite the government employer’s heightened managerial interest as a reason to categorically deny constitutional protection to the employee’s speech. More is at stake than the employee’s interest in the unimpeded exercise of her right to self-expression. Fifty years ago, the Supreme Court recognized:

> The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of

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174 *Garcetti*, 547 U.S. at 434 (Stevens, J. dissenting) (noting that in the circumstance of government corruption or incompetence, “[i]t is . . . no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasional irresponsible one from turning his job into a bully pulpit.”).
government service rendered by all elective or appointed public officials or employees. 175

When we deny employees constitutional protection for the content of truthful communications made at the behest of a public employer, we reduce the possibility that government misconduct or incompetence will ever be exposed. 176 When the interests at stake are as important as they are in the public employee speech context, courts should both expect and tolerate more nuanced rules of decision. Our highest court would go a long way toward rehabilitating “all of the [First Amendment] values at stake” 177 by exempting compelled investigatory and testimonial speech from Garcetti’s operation at its first opportunity.


176 See Garcetti, 547 U.S. at 439-40 & nn.8-11 (Souter, J., dissenting) (countering the majority’s view that the First Amendment has “little . . . work to do” in the realm of government whistleblower protection due to an “assertedly comprehensive complement of state and national statutes protecting [them] from vindictive bosses,” Souter points out multifarious shortcomings with whistleblower protection laws and notes that “the applicability of a provision of the Constitution has never depended on the vagaries of state or federal law.”).

177 Id. at 434 (Stevens, J., dissenting).
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