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Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle

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*Law enforcement makes headline news for shootings of unarmed civilians, departmental corruption, and abuse of suspects and witnesses. Also well-documented is the code of silence, the thin blue line, which discourages officers from reporting improper and unlawful conduct by fellow officers. Accordingly, accountability is challenging and mistrust of law enforcement abounds. There is much work to be done in changing the culture of police departments and many recommendations for change. One barrier to transparency that has been largely ignored could be eliminated by reversal of the Supreme Court's 2006 decision in *Garcetti v. Ceballos*. Criticism of the decision has been widespread, but its specific consequences for law enforcement officers who cross the thin blue line remain little examined in the legal literature. This article begins to fill that gap.*

Garcetti held that when public employees speak pursuant to their job duties, their speech is unprotected by the First Amendment. This boundary creates a threshold hurdle that employees must meet before they can seek

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protection from retaliation for speech. Garcetti has serious consequences in the hierarchical environment of law enforcement, removing Constitutional protection from retaliation for officers who report unlawful conduct through their chain of command. Reporting through the chain of command is often required by policy, practice and culture. While the Garcetti Court suggested that whistleblower laws fill the protection gap created by the elimination of First Amendment protection for employee speech, this article demonstrates that such laws do not provide adequate protection to officers who report, or want to report, corruption and abuse in their department. To reduce the disincentive to report illegal conduct of fellow officers, the Supreme Court should return to the Pickering balancing test. The Pickering test served well for forty years as a means to both protect public employee speech and give due weight to the government employer's need to direct and control its workforce. Furthermore, the Pickering test eliminates confusion in the lower courts in deciding when an employee is speaking pursuant to job duties and better protects the public interest in government transparency. Protecting internal whistleblowers is essential to prevent and correct government corruption in law enforcement and elsewhere. While reversing Garcetti will not solve all the problems created by the culture of silence in law enforcement, it will eliminate one barrier to reporting misconduct by reinstating constitutional protection for such reports.

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INTRODUCTION

In 2014 Laquan McDonald, an African-American teen, was shot and killed by a police officer in Chicago.¹ One year later a video was released that contradicted the story of the police officers at the scene.² The police officer who fired the shots was indicted for murder.³ After an investigation by a special prosecutor, three other police officers were charged with conspiracy, official misconduct, and obstruction of justice based on their reports of the incident.⁴ The special prosecutor stated: “The indictment makes clear that these defendants did more than merely obey an unofficial ‘code of silence.’ Rather it alleges that they lied about what occurred to prevent independent criminal investigators from learning the truth.”⁵

Laquan McDonald, of course, is not the only African-American killed by police in recent years. More recently, police in Sacramento shot and killed Stephon Clark in his grandparents’ back yard.⁶ But the presence of video has enabled the public to learn much more about these incidents, documenting a problem that the African-American community has lamented for years. Why has it taken video? Many of these shootings have occurred in the presence of other officers. What prevents other officers from accurately reporting on what has occurred? One factor might be the well-documented code of silence among police officers alluded to by the prosecutor in the McDonald case.⁷

¹ Nausheen Husain, *Data: Laquan McDonald Timeline: The Shooting, the Video and the Fallout*, CHI. TRIB. (Oct. 20, 2017), <http://www.chicagotribune.com/news/laquanmcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html>.

² *Id.*

³ *Id.*

⁴ *Id.* In addition, the shooting prompted a federal investigation and the removal of the superintendent of police. *Id.*

⁵ Merrit Kennedy, 3 *Chicago Police Officers Accused of Cover-Up in Killing of Laquan McDonald*, NPR (June 27, 2017), <https://www.npr.org/sections/thetwo-way/2017/06/27/534596557/3-chicago-police-officers-accused-of-cover-up-in-killing-of-laquan-mcdonald>.

⁶ Anita Chabria et al., *Updated: ‘Show Me Your Hands.’ Police Video Shows Death of Stephon Clark in a Hail of Gunfire*, SAC. BEE (March 21, 2018), <http://www.sacbee.com/latest-news/article206212019.html>.

⁷ The problem of the police officer who wants to do the right thing when faced with corruption and violence by other officers has been the subject of popular books and films. See *15 Great Movies About Police Corruption that Are Worth Watching*, TASTE OF CINEMA, <http://www.tasteofcinema.com/2015/15-great-movies-about-police-corruption-that-are-worth-watching/> (describing *inter alia* *Prince in the City* from 1981 and *Serpico* from 1973, both based on books) (last visited Feb. 15, 2018).

The police union in Chicago supported the officers who made false statements, although it is unclear what information the union had about the incident at the time.⁸ A significant part of the union's role, however, is protecting officers from unjust discipline, and union-negotiated protections may limit efforts to hold officers accountable for alleged misconduct.⁹ In fact, protections in the union contract may even encourage the code of silence.¹⁰ In light of these factors, unionized officers, accurately or not, may perceive pressure to support and not undermine accused fellow officers.

Another factor is the prospect of reprisals following reports of official misconduct. Police officers who report malfeasance of other officers have limited constitutional protection. In 2006, the Supreme Court decided *Garcetti v. Ceballos*, and therein held that public employees who speak pursuant to their job duties have no First Amendment protection from retaliation for that speech.¹¹ Lower courts have found that application of *Garcetti* "lead[s] to a vexing result in the context of police abuse."¹² While the Supreme Court suggested that whistleblower laws provided adequate substitute protection, whistleblower statutes do not in fact provide comprehensive protection for law enforcement officers reporting misconduct of other officers.¹³ Accordingly, this article argues that the Supreme Court should return to pre-*Garcetti* precedent. Doing so would protect government employees' right to free speech under a fact-specific test that balances the employee's speech rights against the employer's interests in effective and efficient government.¹⁴ Having a

⁸ See Megan Crepeau, *Prosecutors Can Use what Officer Van Dyke Told Union Rep at Laquan McDonald Shooting*, CHI. TRIB. (Aug. 11, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-laquan-mcdonald-jason-van-dyke-court-met-20170811-story.html>. In similar cases, the union has also supported accused officers. See Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 747-48 (2017).

⁹ Fisk & Richardson, *supra* note 8, at 736-44. As Fisk and Richardson document, however, unionization is a response to "managerial neglect and retaliation" as well as lack of voice and concerns about arbitrary discipline. *Id.* at 716, 723-26, 736-37. The authors show that unions can be part of the solution to the problem of police misconduct and have advanced police reform in some departments. *Id.* at 759-76.

¹⁰ U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 14 (2017) <https://www.justice.gov/opa/file/925846/download> [hereinafter CHICAGO REPORT].

¹¹ *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006).

¹² *Dahlia v. Rodriguez*, 735 F.3d 1060, 1082 (9th Cir. 2013) (Pregerson, J., specially concurring).

¹³ See *infra* notes 152-183 and accompanying text.

¹⁴ See *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (establishing the balancing test now known as *Pickering* balancing).

balancing test for free speech offers greater protection for employees reporting police misconduct, thus reducing the discouraging effect of the law. In addition, it furthers the public's interest in holding law enforcement officers and other government employees accountable for misconduct. While a return to *Pickering* balancing is certainly not a complete solution to the problem of police officers who fail to speak out about the malfeasance of other officers, it removes at least one barrier to such speech, opening the door to other approaches to address the problem.

Part I of this paper examines the roots of the growing furor about the problem of police misconduct and the need for information to address the problem. Using examples and analysis, this article suggests that the most reliable means to get this sort of information is by way of internal reporting from within law enforcement itself. This article then examines the current disincentives for such reporting. Specifically, Parts II–V explore why this sort of disclosure is highly unlikely in the current landscape. Parts II and III summarize the evolution of the Supreme Court's doctrinal framework governing protections for public employee speech under the First Amendment, leading to the *Garcetti* case and the problem it poses. Part IV looks at developments in case law after *Garcetti*, showing that the case reduced the likelihood that officers reporting misconduct would be protected from retaliation. Part V analyzes other protections for public employees to determine whether they provide an adequate substitute for First Amendment protection. This article concludes that it does not. Finally, Part VI suggests a return to the *Pickering* test as a remedy and a means to incentivize reporting on matters of great public importance.

I. LAW ENFORCEMENT AND THE NEED FOR DISCLOSURE

Laquan McDonald is but one of many unarmed African-American men shot by police. In August 2014, Michael Brown was shot and killed in the predominantly African-American suburb of Ferguson, Missouri. Accounts of the events leading up to the shooting differed, but the evidence tended to show that Brown was unarmed when he was shot by a white police officer.¹⁵ The shooting kicked off a series of protests in the town of Ferguson, some of which became violent.¹⁶

¹⁵ See Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>.

¹⁶ Hasani Gittens, *Shooting of Michael Brown Sparks Riots in Ferguson, Missouri*, NBC NEWS (Aug. 11, 2014), <https://www.nbcnews.com/storyline/michael-brown->

Over a period of several months during summer and fall, Ferguson was the focus of national attention, the frontline for critics of police brutality and racial inequality, and the birthplace of the “Black Lives Matter” movement.¹⁷

Allegations of police brutality and bias toward minority groups are nothing new. The pervasive notion that law enforcement treats minorities differently to their detriment traces its roots back through the Rodney King beating in Los Angeles in 1991, resulting in riots after the acquittal of the officers,¹⁸ to the Civil Rights Movement in the 1960s and beyond. But for many, the Michael Brown shooting precipitated a growing appreciation for the plight of minority groups in their interaction with law enforcement. Persons all across the racial and ethnic spectrum began to take notice and call for reform. Their outcry was bolstered by studies suggesting that persons of color were far more likely to be shot and killed by police officers than whites.¹⁹

At the state and local level, empirical evidence abounds supporting the disparate treatment of racial minorities at the hands of the police. For example, from January 1995 to December 1997, the Maryland State Police conducted a voluntary review of traffic stops along the Interstate 95 corridor.²⁰ The study revealed that “70 percent of drivers stopped and searched by the police were black, a figure drastically disproportionate to the estimated 17.5 percent of drivers — and speeders — who were black.”²¹ Traffic stop studies in New Jersey, Louisiana, and Florida presented similar results.²² Elsewhere, studies conducted by the New York Police Department (“NYPD”) following outcry over “stop and frisk” programs revealed that almost eighty-four

shooting/shooting-michael-brown-sparks-riots-ferguson-missouri-n177481.

¹⁷ Elliott C. McLaughlin, *What We Know About Michael Brown’s Shooting*, CNN (Aug. 15, 2014), <http://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know/index.html>.

¹⁸ Anjali Sanky & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at The Rodney King Riots*, NPR (April 25, 2017), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

¹⁹ See, e.g., *US Police Shootings: How Many Die Each Year?*, BBC MAGAZINE (July 18, 2016), <http://www.bbc.com/news/magazine-36826297> (citing a Washington Post study of news reports that found blacks 2.5 times more likely to be shot by police than whites); POLICE VIOLENCE REPORTS, <http://mappingpoliceviolence.org> (noting that statistics from 2015 and 2016 suggest blacks are three times more likely to be killed by police than whites) (last visited Feb. 15, 2018).

²⁰ Leadership Conference on Civil Rights, *Justice on Trial, Chapter One: Race and the Police*, CIVILRIGHTS.ORG, <https://web.archive.org/web/20090614190457/http://www.civilrights.org/publications/justice-on-trial/race.html> (last visited Mar. 7, 2018).

²¹ *Id.*

²² *Id.*

percent of the 175,000 “stops” effectuated by NYPD officers between January 1998 and March 1999 were of blacks and Hispanics.²³ This was despite the fact that those groups constituted less than half of the city’s population.²⁴ In the wake of the Michael Brown shooting, statistical analysis of police activity in Ferguson, Missouri revealed that blacks accounted for eighty-five percent of traffic stops, ninety percent of tickets, and ninety-three percent of arrests.²⁵ This is despite the fact that Ferguson is about one-third white.

The reality of widespread racial inequality in policing has been confirmed by data collected by the Department of Justice (“DOJ”). This comes from DOJ reviews of urban police forces with reputations for cross-racial conflict. A 2016 DOJ audit of police practices in Baltimore revealed a pervasive pattern of unconstitutional stops, searches, arrests, and excessive force effectuated against minorities. This was coupled with retaliatory practices against those civilians and police officers that spoke out against misconduct.²⁶ Similarly, a DOJ investigation into police practices in Chicago — often viewed as the frontline in the fight for racial equality in policing — disclosed a pattern and practice of excessive and unreasonable force against minorities.²⁷

This reality has resulted in a national call for oversight of law enforcement. In response, police forces at the state and federal level have taken various actions. These include new training programs, civilian review boards, and police body camera policies, to name a few.²⁸ In spite of these practices, concern about lack of oversight for police officers remains. This concern is exacerbated by the perception that police officers are protected by a culture that discourages internal

²³ *Id.*

²⁴ *Id.*

²⁵ See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (data taken from 2013 to 2015).

²⁶ U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (2016), http://civilrights.baltimorecity.gov/sites/default/files/20160810_DOJ%20BPD%20Report-FINAL.pdf [hereinafter BALTIMORE REPORT].

²⁷ CHICAGO REPORT, *supra* note 10, at 15.

²⁸ *Id.* at 6-7; Jasmine Huda, *St. Louis’ New Civilian Oversight Board Begins to Accept Complaints from Citizens*, FOX2 NOW, (May 10, 2016) <http://fox2now.com/2016/05/10/st-louis-new-civilian-oversight-board-begins-to-accept-complaints-from-citizens/> (describing new oversight board created in St. Louis in the wake of events in Ferguson); see also St. Louis, Mo., *Civilian Oversight Board*, <https://www.stlouis-mo.gov/government/departments/public-safety/civilian-oversight-board/index.cfm> (describing the Civilian Oversight Board and its responsibilities).

reporting and takes steps to insulate itself from legal recriminations. In colloquial parlance, this is the “Thin Blue Line.” That perception has been borne out by empirical data, public opinion, and popular culture. Some of the more shocking anecdotal evidence of the phenomenon comes from former New Jersey State Trooper Justin Hopson.²⁹ As a rookie officer, Hopson witnessed an unlawful arrest and falsification of charges perpetrated by his training officer.³⁰ When he refused to support the officer’s fabricated version of events, he became the target of a rogue group of troopers known as the Lords of Discipline (“LOD”).³¹ This organization had hazed and harassed New Jersey officers for years until Hopson’s defiance sparked a massive internal investigation by the state police.³² The culture of retaliation that Hopson’s experience suggests has been documented by numerous studies and surveys of police force reporting across the country.³³ In particular, the Christopher Commission’s inquiry into Los Angeles police practices suggested that, “[p]erhaps the greatest single barrier to the effective investigation and adjudication of complaints is the officers’ unwritten ‘code of silence’ . . . [the principle that] an officer does not provide adverse information against a fellow officer.”³⁴ Similar conclusions were reached in studies of police departments from New York to Louisiana.³⁵

²⁹ JUSTIN HOPSON, *BREAKING THE BLUE WALL: ONE MAN’S WAR AGAINST POLICE CORRUPTION* (2011).

³⁰ *Id.* at 7-15.

³¹ *Id.* at 20-29.

³² *Id.* at 33-45, 74-78, 108, 128-33, 139; see also Thad Moore, *Taking on the Blue Wall*, THE POST AND COURIER (May 26, 2012), https://www.postandcourier.com/features/faith_and_values/taking-on-the-blue-wall/article_cdc1058d-1b45-5f89-b166-f85cb626bc66.html (“The experience led to a lawsuit and spurred the largest internal investigation in the state police’s history.”).

³³ E.g., MILTON MOLLEN, THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT 53-58 (1994), <https://www.scribd.com/document/248581606/1994-07-07-Mollen-Commission-NYPD-Report> (finding evidence of a “code of silence” within the NYPD); WARREN CHRISTOPHER, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 31 (1991) [hereinafter CHRISTOPHER COMMISSION], https://web.archive.org/web/20110722124708/http://www.parc.info/client_files/Special%20Reports/1%20-%20Chistopher%20Commision.pdf (finding a pattern of excessive force as well as a fundamentally flawed reporting system within the LAPD).

³⁴ CHRISTOPHER COMMISSION, *supra* note 33, at 168.

³⁵ See, e.g., *Code of Silence*, HUMAN RIGHTS WATCH n.131, n.133, n.134, <https://www.hrw.org/legacy/reports98/police/uspo27.htm> (citing, in order, Jeff Gammage, *Code of Silence: A Barrier to Truth in Investigations of Police*, PHILADELPHIA INQUIRER, May 5, 1996; Susan Finch, *NOPD Told to Put Stop to Brutality*, TIMES-

The culture of silence is not limited to rank and file police officers. Both police unions and departmental management are complicit. A report from the Police Accountability Task Force in Chicago, where Laquan McDonald was shot, concluded that “[t]he collective bargaining agreements between the police unions and the City have essentially turned the code of silence into official policy.”³⁶ According to the report, the agreements discourage reporting, make it easy for officers to lie, and require destruction of evidence of misconduct after several years.³⁷ Similarly, a DOJ report on the Baltimore Police Department found that the department’s inconsistent responses to complaints resulted in an unwillingness on the part of officers to report, particularly in light of the risk of retaliation.³⁸

Regardless of the enterprise, the best way to ensure oversight and organizational compliance is often through self-reporting.³⁹ “Employees are particularly effective at promoting compliance because

PICAYUNE, May 20, 1993; and Dick Lehr, *Department Unwilling to Face Brutal Facts*, BOSTON GLOBE, Dec. 8, 1997).

³⁶ POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 14 (2006), <https://chicagopatf.org/wp-content/uploads/2016/04/PATF-Complete-Recommendations-.pdf> [hereinafter PATF REPORT]; see also Stephen Rushin, *Response to When Police Kill*, 22 BERK. J. CRIM. L. (forthcoming 2018) at 3-7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3154036&download=yes (detailing research regarding the impact of union contracts, civil service rules, and law enforcement officers bills of rights on the ability of police departments to investigate and hold officers accountable for police violence); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1240-43 (2017) (arguing based on study of 178 police collective bargaining contracts that contractually required disciplinary procedures limit police accountability).

³⁷ PATF REPORT, *supra* note 36.

³⁸ BALTIMORE REPORT, *supra* note 26, at 128 (“BPD does not consistently classify, investigate, adjudicate, and document complaints of misconduct according to its own policies and accepted law enforcement standards.”).

³⁹ See *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (“[G]overnment employees are often in the best position to know what ails the agencies for which they work”); see also Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 375 (2005) (noting that in passing Sarbanes-Oxley, Congress recognized “the enormous regulatory potential” in encouraging and protecting whistleblowers); Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 L. & POL’Y 363, 363-64 (1997) (noting the potential of individual and industry self-regulation to effect compliance with normative social values); *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014) (recognizing that prosecutions for public corruption often depend on the testimony of fellow government employees); *San Diego v. Roe*, 543 U.S. 77, 80-82 (2004) (recognizing the public interest in receiving information from public employees); *Garcetti v. Ceballos*, 547 U.S. 410, 428 (2006) (Souter, J., dissenting) (arguing that the public’s interest in receiving such information is no less when the employee’s speech is pursuant to job duties).

of their placement and ability to detect unlawful behavior.”⁴⁰ Courts and legislatures have long recognized this fact, consistently reaffirming the importance of statutes protecting whistleblowers from retaliatory employment action.⁴¹ These sorts of protections often intertwine, overlap, and supplement protections for public employees supplied by the First Amendment. However, over the course of the last two decades, First Amendment protection for public employees has been eroded by Supreme Court precedent, leaving a void. This void chills self-reporting, strengthening the thin blue line. The modern public interest in oversight of police practices merits a re-examination of the current approach to protection for government employee speech under Supreme Court jurisprudence.

II. THE PICKERING TEST

For nearly forty years, the Constitutional free speech rights guaranteed to public employees by the First Amendment were delineated by a balancing test articulated in *Pickering v. Board of Education*.⁴² In 1964, Marvin L. Pickering, an Illinois teacher, wrote a letter to the editor of his local newspaper.⁴³ Like many of his fellow citizens, Pickering was concerned with the machinations of the District 205 Board of Education.⁴⁴ In the years leading up to Pickering’s letter, the Board had attempted to pass several pieces of local legislation — namely bond proposals and tax hikes aimed at raising funds for two new schools in the district.⁴⁵ The letter criticized the Board for its allocation of resources between academic and athletic programs, and alleged that the superintendent of schools was suppressing dissent from teachers with respect to the funding issue.⁴⁶

In response to his letter, the Board dismissed Pickering from his position.⁴⁷ Pickering challenged the dismissal as a violation of the First and Fourteenth Amendments.⁴⁸ In 1968, his case came before the United States Supreme Court.⁴⁹ It would go on to become a watershed

⁴⁰ Nancy M. Modesitt, *The Garcetti Virus*, 80 U. CIN. L. REV. 137, 155 (2011).

⁴¹ *Id.* at 154-56.

⁴² *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968).

⁴³ *Id.* at 564.

⁴⁴ *Id.* at 566.

⁴⁵ *Id.* at 565-66.

⁴⁶ *Id.* at 566.

⁴⁷ *Id.*

⁴⁸ *Id.* at 565.

⁴⁹ *Id.*

case in Constitutional employment law, defining the First Amendment rights of public employees for decades to come.

The *Pickering* Court, in an opinion authored by Justice Marshall, held that Pickering's letter to the editor was speech protected by the First Amendment and that the Board's subsequent dismissal was unlawful.⁵⁰ The touchstone of the analysis, for Justice Marshall, was the idea of "public concern."⁵¹ Drawing on a rich history of First Amendment jurisprudence, the *Pickering* Court held that, "statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."⁵² Ultimately, *Pickering* came to be known for its efforts to balance the rights of the public employee, who is also a citizen, against the rights of the public employer.⁵³ The so-called "*Pickering* balancing test" spawned out of these efforts.

Under this balancing test, a court first examines whether the challenged speech entails a matter of public concern.⁵⁴ This is based on an inquiry into its content, form and context.⁵⁵ Then, if it is satisfied that a matter of public concern is implicated, a court proceeds with a rigorous, fact-specific balancing of employer and employee interests.⁵⁶ Furthermore, under the balancing test, the court will assess the context in which the dispute arose.⁵⁷

For several decades, this balancing approach controlled First Amendment speech claims brought against public employers. The *Pickering* test remained largely unchanged until 2006, when Richard Ceballos arrived before the Supreme Court, alleging that his employer, the Los Angeles County District Attorney's Office, had unlawfully

⁵⁰ *Id.* at 574-75.

⁵¹ *Id.*

⁵² *Id.* at 574 (citing *Garrison v. State of Louisiana*, 379 U.S. 64 (1964) and *Wood v. Georgia*, 370 U.S. 375 (1962)).

⁵³ *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of [a public 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."); *see also Connick v. Myers*, 461 U.S. 138, 158 (1983) (applying the *Pickering* test to discharge of the Assistant District Attorney).

⁵⁴ *Id.*

⁵⁵ *Connick*, 461 U.S. at 147-48 ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

⁵⁶ *Id.* at 150-54 ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public.").

⁵⁷ *Id.* at 153.

disciplined him for exercising his First Amendment rights.⁵⁸ In addressing the merits of his case, the Supreme Court sounded a retreat from the *Pickering* balancing test and, in doing so, erected a high barrier between public employees and their First Amendment retaliation protections.

III. *GARCETTI V. CEBALLOS*

In early 2000, Richard Ceballos, an Assistant District Attorney in Los Angeles County, was asked by a defense attorney to review the affidavits supporting a crucial search warrant in a pending criminal case.⁵⁹ The defense attorney was concerned about potential misrepresentations or inaccuracies and appealed to Ceballos in his role as calendar deputy to investigate further.⁶⁰ Ceballos examined the affidavit itself, visited the location it described, and spoke with the warrant affiant on several occasions.⁶¹ He determined that, in his opinion, the affidavit contained serious misrepresentations and recommended that the case be dismissed.⁶² Ceballos memorialized all of this information in memoranda to his supervisors in the District Attorney's Office.⁶³ In response to Ceballos's concerns, his supervisors arranged a meeting with representatives from the sheriff's department to discuss the affidavit.⁶⁴ According to Ceballos, discussions at the meeting were intense and a lieutenant criticized Ceballos for the manner in which he dealt with the case.⁶⁵ Despite the issues Ceballos raised, his superiors pursued the prosecution.⁶⁶ Ceballos was called as a witness by the defense and testified about his observations and opinions regarding the search warrant.⁶⁷ Following this ordeal, Ceballos alleged that he suffered several adverse employment consequences — reassignment, transfer to another courthouse, and denial of a promotion as a result of engaging in protected First Amendment speech.⁶⁸

⁵⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 410 (2006).

⁵⁹ *Id.* at 413.

⁶⁰ *Id.* at 413-14.

⁶¹ *Id.* at 414.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 414-15.

⁶⁸ *Id.* at 415.

The Supreme Court, in a 5–4 decision authored by Justice Kennedy, held that Ceballos’ reports to his superiors did not constitute speech protected by the First Amendment.⁶⁹ In so doing, the Court reconceived the strictures of the *Pickering* balancing test. Specifically, the Court established a threshold question for public employees challenging adverse employment action on First Amendment grounds.⁷⁰ Under *Garcetti*, a court’s first task is to determine whether the employee’s challenged conduct occurred pursuant to official job duties.⁷¹ If the speech is pursuant to job responsibilities, “the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁷² This principle serves as a categorical bar to relief under the First Amendment and precludes application of the *Pickering* balancing test.

IV. SUBSEQUENT DEVELOPMENTS

A. Criticisms of *Garcetti*

Almost since its inception, scholars and researchers have recognized the inconsistencies in the *Garcetti* holding and the difficulties that it presents in terms of application.⁷³ First, and foremost, among these

⁶⁹ *Id.* at 424-26.

⁷⁰ *Id.* at 426; *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014) (“In *Garcetti*, we described a two-step inquiry into whether a public employee’s speech is entitled to protection: ‘The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech.’” (quoting *Garcetti*, 547 U.S. at 418)); *Huppert v. City of Pittsburg*, 574 F.3d 696, 701-03 (9th Cir. 2009) (describing the findings of various circuits that whether the employee spoke as an employee is a threshold question in First Amendment cases after *Garcetti*).

⁷¹ *Garcetti*, 547 U.S. at 421 (“The First Amendment protects some expressions related to the speaker’s job . . . 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.”).

⁷² *Id.*

⁷³ See, e.g., Renee Newman Knake, *Lawyer Speech in the Regulatory State*, 84 *FORDHAM L. REV.* 2099, 2120 (2016) (criticizing restrictions on the speech of government lawyers); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of *Garcetti v. Ceballos* on Public School Educators*, 17 *B.U. PUB. INT. L.J.* 209, 226-29 (2008) (criticizing application of *Garcetti* to school employees); John E. Rumel, *Public Employee Speech: Answering the Unanswered and Related Questions in *Lane v. Franks**, 34 *HOFSTRA LAB. & EMP. L.J.* 243, 246 (2017) (arguing

criticisms is the allegation that *Garcetti* creates an “artificial dichotomy” between a public employee in the role of citizen and in the role of employee.⁷⁴ In the abstract, this distinction is both “false and unprecedented,”⁷⁵ relying as it does on the dubious principle that only speech “as a citizen” is protected by the First Amendment. This principle does not appear anywhere in Supreme Court jurisprudence.⁷⁶ Nor does it comport with the Court’s recognition of “corporate speech” as a category of conduct protected by the First Amendment.⁷⁷ At the same time, this dichotomy results in the logical inconsistency recognized by Justice Stevens in his dissent in *Garcetti*,

Garcetti should be overruled); Paul M. Secunda, *Constitutional Employment Law: Zimmer’s Intuition on the Future of Employee Free Speech Law*, 20 EMP. RTS. & EMP. POL’Y J. 393, 415 (2016) (discussing “reason-specific protections” and the limiting of free-speech rights by *Garcetti*); Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 143-44 (2009) [hereinafter *Garcetti’s Impact*] (criticizing application to the speech of federal employees); Tyler Wiese, *Seeing Through the Smoke: “Official Duties” in the Wake of Garcetti v. Ceballos*, ABA. J. LAB. & EMP. L. 509, 529 (2010) (analyzing the chain-of-command analysis versus the assigned-responsibilities analysis, and finding the latter more consistent with *Garcetti*); Jason Zenor, *This Is Just Not Working for Us: Why after Ten Years on the Job - It Is Time to Fire Garcetti*, 19 RICH. J.L. & PUB. INT. 101, 123 (2016) (analyzing *Garcetti* and arguing “[t]he [Supreme] Court should have refocused the emphasis of the employee speech doctrine back toward whether or not the speech was a matter of public concern”). Some scholars, however, are less troubled by the case. See, e.g., Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 659-60 (2012) (arguing public employee speech has “low First Amendment value” due to a general governmental inability to make “context-sensitive judgments about the quality of speech or its social appropriateness”).

⁷⁴ See, e.g., Ramona L. Paetzold, *When Are Public Employees Not Really Public Employees? In the Aftermath of Garcetti v. Ceballos*, 7 FIRST AMEND. L. REV. 92, 96 (2008) (noting that once an individual is employed it is difficult to immediately separate their speech into two distinct categories of “citizen” and “employee”); *Garcetti’s Impact*, *supra* note 73, at 123 (rejecting the “dichotomous, overly-formalistic view of a public employee as either being a citizen or worker, but never simultaneously both”).

⁷⁵ Erwin Chemerinsky, *The Kennedy Court: October Term 2005*, 9 GREEN BAG 2D 335, 340 (2006).

⁷⁶ See *id.*

⁷⁷ See *id.* (“The fact that the corporations are not citizens did not matter because it is the right of listeners, according to the Supreme Court, that is paramount.”); see also *Citizen’s United v. Federal Election Comm’n*, 558 U.S. 310, 365 (2010) (“The Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

namely that “it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description.”⁷⁸

In practice, the dichotomy has produced inconsistent results. Several subsequent cases illustrate the problem. In *Morales v. Jones*, the Seventh Circuit held that a police officer’s conversations with his superiors concerning an arrest were part of the officer’s job duties and thus outside the purview of First Amendment protections.⁷⁹ At the same time, the court concluded that statements stemming from the same arrest, when made at a deposition for the purposes of a section 1983 action⁸⁰ were not part of the employee’s job duties and merited protection.⁸¹ In *Jackler v. Byrne*, the Second Circuit concluded that a police officer’s failure to make a false statement at the behest of his superiors did not amount to performance of job duties.⁸² And yet, in *Huppert v. City of Pittsburgh*, the Ninth Circuit held that a police officer’s grand jury testimony concerning corruption within the department⁸³ was employee speech and could not serve as the basis of a section 1983 claim for retaliation.⁸⁴

With respect to testimony in court, in *Lane v. Franks*, the Supreme Court found that employee Lane’s testimony in a former employee’s trial on corruption charges was protected by the First Amendment.⁸⁵ The Court emphasized, however, that the job of a director of a community college program did not involve testifying in court.⁸⁶ In Justice Thomas’ concurrence, he highlighted the narrow scope of the majority opinion. Specifically, he noted that the Court did not answer the question of how testifying affects public employees, such as police officers, whose job duties indeed include testifying in court.⁸⁷ In

⁷⁸ *Garcetti*, 547 U.S. at 427.

⁷⁹ *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007).

⁸⁰ Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (1996).

⁸¹ See *Monroe v. Pape*, 365 U.S. 167, 185 (1961) (overruled in part on other grounds by *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978)) (showing 42 U.S.C. § 1983 expressly creates a private right of action to enforce constitutional claims arising “under color of state law”).

⁸² *Jackler v. Byrne*, 658 F.3d 225, 234, 244-45 (2d Cir. 2011).

⁸³ It is worth noting that both statutory law and department policy compelled the officer’s truthful testimony. *Huppert v. City of Pittsburgh*, 574 F.3d 696, 707-09 (9th Cir. 2009).

⁸⁴ *Id.* (overruled by *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013)). Although *Huppert* was later overruled, that fact does not sufficiently mitigate the problems created by *Garcetti*. *Id.*; see also *infra* notes 126-151, 193-218 and accompanying text.

⁸⁵ *Lane v. Franks*, 134 S. Ct. 2369, 2379-80 (2014).

⁸⁶ *Id.* at 2378-79.

⁸⁷ *Id.* at 2384 (Thomas, J., concurring).

finding the speech protected, the Court did emphasize the significance of the fact that Lane's testimony was about public corruption, stating:

[i]t would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials — speech by public employees regarding information learned through their employment — may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.⁸⁸

It might be argued that this language should bring comfort to police officers considering speaking out about public corruption. Several factors, however, lead to the opposite conclusion. First, an officer must bring corruption to the attention of someone in authority before it can be prosecuted. Depending on the circumstances, such speech may be unprotected yet bring retaliatory action long prior to any possibly protected testimony. Second, as noted above, the concurrence suggested that police officers might have less protection for testimony than other employees.⁸⁹ And finally, Lane actually lost his claim challenging his termination by Franks because of his testimony. The Court concluded that the law regarding speech protection for testimony was unclear at the time of Lane's termination and therefore, Franks had qualified immunity.⁹⁰

The only practical differences between the holdings in these post-*Garcetti* cases are the audience to whom the putatively protected speech was delivered, and the job descriptions and duties of the employees. In this respect, *Garcetti* produces results divorced from one of the key concerns highlighted by *Pickering* and its progeny: the public's legitimate interest in being apprised of misconduct or areas of contention within their representative government. In fact, the *Garcetti* Court itself explicitly recognized this interest, conceding "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion."⁹¹ This is the entire purpose of the "public concern"

⁸⁸ *Id.* at 2380.

⁸⁹ Perhaps an officer might be able to claim that testimony about fellow officers' unlawful conduct is not part of her job even though she regularly testifies in court for other purposes. This seems a slim reed on which to risk retaliation and job loss.

⁹⁰ *Lane*, 134 S. Ct. at 2381-83.

⁹¹ *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

inquiry that characterizes the *Pickering* test.⁹² And yet, *Garcetti* subverts this interest and subjects the issue of public concern to a restrictive and wholly arbitrary dichotomy that produces inconsistent and illogical results.

Along similar lines, *Garcetti* has faced criticism for failing to provide guidance to courts on how to properly differentiate between employee speech and citizen speech in the context of public employment.⁹³ The *Garcetti* Court gave lower courts no workable schema for answering this question. It suggested that official job duties and descriptions, while possibly illustrative, did not end the inquiry, and further cautioned that courts should be hesitant to construe a public employee's job duties too narrowly.⁹⁴ This lack of guidance has produced myriad approaches in the lower courts.

Here, it will also be helpful to look at a few practical examples. The Second Circuit's jurisprudence on the issue focuses on the identification of "civilian analogues."⁹⁵ The inquiry hinges in large part on whether the employee's challenged conduct can properly be analogized to some form of citizen speech. Thus, in *Weintraub*, a teacher's complaint about classroom disorder, which took the form of an employee grievance with the union, was not protected because there was no civilian analogue to a union complaint.⁹⁶ Conversely, in *Jackler*, a police officer's refusal to give false evidence had a civilian analogue because a citizen has "the right to reject governmental efforts to require him to make statements he believes are false."⁹⁷ Whether or not one agrees with the logic of these decisions, it is quite evident how far afield the analysis has gone from the limited instructions provided in *Garcetti*.

Other circuits put dispositive weight on the chain of command, consistently holding that public employees who report concerns to their supervisors are not insulated from retaliatory employment action.⁹⁸ In *Davis v. McKinney*, the Fifth Circuit addressed

⁹² *Id.*

⁹³ Paetzold, *supra* note 74, at 97.

⁹⁴ *Garcetti*, 547 U.S. at 424-25.

⁹⁵ See, e.g., *Jackler v. Byrne*, 658 F.3d 225, 229, 241 (2011) (finding speech protected by the First Amendment because it had a "civilian analogue"); *Weintraub v. Board of Educ. of City School Dist. of City of New York*, 593 F.3d 196, 198 (2d. Cir. 2010) (holding that petitioner had no First Amendment protections as his "filing of [a] grievance was in furtherance of one of his core duties as a public school teacher, maintaining class discipline, and had no relevant analogue to citizen speech").

⁹⁶ *Weintraub*, 593 F.3d at 198.

⁹⁷ *Jackler*, 658 F.3d at 241.

⁹⁸ See *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008); see also *Forraker v.*

communications from an internal auditor regarding the financial solvency of the University of Texas.⁹⁹ The court concluded that those communications that went up the chain of the command did not merit protection under the *Garcetti* framework.¹⁰⁰ In *Dahlia v. Rodriguez*, the Ninth Circuit addressed the case of a police officer who reported internal misconduct to his superiors and later to an Internal Affairs Department.¹⁰¹ The court noted that the chain-of-command analysis employed by the Fifth Circuit was enlightening but not dispositive.¹⁰² The court went on to highlight three guiding principles by which it would decide this case and others going forward: the chain of command, the content of the employee communication, and the orders or directions of the employer (including whether or not the employee complied).¹⁰³ The focus on the chain of command may be particularly problematic for police officers, who work in a quasi-military hierarchical organization.¹⁰⁴ Workplace and social norms encourage internal reporting, and the culture in a military-like organization is even more likely to encourage, if not require, reporting in the chain of command.¹⁰⁵

Chaffinch, 501 F.3d 231, 247 (3d Cir. 2007) (holding that troopers' complaints to a State Auditor were adequately within the chain of command and thus not protected by the First Amendment); Freitag v. Ayers, 468 F.3d 528, 545 (9th Cir. 2006) (holding that an officer's communications with a state senator and inspector general regarding sexual harassment did not involve the chain of command, as her job duties did not involve contacting either, and thus constituted First Amendment protected speech); Battle v. Bd. of Regents, 468 F.3d 755, 761 (11th Cir. 2006) (holding an employee's act of notifying her supervising officials about signs of fraud and inaccuracies was not protected free speech as it was pursuant to official responsibilities).

⁹⁹ *Davis*, 518 F.3d at 307-09.

¹⁰⁰ *Id.* at 315-16. Consider the consequences of applying this sort of approach to a case like *Jackler*. In *Jackler*, a police officer made a report of misconduct to his superiors but was disciplined for failing to alter the report to provide false information. *Jackler*, 658 F.3d at 241. Would the *Davis v. McKinney* test bar recovery? The report was made pursuant to Jackler's job duties, as a departmental directive required officers present during use of force to file a report. Thus, under the standard chain-of-command analysis the report is not protected. One could also argue that the order to change the report also renders the speech pursuant to job duties. This case could be analogized to *Garcetti* where the calendar deputy wrote a report about a search warrant's reliability with which his supervisors disagreed.

¹⁰¹ *Dahlia v. Rodriguez*, 735 F.3d 1060, 1074-75.

¹⁰² *Id.*

¹⁰³ *Id.* at 1074-76.

¹⁰⁴ See Fisk & Richardson, *supra* note 8, at 722 ("Police departments are hierarchical, with a chain of command as in the military and a sharp division between the leadership and the rank-and-file.").

¹⁰⁵ See Modesitt, *supra* note 40, at 159-60 (highlighting that for reasons of confidentiality and social cohesiveness, reporting within the chain of command is

These differing approaches between the Circuits to resolving questions of law are not catastrophic problems. At the very least, however, they evince the lack of guidance provided by the Supreme Court in answering the citizen-employee speech question. But, it is important to recall the *Garcetti* framework and the stage of the analysis at which these approaches arise. *Garcetti* imposes a threshold issue for the analysis of public employee free speech. Thus, when a court uses one of the above approaches, and arrives at the conclusion that a public employee spoke as an employee, that ends the analysis and the employee's recovery is barred. In this respect, the myriad approaches delineated above serve as barriers or hurdles, precluding access to Constitutional rights based on wholly arbitrary doctrinal constructs.

Finally, *Garcetti* has faced opposition on policy grounds from those who assert that its holding chills employee speech on matters of public concern.¹⁰⁶ This shortcoming is particularly relevant in the context of modern law enforcement, where the importance of oversight is heightened. The primary concern in this respect is that *Garcetti* discourages police officers from reporting misconduct or impropriety up the chain of command. And yet, bizarrely, *Garcetti* extends enhanced First Amendment protection to officers who go public with their accusations.¹⁰⁷ If the interest of a public employer in having "a significant degree of control over their employees' words and actions"¹⁰⁸ is so compelling, why incentivize employee disclosure to outside enterprises? Again, this is especially damaging in the context of law enforcement, where there is already a culture of hostility toward officers who report on department misconduct. Officers who blow the whistle on their counterparts or report impropriety to an Internal Affairs department are often branded "disloyal" and shunned by the department at large.¹⁰⁹ A study conducted on the Los Angeles Police

often mandatory).

¹⁰⁶ See *Garcetti's Impact*, *supra* note 73, at 143 (concluding that "federal employee free speech claims [will] continue to suffer an unjust fate in this post-*Garcetti* world"); McCarthy & Eckes, *supra* note 73, at 219-24, 228-30 (detailing cases of school employee whistleblowers and showing that they are less likely to be protected from retaliation after *Garcetti* and citing various critics of the discouraging effect on reporting government misconduct).

¹⁰⁷ *Garcetti's Impact*, *supra* note 73, at 125-27.

¹⁰⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

¹⁰⁹ See, e.g., *Wagner v. City of Holyoke*, 100 F. Supp. 2d 78, 90 (D. Mass. 2000) (finding plaintiff police officer subjected to retaliation and adverse employment action where superiors believed he had reported misconduct to state investigative agencies);

Department in response to several high-profile instances of police misconduct discovered that the department routinely retaliated against “disloyal” officers by transferring them to unappealing posts far away from their homes.¹¹⁰ The practice was known as “freeway therapy.”¹¹¹ The application of *Garcetti* in this context makes it far less likely that misconduct or impropriety in law enforcement will be reported to superiors. And, because most of those who report wrongdoing report internally first,¹¹² discouraging such reports makes any report unlikely.

B. Police Officer Cases Pre- and Post-*Garcetti*

A review of cases involving police officers before and after *Garcetti* confirms that the problems identified with the *Garcetti* holding have manifested themselves in the context of law enforcement. In general, officers in cases after *Garcetti* were more likely to lose their cases if they reported internally, while they were more likely to at least survive summary judgment if they reported externally.¹¹³ By way of contrast, pre-*Garcetti* cases focused on different factors.

Before *Garcetti*, several factors surface in the cases as important in the determination of whether the speech of law enforcement officers warranted protection. The claims that failed tended to fall into one of several categories. First, some officers who revealed confidential information to the public in ways that impeded the ability of the police

Walton v. Safir, 122 F. Supp. 2d 466, 481 (S.D.N.Y. 2000) (finding plaintiff police officer subjected to close scrutiny and adverse employment action where she spoke out publicly about racial bias in her former unit); Cochran v. City of Los Angeles, 222 F.3d 1195, 1202 (9th Cir. 2000) (cataloguing numerous instances of stigma and retaliatory action directed at officers of the LAPD who reported misconduct or cooperated with superiors).

¹¹⁰ Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 583 (2001).

¹¹¹ *Id.*

¹¹² See Modesitt, *supra* note 40, at 159; *What Price Free Speech? Whistleblowers and the Ceballos Decision: Hearing Before the Comm. on Gov't Reform, 109th Cong. 2* (2006) (statement of Stephan M. Kohn, National Whistleblower Center) [hereinafter Kohn] (showing most successful whistleblowers before *Garcetti* reported the problem internally first to their supervisor through the chain of command and the report typically related to their job duties); Will Kramer, *Inside the Whistleblower's World*, WISC. LAW. Vol. 91, No. 3 (March 2018), available at <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=91&Issue=3&ArticleID=26212#a> (citing research by the Ethics Resource Center indicating that 92% of whistleblowers initially reported malfeasance internally).

¹¹³ See *infra* notes 119-151 and accompanying text.

department to function effectively or served in a confidential capacity lost their claims because the department's interest in effective operation outweighed the employee's speech interest.¹¹⁴ In other cases, employees failed to prevail because their motives in speaking were personal, or even spiteful.¹¹⁵ Another factor that doomed some pre-*Garcetti* cases is the lack of a reasonable factual basis for the officer's speech.¹¹⁶ Officers who reported police misconduct through the chain of command, or other appropriate channels, without any such delimiting factors found their speech protected by the First Amendment.¹¹⁷ In some cases, even reporting allegations outside official channels was found to be protected.¹¹⁸

In contrast, after *Garcetti* the cases frequently turn on whether the report was made through the chain of command or to an outside agency or internal affairs department. Courts that protect reports to outside agencies reason that such speech is not part of the employee's job duties. In *Spalding v. City of Chicago* an officer was protected when he reported to the FBI because it was an outside law enforcement agency, and the report was made on his own initiative while he was off-duty.¹¹⁹ Another officer was protected after he spoke to the FBI

¹¹⁴ See, e.g., *Pool v. VanRheen*, 297 F.3d 899, 908-09 (9th Cir. 2002) (finding disruptive effects of reading of high level officer's letter at a public meeting outweighed her free speech rights); *Lytle v. City of Hayesville*, 138 F.3d 857, 865, 867 (10th Cir. 1998) (finding disruptive effects of external reporting using confidential information outweighed employee's speech interest); *Moore v. City of Wynnewood*, 57 F.3d 924, 933-34 (10th Cir. 1995) (finding demotion of officer permissible based in part on department's interest in controlling the speech of its employees when they purport to speak for the department).

¹¹⁵ See, e.g., *McMurphy v. City of Flushing*, 802 F.2d 191, 196-98 (6th Cir. 1986) (finding spiteful motive rendered speech about suspected wrongful conduct unprotected).

¹¹⁶ See, e.g., *Lytle*, 138 F.3d at 867 (finding speech unprotected where the officer had little factual support for his allegations against other officers).

¹¹⁷ See, e.g., *Blair v. City of Pomona*, 223 F.3d 1074, 1076-78 (9th Cir. 2000) (reversing summary judgment after holding an officer's complaints to the Department's Major Crimes Task Force as potentially protected speech); *Hare v. Zitek*, 414 F. Supp. 2d 834, 855-58 (N.D. Ill. 2005) (finding police officer's speech about departmental corruption protected and not outweighed by employer's interests where he reported to the State's Attorney's Office's public integrity unit).

¹¹⁸ *Forsyth v. City of Dallas*, 91 F.3d 769, 772-74 (5th Cir. 1996) (upholding jury verdict in favor of officers who directed their attorneys to publicize their allegations of illegal wiretapping after reporting to superior officers).

¹¹⁹ *Spalding v. City of Chicago*, 186 F. Supp. 3d 884, 898-99 (N.D. Ill. 2016); cf. *Griffin v. City of New York*, 880 F. Supp. 2d 384, 397 (E.D.N.Y. 2012) (holding a training manual's broad description of an officer's duties did not restrict plaintiff's First Amendment protection as "it 'would effectively curtail all [NYPD officers'] right

because he did so without the knowledge or permission of anyone else in the department.¹²⁰ However, an officer is not protected when it is her duty to speak. This can happen when her department orders her to report to, or cooperate with an internal affairs or outside agency.¹²¹

Other cases rely on the connection with job duties or the expectations of the employee. For example, the Seventh Circuit ruled against an officer who reported to her supervisor and the Internal Affairs Department that a fellow officer verbally abused her. The holding was based on the expectation that she report such incidents, particularly in a police department, where violent behavior poses a risk to the public and protecting the public is part of the officer's job.¹²² The court went on to say that the report was "intimately connected" with her job duties.¹²³

Similarly, a police officer who reported to her superiors misconduct, corruption and abuse of suspects by fellow officers was deemed unprotected because she had "an official duty to report unlawful activity as well as misconduct."¹²⁴ The court went on to state that the officer "did not engage in communicating information of a concern to the general public as a private citizen but rather reported misconduct pursuant to her official duties as a police officer."¹²⁵ This case

[] to speak out about corruption, thereby discouraging whistleblower activity that is of great benefit to civil society" and thus finding report to Internal Affairs protected).

¹²⁰ *Howell v. Town of Ball*, 827 F.3d 515, 524 (5th Cir. 2016) (reversing district court's decision that speech was unprotected); *see also* *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076-77 (9th Cir. 2013) (finding report to outside agency protected but report to supervisors unprotected).

¹²¹ *See, e.g., Kasprzycki v. DiCarlo*, 584 F. Supp. 2d 470, 476 (D. Conn. 2008) (finding report to internal affairs about missing money unprotected because the reporting police officer was told to report by his employer); *cf. Griffin v. City of New York*, 880 F. Supp. 2d 384, 397 (E.D.N.Y. 2012) (finding that a manual indicating that all officers have a duty to report misconduct did not eliminate First Amendment protection for report to internal affairs.)

¹²² *Kubiak v. City of Chicago*, 810 F.3d 476, 481-82 (7th Cir. 2016). The court also noted that she was protecting the work environment. *Id.*

¹²³ *Id.* at 482.

¹²⁴ *Hunt v. City of Portland*, 726 F. Supp. 2d 1244, 1274 (D. Or. 2010), *aff'd*, 496 F. App'x 751 (9th Cir. 2012), and *aff'd*, 599 F. App'x 620 (9th Cir. 2013). The court pointed to both the city's rules requiring reporting of misconduct and the general duty to enforce the law. *Id.*

¹²⁵ *Id.* at 1275; *see also* *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 580-81, 585 (4th Cir. 2017) (where the court found that the police chief was protected by qualified immunity because it was not clear that two police officers were speaking as citizens rather than employees where they visited an arrestee who was reportedly abused by another officer at his home in plainclothes on their lunch hour, providing him a complaint form and urging him to file a complaint against the officer).

illustrates the Catch-22 for police officers. They are obligated to report yet not protected from retaliation, at least on First Amendment grounds.¹²⁶ And as the next section will illustrate, other protections are insufficient to fill the void.

In a particularly problematic decision, *Davis v. City of Chicago*, the Seventh Circuit withheld First Amendment protection from a municipal employee charged with investigating allegations of police misconduct.¹²⁷ As a supervisor in Chicago's primary police oversight agency, the Independent Police Review Authority ("IPRA"), Lorenzo Davis was tasked with reviewing complaints levied against Chicago police officers, to determine whether the complaints had merit.¹²⁸ Davis's findings were memorialized in a formal report, which summarized the allegations against the police and reached a conclusion on their validity.¹²⁹ Davis alleged that between 2014 and 2015, his supervisors at IPRA began pressuring him to "change 'sustained' findings of police misconduct and to change his reports to reflect more favorably on the accused officers."¹³⁰ When Davis repeatedly refused this instruction, he was terminated.¹³¹

Davis brought suit, arguing, *inter alia*, that he had been unconstitutionally terminated for exercising his First Amendment rights.¹³² The Seventh Circuit affirmed the District Court's dismissal of Davis's constitutional claim. Applying *Garcetti* and its own interpretive precedent, the court concluded that Davis, by virtue of his subordinate position within the departmental hierarchy, "was responsible for revising his reports at the direction of his superiors."¹³³ As such, the court reasoned that when Davis refused to perform these revisions at the behest of his superiors, "[his] refusal was pursuant to his job

¹²⁶ See *Dahlia v. Rodriguez*, 735 F.3d 1060, 1083 (9th Cir. 2013) (Pregerson, J., specially concurring) (noting the Catch-22).

¹²⁷ No. 16-1430, 2018 U.S. App. LEXIS 11985 (7th Cir. May 8, 2018). It is perhaps telling that this case arose in Chicago, where the Laquan McDonald shooting occurred.

¹²⁸ *Id.* at *1-2.

¹²⁹ *Id.* at *2.

¹³⁰ *Id.* at *3. After investigating allegations of misconduct, the IPRA makes disciplinary recommendations that summarize the investigation and include findings. The report will state whether the allegations were found to be "sustained," "not sustained," "exonerated," or "unfounded." *Id.* at *2.

¹³¹ *Id.*

¹³² *Id.* at *4.

¹³³ *Id.* at *5.

duties” and therefore, “he spoke as a public employee rather than a private citizen.”¹³⁴

Davis provides still more empirical evidence of two major issues discussed thus far. First, *Davis* once again illustrates the contours of the thin blue line phenomenon woven throughout the precedent on this subject. And yet, *Davis* should give more pause than any of the cases examined to this point. In *Davis*, the thin blue line is not just a collection of officers laboring under a communal instinct for self-preservation. Instead, here we see the thin blue line rendered at a higher level of abstraction, fully entrenched within the municipal policy of a major U.S. city. A far-reaching policy such as this implicates an even greater degree of public concern than does the typical law enforcement case arising under *Garcetti*. It is even more disappointing to see the analysis of conflicting interests subverted by the Seventh Circuit’s rigidly formulaic reliance on formal job duties at *Garcetti*’s threshold step.

Second, *Davis* presents another example of a court struggling under the arbitrary and false dichotomy imposed by *Garcetti*, and the inconsistent and illogical results this struggle produces. In almost the same breath, the court both invokes *Garcetti*’s admonishment that the analysis of an employee’s job duties involves more than just a written job description, and simultaneously proceeds to dispose of the case on the basis of *Davis*’s job description as defined by Chicago’s Municipal Code.¹³⁵ Additionally, the Seventh Circuit’s holding in *Davis* is inconsistent with other leading cases. For example, it would be fair to wonder how *Davis* squares with the Second Circuit’s holding in *Jackler v. Byrne*.¹³⁶ That case, as discussed *supra*, involved an officer who “refused to make false statements of fact in an investigation of a civilian’s complaint that another officer had used excessive force.”¹³⁷ In granting the officer relief, the Second Circuit held that the police department lacked “authority to coerce or intimidate its employees to engage in criminal conduct by filing reports that are false in order to

¹³⁴ *Id.*

¹³⁵ *Id.* at *4-5 “*Davis* was responsible for revising his reports at the direction of his superiors. Indeed, Chicago’s Municipal Code assigned the power to make disciplinary recommendations to IPRA’s Chief Administrator, not a mid-level supervisor. Chi., Ill., Municipal Code § 2-57-040(h).” *Id.* at *5.

¹³⁶ 658 F.3d 225 (2011).

¹³⁷ *Davis v. City of Chicago*, 889 F.3d 842, 846 (7th Cir. 2018) (citing *Jackler*, 658 F.3d at 230-31).

conceal wrongdoing by another employee or to conceal eyewitness corroboration of civilian complaints of such wrongdoing.”¹³⁸

Judge Hamilton’s concurrence in *Davis* recognizes this inconsistency with its own holding. It offers only this tepid justification: that *Jackler* involved an officer’s refusal to make false statements of fact, while *Davis* alleged that his termination stemmed from his “refusing to accept his boss’s different *evaluations* of facts.”¹³⁹ Assuming *arguendo* that this distinction carries any legal import, this line of reasoning demonstrates just how far afield the *Garcetti* inquiry has led the lower courts. Instead of balancing the interests of employer and employee with an eye to keeping the public informed on matters of great importance, this court was persuaded by a dubious, semantic distinction between facts and evaluations of facts. The Constitution demands better.

Finally, two Ninth Circuit opinions, *Huppert v. City of Pittsburg*¹⁴⁰ and *Dahlia v. Rodriguez*¹⁴¹ further illustrate the struggles of the courts to apply *Garcetti*. In *Huppert*, the officer alleged several First Amendment violations. He cooperated with the District Attorney in an investigation of the Public Works Department and later investigated police department corruption.¹⁴² Because he was assigned to both of these investigations, his speech was deemed unprotected, even though he was instructed to stop the latter investigation by one supervising officer while told to continue by another.¹⁴³ His third claim was that he reported corruption in his department to the FBI on his own time and without any departmental orders.¹⁴⁴ Nevertheless, the court found that his job duties included investigation of corruption and therefore any speech to the FBI was unprotected.¹⁴⁵ Finally, he claimed retaliation based on his grand jury testimony about police department corruption but the court found that testimony before grand juries

¹³⁸ *Jackler*, 658 F.3d at 242.

¹³⁹ *Davis*, 2018 U.S. App. LEXIS 11985, at *7.

¹⁴⁰ 574 F.3d 696 (9th Cir. 2009).

¹⁴¹ 735 F.3d 1060 (9th Cir. 2013).

¹⁴² *Huppert*, 574 F.3d at 703-06.

¹⁴³ *Id.* at 705-06.

¹⁴⁴ *Id.* at 706-07.

¹⁴⁵ *Id.* at 707. The court relied on California case law holding that the duties of a police officer include crime prevention, crime detection, and disclosure of any information relating to criminal activity. *Id.* As a result, the court concluded that the fact that he engaged in the speech on his own volition and own time was not determinative, *id.*, although similar facts led to a determination in *Spalding*, that the speech was citizen speech. *Spalding v. City of Chicago*, 186 F. Supp. 3d 884, 898-99, 905 (N.D. Ill. 2016).

about corruption was expected of police officers and therefore the testimony was unprotected speech.¹⁴⁶

Four years later, the *Dahlia* court reversed *Huppert*, criticizing the court for failing to make a “‘practical’ fact-specific inquiry” into the job duties of the officer.¹⁴⁷ The *Dahlia* court found that the *Huppert* court properly used the “‘practical’ inquiry” to find the cooperation with the District Attorney and continuation of the corruption investigation unprotected, but failed to properly apply the test to the speech to the FBI and the grand jury.¹⁴⁸ Applying its test to the officer’s speech in *Dahlia*, the court found that his report up the chain of command about abuse of witnesses and suspects was unprotected employee speech.¹⁴⁹ With respect to the allegations that the officer suffered retaliation for speech about the abuse to the Internal Affairs Department, his union, and an outside agency, the court reversed the district court’s dismissal for failure to state a claim.¹⁵⁰ However, the court left open the possibility that his duties might include these reports, depending on what was revealed in discovery.¹⁵¹

These two cases reveal the difficulties in distinguishing employee speech from citizen speech. Additionally, they show that it is common in cases involving police officer reports of corruption and abuse for complaints to be made to various entities. This results in a commingling of the two types of speech defined in *Garcetti*, thereby confusing the issues even further for employers, courts, and employees. If there were truly other protections for employees that did not raise these same issues, the application of *Garcetti* would not be as concerning. But as the next section demonstrates, other laws do not provide the protection that law enforcement officers need.

V. OTHER PROTECTIONS FOR PUBLIC EMPLOYEES

Before *Garcetti*, the First Amendment was understood to provide the “ultimate whistleblower protection”¹⁵² by insulating public employees from retaliation. With this protection largely gutted by *Garcetti*, all

¹⁴⁶ *Id.* at 707-08.

¹⁴⁷ *Dahlia v. Rodriguez*, 735 F.3d 1060, 1071 (9th Cir. 2013).

¹⁴⁸ *Id.* at 1070-71.

¹⁴⁹ *Id.* at 1076.

¹⁵⁰ *Id.* at 1077-78.

¹⁵¹ *Id.* *Dahlia* will be discussed further *infra* to assess how the *Pickering* framework improves the analysis of police officer cases. See *infra* notes 193-218 and accompanying text.

¹⁵² Joel Gora, *First Amendment Decisions in the October 2005 Term*, 22 *TOURO L. REV.* 917, 926 (2007).

that remains to shield public employees are statutory remedies. In fact, the *Garcetti* majority noted this fact and contended that whistleblower laws at the state and federal level were sufficient to protect employees from adverse employment action.¹⁵³ This is a dubious contention.

The whistleblower laws are rife with gaps in protection. As is evidenced by post-*Garcetti* case law,¹⁵⁴ reporting the misconduct of other police officers internally will often be considered part of an officer's job duties. It may be explicitly required by an employee handbook or job description, or may be inferred because their job is to enforce the law.¹⁵⁵ Of course, this is the problem with *Garcetti*, but the problem is also present in many whistleblower statutes.¹⁵⁶ The federal Whistleblower Protection Act was amended in 2012 to cover employees making reports as part of their job duties.¹⁵⁷ While that is a positive development, the application to police officers is not yet clear and, in any event, most police officers are employees of state and local governments. Many state whistleblower statutes do not contain explicit protection for "internal/official duty whistleblowers"¹⁵⁸ and some have been interpreted to exclude them from protection.¹⁵⁹

The coverage of whistleblower statutes varies widely, resulting in exclusion of some law enforcement officers altogether. For example, some state statutes do not cover employees of subdivisions like municipalities or counties, thereby excluding many police officers.¹⁶⁰

¹⁵³ *Garcetti v. Ceballos*, 547 U.S. 410, 425-26 (2006).

¹⁵⁴ See *supra* notes 119-151 and accompanying text.

¹⁵⁵ See *supra* notes 122-124 and accompanying text.

¹⁵⁶ According to research by the National Whistleblower Center following the *Garcetti* decision, only fifty-eight percent of states protected "internal, official-duty" whistleblowers. Kohn, *supra* note 112, at 5. Some states have since expanded coverage of their laws. See *infra* note 158.

¹⁵⁷ See 5 U.S.C. § 2302(f)(1)(A), (G)(2) (specifying protection for disclosures made to supervisors and disclosures "made during the normal course of duties of the employee."); Jason Zuckerman, *Congress Strengthens Whistleblower Protections for Federal Employees*, ABA SECTION OF LABOR & EMPLOYMENT LAW FLASH (Nov.-Dec. 2012), https://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/1212_abalel_flash/lel_flash12_2012spec.html.

¹⁵⁸ Kohn, *supra* note 112, at 17-18. A few states have interpreted their statutes to protect internal/official duty whistleblowers since 2006. See, e.g., *Igwe v. City of Miami*, 208 So. 3d 150 (Fla. Dist. Ct. App. 2016); *Lippman v. Ethicon, Inc.*, 119 A.3d 215 (N.J. 2015) (finding protection for such employees); *Brown v. Mayor of Detroit*, 734 N.W.2d 514, 517 (Mich. 2007).

¹⁵⁹ See *Modesitt*, *supra* note 40, at 168-76 (discussing increasing number of employers in state whistleblower cases asserting an exception to protection for internal/job duties whistleblowing and courts in several states that have adopted the exclusion).

¹⁶⁰ See, e.g., ALA. CODE § 36-26A-3 (1975); COLO. REV. STAT. ANN. § 24-50.5-102(3)

Additionally, the Arkansas Supreme Court recently dismissed the claim of a state employee under the Arkansas Whistle-Blower Act, holding that the legislature did not have the authority to waive the state's sovereign immunity from suit.¹⁶¹

Other states have specific requirements for coverage that may not be met where the employee has no knowledge of the technical requirements for protection. For example, in Alabama, the disclosure must be made under oath or by affidavit,¹⁶² while in Delaware the report must be made to an elected official, including employees of the office of the elected official.¹⁶³ Similarly, Florida requires that the report be made to the Chief Executive Officer of the local government or "other appropriate official."¹⁶⁴ Just who is an "appropriate official" has been the subject of litigation, with the Florida District Court of Appeals stating "the protection extends to disclosures to members of boards, committees, departments, or divisions affiliated with the offending governmental entity, so long as the board, committee, department, or division has the authority to investigate, police, manage, or otherwise remedy the violation or act by the violating governmental entity."¹⁶⁵ Does this include the police officer's supervisor? A higher level official within the police department?

A police officer who wishes to report police misconduct is unlikely to be aware of such nuances. The appropriate time to report may be immediately after an incident occurs, or perhaps as part of a mandated report. This gives little time to consult with any knowledgeable adviser.

Other states' whistleblower statutes have different technical requirements for coverage. This can include a mandated initial disclosure to the employee's supervisor in order for protection to attach,¹⁶⁶ or a requirement that the report be in writing.¹⁶⁷ In these

(2016); IND. CODE ANN. § 4-15-10-1, 4 (1981); KAN. STAT. ANN. § 75-2973 (2010).

¹⁶¹ *Arkansas Community Correction v. Barnes*, 2018 Ark. 122 (Apr. 12, 2018).

¹⁶² See ALA. CODE § 36-26A-3 (1975).

¹⁶³ See DEL. CODE. ANN. Tit. 29, § 5115 (1995). This seems unlikely to include superior officers in the police department. See also MISS. CODE ANN. § 25-9-173 (1999) (requiring disclosure to a state investigative body).

¹⁶⁴ See FLA. STAT. § 112.3187(6) (2002).

¹⁶⁵ *Rustowicz v. N. Broward Hosp. Dist.*, 174 So. 3d 414, 424 (Fla. Dist. Ct. App. 2015).

¹⁶⁶ See, e.g., N.J. STAT. ANN. § 34:19-4 (2006) (with limited exceptions, protecting disclosures to public bodies only if the employee first discloses to a supervisor in writing and provides the employer with an opportunity to correct the problem); N.Y. LAB. LAW § 740 (McKinney 2006). This mandate, if followed, would likely eliminate protection under the First Amendment because such a report would likely constitute

states, the police officer whose supervisor is part of the problem or the officer who makes an oral report may be unprotected. And while some states have exceptions to the requirement of an initial internal report, the officer may be unable to ascertain in advance whether the exception applies.¹⁶⁸

In addition to confusing and problematic technical requirements, ninety-five percent of state laws provided fewer remedial or procedural protections than would be afforded by the First Amendment.¹⁶⁹ These differences may discourage reporting as well for those who consult with knowledgeable advisers before taking action.

Federal law also has specific requirements that may be difficult to satisfy in a typical case. Under the Whistleblower Protection Act, case law requires “an employee complaining of retaliation to show irrefutable proof that the person criticized was not acting in good faith and in compliance with the law.”¹⁷⁰ Moreover, federal employees are not protected in the case of “statements of facts publicly known already.”¹⁷¹ In a given situation, whether a disclosure meets these requirements may be difficult to ascertain in advance.

All of this contributes to the picture painted by Justice Souter’s dissent of a “patchwork” system of protection for public employees, “not a showing that worries may be remitted to legislatures for relief.”¹⁷² Close examination reveals that protections for public employee whistleblowers are a far cry from “the powerful network of legislative enactments . . . available to those who seek to expose wrongdoing.”¹⁷³

As for police unions, they have been identified as both obstacles to reform and agents for reform.¹⁷⁴ Typically, union membership

employee speech. See Kohn, *supra* note 112, at 6; cases cited *supra* notes 122-126, 149 and accompanying text.

¹⁶⁷ See, e.g., ALASKA STAT. ANN. § 39.90.110(c) (2010) (allowing employer to require a report in writing to the employer prior to reporting a matter of public concern under the statute with limited exceptions); OHIO REV. CODE ANN. § 124.341 (2017).

¹⁶⁸ See, e.g., WYO. STAT. ANN. § 9-11-103 (2013) (dispensing with the requisite supervisory report if the individual reasonably believes it will not correct the problem but then requiring report to the agency head or the office of the governor).

¹⁶⁹ Kohn, *supra* note 112, at 6.

¹⁷⁰ Public Employees, 2 Manual on Employment Discrimination § 10:16 (citing *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999)).

¹⁷¹ *Id.* (citing *Francisco v. Office of Personnel Management*, 295 F.3d 1310, 1314 (Fed. Cir. 2002)).

¹⁷² *Garcetti v. Ceballos*, 547 U.S. 410, 440 (2006) (Souter J., dissenting).

¹⁷³ *Id.* at 425.

¹⁷⁴ See generally Fisk & Richardson, *supra* note 8 and sources cited therein.

provides an expressive conduit for the rank-and-file police officer so often suppressed by the police department's rigid, hierarchical structure.¹⁷⁵ Union representation gives officers an outlet to air grievances and participate in policymaking that would not otherwise exist.¹⁷⁶ However, union representation may in fact impede reform efforts by providing categorical protection to officers who engage in misconduct or improper police practices.¹⁷⁷ For example, police union contracts often "contain provisions that protect officers accused of misconduct, shield them from civilian oversight, and limit the ability to change officers' conditions of employment, which also makes it difficult to enact reforms such as setting up early warning systems."¹⁷⁸

These provisions offer protection not only to officers who engage in misconduct, but also to officers who report misconduct, potentially shielding them from unjust discipline. Yet, given the culture of silence that is typical of police departments and the systemic problems of police violence,¹⁷⁹ it seems unlikely that officers who are breaking the code would rely on their unions for protection. It is always challenging for unions to handle cases involving conflicts between members when they have a duty to represent all members fairly.¹⁸⁰ And, where there is strong organizational pressure to protect fellow officers and union officials are elected, their incentive to support the whistleblower reporting a fellow officer is reduced.¹⁸¹ Further, while the union contract may insulate the individual officer from adverse employment consequences based on reporting misconduct, it is not a substitute for First Amendment rights and protections.

Few other legal protections exist for officers retaliated against for reporting police misconduct.¹⁸² As a result of *Garcetti*, "public

¹⁷⁵ Fisk & Richardson, *supra* note 8, at 726-28 ("[P]olice officers responded to . . . [a] hierarchical and punitive supervisory structure by forming unions.").

¹⁷⁶ *Id.* at 738-40, 759-66.

¹⁷⁷ *See id.* at 717-18 and sources cited therein.

¹⁷⁸ *Id.* at 749 (citation omitted).

¹⁷⁹ *See* Chemerinsky, *supra* note 110, at 573-75 (describing the culture of silence in the Los Angeles Police Department); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 495-507 (2004) (describing a systemic culture of violence in many police departments).

¹⁸⁰ Fisk & Richardson, *supra* note 8, at 715.

¹⁸¹ *Id.* at 715, 748.

¹⁸² If an employee's whistleblowing complaints involved complaints of violation of state or federal statute, the employee might have a retaliation claim under the particular statute alleged to be violated. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (prohibiting discrimination for opposing unlawful practices under Title VII of the Civil Rights Act or for filing a charge of discrimination or participating in an investigation of discrimination); 29 U.S.C. § 623(d) (same regarding Age Discrimination in

employees now enjoy only the types of protections that private employees enjoy for their undesirable workplace speech.”¹⁸³ This is a dramatic step back from the protections afforded in the wake of *Pickering*.

VI. A RETURN TO PICKERING

As the previous sections have demonstrated, *Garcetti* is excessively restrictive and creates a substantial chilling effect on public employee speech. This is particularly true in the context of law enforcement. The solution is a return to the *Pickering* test that controlled these disputes until the decision in *Garcetti*.

In effect, this is the approach suggested by Justices Stevens and Souter in their dissenting opinions in *Garcetti*.¹⁸⁴ Justice Souter’s opinion in particular highlights the problems with the majority’s framework, many of which have been examined in detail in the above sections, as well as the benefits of returning to the more lenient strictures of the *Pickering* test. The fallacy of the arbitrary dichotomy of citizen-employee speech, the subversion of the public interest in effective governance, and the inadequacy of statutory remedies for protecting public employees who express dissent all require a return to the *Pickering* balancing test without the *Garcetti* gloss. A return to the *Pickering* test would alleviate many of these concerns.

First of all, the *Pickering* test is desirable in that it removes the arbitrary and fallacious distinction between employee and citizen speech. No longer would lower courts be forced to fashion arbitrary decisions governing what constitutes employee speech and what constitutes citizen speech. At the same time, removing that forced distinction would allow for the possibility, contemplated in some case law but largely unexplored, that citizen speech and employee speech are often inextricably linked.¹⁸⁵

Additionally, a return to the *Pickering* test would place the focus of the inquiry once again on the public interest in governmental

Employment Act).

¹⁸³ Paetzold, *supra* note 74, at 108.

¹⁸⁴ See *Garcetti v. Ceballos*, 547 U.S. 410, 426-27 (Stevens, J., dissenting) (arguing that the case should have been decided in accordance with the precedent set by *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 (1979), with no examination of employee-citizen speech); *id.* at 427-29 (Souter, J., dissenting) (arguing for application of the *Pickering* test).

¹⁸⁵ See, e.g., *Davis v. McKinney*, 518 F.3d 304, 311, 314 (5th Cir. 2008) (acknowledging “mixed” speech cases but dividing them into individual communications); see also Paetzold, *supra* note 74, at 97.

disclosure. This public interest has been subverted by the *Garcetti* threshold question, which renders otherwise protected speech a valid pretext for retaliatory employment action, thus discouraging employees from reporting improper or unlawful conduct. The Supreme Court acknowledged that the root of *Pickering* and its progeny was:

the recognition that public 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. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. 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.¹⁸⁶

If this is indeed the case, the *Garcetti* Court's willingness to remove cases from judicial scrutiny before even reaching the *Pickering* test is perplexing. Furthermore, as examined above, the alternative remedies for the employee are so deficient that *Garcetti* can be a substantial barrier to the goal of a well-informed public.

Proponents of the *Garcetti* holding argue that it provides essential assistance to public employers in maintaining discipline and efficiency in the workplace.¹⁸⁷ This is undoubtedly the case, but we should be concerned with how far we are willing to go to satisfy this end, especially when fundamental Constitutional rights are at stake. As Justice Souter so eloquently put, "when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake."¹⁸⁸ Where the public interest in disclosure is great, the employer should not be able to defeat protection solely because the employee had a duty to disclose or spoke in her role as employee. If the employer can show substantial, or in some cases even potential,¹⁸⁹ disruption to government operations, the employer can still prevail under *Pickering*.

Garcetti supporters also posit that a return to the *Pickering* test without any threshold question would lead to a flood of litigation in the courts.¹⁹⁰ This argument suggests that by implementing a less

¹⁸⁶ *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (citation omitted).

¹⁸⁷ *Garcetti*, 547 U.S. at 422-23.

¹⁸⁸ *Id.* at 434 (Souter, J., dissenting).

¹⁸⁹ *Connick v. Myers*, 461 U.S. 138, 151-52 (1983) (part of the speech in question "carries the clear potential for undermining office relations").

¹⁹⁰ *See Garcetti*, 547 U.S. at 419.

restrictive test for First Amendment protections, the judiciary would open itself to fielding countless frivolous suits on behalf of jilted public employees. This argument ignores several important facts. First of all, the *Pickering* test was the controlling law in this arena for almost forty years and in that time, the Court saw no need to drastically alter the framework in response to any flood of litigation.¹⁹¹ Moreover, as noted above, the *Pickering* test does not necessarily amount to more freedom for public employees. It simply assures that the interests of the employee-citizen will always be accounted for, even if that accounting ultimately weighs in favor of the government.

Should pure *Pickering* balancing be deemed overly disruptive to the government, Justice Souter's formulation offers another solution to the problem. He argues not for a return to the *Pickering* test in all cases, but a willingness to balance interests where an employee "speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it."¹⁹² This "*Pickering* test plus" approach seems almost tailor made to suit the growing need for oversight in the context of law enforcement. When a law enforcement officer speaks out on police misconduct or the impropriety of department policies, the officer would satisfy the "unusual importance" analysis. And, an officer reporting to his superiors would satisfy the second prong of the analysis, requiring "high standards of responsibility." No longer would courts be required to deny protection to the officer who goes up the chain of command, as his employer would surely prefer and may actually require, while protecting the employee who blows the whistle publicly. Apart from removing this inconsistency, the *Pickering*-plus approach would give the public a chance to get what it so desperately craves: law enforcement willing to cross the "Thin Blue Line."

At this point, it will be beneficial to look at the practical application of the proposed *Pickering*-plus balancing test. Justice Souter's dissenting opinion never carried the force of law, so there are no exemplary cases on point. However, let us endeavor to play the role of federal judges and apply the *Pickering*-plus test to a real factual scenario, taken from the *Dahlia* case discussed earlier.

The facts of *Dahlia* are appropriate for this purpose because they encapsulate much of what is wrong with both police culture and the

¹⁹¹ See *id.* at 435 ("[P]rotection less circumscribed than what I would recognize has been available in the Ninth Circuit for over 17 years, and neither there nor in other Circuits that accept claims like this one has there been a debilitating flood of litigation.") (Souter, J., dissenting).

¹⁹² *Id.*

judicial systems designed to monitor it. In *Dahlia*, the plaintiff-officer was assigned to work a large robbery case with several other officers from his department.¹⁹³ Almost immediately upon being assigned to the case, Dahlia began witnessing incidents of excessive force and improper interrogation tactics perpetrated by his fellow officers.¹⁹⁴ In response, Dahlia went to his immediate supervisor and reported the misconduct.¹⁹⁵ Dahlia's supervisor told him to "stop his sniveling" and took no action, despite two more complaints made by Dahlia and another officer.¹⁹⁶ Following these reports, the offending officer, Rodriguez, became suspicious of Dahlia and made efforts to cut him out of the investigation.¹⁹⁷

That suspicion increased when Dahlia met with his Internal Affairs division on several occasions.¹⁹⁸ Dahlia began receiving threats and harassment from Rodriguez and another officer on an almost daily basis, in an effort to ensure that he did not report any misconduct to Internal Affairs.¹⁹⁹ On one occasion, Dahlia was called to a nearby park on the pretext of an emergency situation and arrived to find only Rodriguez and another officer present, the two of whom attempted to intimidate him into revealing what he said to Internal Affairs.²⁰⁰ Following this incident, the department received word that the FBI might be looking into the robbery investigation and the actions of the investigating officers.²⁰¹ At this, Rodriguez called Dahlia into his office, displayed his gun in a menacing fashion and told Dahlia that if he continued reporting on the investigation Rodriguez would fabricate criminal charges against him.²⁰² Dahlia subsequently reported this incident to his local police union and, ultimately, to the Los Angeles Sheriff's Department.²⁰³

As an initial matter, *Dahlia* provides excellent anecdotal evidence of the "Thin Blue Line" phenomenon. Dahlia bore witness to gross misconduct on the part of his fellow officers. Instead of being applauded for disclosing the truth, he faced harassment and censure

¹⁹³ *Dahlia v. Rodriguez*, 735 F.3d 1060, 1063 (9th Cir. 2013).

¹⁹⁴ *Id.* at 1063-64.

¹⁹⁵ *Id.* at 1064.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1064-65.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1064.

²⁰¹ *Id.* at 1065.

²⁰² *Id.*

²⁰³ *Id.*

from within his own department. What is worse, he had very little recourse within the hierarchy of the police department. Dahlia suffered an intolerable working environment for months until he was ultimately disciplined for doing what he knew to be right.

As noted above, the Ninth Circuit mentioned several considerations that underlie the *Garcetti* citizen-speech inquiry. The court then divided Dahlia's complaint into the individual incidents of speech — per *Connick*²⁰⁴ — that were alleged: (1) Dahlia's report to his immediate superior, (2) Dahlia's meetings with Internal Affairs, (3) Dahlia's report to his local union, and (4) Dahlia's report to the Los Angeles Sheriff's Department.²⁰⁵ Following the dictates of *Garcetti* and its own interpretive precedent, the Ninth Circuit concluded on the first point that Dahlia's report to his supervisor occurred within the chain of command and thus did not merit protection under the *Garcetti* framework.²⁰⁶ Regarding the second incident, the Ninth Circuit held that Dahlia's meetings with Internal Affairs might be protected speech, although Dahlia may not have disclosed any misconduct for fear of reprisals.²⁰⁷ While the Court expressed concerns that Dahlia did “precisely what his superiors wanted him to do — that is, meet with IA but stay mum,” which the court indicated would render his speech unprotected. Yet it also recognized that drawing all inferences in Dahlia's favor, as required on a motion to dismiss, Dahlia had stated a claim worthy of First Amendment protection.²⁰⁸ Regarding the third incident, the court was again concerned with Dahlia's explicit job duties, but found that at the motion to dismiss stage, Dahlia's disclosure to his union was protected.²⁰⁹ Similarly, with respect to the fourth incident, the court expressed skepticism about whether Dahlia would be required to report to the Los Angeles Sheriff's Department, but ultimately concluded that this incident survived the Motion to Dismiss.²¹⁰ The standard of review is important here. The *Dahlia* court made clear throughout the opinion that Dahlia was entitled to a favorable inference at the Motion to Dismiss stage and that it was this inference, not any sort of compelling legal case, that allowed Dahlia to prevail.²¹¹

²⁰⁴ *Connick v. Myers*, 461 U.S. 138, 147-49 (1983).

²⁰⁵ *Dahlia*, 735 F.3d at 1076-78.

²⁰⁶ *Id.* at 1076.

²⁰⁷ *Id.* at 1077.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1077-78.

²¹¹ *Id.* at 1076-78.

Again, we should pause and examine the inherent flaws of the *Garcetti* framework as applied to Dahlia's case. This decision makes clear the tendency under *Garcetti* to focus on the wrong sort of inquiries. Instead of emphasizing the balance between employee-employer rights, informed by public interest, the *Dahlia* court was consumed with inquiries into whether or not Dahlia's reports were made pursuant to his official job duties. Even though three of Dahlia's reporting incidents ultimately survived the Motion to Dismiss, the court was clearly skeptical that Dahlia could prevail at trial under the *Garcetti* framework. There is, at the very least, a good possibility that none of Dahlia's communications would merit protection under *Garcetti*. And, if disclosures to a superior, Internal Affairs, a local union, and an outside law enforcement agency are not protected, what recourse is there for the police officer who witnesses misconduct? Is he to suffer the indignity of threats and harassment at his job, knowing all the time that he had a chance to stop the corruption? The *Dahlia* court seems to suggest that a report wholly outside the chain of command and not directed by supervisors would be protected under *Garcetti*. But again, this raises a question as to the purpose of the test. If the concern is the interests of the employer, there is no reason to create a test that encourages public whistleblowing as the only route to potential protection from retaliation. Certainly, such disclosure would serve to inform the public, but it would also create precisely the sort of unstable and ill-disciplined government work force that *Garcetti* sought to prevent. Further, under the *Pickering* balancing test a court may find that such outside reporting is sufficiently disruptive to justify any adverse action directed at the employee. The officer could win the battle but lose the war.

Now, consider how *Dahlia* would have been decided under the *Pickering*-plus test. As an initial matter, the Ninth Circuit's severance of Dahlia's complaint into four separate "communications" or "incidents," squares with Supreme Court precedent under *Connick*,²¹² but it may not be necessary under the *Pickering*-plus test. For the sake of comparison, however, the analysis will preserve the Ninth Circuit's analytical framework. Looking at the first communication, Dahlia's report to his supervisor meets the two requirements for balancing under *Pickering*-plus. First, misconduct by police officers involving use of force against civilians is indisputably a matter of "unusual importance" to the public, especially in light of the national cry for police oversight. Second, Dahlia's decision to report to his direct

²¹² *Connick v. Myers*, 461 U.S.138, 147-49 (1983).

superior — also the officer in charge of the investigation — complied with high standards of professional responsibility. As a result, we can proceed to balancing the interests of the employee against the interests of the employer. Dahlia clearly has a compelling interest in not being complicit in unlawful police practices and also in avoiding the rigors of a hostile work environment. At the same time, the police department has little to no interest in precluding this sort of communication as it does not disrupt the workplace in any form. Thus, a court would likely find that First Amendment protection applies, and any adverse action taken against the employee in retaliation for the speech would be unconstitutional.

Looking at the other three communications, there is a strong case for balancing in each.²¹³ The most interesting of the three, for balancing purposes, is Dahlia's report to the Los Angeles Sheriff's Department. Here, Dahlia's employer has a case for prevailing on the balance because Dahlia's disclosure to an external agency does implicate the department's ability to properly maintain efficiency and compliance. The outcome will likely depend on how the outside investigation was initiated, how Dahlia came to testify, and whether the employer can show actual or potential disruption in the department as a result. These facts are not revealed by the complaint.²¹⁴ At the very least, this demonstrates that balancing under *Pickering* does not automatically amount to a victory for the employee.²¹⁵

The outcome under *Pickering*-plus squares more properly with the interests that we have considered thus far and removes some of the inconsistencies inherent in the *Garcetti* framework. For example, the outcome under *Pickering*-plus removes the incentive for the employee to report outside the chain of command.²¹⁶ There is no way to be

²¹³ There is certainly an argument that Dahlia's report to the Los Angeles Sheriff's Department did not comply with high standards of professional responsibility in that he reported to an external agency. The complaint before the court did not indicate whether his report was made on his own volition or at the direction of his employer. *Dahlia*, 735 F.3d at 1077-78. If the former, this fact implicates the employer's interest in maintaining a stable and efficient workforce, and weighs in the employer's favor at balancing. The fact that no outside report would have been necessary if the employer had acted in response to Dahlia's initial report to his supervisor should weigh on Dahlia's side of the balance. *Id.* at 1063-64.

²¹⁴ *Id.* at 1077.

²¹⁵ In fact, *Pickering*-plus likely preserves some of the *Garcetti* framework's preference for employer interests in that it considers the employer's interest at the initial stage and again during traditional *Pickering* balancing.

²¹⁶ There has been some suggestion that if the public concern is a paramount

certain, of course, that the employee's report will be treated seriously or result in a policy change but, at the very least, the employee will have a remedy if subjected to adverse employment action. And if disclosures to several internal organizations — Internal Affairs and the police union in the *Dahlia* example — are not sufficient to address a problem, then the corruption at issue is probably so systemic and structural that employee speech may be simply insufficient as a remedy.²¹⁷ But at least the test offers protection from retaliation for public employees who do the right thing.

Moreover, the *Dahlia* example makes clear the *Pickering*-plus test's capability to represent all relevant interests in the case. The public's interest is vitiated at the initial stage — by way of appeal to matters of “unusual importance” — and again at the *Pickering* balancing test. The employer's interest is also represented at the initial stage — via the high standards of professional responsibility requirement — and again at the *Pickering* balancing stage. And, of course, the employee's interest is validated in the balancing test itself. This recognition and respect for the interests of all involved parties is preferable to the *Garcetti* framework's preclusion of balancing based on the arbitrary and false citizen/employee speech dichotomy.

Applying regular *Pickering* balancing to the facts of *Dahlia* leads to the same result. There is no requirement that the speech be on a matter of “unusual importance” to the public or that it be raised in a highly professional manner. The speech need only be on a matter of public concern. That determination is made based on the context of the speech. Abuse of suspects and witnesses by police officers reported to superiors, the Internal Affairs Department, and ultimately to an outside investigating agency certainly meets that test. Then balancing occurs, with the employee's speech interests balanced against the employer's interests in managing the workforce. The factors in the balance will be the same under either test. While this test does not contain the preliminary requirements that take into account the interests of the employer and the public, the public concern requirement, present in both tests does provide a check that insures

interest then we *should* incentivize disclosures outside the chain of command. While this may be a compelling rhetorical argument, it miscasts the problem. The public's real interest is in removing and deterring police misconduct, and the best way to accomplish this goal is by incentivizing efficient, internal reporting and prohibiting adverse employment complications.

²¹⁷ Incidentally, whistleblowing on structural corruption like this would almost certainly satisfy the “bad faith” requirements of federal whistleblowing laws. *See supra* note 170 and accompanying text.

that the subject of the speech indeed concerns the public interest and is not merely a private dispute between the employer and employee.²¹⁸

A return to *Pickering* balancing, with or without the enhancements suggested by Justice Souter, will not solve the problems of police shootings of unarmed citizens, abuse of suspects and witnesses, or departmental corruption. It will, however, remove one barrier for officers who want to do the right thing and truthfully report identified problems in policing. While retaliation may occur, the officers will have a more potent remedy, which may encourage some to come forward. An altered legal test would not have saved Laquan McDonald. But perhaps the truth about Laquan McDonald's shooting would have surfaced earlier. Perhaps there would have been fewer necessary indictments of officers. Perhaps officers will think twice about engaging in unlawful conduct if the gaps in remedies for truth-telling are replaced by gaps in the thin blue line.

CONCLUSION

Since its inception, the *Garcetti* test for First Amendment protections in public employment has proven problematic. The test is difficult to apply, removes incentives for public employees to disclose government misconduct, and robs the public of internal government oversight. Recent developments in the field of state and federal law enforcement have rendered these drawbacks particularly damning. The growing demand for oversight in the realm of law enforcement necessitates a retreat from *Garcetti*. Instead, the Court should adopt either the standard *Pickering* balancing test or the *Pickering*-plus approach advocated by Justice Souter in his *Garcetti* dissent. Both tests allow a court to consider all the relevant interests implicated by a public employee's First Amendment claim: the interest of the employee, the interest of the employer, and the interest in maintaining transparent government and a safe and informed public. Moreover, these approaches offer a simple balancing test that courts can understand and apply, rather than the arbitrary and false dichotomy created by *Garcetti*. Most importantly in this time of civil unrest, *Pickering* balancing presents an opportunity to cross the "Thin Blue Line."

²¹⁸ See *Connick v. Myers*, 461 U.S. 138, 147-49, 154 (1983) (finding questionnaire distributed to coworkers after employee transfer largely concerned the employee's own interests and to the limited extent that it raised a matter of public concern, the employee's speech interest was outweighed by the employer's interest in avoiding office disruption).