

1-1-2011

# CONSTITUTIONAL LAW—DAMNED IF YOU DO, DAMNED IF YOU DON'T: A PUBLIC EMPLOYEE'S TRILEMMA REGARDING TRUTHFUL TESTIMONY

Adelaida Jasperse

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

---

### Recommended Citation

Adelaida Jasperse, *CONSTITUTIONAL LAW—DAMNED IF YOU DO, DAMNED IF YOU DON'T: A PUBLIC EMPLOYEE'S TRILEMMA REGARDING TRUTHFUL TESTIMONY*, 33 W. New Eng. L. Rev. 623 (2011), <http://digitalcommons.law.wne.edu/lawreview/vol33/iss2/13>

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact [pnewcombe@law.wne.edu](mailto:pnewcombe@law.wne.edu).

CONSTITUTIONAL LAW—DAMNED IF YOU DO, DAMNED IF YOU DON'T: A PUBLIC EMPLOYEE'S TRILEMMA REGARDING TRUTHFUL TESTIMONY

INTRODUCTION

Suppose that you, a police officer, are called to testify against your supervisor who has demoted another police officer for arresting your supervisor's brother on felony warrants for dealing drugs.<sup>1</sup> What are your options? You may truthfully testify and run the risk of lawfully being fired as a result of your boss's retaliation, refuse to testify and face contempt of court for disobeying the subpoena, or lie under oath and commit perjury.<sup>2</sup> This was the plaintiff's trilemma in *Morales v. Jones*.<sup>3</sup> Morales chose to testify truthfully, and, fortunately, the court ruled that his deposition testimony was protected.<sup>4</sup> Not many public employees in Morales's circumstances are as lucky as he was, however. In the plethora of cases concerning a public employee's protected speech, the subject of truthful testimony presents an unsettled issue.<sup>5</sup>

When it comes to deciding the degree to which a public employee's truthful testimony should be protected, or if it enjoys any

---

1. See, e.g., *Morales v. Jones*, 494 F.3d 590, 593, 595 (7th Cir. 2007).

2. See *Reilly v. City of Atlantic City*, 532 F.3d 216, 229 (3d Cir. 2008) (pointing out the testifying dilemma that public workers face); cf. *Huppert v. City of Pittsburg*, 574 F.3d 696, 709 (9th Cir. 2009) (holding that testifying is part of a police officer's job duties; consequently his obligation to testify does not engender First Amendment protection). See generally Michael L. Wells, *Section 1983, The First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 960 (2001) (asserting that public employees do not have an interest in rocking the boat because they face public disapproval aside from the risk of losing their jobs).

3. *Morales*, 494 F.3d at 590-91.

4. *Id.* at 598 ("Being deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties. . .").

5. Testimony is defined as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." BLACK'S LAW DICTIONARY 1613 (9th ed. 2009). Truthful testimony implies that the witness is telling the truth as he understands it. On the other hand, false statements made knowingly, or with reckless disregard for the truth, generally receive no First Amendment protection. See Hon. Harvey Brown & Sarah V. Kerrigan, 42 U.S.C. § 1983: *The Vehicle for Protecting Public Employees' Constitutional Rights*, 47 BAYLOR L. REV. 619, 653 n.213 (1995); Scott E. Michael, "Lie or Lose Your Job!" *Protecting a Public Employee's First Amendment Right to Testify Truthfully*, 29 HAMLINE L. REV. 413, 415 (2006) (demonstrating that the courts disagree on the degree of protection a public employee's truthful testimony should enjoy).

First Amendment protection,<sup>6</sup> the courts are divided.<sup>7</sup> In forming their decisions, courts try to interpret the Supreme Court's elusive decisions, which, unsurprisingly, have led to inconsistent results.<sup>8</sup>

Indeed, courts' rulings vary widely depending on their interpretation of speech involving a matter of public concern and whether employee's official duties compelled the testimonial speech. Several courts have adopted a per se rule<sup>9</sup> that truthful testimony in a court of law or administrative hearing constitutes protected speech because it is inherently a matter of public concern.<sup>10</sup> Under these circumstances, retaliatory dismissal would jeopardize

---

6. U.S. CONST. amend. I. The First Amendment of the United States Constitution states in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*

7. *Reilly*, 532 F.3d at 229 (ruling that a public employee's truthful testimony is automatically protected because every citizen has a duty to testify); *Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1576-78 (5th Cir. 1989) (holding that truthful testimony deserves full First Amendment aegis because it is a per se matter of public concern); *Reeves v. Claiborne Cnty. Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987) ("[The interest of the judicial system] along with the first amendment values, would not be served' if the fear of retaliation . . . 'effectively muzzled' witnesses testifying in . . . court." (quoting *Smith v. Hightower*, 693 F.2d 359, 368 (1982))). Compare *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1505-07 (7th Cir. 1994) (holding that truthful testimony deserves heightened but not per se protection), with *Huppert*, 574 F.3d at 708-10 (holding that truthful testimony, even when related to a matter of public concern, is not protected so long as it is made pursuant to a public employee's official duties), and *Kirby v. City of Elizabeth City*, 388 F.3d 440, 445-47 (4th Cir. 2004) (noting that truthful testimony is protected only when the content of the testimony constitutes a matter of public concern). The First Amendment has been extended to protect the right of witnesses to give truthful testimony. See *Langley v. Adams Cnty.*, 987 F.2d 1473, 1479 (10th Cir. 1993) ("The law is clearly established that the 'First Amendment protects the right to testify truthfully at trial.'" (quoting *Melton v. City of Oklahoma City*, 879 F.2d 706, 714 (10th Cir. 1989), *overruled in part on reh' en banc*, 928 F.2d 920 (10th Cir. 1991))).

8. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (ruling that speech given pursuant to "official duties" is not protected); *Waters v. Churchill*, 511 U.S. 661, 667 (1994) (holding that the government may fire an employee if it reasonably believes that his speech will potentially disrupt his effective job performance); *Rankin v. McPherson*, 483 U.S. 378, 378 (1987) (determining that even inappropriate and controversial speech is protected so long as it involves a matter of public concern); *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (holding that a matter of public concern is measured "by the content, form, and context of a given statement, as revealed by the whole record"); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 563 (1968) (positing that speech is protected if it involves a matter of public concern and when the interest of the public employee in commenting on such matter does not outweigh the government's interest in efficiently performing its duties).

9. "Per se" is defined as "[o]f, in, or by itself." BLACK'S LAW DICTIONARY 1257 (9th ed. 2009).

10. *Pro v. Donatucci*, 81 F.3d 1283, 1290 (3d Cir. 1996) (holding that responding to a subpoena enjoys First Amendment protection much like truthful testimony, because contextually it constitutes speech on a matter of public concern); *Johnston*, 869

the integrity of the judicial process because the public employee might be deterred from testifying by fear of retribution.<sup>11</sup> Other courts have held that truthful testimony deserves heightened but not per se protection.<sup>12</sup> Conversely, the courts that have refused to grant First Amendment protection for truthful testimony have reasoned that speech that relates to a public employee's official duties or his private interests is not safeguarded.<sup>13</sup>

Truthful testimony is a unique form of speech aimed at helping the judiciary to arrive at the truth. Testimony is unique because "it is every [citizen's] duty to give testimony before a duly constituted tribunal,"<sup>14</sup> and the citizen does not have a choice over the content of the testimony.<sup>15</sup> The mission of our justice system is to ensure equal justice under the law.<sup>16</sup> What makes this goal possible is searching for and discovering the truth.<sup>17</sup> Truthful testimony is therefore one of the crucial components in the proper functioning of our judicial process, and its protection should play an essential role in maintaining the integrity of the justice system.<sup>18</sup> Truthful testimony is not only a tool in revealing the truth, but, unlike other forms of speech, it is also often mandatory because the witness is obligated to testify or face the consequences.<sup>19</sup>

In the interest of protecting the judicial truth-seeking process, this Note will argue that truthful testimony in general, and particularly compelled truthful testimony, should receive First Amend-

---

F.2d at 1578 ("When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern.").

11. *Donatucci*, 81 F.3d at 1291 (holding that an employee's fear of retaliation may lead to distorting the truth, which, in turn, would jeopardize the mission of our justice system); *Johnston*, 869 F.2d at 1578 (stating that "[w]e would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state" because employees may not be forthcoming out of fear of reprisal).

12. *Wright*, 40 F.3d at 1507 n.6 ("[E]xcept in the rarest of cases . . . , truthful testimony is protected speech.").

13. *Kirby v. City of Elizabeth City*, 388 F.3d 440, 446 (4th Cir. 2004) (holding that the fact that speech was given during a hearing is immaterial so long as "the statement was made not to further any public debate, but only to further the interests of the two officers involved" (citing *Arvinger v. Mayor of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988))).

14. *Ullmann v. United States*, 350 U.S. 422, 439 n.15 (1956).

15. *Reilly v. City of Atlantic City*, 532 F.3d 216, 228 n.8 (3d Cir. 2008) ("It is axiomatic that '[e]very citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law.'" (quoting *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961))).

16. See *Johnston*, 869 F.2d at 1578.

17. *Id.*

18. *Id.*

19. *Reilly*, 532 F.3d at 228.

ment safeguards, and its protection should not be predicated on “matters of public concern”<sup>20</sup> or “official duties” tests.<sup>21</sup> Instead, truthful testimony should be immunized from job retaliation similar to the way testimony has been immunized from damage claims.<sup>22</sup> Part I of this Note will review the Supreme Court’s stance regarding public employees’ speech. Part II will discuss the protection that witness testimony enjoys from civil damage claims and will argue that a public employee’s truthful testimony should receive the same immunization.

Next, Part III will identify the lower courts’ divergent decisions on the issue of truthful testimony pre-*Garcetti* and discuss the retaliation that public employees face at work as a result of their truthful testimonies. Part IV will discuss the lower courts’ split decisions post-*Garcetti*. Part V will demonstrate the ramifications that legal uncertainty has on this issue—not only on public employees, but on the integrity of our judicial system and the functioning of our government as a whole. Lastly, Part V will conclude that truthful testimony should be protected and afforded immunity from job retaliation.

## I. PUBLIC EMPLOYEES’ FREE SPEECH RIGHTS

### A. *Matter of Public Concern and the Balancing Act: Pickering/Connick Test*

An historical overview of the evolution of a public employee’s speech reveals four distinct stages. Until the early 1950s, the Supreme Court considered government employment a privilege, not a right.<sup>23</sup> From the mid 1950s until the late 1960s, the Court afforded

---

20. *Connick v. Myers*, 461 U.S. 138, 146 (1983) (holding that speech is a matter of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community”). The “matter of public concern” test has received criticism because of its vagueness and the propensity of unpredictable results. See Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 *IND. L.J.* 101, 115 (1995).

21. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (“[W]hen public employees make statements pursuant to their official duties, [they] are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”); Ruben J. Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protection For Public Employees*, 7 *FIRST AMEND. L. REV.* 22, 22-23 (2008) (arguing for a very narrow application of *Garcetti* while advocating for constitutional and international protection of public employees’ speech).

22. See *infra* Part IV.A.

23. See *Adler v. Bd. of Educ.*, 342 U.S. 485, 492 (1952) (upholding a New York statute which allowed the Board of Regents to terminate teachers who were members

public employees greater First Amendment rights.<sup>24</sup> During this time the Court unambiguously favored the government, but recognized that its workers could not lose their constitutional rights by virtue of their employment.<sup>25</sup>

The Supreme Court's position regarding a public employee's freedom of speech, beginning in 1968 and continuing until 2006, denoted a more balanced approach in determining public employees' First Amendment rights. The Court's rationale during this period was that if a public employee spoke as a citizen on a matter of public concern, his speech would be protected, provided that the government's interest in functioning properly did not outweigh the employee's interest in commenting on these matters.<sup>26</sup> In 2006, the Court presented an additional test whereby, if a public employee spoke pursuant to his official duties, his speech would not be protected even if it addressed a matter of public concern.<sup>27</sup>

*Pickering v. Board of Education*, a landmark case, set the standard for measuring the current parameters of a public employee's right to free speech under the First Amendment.<sup>28</sup> Marvin Pickering was fired from his position as a school teacher because he published an article in the local newspaper criticizing the school board and the superintendent for their mishandling of the proposals to raise funds for the school.<sup>29</sup> Pickering responded to his termination by taking the matter to trial.<sup>30</sup>

Balancing both parties' interests, the Supreme Court determined that a government employer could not terminate an employee for merely exercising his First Amendment right of speaking

---

of the Communist Party), *overruled in part by* *Keyishian v. Bd. of Regents*, 385 U.S. 589, 593-94 (1967); *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) ("The [public employee] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."), *abrogated by* *Keyishian*, 385 U.S. at 605-06, and *Rankin v. McPherson*, 483 U.S. 378, 383 (1987).

24. *See, e.g., Keyishian*, 385 U.S. at 605-06 (asserting the notion that public employment may be denied on any terms, no matter how unreasonable, is no longer viable).

25. *Id.*

26. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

27. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

28. *See Pickering*, 391 U.S. at 568; ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1069 (2d ed. 2002) (noting that *Pickering* is the first case to recognize a public employee's right to free speech). But in *Pickering*, the Court stated that its ruling relied on a series of cases originating with *Wieman v. Updegraff*, 344 U.S. 183 (1952), that denied the withholding of state employees' salaries because of failure to complete a loyalty oath. *Pickering*, 391 U.S. at 568.

29. *Pickering*, 391 U.S. at 564-65.

30. *Id.* at 565.

on a matter of public concern.<sup>31</sup> In the Court's opinion, Pickering's article constituted a matter of public concern<sup>32</sup> because "free and open debate is [not only] vital to informed decision-making by the electorate," but also Pickering, as a citizen, taxpayer, and teacher, had a civic stake and a free speech right to discuss whether school funds were properly managed.<sup>33</sup> By the same token, the state had a prerogative to regulate an employee's speech in the interest of its efficient and proper functioning.<sup>34</sup> The Court put both interests on the scale, weighing the interest of the employee, speaking on matters of public concern as a citizen on one hand, and on the other, measuring the interest of the government as an employer in "promoting the efficiency" of public services.<sup>35</sup> The balance shifted in Pickering's favor because, "absent proof of false statements," it was his right as a citizen to speak on matters "of public importance" and his right trumped the school's interest of functioning efficiently.<sup>36</sup>

Fifteen years later, in *Connick v. Myers*, the Court further redefined the outer-limits of public employees' speech, asserting that speech which touches on a matter of a public concern triggers the *Pickering* balancing test.<sup>37</sup> The plaintiff, an assistant district attorney, on her own initiative, prepared and distributed a questionnaire shortly after her supervisor informed her she was being

---

31. *Id.* at 574-75.

32. Matters of public concern include speech on "government corruption, racial discrimination or—as in the case of teacher Marvin Pickering—how school boards allocate their funds between academics and athletics." David L. Hudson, Jr., *The Garcetti Effect, Government Employees Fear High Court Case Undermines Retaliation Protections*, 94 A.B.A. J. 16, 16 (2008).

33. *Pickering*, 391 U.S. at 571-72. Also, in justifying First Amendment protection, the Court articulated that matters of public concern are of beneficial value to the public at large, and that public employees are well-suited to comment on them. *Id.* at 572.

34. *Id.* at 568.

35. *Id.* at 566-68. The burden of showing that his interest as a citizen outweighs the interest of his employer rests with the public employee who has to show that his speech addressed a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 149-50 (1983). Once that is established, the burden shifts to the government to demonstrate the justifications for the employee's demotion or discharge. *Id.* at 150-51. When balancing the employee's right, the higher the level of public concern, the higher the need for the government to bring forth a showing of disruption in the office. *Id.* at 152; Brown & Kerrigan, *supra* note 5, at 653. These showings include:

(1) The need to maintain discipline or harmony among coworkers; (2) The need for confidentiality; (3) The need to curtail conduct which impedes the employee's proper and competent performance of his daily duties; and (4) The need to encourage a close and personal relationship between the employee and his superiors, where the relationship calls for loyalty and competence.

*Id.*

36. *Id.* at 574.

37. *Connick*, 461 U.S. at 146.

transferred to a different department.<sup>38</sup> The plaintiff's supervisors regarded the questionnaire as "a mini-insurrection," fueled by her resentment for her transfer.<sup>39</sup> The Court determined that only one out of the fourteen items on the questionnaire addressed a matter of public concern.<sup>40</sup> The rest of the questionnaire represented the plaintiff's personal dissatisfaction regarding internal office policy and disapproval of her transfer.<sup>41</sup>

Accordingly, its content contained a minimal level of matter of public concern and consequently the government's proper functioning received priority, making the plaintiff's speech unworthy of First Amendment protection.<sup>42</sup> The Court specified that a matter of public concern, in addition to the *content*, was also measured by the "form[ ] and context of a given statement, as revealed by the whole record."<sup>43</sup> The context did not involve a matter of public concern either, because the time, place, and manner in which the plaintiff created the questionnaire favored the likelihood of office disharmony.<sup>44</sup> Consequently, due to the context, and because the questionnaire represented a low level of public concern, the Court ruled in favor of the government.<sup>45</sup> *Connick's* holding reflected the view that the government has duties to perform, and if every issue is regarded as a constitutional matter, the government's performance would suffer.<sup>46</sup>

In sum, the *Pickering/Connick* test established a two-step approach in determining whether a public employee's speech is protected. The first step is to decide if the speech in question involves a matter of public concern.<sup>47</sup> If so, the court will balance the interest of the public employee's speech against that of the government's interest in efficiently performing its duties.<sup>48</sup> When the balance tips

---

38. *Id.* at 141.

39. *Id.* at 141, 151.

40. *Id.* at 148. Item eleven of the questionnaire asked: "Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?" *Id.* at 155.

41. *Id.* at 148.

42. *Id.* at 154.

43. *Id.* at 147-48.

44. *Id.* at 152-53. The Court stated that context is determined by the time, place, and manner of speech. *Id.*

45. *Id.* at 154.

46. *Id.* at 149.

47. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

48. *Connick*, 461 U.S. at 140.

in favor of the public employee, the speech is protected; otherwise, it is not.<sup>49</sup>

### B. *Inappropriate Speech, Yet Protected*

Four years after *Connick*, the Court was confronted with the question of whether a public employee's inappropriate and controversial statement, which nonetheless fell within the realm of a matter of public concern, deserved First Amendment protection.<sup>50</sup> In *Rankin v. McPherson*, the Court answered this question in the affirmative, expanding the notion of safeguarded speech.<sup>51</sup> In 1981, Ardith McPherson worked as a data-entry employee in a county constable's office where she performed clerical duties.<sup>52</sup> She had heard about the attempted assassination of the United States President Ronald Reagan on the radio.<sup>53</sup> In the course of discussing the President's reform in reducing welfare programs with a co-worker, she said: "[i]f they go for him again, I hope they get him."<sup>54</sup> This statement caused her job termination.<sup>55</sup>

The Court ruled that McPherson's comment, while inappropriate and controversial, viewed contextually, addressed a matter of public concern because she uttered it while discussing the policies of the President's administration.<sup>56</sup> However, the Court clarified that unlike McPherson's statement, a comment which amounts to an imminent threat to kill the president enjoys no protection.<sup>57</sup> In the Court's balancing act of the employee's and the government's interests, McPherson came through victorious, mainly, because the Court considered her utterance a matter of public concern.<sup>58</sup> In addition, the fact that she was a data-entry employee and served no confidential policy-making role received substantial weight in her favor, because in the Court's view, the speech of a low-level employee posed minimal risk to workplace efficiency.<sup>59</sup>

---

49. *Id.*

50. *Rankin v. McPherson*, 483 U.S. 378, 387-88 (1987).

51. *Id.* at 380, 386.

52. *Id.* at 378, 380.

53. *Id.* at 381.

54. *Id.*

55. *Id.* at 380.

56. *Id.* at 386-87.

57. *Id.*

58. *See id.*

59. *Id.* at 390-91 ("Where . . . an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal.").

### C. *Setting Procedural Guidelines*

For the first time, in *Waters v. Churchill*, the Court introduced and emphasized the importance of implementing reliable procedures when making adverse employment decisions.<sup>60</sup> The plaintiff, Cheryl Churchill, who worked as a nurse for a public hospital was terminated after she allegedly made disruptive comments about her department to a trainee nurse.<sup>61</sup> Churchill, however, claimed that she was fired because she disagreed with the hospital's policies of nurse cross training and commented that certain units were left understaffed.<sup>62</sup> The *Waters v. Churchill* Court explained that in deference to its interest of functioning properly, the government may fire an employee if it *reasonably believes* that his or her speech will potentially disrupt its effective performance.<sup>63</sup> With this in mind, the government can only dismiss an employee in good faith<sup>64</sup> and, more importantly, after a reasonable investigation.<sup>65</sup> In addition, the government's greater control over a public employee's speech hinges on "the nature of [its] mission as employer."<sup>66</sup> The Court did not, however, devise a detailed procedural test.<sup>67</sup> Consequently, the courts, when faced with these issues, still employ a case-by-case approach.

---

60. *Waters v. Churchill*, 511 U.S. 661, 669 (1994).

61. *Id.* at 664-65.

62. *Id.* at 666-67.

63. *Id.* at 677-78. The Court stated that reasonable care is "the care that a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case." *Id.* at 678. Instances of unreasonable actions would include disciplinary reprimands when the evidence does not exist, or is "extremely weak . . . [or] when strong evidence is clearly available—if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay." *Id.* at 677.

64. *Id.* The Court noted that "[i]t is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith [alone] is sufficient" under the First Amendment. *Id.*

65. *Id.* at 677-78.

66. *Id.* at 674. The Court stated:

The government's interest in achieving its goals as effectively . . . as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

*Id.* at 675; *see also* Brown & Kerrigan, *supra* note 5, at 658 ("[The Court's] holding [in *Waters*] add[ed] a procedural step to an employer's consideration of the impact of the employee's speech . . .").

67. *Waters*, 511 U.S. at 661.

#### D. *Garcetti and the Official Duty Standard*

In 2006, faced once again with the issue of a public employee's free speech in the workplace, the Court introduced an additional test to determine a worker's First Amendment protection. Indeed, the *Garcetti* Court posited that in order to be protected, besides satisfying the matter of public concern requirement, a worker's speech could not stem from his "official duties."<sup>68</sup> Because—the Court added—when public employees speak in the course of their official duties, they do not speak in their capacity as citizens; thus, the Constitution cannot protect them "from employer discipline."<sup>69</sup> In *Garcetti*, the plaintiff, Richard Ceballos, a deputy district attorney, wrote a memorandum recommending that his supervisors dismiss a criminal case because his investigation revealed that the case relied on "serious misrepresentations" on the part of the Los Angeles County Sheriff's Department.<sup>70</sup> While Ceballos's supervisors decided to pursue the case despite his recommendation, Ceballos was subjected to numerous retaliatory actions.<sup>71</sup>

In reaching its decision, the Court differentiated between employee speech and citizen speech.<sup>72</sup> The dispositive factor was that Ceballos prepared the memorandum "pursuant to his duties as a calendar deputy" and not in his capacity as a citizen.<sup>73</sup> In writing the memorandum, the Court noted, he simply complied with his professional obligations and responsibilities.<sup>74</sup> Consequently, limiting speech, derived from a public worker's job, did not impinge upon his First Amendment rights as a citizen.<sup>75</sup> The Court con-

---

68. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); see also Elisabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 BERKELEY J. EMP. & LAB. L. 175, 175 (2008) ("[T]he Court in *Garcetti* defined public employee speech rights in a way that may ultimately strengthen the hand of public employees."). But see Erwin Chemerinsky, *The Rookie Year of the Roberts Court and A Look Ahead: Civil Rights*, 34 PEPP. L. REV. 535, 538-39 (2007) ("Surely government employees do not give up their citizenship when they walk into the government office building. But to me there are real consequences of the [*Garcetti*] case and why it is so misguided is that it is much less likely that wrongdoing will be exposed by government employees.").

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

70. *Id.* at 414. Ceballos's memorandum stated that the deputy sheriff had falsified an affidavit to obtain a search warrant. *Id.* at 413-14.

71. *Id.* at 414-15.

72. *Id.* at 424.

73. *Id.* at 421.

74. *Id.* at 424.

75. *Id.*

cluded that this limitation was merely an expression of the government's exercise of its managerial role.<sup>76</sup>

In addition, the Court determined that defining the meaning of "official duties" would be unwarranted because a public employee's daily tasks often differ noticeably from his official job description.<sup>77</sup> Instead, the courts must follow a case-by-case inquiry.<sup>78</sup> The Court stated that the "official duties" rationale is based on the attempt to avoid judicial interference in communications between the government and its employees and to give the public employer a degree of discretion in performing its duties.<sup>79</sup> On the other hand, the Court emphasized the paramount importance of exposing governmental corruption in a democracy and referred to various appropriate mechanisms available to employees, such as whistle-blower statutes,<sup>80</sup> labor codes, and other constitu-

---

76. *Id.* at 422.

77. *Id.* at 424-25. In the words of the Court:

Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

*Id.*

78. *See id.*

79. *Id.* at 422-23.

80. Peter Katel, *Protecting Whistleblowers, Do Employees Who Speak Out Need Better Protection?*, CQ RESEARCHER, Vol. 16, No. 12, 265, Mar. 31, 2006, available at [http://hsgac.senate.gov/\\_files/111203devine.pdf](http://hsgac.senate.gov/_files/111203devine.pdf); *The Federal Workforce: Observations on Protections From Discrimination and Reprisal for Whistleblowing: Testimony Before the H. Comm. on the Judiciary 1* (2001) [hereinafter *The Federal Work Force*] (statement of J. Christopher Mihm, Director, Strategic Issues), available at <http://www.gao.gov/new.items/d01715t.pdf>. However, possibly due to the "complexity of the redress system" and the multiple ways employed to report these cases, "lacks a clear picture" of the amount of whistleblowing retaliatory cases filed by federal employees. *Id.*

On the federal level, there are about forty laws enacted to protect whistleblowers. *See* Katel, *supra*. For some of the statutes, see generally, Merit System Principles Act 2002, 5 U.S.C. § 2301 (2006); Prohibited Personnel Practices Act 2008, 5 U.S.C. § 2302 (2006); Labor Management Relations Act, 1935, 29 U.S.C. §§ 141-69 (2006); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2006); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C.); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (2006).

The federal employees of the executive branch can redress their grievances of discrimination or retaliation for whistleblowing in three ways. First, they may file their complaints within their agencies. *The Federal Workforce, supra*, at 2. Next, they may take them up with one of three administrative agencies; namely, the Equal Employment Opportunity Commission (EEOC); the Merit Systems Protection Board (MSPB); and the Office of Special Counsel (OSC). *Id.* These agencies are in charge of the investigation or adjudication of public employees' complaints. Finally, the United States Court of Appeals for the Federal Circuit is the employees' last resort. *Id.* However, federal

tional obligations.<sup>81</sup> But the Court stated that it refused the notion of planting a constitutional seed behind every workplace speech.<sup>82</sup> In sum, the current Supreme Court's test on public employees' speech provides that speech flowing from their "official duties" receives no constitutional protection, even if it constitutes a matter of public concern.<sup>83</sup> Finally, the Supreme Court has not specifically addressed the narrower question of whether a public employee's truthful testimony is safeguarded. However, relying on the com-

---

employees must exhaust the first two levels of grievances before appealing to the court. *Id.* at 3. In 1978, Congress passed the first comprehensive whistleblower legislation which promulgated the creation of the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) as agencies responsible for the deliberation of retaliatory complaints. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.). Eleven years later, the Whistleblower Protection Act (WPA) intended to improve the reprisal process came into effect. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 101 Stat. 16 (codified as amended in 5 U.S.C. § 2302). Generally, the WPA statute protects whistleblowers when reporting a violation of law, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. *Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection from Reprisal: Fact Sheet for the Chairman, H. Subcomm. on the Civil Service, H. Comm. on Post Office and Civil Service* 1, n.1, n. 2 (1992) [hereinafter *Survey of Federal Employees on Civil Service*], available at <http://archive.gao.gov/d33t10/147240.pdf>. As to the structure of the administrative grievance bodies, the EEOC is the body responsible for reviewing and hearing complaints that employees file within their agencies. *The Federal Workforce, supra*, at 2-3. MSPB handles more serious cases such as retaliatory actions leading to dismissal or transfer for more than fourteen days. Other complaints, such as transfers or denial of promotions, can be filed with the OSC. *Id.* at 3. If the OSC does not act within 120 days, whistleblowers can take their cases to the MSPB. *Id.* An employer may appeal a MSPB or EEOC decision by filing with the United States Court of Appeals for the Federal Circuit, a court of exclusive jurisdictions over whistleblower cases. *Id.* Employees who work in the public health and safety sectors can file their grievances directly with the Department of Labor (DOL).

The process of redressing First Amendment violations under the whistle-blower statutes is cumbersome and has not proven effective. *See* Garcia, *supra* note 21, at 22 ("[S]tatutory protection for whistleblowers can be ineffective and sometimes counter-productive for public employees."); *see also* *Federal Employee Redress: A System in Need of Reform: Testimony Before the H. Subcomm. on Treasury, Postal Service, and General Government, H. Comm. on Appropriations*, 1-6 (1996) [hereinafter *A System in Need of Reform*] (statement of Timothy P. Bowling, Associate Director, Federal Management and Workforce Issues, General Government Division) (evidencing the inefficiency of the whistleblower redress system), available at <http://www.gao.gov/archive/1996/gg96110t.pdf>; *Federal Employee Redress: An Opportunity for Reform: Testimony Before H. Subcomm. on the Civil Service, H. Comm. on Post Office and Civil Service*, 1-6 (1995) [hereinafter *An Opportunity for Reform*] (statement of Timothy P. Bowling, Director, Federal Management and Workforce Issues, General Government Division), available at <http://161.203.16.4/papr2pdf/155680.pdf>.

81. *Garcetti*, 547 U.S. at 425-26.

82. *Id.* at 426-27.

83. *Id.* at 421.

mon law tradition, it has held that trial witnesses' testimonies are immune from damage claims. The following Section discusses the rationale for this protection.

## II. WITNESSES' RIGHTS AT COMMON LAW

At common law, trial witnesses enjoyed absolute immunity from civil damage liability for their court testimonies.<sup>84</sup> The purpose of this immunity was to avoid two types of self-censorship<sup>85</sup>—refusing to testify and distorting the truth.<sup>86</sup> As this Note will later explore, a similar rationale should apply to the effort of protecting a public employee's truthful testimony from employer retaliation because the truth-finding process compels this protection.

Overcoming self-censorship was so compelling at common law that the rule afforded protection even to those who offered false and malicious testimony.<sup>87</sup> Indeed, the Court of Exchequer in *Henderson v. Broomhead* held “that no action will lie for words spoken or written in the course of giving evidence,” regardless of their malicious nature.<sup>88</sup> In *Henderson*, the plaintiff asserted a damages claim against the defendant maintaining that the defendant's affidavit, given during another trial proceeding, falsely and maliciously defamed the plaintiff.<sup>89</sup> The court firmly resolved that witnesses were immune from damage claims and asserted that it based its decision on numerous legal authorities rooted in centuries of judge-made legal jurisprudence.<sup>90</sup> Holding otherwise, the court stated,

---

84. *Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1983); *Henderson v. Broomhead*, (1859) 157 Eng. Rep. 964 (Exch.) 968 (refusing to recognize a cause of action against witnesses who testify in court even if their speech is defamatory and malicious); *Revis v. Smith*, (1856) 139 Eng. Rep. 1314 (C.P.) 1314 (stating that “[n]o action lies against a man for a statement made by him, whether by affidavit or [verbally], in the course of a judicial proceeding, even [if the statement is false or malicious] ‘and without any reasonable or probable cause’”); *Anfield v. Feverhill*, (1614) 80 Eng. Rep. 1113 (K.B.) (holding that witnesses are immune from damages liability for their testimony in trial); *Cutler v Dixon*, (1585) 76 Eng. Rep. 886 (K.B.) 887-88 (denying the plaintiff's claim because “if actions should be permitted [against witnesses], those who have just cause for complaint, would not dare to complain for fear of infinite vexation”).

85. *Briscoe*, 460 U.S. at 333 (citing *Henderson*, 157 Eng. Rep. at 968-69); see also *Haddle v. Garrison*, 525 U.S. 121, 125-26 (1998) (stating that retaliation against an employee at will for testifying in court may “injure [the employee] in his person or property” and in turn subjects the employer to civil liability pursuant to 42 U.S.C. § 1985 (quoting *Conspiracy to Interfere with Civil Rights*, 42 U.S.C. § 1985(2) (2006))).

86. *Briscoe*, 460 U.S. at 333 n.13.

87. *Id.* at 331-32; see *supra* note 84.

88. *Henderson*, 157 Eng. Rep. at 968.

89. *Id.* at 967.

90. *Id.* at 968.

would undermine witnesses' willingness "to speak freely" resulting in "great mischief [for the] Courts of justice."<sup>91</sup>

Similarly, the Supreme Court affirmed this well-established common law principle in *Briscoe v. LaHue*.<sup>92</sup> There, the Court held that a police officer was immune from civil liability suits under 42 U.S.C. § 1983<sup>93</sup> based on his allegedly perjurious testimony at a criminal trial.<sup>94</sup> Briscoe, the plaintiff, had been convicted of burglarizing a house trailer.<sup>95</sup> Briscoe claimed that LaHue, the defendant, lied at Briscoe's trial when he testified that Briscoe was one out of fifty to a hundred people "whose prints would match a partial thumbprint" found at the crime scene.<sup>96</sup> Briscoe insisted that the testimony was perjurious, because the FBI and state police had deemed the partial thumbprint evidence unreliable.<sup>97</sup>

The Court noted that the legislators, by enacting this section of the Civil Rights Act of 1871, intended to extend the same protection from damage claims to trial witnesses as they had under the common law.<sup>98</sup> The policy rationale behind this rule was to allow "the paths which lead to the ascertainment of truth [to be] as free and unobstructed as possible," so that the judicial truth-seeking mission may be best served.<sup>99</sup> In addition, the Court observed that protecting witnesses from damage liability is essential, especially in light of a witness' non-negotiable duty to testify.<sup>100</sup> The rule protected witnesses as well as other integral players in the judicial process, such "as judges, sheriffs, and marshals," and applied to both public officials and private citizens.<sup>101</sup> Generally, all those who played a crucial role in the judicial system were immune from civil suits.<sup>102</sup> Applying this common law rationale to a public employee's truthful testimony would avoid current variant outcomes and confusion as shown in the next Section.

---

91. *Id.*

92. *Briscoe*, 460 U.S. at 325.

93. Civil Action for Deprivation of Rights Act, 42 U.S.C. § 1983 (2006).

94. *Briscoe*, 460 U.S. at 331.

95. *Id.* at 326.

96. *Id.* at 327.

97. *Id.*

98. *Briscoe*, 460 U.S. at 330.

99. *Id.* at 333 (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)).

100. *Id.*

101. *Id.* at 341 n.26.

102. *Id.* at 330-31.

III. THE CIRCUIT SCHISM PRIOR TO *GARCETTI*A. *Fully Protecting Truthful Testimony*

Even pre-*Garcetti*, courts' divergent perspectives on the notion of "matters of public concern," pertinent to testimonial speech, yielded inconsistent results.<sup>103</sup> Some courts viewed truthful testimony as another form of run-of-the-mill speech, and as such, they relied squarely on the *content* of testimony to determine whether it deserved protection.<sup>104</sup> Others focused their analysis on the *context* in which the testimony was made.<sup>105</sup> They argued that because testimonial speech was compulsory and given before a fact-finding or judicial body, it was inherently a matter of public concern; thus it enjoyed full First Amendment protection.<sup>106</sup> Others took the middle road, reasoning that truthful testimony deserved heightened but not per se protection.<sup>107</sup>

The justification for the per se "matters of public concern" approach is that to allow an employer to retaliate against an employee for testifying would discourage that person from speaking truthfully and undermine the judicial system.<sup>108</sup> *Johnston v. Harris County Flood Control District* stands in the forefront of the line of cases that have adopted the per se test; courts faced with claims of the per se rule have relied substantially on this case.<sup>109</sup> Carl Johnston worked for the Harris County Flood Control District (HCFD).<sup>110</sup> He testified at an Equal Employment Opportunity (EEO) hearing on behalf of a co-worker and against his employer.<sup>111</sup> After his tes-

---

103. See *supra* note 7.

104. Kirby v. City of Elizabeth City, 388 F.3d 440, 447 (4th Cir. 2004); Arvinger v. Mayor of Balt., 862 F.2d 75, 79 (4th Cir. 1988) (holding that if a testimonial statement does not involve issues of public concern, it is not protected).

105. Johnston v. Harris Cnty. Flood Control Dist., 869 F.2d 1565, 1578 (5th Cir. 1989); Reeves v. Claiborne Cnty. Bd. of Educ., 828 F.2d 1096, 1100 (5th Cir. 1987).

106. *Johnston*, 869 F.2d at 1578.

107. Wright v. Ill. Dep't of Children & Family Servs., 40 F.3d 1492, 1505-07 (7th Cir. 1994).

108. *Johnston*, 869 F.2d at 1578.

109. Catletti v. Rampe, 334 F.3d 225, 230 (2d Cir. 2003) (citing *Johnston*'s per se rule); see also Padilla v. S. Harrison R-II Sch. Dist., 181 F.3d 992, 996 (8th Cir. 1999); Pro v. Donatucci, 81 F.3d 1283, 1289 (3d Cir. 1996) (extending a per se rule relying on *Johnston*); Wright, 40 F.3d at 1505; Workman v. Jordan, 32 F.3d 475, 483 (10th Cir. 1994). But see Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 925-27, 926 n.6 (citing *Johnston* but specifically not deciding whether or not to accept a per se rule).

110. *Johnston*, 869 F.2d at 1568.

111. *Id.*

timony, he was subjected to myriad retaliatory actions<sup>112</sup> that eventually resulted in his termination.<sup>113</sup>

Subsequently, he sued his former employer, alleging a violation of his First Amendment liberty to testify freely.<sup>114</sup> The testimony in question addressed a personal dispute between Johnston's co-worker and the HCFD.<sup>115</sup> However, the court held it was immaterial that the content of Johnston's testimonial speech dealt with a private issue.<sup>116</sup> Rather, the court explained that the controlling factor for its constitutional protection was the context because "[w]hen a [public] employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern."<sup>117</sup>

Seven years later, in *Pro v. Donatucci*,<sup>118</sup> another circuit expanded the notion of the per se rule by applying it to "would-be testimony" concerning a purely private matter.<sup>119</sup> In a case of first impression, the court held that responding to a subpoena enjoys First Amendment protection much like truthful testimony because, contextually, it constitutes speech on a matter of public concern.<sup>120</sup> *Sisinia Pro* worked as a secretary for Ronald Donatucci, Register of Wills in Philadelphia.<sup>121</sup> Donatucci's wife subpoenaed *Pro* to testify in her divorce action against her husband.<sup>122</sup> *Pro* appeared in court to testify but did not have the opportunity to do so.<sup>123</sup> A short time

---

112. *Johnston v. Harris Cnty. Flood Control Dist.*, No. H-82-21729, 1986 WL 14438, at \*1-3 (S.D. Tex. Dec. 16, 1986). The United States District Court found that Johnston had worked for HCFD for thirty years. *Id.* at \*1. His job performance, although not stellar, was on par with that of the other county workers. *Id.* The evidence revealed that the HCFD's retaliatory actions after his testimony included giving him assignments unrelated to his position, such as clerical duties or "strenuous field work." *Id.* In addition, his supervisors had moved him around to several office environments that were "less desirable" than his regular office. *Id.* One year, he was the only employee in the HCFD that did not get the raise of twelve percent. *Id.* Finally, upon his refusal to accept a demotion, HCFD fired him. *Id.* at \*2.

113. *Johnston*, 869 F.2d at 1568.

114. *Id.*

115. *Id.* at 1577.

116. *Id.*

117. *Id.* at 1578.

118. *Pro v. Donatucci*, 81 F.3d 1283, 1289 (3d Cir. 1996).

119. *Id.* Would-be testimony referred to *Pro*'s testimony, which was scheduled to occur but did not take place. *Id.*

120. *Id.* at 1291.

121. *Id.* at 1285.

122. *Id.*

123. *Id.*

later, she was discharged from her post due to “an on-going department reorganization.”<sup>124</sup> Pro brought a section 1983 action<sup>125</sup> against Donatucci alleging retaliatory discharge in violation of her First Amendment rights.<sup>126</sup>

The court posited “that the context of [courtroom testimony] raise[d] the speech to a level of public concern regardless of its content.”<sup>127</sup> Its ruling relied on two important considerations: public employees’ interests in testifying truthfully and the judicial interest in having them testify without fearing retaliation.<sup>128</sup> Reiterating that testimony deserves protection, despite the nature of the speech, the court reasoned that the crux of the matter boiled down to “control,” or lack thereof.<sup>129</sup> A public employee may choose to comment or not on an issue that is likely to trigger retribution from his or her supervisor.<sup>130</sup> But “[a] subpoenaed witness” is compelled to appear at trial, or, in the alternative, face contempt of court.<sup>131</sup> Thus, retaliating against employees for acts that they are legally obligated to fulfill is unjust.<sup>132</sup> Furthermore, no distinction exists between retaliating against an employee who actually testifies at trial or one who appears in order to testify but does not.<sup>133</sup> Lastly, the court concluded that this protection was not without exception, but subject to the *Pickering* balancing test, which weighs the interest of the employee in speaking on a matter of public concern against that of the employer in regulating the speech.<sup>134</sup>

---

124. *Id.*

125. Civil Action for Deprivation of Rights Act, 42 U.S.C. § 1983 (2006). The statute states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

*Id.*

126. *Pro*, 81 F.3d at 1285.

127. *Id.* at 1291 n.4.

128. *Id.* at 1291.

129. *Id.* at 1290.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1291.

134. *Id.* at 1291 n.4.

B. *Protecting Truthful Testimony Only When it Advances a Public Concern*

The *Kirby v. City of Elizabeth City* court refused to automatically grant First Amendment protection to a policeman's truthful testimony, relying on the rationale that testimony concerning private issues did not deserve protection.<sup>135</sup> Carl Kirby, a police officer, testified in front of the City Personnel Appeals Committee regarding a grievance that his co-worker had filed in response to the disciplinary actions taken against the co-worker for damaging a patrol car.<sup>136</sup> In his testimony, Kirby discussed the maintenance history of the patrol car and his assessment of the officer's habits in maintaining and driving the car.<sup>137</sup>

Kirby's testimony signaled the beginning of a slew of disciplinary actions against him.<sup>138</sup> Shortly after testifying, he "received an oral reprimand for '[f]ailure to support the Department's Administration.'" <sup>139</sup> He was eventually demoted to a lower position for "poor job performance" and failure to comply with proper policies and procedures.<sup>140</sup> He asserted that this treatment was in retaliation for his testimony before the committee.<sup>141</sup> After filing a grievance the Appeals Committee reinstated Kirby to his previous position.<sup>142</sup> He maintained, however, that his supervisors continued to retaliate against him by giving him menial tasks.<sup>143</sup> Kirby finally brought suit against his employer.<sup>144</sup>

Focusing solely on the content of Kirby's testimony, the court did not grant him First Amendment protection because his testimony addressed a private matter.<sup>145</sup> *Kirby* posited that issues such as the reliability of the car and his co-worker's negligence in maintaining the car's transmission fluids involved private interests.<sup>146</sup>

---

135. *Kirby v. City of Elizabeth City*, 388 F.3d 440, 447 (4th Cir. 2004). Courts have characterized truthful testimony related to private interests as speech aimed at simply furthering the plaintiff's personal concerns, distinguishing it from speech addressing issues of public concern. *Id.*; see also *Arvinger v. Mayor of Balt.*, 862 F.2d 75, 79 (4th Cir. 1988).

136. *Kirby*, 388 F.3d at 443.

137. *Id.*

138. *Id.* at 444.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 445.

143. *Id.*

144. *Id.*

145. *Id.* at 450.

146. *Id.* at 447.

The court further explained that testimony given in a public hearing did not automatically become a matter of public concern.<sup>147</sup> Instead, the key issue was whether the testimony served to further a public debate or merely advanced the private interests of the public employee in question.<sup>148</sup> Although the safety standards of a police car were at stake, the court did not regard this issue as advancing a public debate.<sup>149</sup> As such, it deemed the issue not a matter of public concern.<sup>150</sup>

#### IV. THE CIRCUIT SPLIT POST-*GARCETTI*

##### A. *Protecting Truthful Testimony as Citizen Speech*

The courts' decisions post-*Garcetti* reflects two distinct interpretations of the Supreme Court's rulings. Some courts hold that testimony given pursuant to a public employee's official duties is speech that belongs to the government, thus it is not protected despite its context.<sup>151</sup> Others opine that testifying truthfully at a judicial trial is every citizen's obligation.<sup>152</sup> Consequently, full protection is granted because "[w]hen a government employee testifies truthfully, [he] is not 'simply performing his . . . job duties[;]' rather, [he] is acting as a citizen and is bound by the dictates of the court . . . ." <sup>153</sup>

Indeed, the *Reilly v. City of Atlantic City* Court adopted the latter rationale in reaching its decision.<sup>154</sup> Robert Reilly worked for the Atlantic City Police Department for twenty-five years.<sup>155</sup> In the course of his employment, he testified as a witness for the prosecution in a trial concerning department corruption indirectly involving his supervisor.<sup>156</sup> Reilly had obtained information about the corruption while he worked as an investigator for the department.<sup>157</sup> He was later charged with several disciplinary violations, including making disparaging comments to a colleague.<sup>158</sup> Upon

---

147. *Id.* at 446.

148. *Id.* at 447.

149. *Id.*

150. *Id.*

151. *Huppert v. City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009).

152. *Reilly v. City of Atlantic City*, 532 F.3d 216, 218 (3d Cir. 2008).

153. *Id.* at 231 (citation omitted) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)).

154. *Id.*

155. *Id.* at 220.

156. *Id.*

157. *Id.*

158. *Id.* at 221.

reviewing the evidence, an independent hearing officer recommended that Reilly be suspended for four days.<sup>159</sup> But, his two supervisors demoted him instead.<sup>160</sup> Finally, Reilly resigned, and, subsequently, he filed a section 1983 lawsuit.<sup>161</sup> Reilly asserted that his supervisors retaliated against him because of his previous testimony in the police corruption case where one of them was involved.<sup>162</sup> His supervisors pleaded that they were entitled to qualified immunity because, consistent with *Garcetti*, Reilly's trial testimony was not protected speech because it stemmed from his official job duties.<sup>163</sup>

The court disagreed and stated that the Supreme Court's precedent "settled principles" of our jurisprudence, and that the Court's judgment supported the conclusion that Reilly's testimony was citizen speech deserving full protection.<sup>164</sup> The court posited that this conclusion was rooted in the axiom "that '[e]very citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law.'"<sup>165</sup> Since the substance of Reilly's testimony had been obtained on the job, the question before the court was whether a public employee's testimonial speech stemming from his job duties deserved constitutional protection.<sup>166</sup> The Third Circuit stated that, when a public employee testifies "[he] is not 'simply performing his . . . job duties[;]'" rather, [he] is acting as a citizen . . ."<sup>167</sup> Thus, per *Reilly*, a public employee's testimony is considered citizen speech because when a public employee testifies, his citizen duty prevails over his employee duty.<sup>168</sup>

In a similar vein, the court limited *Garcetti*'s reach "to the question whether Reilly spoke as a citizen when he testified . . ."<sup>169</sup> The court also pointed out that the *Garcetti* ruling only applied to the speech embodied in plaintiff Ceballos's internal memorandum and not to the issue of truthful testimony.<sup>170</sup> Identifying as the dis-

---

159. *Id.*

160. *Id.* at 222.

161. *Id.*

162. *Id.* at 224.

163. *Id.* at 226-27.

164. *Id.* at 231.

165. *Id.* at 228 (quoting *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961)).

166. *Id.*

167. *Id.* at 231 (citation omitted) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)).

168. *Id.* at 228.

169. *Id.*

170. *Id.* at 231.

positive factor the fact that Reilly testified at trial in his capacity as a citizen, the court concluded that his testimony was protected.<sup>171</sup>

B. *No Immunity if Truthful Testimony is Made Pursuant to Official Duties*

*Huppert v. City of Pittsburg* agreed with *Garcetti*'s "official duties" rationale, by holding that the truthful testimony of a public employee is not protected when given as an extension of his official duties.<sup>172</sup> In 1991, Ron Huppert started working as a patrol officer and an inspector for the Pittsburg Police Department (PPD).<sup>173</sup> While working as a police officer, he was called to assist in investigating corruption at the Pittsburg Public Works Yard.<sup>174</sup> Huppert maintained "that [f]rom that time on, my superiors [at the PPD] treated me with scorn and as an outcast."<sup>175</sup> A year later, Huppert took the sergeant's exam, but he did not get promoted even though he scored high on the test.<sup>176</sup> His supervisor told him that he did not become a sergeant because he had a goatee.<sup>177</sup>

In the following years while still working for the PPD, Huppert was engaged in an FBI investigation about alleged corruption within the department.<sup>178</sup> He asserted that his work for the FBI was unrelated to his PPD position.<sup>179</sup> Subsequently, he was transferred "to a building known within the PPD as the Penal Colony, because disaffected and/or disfavored officers were assigned there."<sup>180</sup> Huppert's new supervisor told him that he had been sent there because Huppert's former supervisor wanted to fire Huppert.<sup>181</sup>

In 2004, Huppert was subpoenaed to testify before a civil grand jury in charge of investigating corruption in the PPD.<sup>182</sup> Shortly thereafter, he was transferred from his position as a gang investigator to a fraud and forgeries investigator, with an increased wor-

---

171. *Id.* at 227-28. Also, the court did not address whether Reilly's testimony constituted a matter of public concern because it upheld the district court's affirmative ruling on the matter. *Id.* at 228.

172. *Huppert v. City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009).

173. *Id.* at 698.

174. *Id.* at 698-99.

175. *Id.* at 699 (internal quotation marks omitted).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* (internal quotation marks omitted).

181. *Id.*

182. *Id.* at 700.

kload.<sup>183</sup> He claimed that his transfer “was initiated simply as a method of harassment.”<sup>184</sup> Huppert and the Patrol Officers Association were finally forced to file a grievance against the PPD after Huppert’s superior “attempted to replace Huppert’s superlative yearly evaluation,” conducted by another sergeant, with an evaluation Huppert’s superior had prepared.<sup>185</sup> Huppert eventually retired on disability.<sup>186</sup>

With regard to Huppert’s testimony before the grand jury, the court determined that his testimony was not protected because it flowed from his official duties.<sup>187</sup> The court further explained that speech pursuant to one’s official duties is distinguished from speech as a private citizen because it “does not infringe any liberties the employee might have enjoyed as a private citizen.”<sup>188</sup> The court disagreed with the *Reilly* rationale and refused to follow its ruling, claiming that it unjustifiably chipped away at the *Garcetti* holding.<sup>189</sup>

Furthermore, the court asserted that, in California, police officers have an official duty to testify.<sup>190</sup> The court relied on *Christal v. Police Commission of San Francisco*, which predated *Garcetti*, stating that, in accordance with California law, police officers must testify freely in front of a grand jury.<sup>191</sup> The *Huppert* court stated, however, that its holding did not categorically foreclose the possibility of protecting a police officer’s speech.<sup>192</sup> An exception might be made, if, for example, speech revealed corruption of which exposure was paramount in the proper functioning of the government’s duties.<sup>193</sup> Finally, the court stated that other avenues, like “whistle-blower” statutes, existed to remedy reprisal that resulted from reporting government corruption.<sup>194</sup>

---

183. *Id.*

184. *Id.*

185. *Id.* at 700-01.

186. *Id.* at 701.

187. *Id.* at 708.

188. *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006)).

189. *Id.*

190. *Id.* at 709.

191. *Id.* at 720; *Christal v. Police Comm’n of S.F.*, 92 P.2d 416, 418-19 (1939).

192. *Huppert*, 574 F.3d at 709.

193. *Id.*

194. *Id.* at 710.

## V. SAFEGUARDING TRUTHFUL TESTIMONY

A. *Protecting Public Employees and the Integrity of Our Justice System: The Need for Constitutional Protection*

In the current *Garcetti*-free speech climate, where the government is unrestrained to retaliate against public employees for testifying truthfully, unfettered First Amendment protection is necessary. Presently, public employees face a triple dilemma<sup>195</sup>: testifying truthfully and losing their jobs; lying under oath and committing perjury; or refusing to testify and thus facing contempt. Testifying is a civic duty, autonomous of a public employee's job obligations.<sup>196</sup> As Judge Fletcher stated in his *Huppert* dissenting opinion, "[t]he fact that the employer may require its employees to obey a law that exists independent of the employment relationship does not allow the employer to retaliate against an employee for obeying that law."<sup>197</sup> Arriving at the truth requires some guarantees that the one who testifies will not be penalized.<sup>198</sup> Punishing employees for speaking truthfully while complying with an obligatory civic duty goes against the grain of fairness and decreases the efficiency of our judicial system.<sup>199</sup>

The Supreme Court has not specifically deliberated on the issue of truthful testimony but has intimated that it regards a public employee's truthful testimony as a unique type of speech distinct from the others.<sup>200</sup> Indeed, the Court has recognized that a public employee's testimony regarding government policies falls within the realm of protected speech.<sup>201</sup> In *Perry v. Sindermann*, the plaintiff, a professor in the Texas state college system, who also served as the president of the Texas Junior College Teachers Association for a short time, had testified on several occasions before committees of the Texas Legislature against his college's policies.<sup>202</sup> When his annual employment contract was not renewed, the plaintiff alleged retaliation for his critical testimonies.<sup>203</sup> The Court observed that the plaintiff's "allegations present[ed] a bona fide constitutional claim. For this Court has held that a teacher's public

---

195. See *id.* at 709; *Reilly v. Atlantic City*, 532 F.3d 216, 229 (3d Cir. 2008).

196. *Huppert*, 574 F.3d at 709-10.

197. *Id.* at 722 (Fletcher, J., dissenting).

198. See Wells, *supra* note 2, at 960.

199. *Huppert*, 574 F.3d at 722 (Fletcher, J., dissenting).

200. *Garcetti v. Ceballos*, 547 U.S. 410, 444 (2006).

201. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972).

202. *Id.* at 594-95.

203. *Id.*

criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment.”<sup>204</sup>

In the same vein, the lower courts that have adopted this rationale have reasoned that truthful testimony, which is often compulsory, differs from other forms of speech.<sup>205</sup> As the Third Circuit pointed out, the crux of the issue is control.<sup>206</sup> Because a public employee cannot choose to avoid testifying without facing consequences, retaliation in this context would be unjust.<sup>207</sup> It is therefore imperative that truthful testimony receive First Amendment protection.<sup>208</sup> This protection would also align with the doctrine of the separation of powers and help support the judicial system’s mission of discovering the truth by disallowing government intrusion in the affairs of the judiciary.<sup>209</sup>

Moreover, affording constitutional protection to truthful testimony is compelling seeing that whistleblower statutes, albeit well-intentioned, are ineffective. But, some courts dismissing violation of freedom of speech claims do not hesitate to use the existence of whistleblower statutes as a pretext for denying protection.<sup>210</sup> Indeed, there are about forty whistleblower protection statutes, but, despite this impressive number, more has proven less for federal whistleblowers.<sup>211</sup> The Government Accountability Office has reported that the whistleblower redress system is “adversarial, inefficient, time-consuming, and costly.”<sup>212</sup> As a matter of fact, whistleblowers lose their cases so often that some advocates advise

---

204. *Id.* at 598 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

205. *Pro v. Donatucci*, 81 F.3d 1283, 1290 (3d Cir. 1996).

206. *Id.*

207. *Id.*

208. *Id.* This should include truthful testimony in the context of administrative, civil, or criminal trial. *Id.*

209. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006). This represents the other side of the coin of the concern the Court observed regarding principles of federalism and separation of powers. In *Garcetti*, the concern was that to hold the government responsible for regulating speech stemming out of an employee’s official duties would create “permanent judicial intervention” into the government’s activity. *Id.* However, to allow the government to constantly interfere into the judiciary’s operation by retaliating against employees’ truthful testimonies involves the same violation of the separation of powers’ principle. *See id.*

210. *Id.* at 425; *Huppert v. City of Pittsburg*, 574 F.3d 696, 710 (9th Cir. 2009); *Garcia*, *supra* note 21, at 22-23.

211. *Katel*, *supra* note 80, at 269-71.

212. *A System in Need of Reform.*, *supra* note 80, at 3; *An Opportunity for Reform*, *supra* note 80, at 3.

whistleblowers to report anonymously to the press instead of following the regular redress protocol.<sup>213</sup>

Analogously, in his *Garcetti* dissenting opinion, Justice Souter noted that common law and statutory protections available to public employees are “patchwork” and of little value.<sup>214</sup> Indeed, in many cases involving on-duty speech that have resulted in the government’s victory, no other remedies have been available to public employees.<sup>215</sup> Therefore, in the interest of disallowing government intrusion into the judiciary process, and since the current statutory framework has failed to guard public employees against reprisal, the constitutional protection of truthful testimony should become a priority.

The common law approach of witnesses’ immunization, aiming at preserving the integrity of the judicial system, should apply to truthful testimony.<sup>216</sup> The roots of this tradition are “well grounded in history and reason.”<sup>217</sup> Recognizing the paramount importance of testimonial speech, Congress codified the common law by making false testimony given under oath a crime.<sup>218</sup> The Supreme Court has resolved to protect testimonial speech outside the First

213. Katel, *supra* note 80, at 265. In 2006, Thomas Devine, legal director of the Governmental Accountability Project, told the CQ Researcher that from 1994 to 2005, only one out of 120 Federal Circuit decisions that whistleblowers filed favored the public employee. *Id.* at 270. A Federal Circuit landmark case, *Lachance v. White*, set the tone for this unsuccessful rate when it ruled that a whistleblower can have a reasonable claim only if “a disinterested observer” attests to the government’s gross mismanagement. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). Ever since, any witness testifying for the government has resulted in the plaintiff’s defeat. Katel, *supra* note 80, at 270. Furthermore, from 1999 to 2006, employees won only two out of fifty-two MSPB cases. *Id.*

R

214. *Garcetti*, 547 U.S. at 440 (Souter, J., dissenting); see Garcia, *supra* note 21, at 25 (“[S]tatutory protection for whistleblowers can be ineffective and sometimes counterproductive for public employees.”); see also *A System in Need of Reform*, *supra* note 80, at 3; *An Opportunity for Reform*, *supra* note 80, at 3 (evidencing the inefficiency of the whistleblower redress system).

R

215. Garcia, *supra* note 21, at 25-26.

R

216. *Briscoe v. LaHue*, 460 U.S. 325, 332-34 (1983).

217. *Id.* at 334 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

218. See 18 U.S.C. § 1621 (2006).

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, will-

Amendment context.<sup>219</sup> The cases that grant trial witnesses full immunity from civil damage claims illustrates the Court's favorable position on testimony.<sup>220</sup> The rationale for this protection hinged on the likelihood that a witness's fear of damages liability may lead to self-censorship which, in turn, would jeopardize the justice system's mission of discovering the truth.<sup>221</sup>

In the interest of the truth-finding process, a parallel approach should apply to safeguarding a government worker's truthful testimony. Public employees are vulnerable to job retaliation as a result of testimony their employers may regard as unfavorable.<sup>222</sup> Fearing their jobs are in jeopardy, or worse, the loss of their livelihoods, they may be inclined to adjust their testimonies to be more palatable to their employers.<sup>223</sup> The fear of retaliation and employer-induced witness intimidation against employees is real.<sup>224</sup> Indeed, the Supreme Court characterized "[t]he danger of witness intimidation" of an employer over its employee as "acute."<sup>225</sup> The Court noted that "[n]ot only can the employer fire the employee, but job

---

fully subscribes as true any material matter which he does not believe to be true;  
is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

*Id.*

219. *Haddle v. Garrison*, 525 U.S. 121, 125-26 (1998) (stating that an at-will employee who suffered retaliation for obeying a federal grand-jury subpoena was entitled to damage claims); *Briscoe*, 460 U.S. at 330-31.

220. *See supra* note 219.

221. *Briscoe*, 460 U.S. at 333 ("A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." (citation omitted)).

222. *Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir.1989).

223. *Id.*

224. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-00-70, WHISTLEBLOWER PROTECTION: VA DID LITTLE UNTIL RECENTLY TO INFORM EMPLOYEES ABOUT THEIR RIGHTS 3 (2000), available at <http://www.gao.gov/new.items/gg00070.pdf> (stating that fear of retaliation could deter Veteran Affairs employees from coming forth with claims of misconduct). Only twenty-one percent of Veteran Affairs employees reported that protection against retaliation was reasonably sufficient. *Survey of Federal Employees on Civil Service*, *supra* note 80, at 3 (stating that fear of retaliation "for reporting misconduct continues to be a concern for many federal employees"). Thirty-six percent reported that protection against retaliation was inadequate and thirteen percent believed it was sufficient. *Id.* at 4. Twenty-five percent thought that they would be retaliated against for reporting misconduct. *Id.*

225. *Robbins Tire & Rubber Co.*, 437 U.S. at 240.

R

R

assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted.”<sup>226</sup> Out of the fear of retribution, public employees may “magnify uncertainties, and thus . . . deprive the finder of fact of candid, objective, and undistorted evidence,”<sup>227</sup> which would have undesirable consequences for the integrity of our justice system.<sup>228</sup>

#### B. *Truthful Testimony is Inherently a Matter of Public Concern*

The Supreme Court, in *Connick* and *Rankin*, deemed that the context alone may elevate speech to a matter of public concern.<sup>229</sup> The context of a statement is one of three elements courts take into account to determine whether a public employee’s speech involves a matter of public concern.<sup>230</sup> In *Connick*, the Court stated that context, which is determined by the time, place, and manner of speech, is one factor that may determine whether speech is a matter of public concern.<sup>231</sup> However, the Court held that context did not elevate the plaintiff’s questionnaire to the level of public concern.<sup>232</sup> This was because the plaintiff prepared the questionnaire while in her office, on the government’s time, engaging other co-workers to complete the questionnaire during their working hours—thus increasing the chances of office disruption.<sup>233</sup>

Similarly, the *Rankin* Court analyzed the context of plaintiff’s speech, but in contrast with *Connick*, it found that the context in which she uttered her remark was the sole factor for classifying her statement a matter of public concern.<sup>234</sup> Rankin’s remark about the United States President “[i]f they go for him again, I hope they get him,” received protection because she said it while discussing the President’s welfare policies.<sup>235</sup>

---

226. *Id.*

227. *Briscoe v. LaHue*, 460 U.S. 325, 333-34 (1983).

228. *Id.*

229. *Rankin v. McPherson*, 483 U.S. 378, 386 (1987); *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

230. *Connick*, 461 U.S. at 147-48 (holding that a matter of public concern is measured by “content, form, and context of a given statement, as revealed by the whole record”).

231. *Id.* at 153 (“[T]he context in which the dispute arose is also significant.”).

232. *Id.*

233. *Id.*

234. *Rankin*, 483 U.S. at 381-386.

235. *Id.* at 387. The Court also considered the plaintiff’s rank in the constable’s office. *Id.* at 390-91. Determining that Rankin held a low-level position, the Court observed that her statement could not cause office disruption. *Id.*

Analogously, compelled testimonial speech is contextually a per se matter of public concern.<sup>236</sup> That is because testimony given before a judicial body pursuant to a civic duty, during the time set by the court, and in accordance with the rules of evidence, is inherently important to the public. The Fifth Circuit reached the same conclusion when it decided that the context of the plaintiff’s testimony guaranteed its protection.<sup>237</sup> The court noted that “[u]nder certain circumstances . . . the context in which the employee speaks may be sufficient to elevate the speech to the level of public concern.”<sup>238</sup>

In addition, even when a public employee testified on a merely private matter, such as her supervisor’s extramarital affair, the testimony was protected.<sup>239</sup> Because the duty to testify is often not only compulsory but also has significant civic importance,<sup>240</sup> context alone should be the determining factor, because it is context which elevates testimony to a matter of public concern.<sup>241</sup> Adopting a bright-line rule would avoid confusion and unpredictable results, thereby benefiting public employees, the government, and our justice system.

The “inherent matter of public concern” rule should apply to truthful testimony, but it should not include a public employee’s testimony about his own grievances as these cases deal with private employment disputes.<sup>242</sup> Naturally, a per se matter of public con-

236. *Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir.1989); Michael, *supra* note 5, at 442.

237. *Johnston*, 869 F.2d at 1578 (“When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern.”).

238. *Id.* at 1577.

239. *Pro v. Donatucci*, 81 F.3d 1283, 1285 (3d Cir.1996).

240. The notion that testifying in court is a civic duty is grounded in Supreme Court precedent. *United States v. Nixon*, 418 U.S. 683, 708-09 (1974). In *United States v. Nixon* the Court, asserting that “presumptive privilege for Presidential communications” is not absolute because every citizen is obligated to obey the rule of law, observed:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

*Id.*

241. *Johnston*, 869 F.2d at 1577.

242. *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004) (stating that “employment grievances in which the employee is complaining about her own job treat-

cern should be subject to the *Pickering* test, which balances a public employee's right to speak as a citizen on a matter of public concern with the government's interest in effectively performing its duties.<sup>243</sup> But a public employee's *involuntary*, truthful testimony should be given compelling weight, and the government's interest should prevail only in cases of extreme importance.<sup>244</sup>

C. *Truthful Testimony Pursuant to a Public Employee's Job Duties Should be Protected*

This part of the Note argues that the *Garcetti* decision that speech pursuant to one's official duties enjoys no protection does not pertain to truthful testimony. *Garcetti* placed an additional obstacle in the way of a public employee's First Amendment claim.<sup>245</sup> Indeed, this decision has added another layer of jurisprudential murkiness to the already muddled waters of public employees' speech.<sup>246</sup> The "official duties" test has created confusion on the

---

ment" are not safeguarded because they fall under the category of private employment disputes).

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

244. *Tedder v. Norman*, 167 F.3d 1213, 1215 (8th Cir. 1999). A public employee testimony is involuntary or compelled when his official duty compels him to testify. *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 886 (3d Cir. 1997). The Eighth Circuit concluded that the Law Enforcement Training Academy's interest outweighed the deputy director's free speech interest because the voluntary deposition testimony disrupted the relationship equilibrium in the academy. *Tedder*, 167 F.3d at 1215. In the same vein, the Third Circuit distinguished between voluntary and involuntary testimony by attaching less weight to a police officer's First Amendment interest because he had testified voluntarily. *Green*, 105 F.3d at 888. The court argued that his voluntary testimony had created tension and mistrust among his colleagues, thereby undermining the efficient operation of the police department. *Id.*

245. *Hudson*, *supra* note 32, at 16 (asserting that *Garcetti* has undermined a public employee's ability to vindicate against retaliation against speech on a matter of public concern); *see also* *Chemerinsky*, *supra* note 68, at 539.

246. *See Garcetti v. Ceballos*, 547 U.S. 410, 421, 426-31 (2006) (Souter, J., dissenting). The majority in *Garcetti* did not regard it useful to define a public employee's job duties, observing that "job descriptions" rarely resemble an employee's day-to-day job duties. *Id.* at 424-25 (majority opinion). Consequently, the Court opted to adopt a case-by-case approach which, albeit plausible in theory, leads to ad-hoc results in practice. And the dissent's prediction that failure to define job duties would result in more litigation has proven true. *See Huppert v. City of Pittsburgh*, 574 F.3d 696, 708 (9th Cir. 2009) (holding that truthful testimony even when related to a matter of public concern is not protected so long as it is made pursuant to a public employee's official duties); *Bradley v. James*, 479 F.3d 536, 538 (8th Cir. 2007) (concluding that speech not protected because it flowed out of plaintiff's duty to cooperate with the investigation); *Green v. Barrett*, 226 F. App'x 883, 886 (11th Cir. 2007) (stating that chief jailer's testimony was not protected because it stemmed from his duties); *Deprado v. City of Miami*, 446 F. Supp. 2d 1344, 1346-47 (S.D. Fla. 2006) (holding that police officer's subpoenaed grand jury testimony was not protected speech); *see also* *Garcia*, *supra*

R  
R

issue of protection of truthful testimony and has further eroded public employees' constitutional protection.<sup>247</sup> After *Garcetti*, the lower courts have been pondering the question of what constitutes speech in the course of one's employment.<sup>248</sup> The answer fairly often has resulted in the overzealous application of *Garcetti* and courts' willingness to categorize any speech in the workplace as on-duty speech.<sup>249</sup> This decision has of course had a chilling effect on truthful testimony.<sup>250</sup>

However, *Garcetti* did not address the issue of truthful testimony and as such the courts should construe it narrowly and in particular, they should not apply *Garcetti* to truthful testimony. *Garcetti's* focus of speech was the memorandum that the plaintiff, a deputy district attorney, wrote.<sup>251</sup> In it, he recommended the dismissal of a case because in his assessment, the affidavit used to obtain the search warrant contained serious misrepresentations.<sup>252</sup> Compiling the memorandum was clearly the plaintiff's professional duty, not his civic obligation; thus his speech belonged to the government. Conversely, testimony before a fact-finding body, prompted by a worker's job obligation is inseparable from his testifying duty as a citizen and is governed by the rules of the court

note 21, at 22. *But cf.* *Reilly v. City of Atlantic City*, 532 F.3d 216, 229 (3d Cir. 2008) (ruling that a public employee's truthful testimony is automatically protected because every citizen has a duty to testify); *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) ("Being deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties. . .").

R

247. Hudson, *supra* note 32, at 16; Garcia, *supra* note 21, at 22.

R

248. Dale, *supra* note 68, at 196-200. The author, who pointed out that courts have taken a formalist approach to *Garcetti*, stated:

R

As lower courts struggle to implement the decision, they approach *Garcetti* in several ways: Some decisions emphasize process, assuming that *Garcetti* altered plaintiff's burdens of pleading or proof. Others turn on substance, focusing on the employee's position, the content of the employee's speech, or the audience for the employee's statement . . . . Some ground their decision on the employee's status; others emphasize the content of the speech; and still others focus on the audience at which the remarks were directed.

*Id.*

249. *Id.* at 196-97; Garcia, *supra* note 21, at 23-24; *see also* Chemerinsky, *supra* note 68, at 539 ("[*Garcetti*] is not only a loss of free speech rights for millions of government employees, but it is really a loss for the general public, who are much less likely to learn of government misconduct.").

R

R

250. *See Huppert*, 574 F.3d at 708; *Bradley*, 479 F.3d at 538; *Green*, 226 F. App'x at 886; *Deprado*, 446 F. Supp. 2d at 1344; Hudson, *supra* note 32, at 16 (citing an attorney, representing public employees in First Amendment litigation, saying that "[*Garcetti*] has resulted in a lower level of constitutional protection for many public employees").

R

251. *Garcetti*, 547 U.S. at 415.

252. *Id.* at 421.

system. Indeed, three out of four dissenting justices—namely, Justices Souter, Stevens, and Ginsburg—poignantly noted that not all speech derives from one’s job duty and “the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.”<sup>253</sup>

Moreover, applying *Garcetti* to truthful testimony would not only undermine the judiciary’s truth-seeking mission, but it may also prove detrimental to the government’s efficient operation and to the function of democracy. A further examination of *Garcetti* reveals that the impetus for the Court’s decision was to quash the possibility that every work-related dispute would turn into a constitutional claim.<sup>254</sup> The purpose was to allow the government a greater degree of influence over speech that damages its proper functioning and causes disharmonious work environments.<sup>255</sup> The Court’s deferential treatment of the government is sensible given that the government has an obligation to perform its duties.<sup>256</sup> In a democracy, the government must carry out the will of the people.<sup>257</sup> Therefore, the government needs to manage its employees, determine job expectations, and assess their performances without the looming fear of litigation.<sup>258</sup> The government achieves its function through the operation of its agencies.<sup>259</sup> In turn, public workers whom these agencies employ implement their duties, and in exchange for their work, receive a salary.<sup>260</sup>

To a certain extent, this contractual relationship justifies the government’s dominion over its employees’ speech. Indeed, allowing every work-related gripe to turn into a constitutional issue would paralyze the government’s activity and render its existence useless.<sup>261</sup> Considered on a larger scale, the very existence of democracy depends on the government’s ability to perform efficiently, hold its employees accountable and have a degree of control over their speech. After all, the government cannot run like a public square when acting in the role of employer.<sup>262</sup>

---

253. *Id.* at 444 (Souter, J., dissenting).

254. *Id.* at 412 (majority opinion).

255. *Id.*

256. *Waters v. Churchill*, 511 U.S. 661, 675 (1994).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

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

262. *Connick v. Myers*, 461 U.S. 138, 149 (1983).

On the other hand, democracy cannot exist without public workers' freedom of speech and governmental accountability.<sup>263</sup> Moreover, there is no justification for government control of a public employee's truthful testimony. Testimony, such as that before a criminal, civil, or administrative fact-finding body is not speech that belongs to the government. Allowing a public employer to retaliate against truthful testimony would sanction intrusion into the judicial system as well as its truth-seeking mission.<sup>264</sup> The fact that a public employee's official duty compels him to testify is unrelated to his obligation as a citizen to truthful testimony. This should also apply to those employees, such as law enforcement officers, whose duty to testify, is part of their job descriptions because in a democratic society citizen testimony takes priority.<sup>265</sup>

Furthermore, government accountability without its employees' ability to testify freely would be an illusion. Indeed, testimonial censorship has undesirable consequences for the interest of the public employee; for the integrity of our justice system; for the public's interest in holding the government accountable for its actions; and, certainly, for the government itself.<sup>266</sup> The public employer should know that, if its workers fear to testifying truthfully, the government also pays the price in the resulting costs and inefficiencies from not addressing misconduct and office corruption.<sup>267</sup>

In addition, *Garcetti* observed that public employees are not entirely deprived of First Amendment protection for speech uttered at work, but they have to show they spoke as citizens and not merely within the scope of their duties.<sup>268</sup> For example, if they take their concerns to a public forum such as the press,<sup>269</sup> provided that the *Pickering* test is satisfied, their claims may survive.<sup>270</sup> Conse-

---

263. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

264. *Garcetti*, 547 U.S. at 444 (Souter, J., dissenting) (“[T]he claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.”).

265. *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008).

266. *Garcetti*, 547 U.S. at 429 (Souter, J., dissenting) (“Still, the First Amendment safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose.”).

267. *Id.* at 425 (majority opinion) (“Exposing governmental inefficiency and misconduct is a matter of considerable significance.”).

268. *Id.* at 419.

269. Hudson, *supra* note 32, at 17 (noting that even this is not a safe and one hundred percent guarantee).

270. *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting). The dissent, however, criticized this rationale stating that despite the audience, no considerable difference should exist between speaking as a citizen and speaking within one's scope of duty. *Id.* Al-

quently, because testimony is conducted in a public forum, compelled by every citizen's duty to testify, the "official duties" test does not apply. Finally, a public employee does not relinquish all his First Amendment liberties in exchange for a paycheck.<sup>271</sup> "[T]he Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits . . . a public employer . . . [from] incidentally or intentionally [restricting] the liberties employees enjoy in their capacities as private citizens."<sup>272</sup> Allowing the government to punish its workers for fulfilling their obligation as citizens to testify, under the pretext of official speech, not only robs them of constitutionally protected rights, but also, in effect, places them in a category of second-class citizenry.

#### CONCLUSION

Not all speech is created equal. In the public employee's First Amendment arsenal, testimonial speech is unique because it is made in a public forum pursuant to a civic obligation.<sup>273</sup> Testimonial speech is inherently a matter of public concern and independent of a public employee's official duties, even if his job provides the impetus to testify. For these reasons, compelled truthful testimony should receive unfettered First Amendment protection.

First and foremost, at stake is the integrity of our justice system. Fear of reprisal from a vengeful boss may dissuade a witness from testifying truthfully.<sup>274</sup> This in turn would threaten the proper functioning of our judicial process and lead to unjust results be-

---

though delving further into this argument would be outside the scope of this Note it is worthwhile to briefly mention the ramification of the majority's rationale. First, the public employee would essentially be addressing the same issue and the court analysis would be identical, whether he raised it within his work's chain of command or took it to the press. Second, going public rather than addressing issues within the governmental agency would not serve the government's goal of operating efficiently. By contrast, this practice could result in distraction, prove disruptive for the government's proper functioning, and cause unnecessary embarrassment, the very ailments that the Court sought to avoid. Finally, in Justice Stevens's words "it [is] perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors," and "it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description." *Id.*

271. *Id.* at 428.

272. *Id.* at 419 (majority opinion) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

273. *Reilly v. City of Atlantic City*, 532 F.3d 216, 228 (3d Cir. 2008).

274. *Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989).

cause this process depends largely on ascertaining the truth.<sup>275</sup> Granting constitutional protection to a government worker's testimonial speech is even more compelling given the current inadequate statutory remedy through whistleblower laws. As such, the courts should apply the common law rationale of protection of a witness's testimony from damage claims to truthful testimony to a government worker's compelled truthful testimony.<sup>276</sup>

In addition, a law that does not protect the testimony of a public employee is not only damaging for our justice system but also for our public employees, government, and taxpayers. In a time of record governmental spending, we especially need its workers to report fraud, abuse, or waste. We need them to tell the truth without fear of losing their livelihood. In the words of the late Justice Thurgood Marshall, "vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."<sup>277</sup> Protecting truthful testimony is one step toward maintaining a vibrant dialogue so crucial for the proper functioning of a democratic government.

*Adelaida Jasperse\**

---

275. *Id.*

276. *Briscoe v. LaHue*, 460 U.S. 325, 325 (1983).

277. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

\* J.D., Western New England University School of Law, 2011; Note Editor, *Western New England Law Review*, Volume 33. I am grateful to my Note Editor, Theresa Morris, Professor of Law, Bruce K. Miller and Professor of Legal Research and Writing, Jeanne M. Kaiser for their ongoing support, encouragement, and insightful comments. My deepest thanks to my husband, Jeff, and my sons, Jonathan and Jackson, for their unwavering love, support, and inspiration.