

## The Ethical Implications of *Garcetti v. Ceballos*

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A sharply divided U.S. Supreme Court ruled in May 2006 that statements made by government employees in the course of their official duties are outside the protection of the First Amendment. The case was *Garcetti v. Ceballos*.<sup>1</sup> Public employee advocates said the result would make it more difficult for government employees to file lawsuits claiming they were the victims of retaliation for going public with allegations of official misconduct. Public employers said the decision would prevent routine internal workplace disputes from becoming federal court cases and avoid judicial intervention in the conduct of governmental operations. The precise scope of the holding is yet unclear. What is clear is that the decision is certain to generate more litigation in this unsettled area of the law.<sup>2</sup>

Although the case holds that employees can no longer rely on the First Amendment for protection, the Court said they could rely on public employers' "good judgment" in being receptive to constructive criticism, reinforced by the "powerful network" of legislative enactments available to those who seek to expose wrongdoing. In addition, the court said, government attorneys could rely on "additional safeguards" in the form of rules of conduct and constitutional obligations that provide checks on supervisors who might order unlawful or otherwise inappropriate actions.<sup>3</sup> The discussion that follows considers particularly what those safeguards might be. To lay a foundation for that discussion, it begins with a review of the law pertaining to employee speech in the public workplace before *Garcetti* and a review of the decision in *Garcetti* itself.

### I. Public Employee Speech Cases before *Garcetti*

In considering how courts apply the First Amendment to the speech of public employees, Professor William Van Alstyne finds three general approaches reflected in the cases.<sup>4</sup> What one might call the "classical approach" treats the government and the individual equally as free agents, mutually competent to determine their own best interests, and measures the terms of the arrangement according to general principles of

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<sup>1</sup> \_\_\_ U.S. \_\_\_, 126 S.Ct. 1951, 164 L.Ed.2d 689, 74 USLW 4257 (May 30, 2006).

<sup>2</sup> Tony Mauro, *Head-scratching Follows Garcetti Ruling*, <http://www.fac.org/analysis.aspx?id=16956>.

<sup>3</sup> 164 L.Ed.2d at 703-04.

<sup>4</sup> See William Van Alstyne, *THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY* 293-98 (2002).

the common law of contracts. What one might call the “purist approach” regards the common law of contracts as essentially irrelevant. In this view, the First Amendment disallows government from imposing any restrictions on free speech by contract or otherwise. Any terms, conditions, regulations, or restrictions on free speech, insofar as they come from government, are constitutionally void. What one might call the “modern approach” treats the First Amendment as applicable, and then tries to sort out what that means in particular instances.

Well into the twentieth century, the classical approach was dominant. Public employees had no right to object to conditions placed upon the terms of their employment, including conditions that restricted the exercise of constitutional rights. Oliver Wendell Holmes, in the appeal of a policeman who sought reinstatement after his department fired him for violating a rule against political activity, famously summed up this approach:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control.<sup>5</sup>

The law began to change in the 1950s and early 1960s, spurred by challenges to statutes that required public employees, particularly teachers, to swear oaths of loyalty and to reveal the groups with which they associated.<sup>6</sup> By the end of the 1960s, the U.S. Supreme Court confidently asserted that its prior decisions “unequivocally rejected” the premise that government could constitutionally compel public employees to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest connected with the operation of the governments in which they worked.<sup>7</sup>

#### *A. Pickering v. Board of Education*

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<sup>5</sup> *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892).

<sup>6</sup> *See, e.g.*, *Wieman v. Updergraff*, 344 U.S. 183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

<sup>7</sup> *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

*Pickering v. Board of Education*<sup>8</sup> was a milestone in the recognition of public employees' rights to freedom of speech, the first of the Supreme Court's modern approach cases.<sup>9</sup> Marvin Pickering was a teacher fired after a local newspaper published his letter to the editor. The letter was critical of the school board's handling of a defeated bond issue and of the board's subsequent allocations of school funds between educational and athletic programs. The school board said that the letter was detrimental to the efficient operation and administration of the school; the Supreme Court said that the firing was a violation of the teacher's right to freedom of speech.

At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"<sup>10</sup>

In balancing those interests, the Court emphasized that the statements in Pickering's letter were critical of the school board and the superintendent and did not affect relations with coworkers or immediate supervisors with whom the teacher regularly worked. Even though some of the statements in the letter were erroneous, that was not enough "absent proof of false statements knowingly or recklessly made by him," to justify his firing.<sup>11</sup> The statements neither "impeded the teacher's proper performance of his daily duties in the classroom" nor "interfered with the regular operation of the school generally."<sup>12</sup> Of particular importance to the Court was that the letter addressed a matter of legitimate public concern and current public attention – the operation of the schools. "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such question without fear of retaliatory dismissal."<sup>13</sup>

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<sup>8</sup> 391 U.S. 563 (1968).

<sup>9</sup> See generally Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 TEXAS TECH. L. REV. 5 (1999). Compare Randy J. Kozef, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005) (arguing for a return to the classical approach).

<sup>10</sup> 391 U.S. at 568.

<sup>11</sup> 391 U.S. at 574. See Howard C. Nielson, Jr., Comment, *Recklessly False Statements in the Public-Employment Context*, 63 U. CHI. L. REV. 1277 (1996).

<sup>12</sup> 391 U.S. at 572-73.

<sup>13</sup> 391 U.S. at 572.

*Pickering* is important in two respects. First, it recognizes that the employer-employee relationship predominates in public employee free speech cases. Second, it establishes that a proper resolution of those cases involves identifying and weighing the competing interests of the public employee and the government employer. This “*Pickering* balancing test” involves courts in a difficult, highly fact-intensive inquiry where, as subsequent cases show, even Supreme Court justices sharply disagree about how to strike a proper balance.

### B. *Connick v. Myers*

That sharp division appeared in the Supreme Court’s next major public employee speech case, *Connick v. Myers*.<sup>14</sup> Sheila Myers was an assistant district attorney upset over her transfer to a different part of the office. After discussing the transfer and other office matters with a superior, she circulated a questionnaire among her colleagues. It sought their opinions about office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and pressure to work on political campaigns. Harry Connick, the district attorney, considered the questionnaire insubordinate and fired Myers for refusing to accept the transfer. She sued, alleging a violation of her First Amendment rights. The lower courts agreed with her that the questionnaire related to the effective functioning of the district attorney’s office and so addressed matters of public concern within the holding of *Pickering*. The Supreme Court ruled that the questionnaire “touched upon matters of public concern in only a most limited sense”<sup>15</sup> and that the First Amendment afforded Myers no protection.

The repeated emphasis in *Pickering* on the right of a public employee “as a citizen, in commenting upon matters of public concern” was not accidental. . . . When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer’s dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. . . . We hold only that when a public employee speaks not as a citizen upon matters of public

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<sup>14</sup> 461 U.S. 138 (1983). Between *Pickering* and *Connick*, the Supreme Court decided two other public employee speech cases: *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) and *Givhan v. Western Line consolidated School District*, 439 U.S. 410 (1979). *Mt. Healthy* holds that a public employee who otherwise would have been fired does not deserve special protection because of the speech. *Givhan* holds that a public employee’s free speech rights are not lost simply because the speech is communicated privately to the employer rather than to the public.

<sup>15</sup> 461 U.S. at 154.

concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.<sup>16</sup>

*Connick* made the "public concern" inquiry the critical threshold test.<sup>17</sup> Whether an employee's speech addressed a matter of public concern content, the court said, depended upon the content, form, and context of a given statement.

To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.<sup>18</sup>

Although the questionnaire related to the operation of a public office, the *Connick* majority saw it as an extension of the dispute over the transfer – an employee grievance concerning matters internal to the office, not matters of public concern. Unlike the teacher in *Pickering*, the attorney in *Connick* was not seeking to inform the public about anything.

Had the questionnaire touched upon no matter of public concern at all, the analysis would have ended there and the district attorney would have been free to take whatever action he pleased. However, the Court found that the question about forced participation in political campaigns pertained to a matter of public concern. This triggered the *Pickering* balancing test. The Court said this meant giving "full consideration" to the government's interest in the effective and efficient fulfillment of its responsibilities to the public. Pertinent considerations would include whether the speech impaired discipline by superiors or harmony among co-workers, had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impeded the performance of the speaker's duties, or interfered with the regular operation of the

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<sup>16</sup> 461 U.S. at 146-47. *But see* *Waters v. Churchill*, 511 U.S. 661 (1994) (reasonable investigation of a proposed speech-based termination is required to reduce the risk of inadvertent termination for speech that is protected by the First Amendment).

<sup>17</sup> *Kozef*, *supra* note 8, at 1016.

<sup>18</sup> 461 U.S. at 149.

government.<sup>19</sup> The Court held 5-4 that the district attorney did not have to tolerate action he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. *Connick* thus struck the balance in favor of the government employer.

### C. *Rankin v. McPherson*

*Rankin v. McPherson*<sup>20</sup> provides an example of a 5-4 split that struck the balance in favor of the employee. Ardith McPherson was a clerical worker in a law enforcement agency whose job did not bring her into contact with the public. When she heard on the office radio of the attempted assassination of President Reagan, she remarked to a co-worker, “If they go for him again, I hope they get him.” Another co-worker overheard the remark and reported it to Constable Rankin, the elected official for whom she worked. He confronted her about the remark and, following the discussion, fired her.

The Court began its opinion by warning government employers that they should proceed against employees only for speech that hampers public functions, not for speech with which the employer disagrees. Turning then to the *Connick* analysis, the Court concluded first that the speech dealt with a matter of public concern. While a threat to kill the president would not be protected, McPherson’s statement was not a threat but simply an inappropriate remark. Like the inaccurate statements in *Pickering*, remarks of this kind have to be tolerated if freedom of speech is to have “the breathing space it needs to survive.”<sup>21</sup>

Having concluded that McPherson’s statement addressed a matter of public concern, the Court proceeded to the *Pickering* balancing test. The government provided no evidence that the remark interfered with the efficient functioning of the office, no danger that the employee discredited the office by making the statement in public, and no assessment that the remark demonstrated a character trait that made her unfit to perform her work. Therefore, the government failed to meet its burden of justifying the discharge. “Where, as here 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.... At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public

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<sup>19</sup> Professor Schoen lists the following among the factors that enter into the *Pickering* balance: the content of the speech, the time, place, and manner of the speech, the context and motive of the speech, the actual or potential effects of the speech, and the employee’s responsibilities within the government. Schoen, *supra* note 8, at 30.

<sup>20</sup> 483 U.S. 378 (1987).

<sup>21</sup> 483 U.S. at 387.

employee.”<sup>22</sup> The dissenters chastised the holding as one that allowed a person to “ride with the cops and cheer for the robbers.”<sup>23</sup>

Of the *Pickering/Connick* rule, Professor Erwin Chemerinsky observes:

On the one hand, this lessened protection of the speech of government employees can be justified based on the Court’s desire to minimize judicial interference with the government’s role as employer. On the other hand, the test can be criticized for not providing adequate protection for the speech rights of government employees. The requirement that the speech be of public concern can be questioned because the First Amendment generally has no such limitation and because of the narrow definition of public concern in *Connick*; the employee’s speech there concern the functioning of an important public office. Moreover, the simple balancing test – weighing speech interests against the government’s interest in administrative efficiency – can be questioned as failing to place sufficient weights on the First Amendment side of the scale.<sup>24</sup>

In *Connick*, the Court acknowledged the difficulty in its approach. However, it said, “[b]ecause of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.”<sup>25</sup>

## II. *Garcetti v. Ceballos*

The preference in the modern cases for a nuanced approach rather than a bright-line rule necessarily leaves many unanswered questions with which lower courts must struggle.<sup>26</sup> It was somewhat unexpected then that in *Garcetti v. Ceballos*<sup>27</sup> the Court

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<sup>22</sup> 483 U.S. at 390-91.

<sup>23</sup> 483 U.S. at 394 (Scalia dissenting).

<sup>24</sup> Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1112-13 (3d ed. 2006).

<sup>25</sup> 461 U.S. at 154 quoting *Pickering*, 391 U.S. at 569.

<sup>26</sup> See, e.g., Board of Commissioners of Wabaunsee County v. Umbehr, 518 U.S. 668 (1996) (First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of freedom of speech.). “There is ample reason to believe that such a nuanced approach, which recognizes the variety of interest that may arise in independent contractor cases, is superior to a bright-line rule distinguishing independent contractors from employees.” *Id.* at 678.

<sup>27</sup> \_\_\_ U.S. \_\_\_, 126 S.Ct. 1951, 164 L.Ed.2d 689, 74 USLW 4257 (May 30, 2006).

opted for a categorical answer to one of those questions: whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

A. The Majority Opinion

Richard Ceballos was an experienced deputy district attorney in the office of the Los Angeles County District Attorney, Gil Garcetti. A defense attorney in a pending criminal case asked Ceballos to review an affidavit used by the police to obtain a critical search warrant. The defense attorney said there were inaccuracies in the affidavit. After examining the affidavit, visiting the location it described, and talking to the deputy sheriff involved, Ceballos concluded that the defense attorney was right. Ceballos told his superiors and followed up by preparing a disposition memorandum recommending dismissal of the case. That led to a heated meeting between representatives of the district attorney's office and the sheriff's department called to discuss the affidavit. Afterwards, the office decided to proceed with the case pending the disposition of a defense motion to challenge the warrant. At the hearing on the motion, the defense lawyer called Ceballos to testify; the trial court rejected the challenge.

Ceballos claimed that subsequently he suffered a series of retaliatory employment actions. He filed a grievance, which was denied, and a lawsuit followed. The federal district court granted summary judgment in favor of the defendants; the U.S. Court of Appeals for the Ninth Circuit reversed. In a 5-4 decision, the U.S. Supreme Court reversed the Ninth Circuit. Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

*Pickering* and the later cases, said Justice Kennedy,

identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern.... If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.... If the answer is yes, the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee different from any other member of the general public.... A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.<sup>28</sup>

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<sup>28</sup> 164 L.Ed.2d at 698-99.

That Ceballos expressed his view inside his office rather than publicly, and that it concerned the subject matter of his employment, said Justice Kennedy, were not dispositive. The controlling factor, he said, was that his expressions were made pursuant to his duties as a calendar deputy. “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>29</sup>

For Justice Kennedy this was a case about the public employer’s ability to control what the employer itself had commissioned or created. “Official communications have official consequences,” he said.<sup>30</sup> Supervisor must be able to ensure that those communications were accurate, demonstrated sound judgment, and promoted the employer’s mission. From his perspective, the greater danger was that the rule adopted by the Court of Appeals, would displace managerial discretion with judicial supervision “to a degree inconsistent with sound principles of federalism and the separation of powers.”<sup>31</sup>

In conclusion, Justice Kennedy said,

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, public employers should, “as a matter of good judgment,” be “receptive to constructive criticism offered by their employees.” . . . The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing. . . . Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment. . . . These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.<sup>32</sup>

## B. The Dissents

In his brief dissent, Justice Stevens captured the essence of the dissenters’ position. The proper answer to the question posed by Justice Kennedy at the outset of the

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<sup>29</sup> 164 L.Ed.2d at 701.

<sup>30</sup> 164 L.Ed.2d at 702.

<sup>31</sup> 164 L.Ed.2d at 702.

<sup>32</sup> 164 L.Ed.2d at 703-04 (internal citations omitted).

majority opinion, he said, “is ‘Sometimes,’ not ‘Never.’ ... The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one’s employment is quite wrong.”<sup>33</sup>

Justice Souter, writing for himself and Justices Stevens and Ginsburg elaborated.<sup>34</sup> Prior cases, noted Justice Souter, “realized that a public employee can wear a citizen’s hat when speaking about subjects closely tied to the employee’s own job....”<sup>35</sup> Some government jobs combine the roles of employee and citizen, and Justice Souter pointed to the website of the office for which Ceballos worked as evidence that this was an example. It follows that the need for *Pickering* balancing does not disappear when an employee speaks on matters that his job requires him to address. For Justice Souter, removing that speech from *Pickering* protection not only discounts the value of that speech to the individual, but also deprives the community of informed opinions on important public issues.

Justice Souter agreed with the majority that “official communications have official consequences” and that “government needs civility in the workplace, consistency in policy, and honest and competence in public service.”<sup>36</sup> The better solution, he argued, is to adjust the *Pickering* balancing scheme rather than to exclude speech uttered pursuant to official duties. To warrant *Pickering* protection, the speech should be “on a matter of unusual importance and satisf[y] high standards of responsibility.... [I]t is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in the employees favor.”<sup>37</sup> That standard, in the opinion of Justice Breyer, gives insufficient weight to managerial and administrative concerns and is what lead him to write a separate dissenting opinion.

Justice Souter criticized two other aspects of the majority opinion. First, he said, it was wrong for the majority to regard any statement made within the scope of government employment as the government’s own speech. Under the rule of *Rosenberger v. Rector and Visitors of Univ. of Va.*, “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”<sup>38</sup> However, argues the dissent, the employee here “was paid to enforce the law by constitutional action; to exercise the county government’s prosecutorial power by acting honestly, competently,

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<sup>33</sup> 164 L.Ed.2d at 704.

<sup>34</sup> Justice Breyer dissented in a separate opinion.

<sup>35</sup> 164 L.Ed.2d at 706.

<sup>36</sup> 164 L.Ed.2d at 709.

<sup>37</sup> 164 L.Ed.2d at 709-10.

<sup>38</sup> 515 U.S. 819, 833 (1995).

and constitutionally.”<sup>39</sup> He was not paid “to promote a particular policy.” The dissent regarded the majority’s view of the scope of employer control over speech that owes its existence to professional responsibilities as too broad.<sup>40</sup>

Second, Justice Souter criticized the majority’s assessment of the protection available under whistle-blower statutes. Where the majority saw “a powerful network of legislative enactments,” the dissenters saw “a patchwork” that affords individuals different protection depending on the local, state, or federal jurisdictions that employ them. Justice Breyer, in his dissent, focused on the obligation to speak imposed by rules of professional conduct and constitutional obligations. He said such obligations augment the need to protect employee speech, diminish the need for government to control the speech, and make *Pickering* balancing appropriate.

### III. Is The Employee Trapped?

As noted above, the Court leaves the fate of the employee exposing governmental inefficiency and misconduct to the “sound judgment” of public employers, “reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing....” In addition, said the court, there are “additional safeguards” for government attorneys in the form of rules of conduct and constitutional obligations apart from the First Amendment. Before considering those “additional safeguards,” some brief comments about the protections in which the Court puts its faith are in order.

#### A. The Duty of Loyalty Trap

Having removed the protection of the First Amendment, the court sets the first of several traps when it says:

We have no occasion to articulate a comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employee’s rights by creating excessively broad job descriptions. ... The proper inquiry is a practical one. Formal job descriptions bear little resemblance to the duties of an employee actually is expected to perform,

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<sup>39</sup> 164 L.ed.2d at 711.

<sup>40</sup> As evidence of this over breadth, Justice Souter suggested that the rule might have important ramifications for academic freedom in public colleges and universities. About this Justice Kennedy wrote, “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” 164 L.Ed.2d at 703.

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.<sup>41</sup>

The court overlooks the fact that it is not necessary for an employer to create an excessively broad job description in order to impose upon an employee a duty to disclose misconduct within the organization. The law of agency already does so.<sup>42</sup>

Every agent owes to the principal duties of loyalty<sup>43</sup> and duties of service and obedience.<sup>44</sup> Consider these duties in particular:

Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with the agency.<sup>45</sup>

Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.<sup>46</sup>

Taken together, they mean that reporting instances of wrongdoing is implicit in every employee's job description. It is a duty that every employer has a right to expect the employee to perform. Concededly, the duty may be more extensive in some positions than in others.<sup>47</sup> If that is what the court means when it refers to the proper inquiry being a practical one, the statement is tautological and offers no effective protection to the employee. Because the court categorically excludes from First Amendment protection "official" communications, the inquiry the court directs will always work to the employer's advantage.

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<sup>41</sup> 164 L.Ed.2d at 703.

<sup>42</sup> See Restatement (Second) of the Law of Agency, §§ 376-398.

<sup>43</sup> RESTATEMENT (SECOND) OF THE LAW OF AGENCY §§ 387-98.

<sup>44</sup> RESTATEMENT (SECOND) OF THE LAW OF AGENCY §§ 377-86.

<sup>45</sup> RESTATEMENT (SECOND) OF THE LAW OF AGENCY §387.

<sup>46</sup> RESTATEMENT (SECOND) OF THE LAW OF AGENCY §381.

<sup>47</sup> The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made.... RESTATEMENT (SECOND) OF THE LAW OF AGENCY §376.

At least one court has already sprung the duty-of-loyalty trap. In *Springer v. City of Atlanta*,<sup>48</sup> an employee of the Atlanta Workforce Development Agency claimed he was fired for speaking up about financial mismanagement at the agency. The city argued that *Garcetti* barred the claim because the employee made the statements pursuant to his official duties. The employee asserted that reporting agency mismanagement was not part of his official duties because his day-to-day activities – policy and system building, member support, external relations, administration, and compliance – did not include fiduciary obligations.

The court acknowledged that the inquiry “was a practical one.” Nevertheless, said the court, the law imposes upon employees a duty to do whatever the employer might do in the protection of his master’s property. When the employee spoke out about the wrongdoing of agency officers, he was speaking out of regard for his employer’s interest. He thus “had an obligation as an employee to engage in the speech at issue. The expression fulfilled on the plaintiff’s job responsibilities and was made in plaintiff’s role as an employee.”<sup>49</sup> The court accordingly awarded the city summary judgment.<sup>50</sup>

## B. The Grievance Procedure Trap

The court tells us, “A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their view in public.”<sup>51</sup> But if this enlightened employer follows the court’s suggestion, the employee who uses that procedure falls into yet another trap. Jack Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale, in his blog Balkinization, explains:

After *Ceballos*, employees who do know what they are talking about will retain First Amendment protection only if they make their complaints publicly without going through internal grievance procedures. Although the Court suggests that its decision will encourage the creation

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<sup>48</sup> *Springer v. City of Atlanta*, No. CIVA 1:05CV0713 GET, 2006 WL 22461888 (N.D.Ga. Aug 4, 2006).

<sup>49</sup> Slip Opinion at \*4.

<sup>50</sup> See also *Price v. MacLeish*, Nos. 04-956(GMS), 2006 WL 2346430 (D.Del. Aug. 14, 2006) (Police officers were expected to speak out within the chain of command if they noticed any hazardous firing range conditions.). Compare *Walters v. County of Maricopa*, No. CV 04-1920-PHX-NVW, 2006 WL 2456173 (D. Ariz. Aug. 22, 2006) (“Any attempt to inflate Walters’ job description so as to include blowing the whistle on other officers would likely exceed the ‘practical inquiry’ suggested by the Supreme Court.”), Slip opinion at \*14; *Batt v. City of Oakland*, No. C 02-04975 MHP, 2006 WL 1980401 (N.D.Cal. July 13, 2006) (Evidence supports claim that, notwithstanding any official policy, plaintiff had a duty not to report misconduct.).

<sup>51</sup> 164 L.Ed.2d at 703.

and use of such internal procedures, it will probably not have that effect. Note that if employees have obligations to settle disputes and make complaints within internal grievance procedures, then they are doing something that is within their job description when they make complaints and so they have no First Amendment protections in what they say. Hence employees will have incentives not to use such procedures but to speak only in public if they want First Amendment protections (note that if they speak both privately and publicly, they can be fired for their private speech). However, if they speak only publicly, they essentially forfeit their ability to stay in their jobs, first because they become pariahs, and second, because they have refused to use the employer's internal mechanisms for complaint (mechanisms which, if they used them, would eliminate their First Amendment rights). In short, whatever they do, they are pretty much screwed. So the effect of the Court's decision is to create very strong incentives against whistleblowing of any kind. (Another possible result of the case is that employees will have incentives to speak anonymously or leak information to reporters and hope that the reporters don't have to reveal their sources).<sup>52</sup>

### C. The Whistleblower Trap

The majority opinion sets yet another trap when it alludes to “the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing.” Although legislatures in all fifty states have enacted whistleblower protection statutes, their measure and scope vary greatly.<sup>53</sup> The dissenters have the stronger argument when they say, “the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not showing that worries may be remitted to legislatures for relief.”<sup>54</sup>

The whistleblower is in a double bind. As noted above, the law of agency imposes on every employee simultaneous duties of loyalty and care. By reporting suspicious activities, the whistleblower may violate her duty of loyalty to the principal by disclosing

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<sup>52</sup> Jack Balkin, *Ceballos – The Court Creates Bad Information Policy*, <http://balkin.blogspot.com/2006/05/ceballos-court-creates-bad-information.html>.

<sup>53</sup> See generally, Elletta Sangrey Callahan and Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000) (showing that coverage varies greatly and that judicial interpretations of similar provisions are inconsistent from state to state.) See also Robert G. Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMIN. L. REV. 581 (1999) (arguing that many statutes fail to address important, if not crucial, issues). The National Conference of State Legislatures summarizes state whistleblower laws in a table at <http://www.ncsl.org/programs/employ/whistleblower.htm>.

<sup>54</sup> 164 L.Ed.2d at 713 (Souter dissenting).

confidential information.<sup>55</sup> At the same time the failure to report such activities may be a violation of the duty of care.

A complete exposition of the patchwork nature of the protections afforded whistleblowers is beyond the scope of this paper. One example, however, should suffice to demonstrate the point. *Huffman v. Office of Personnel Management*<sup>56</sup> reveals the inadequacy of that portion of the network that protects employees of the federal government, the Whistleblower Protection Act of 1989.<sup>57</sup>

Kenneth Huffman was an Assistant Inspector General in the Office of the Inspector General (OIG) for the Office of Personnel Management (OPM). In a series of memoranda to his supervisor, he alleged that the supervisor violated personnel practices, that other OIG managers violated personnel practices, that certain contracts constituted a gross waste of funds and gross mismanagement, and that certain conduct within the agency constituted a violation of law, rule, or regulation, gross mismanagement, and abuse of authority. Huffman claimed that these were protected disclosures under the WPA and that they were a contributing factor to the agency's decision to terminate him.

*Huffman* affirms earlier decisions that complaints to a supervisor about the supervisor's conduct are not "disclosures" for the purpose of the WPA, although disclosures about others' wrongdoing are protected, as are disclosures to the press.<sup>58</sup> Furthermore, the court held, disclosures made as part of the employee's normal duties are not covered. "[A]ll government employees are expected to perform their required everyday job responsibilities 'pursuant to the fiduciary obligation which every employee owes to his employer.'"<sup>59</sup> *Huffman*, in other words, also springs the duty-of-loyalty trap.

In the instance of the employee who, as part of his normal duties, has been assigned to investigate and report wrongdoing, the WPA affords no protection. Rather it was designed "to protect employees who go above and beyond the call of duty and report

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<sup>55</sup> An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or a third person. Thus, if the confidential information is to the effect that the principal is committing or is about to commit a crime, the agent is under no duty not to prevent it.... RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 395, Comment f.

<sup>56</sup> 263 F.3d 1341 (Fed. Cir. 2001).

<sup>57</sup> See generally, Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531 (1999) ("The Whistleblower Protection Act is a work in progress. Freedom of employment dissent is continuing to evolve for federal employees, but they still would be foolhardy to rely on the law's promise of strengthened free speech rights." *Id.* at 577.); Rebecca L. Dobias, Note, *Amending The Whistleblower Protection Act: Will Federal Employees Finally Speak Without Fear?*, 13 FED. CIRCUIT B.J. 117(2003) (examining current problems with whistleblower law and reviewing Federal Circuit decisions that narrow the act).

<sup>58</sup> *Id.* at 1351.

<sup>59</sup> *Id.* at 1351 quoting *Willis v. Dept of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998).

infractions of law that are hidden.”<sup>60</sup> However, in the instance where that employee, feeling that the normal chain of command is unresponsive, reports wrongdoing outside of normal channels, is protected.<sup>61</sup>

Huffman could not escape discipline for making the very disclosures the majority invites. This creates a perverse incentive for the employee to take his accusations public and receive First Amendment protection rather than seeking to take them up the chain of command and risk retaliation.

As Professor Balkin pointed out above, the effect of the Court's decision is to create very strong incentives against whistleblowing of any kind.<sup>62</sup> Whistleblowers become pariahs. The experience of Jesselyn Radack, a former legal advisor in the Justice Department's ethics unit who advised her agency that it would violate ethics rules to have the FBI interrogate John Walker Lindh without his attorney, serves as a warning.<sup>63</sup> “When I blew the whistle on government misconduct in the Lindh case - first internally and then in the press, after I was forced out of the Justice Department - the government publicly branded me a ‘turncoat,’ got me fired from my private sector job by disparaging me to my new bosses, placed me under criminal investigation, and put me on the ‘no-fly’ list. And the WPA helped me not at all.”<sup>64</sup> Nor did internal grievance procedures help Ceballos.

#### IV. Additional Safeguards?

As Part III showed, the employer’s good judgment and the network of whistleblower statutes turn out to be no safeguards for the public employee. The *additional* safeguards for government attorneys in the form of rules of conduct turn out to be the *only* safeguards, if indeed they exist at all. Upon closer examination, the government lawyer fares no better than his or her non-lawyer counterparts do.

##### A. The problem generally

The Court’s confidence in the ability of the canons of legal ethics to protect government lawyers and check their supervisors is misplaced in part because the “rules of

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<sup>60</sup> 263 F.3d at 1353.

<sup>61</sup> *Id.* at 1354.

<sup>62</sup> *Supra* note 50.

<sup>63</sup> Jesselyn Radack, *Why the Supreme Court Got It Wrong When It Rejected a Government Whistleblower's First Amendment Claim*, Findlaw Writ, [http://writ.news.findlaw.com/commentary/20060607\\_radack.html](http://writ.news.findlaw.com/commentary/20060607_radack.html), (“The Whistleblower Protection Act is an abysmal failure.”).

<sup>64</sup> *Id.* See also Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125 (2003).

the law of legal ethics as constituted for the private lawyer are not reliable and effective guides for the public lawyer....”<sup>65</sup>

“The ultimate source of the rules of legal ethics is the lawyer-client relationship. The paradigm of that relationship is one lawyer, one client and the lawyer’s first duty is to serve and protect the interests of that client.... The structure of the lawyer’s relationship to the government client is not so simple.”<sup>66</sup> “

There is a fundamental tension between the government lawyer’s public role and the private relationship basis of traditional conceptions of legal ethics.<sup>67</sup> Moreover, traditional ethics tend to play up the role of lawyer as advocate and play down the role of lawyer as counselor.<sup>68</sup> More so than for his private counterpart, the work of the government lawyer is non-adversarial. In addition, there is a duality in the function of the government lawyer not present in the function of the private lawyer: lawyers are the government’s legal experts while at the same time being responsible to perform the legal work necessary to implement government policy.<sup>69</sup>

Many of the aspects of the government lawyer’s role described above coincide with the duties of private attorneys. Private attorneys, much like government attorneys, are responsible for advising clients on the current state of the law, helping them to form legal positions, and then advancing those positions. Beyond this surface similarity, however, the government layers’ role is considerably different from that of the private attorney. The most important difference is that, as part of the agency decision-making process, the government attorney is responsible for the positions the agency takes in a way that private lawyers are not. It is this – admittedly partial – responsibility for the agency’s policy that gives rise to additions duties that private attorneys do no share.<sup>70</sup>

## B. The problem specifically

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<sup>65</sup> L. Ray Patterson, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY at Pt III-4.

<sup>66</sup> *Id.*, Pt.III-3 (1982).

<sup>67</sup> Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 Harv. L. Rev. 1170, 1170 (2002).

<sup>68</sup> *Id.* at 1183.

<sup>69</sup> *Id.* at 1178.

<sup>70</sup> *Id.* at 1180. See also Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000).

The Model Rules of Professional Conduct take cognizance of the situation of the government lawyer in certain instances.<sup>71</sup> If we turn our attention from the generally poor fit between the canons of ethics and the role of the government lawyer to specific provisions in the canons, we can see more clearly the lack of a safe harbor.

### **Model Rule 1.6 Confidentiality of Information**

**(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).**

**(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:**

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**(4) to comply with other law or a court order.**

Model Rule 1.6 privileges certain disclosures that would otherwise subject a lawyer to discipline for breach of the duty of confidentiality. The obligations imposed by Model Rule 1.6 apply to attorneys for the government as well as to attorneys in private practice.<sup>72</sup> However, the lawyer with a government client is, or soon becomes, keenly aware that his or her situation differs markedly from the lawyer with a private client, even where the private client is an organization.<sup>73</sup>

Ascertaining the client of the government lawyer is a perennial problem. Many writers have offered suggestions as to the identity of the government lawyer's client. Prof. Crampton lists as possibilities "(1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible officers who make decisions for the agency."<sup>74</sup> Treating the officers as client probably makes for the easiest application of Rule 1.6 and for determining who can waive the right to confidentiality. Working backward through the list makes it increasingly difficult to figure out who has the power to consent to disclosures of confidential information. By the time one gets

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<sup>71</sup> Some, like Model Rule 1.7, Conflict of Interest: Current Clients, and Model Rule 1.11, Special Conflicts of Interest for Former and Current Government Officers and Employees, have little relevance to the issue here.

<sup>72</sup> LEGAL ETHICS DESKBOOK at 223.

<sup>73</sup> See MRPC 1.13 (Organization as Client).

<sup>74</sup> Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991). See also Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 797-802 (2000), Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J. 61 (1978), and Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C.L. REV. 625 (1978-79).

through the list to the public as client, the question becomes whether there is really much that can be truly confidential and whether there is anything to waive.<sup>75</sup>

Prof. James Moliterno observes that the government lawyer's duty of confidentiality "is much more modest in scope and perhaps even different in kind."<sup>76</sup> The law of legal ethics as constituted for the private lawyer is not necessarily a reliable and effective guide for the public lawyer.<sup>77</sup> Professor Patterson explains why: "The ultimate source of the rules of legal ethics is the lawyer-client relationship. The paradigm of that relationship is one lawyer, one client and the lawyer's first duty is to serve and protect the interests of that client.... The structure of the lawyer's relationship to the government client is not so simple."<sup>78</sup> This less than perfect fit between the Model Rules and the situation of the government lawyers is compounded by the fact that the Model Rules as a whole tend to emphasize the role of lawyer as advocate and downplay the role of lawyer as counselor.<sup>79</sup> Rule 1.6 is no exception. Nevertheless, the common assumption is that the government lawyer represents his or her client in much the same way a private lawyer represents the individual client and that the rules of ethics apply in much the same way as well.

### **Model Rule 1.13 Organization as Client**

**(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.**

**(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the**

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<sup>75</sup> Kristina Hammond, Note, *Plugging the Leaks: Applying the Model Rules to Leaks Made by Government Lawyers*, 18 GEO. J. LEGAL ETHICS 783, 790-91 (2005).

<sup>76</sup> James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 TEMPLE POL. AND CIVIL RIGHTS L. REV. 633, 633 (2005) (Policies such as open records and open meetings laws militate in favor of a weaker duty of confidentiality and a weaker attorney-client privilege.).

<sup>77</sup> L. Ray Patterson, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY, Pt.III-4 (1982).

<sup>78</sup> *Id.* at Pt.III-3 (1982).

<sup>79</sup> Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1184 (2001).

**violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:**

- (1) asking for reconsideration of the matter;**
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and**
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.**

Comment 9 to Rule 1.13 states that the duty defined in the rule applies to governmental organizations. It goes on to say:

Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.... Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority.

Many writers have offered suggestions as to the identity of the government lawyer's client. Prof. Roger Cramton suggests as possibilities "(1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible

officers who make decisions for the agency.”<sup>80</sup> As a prosecutor, subject to the obligations of Berger and armed with information that a police officer took liberties with an affidavit supporting a search warrant, one might fairly say that Ceballos “knows that [another] person associated with the organization is engaged in action ... related to the representation that is a ... violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization....” Reasonable minds might differ as to whether Ceballos proceeded “as is reasonably necessary in the best interest of the organization” because they will differ as to the identity of the client in this circumstance.

### **Rule 3.6 Trial Publicity**

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.**
- (b) Notwithstanding paragraph (a), a lawyer may state:**
- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;**
  - (2) information contained in a public record;**
  - (3) that an investigation of a matter is in progress;**
  - (4) the scheduling or result of any step in litigation;**
  - (5) a request for assistance in obtaining evidence and information necessary thereto;**
  - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and**
  - (7) in a criminal case, in addition to subparagraphs (1) through (6):**
    - (i) the identity, residence, occupation and family status of the accused;**
    - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;**
    - (iii) the fact, time and place of arrest; and**
    - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.**
- (c) Notwithstanding paragraph (a), a lawyer may make a statement**

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<sup>80</sup> See, e.g., Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991). See also Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 797-802. (2000), Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J. 61 (1978), and Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C.L. REV. 625 (1978-79).

**that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.**

**(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).**

Several courts found First Amendment problems with DR-107, the predecessor to Model Rule 3.6.<sup>81</sup> In *Gentile v. State Bar of Nevada*<sup>82</sup>, the Supreme Court also found problems with a Nevada rule that was almost identical to the original version of Model Rule 3.6. Amended in response to that decision, the present version of Rule 3.6(b) creates a safe harbor to avoid unconstitutional restrictions on a lawyer's First Amendment right to comment on litigation.<sup>83</sup>

When a lawyer representing government in a criminal or civil case makes the statements allowed by Rule 3.6(b), invariably the lawyer speaks in his or her official capacity. However, the assurance provided by the rule that the lawyer will not face discipline by the bar does not prevent his facing discipline by his government employer, even where the comment is a self-defense type statement contemplated by Rule 3.6(c). It is hard to imagine a matter of greater public concern than the fundamental fairness of the criminal justice system, but after *Garcetti* the courts never get to reach that question in the case of the prosecutor discharged after making a statement allowed by the rule but is unwelcome to the employer.

### **Model Rule 3.8 Special Responsibilities of a Prosecutor**

**The prosecutor in a criminal case shall:**

**(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;**

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<sup>81</sup> Deskbook at 769.

<sup>82</sup> 501 U.S. 1030 (1991).

<sup>83</sup> But see the additional restrictions imposed upon prosecutors by Model Rule 3.8(f): "The prosecutor in a criminal case shall: ... (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule." Comment 5 makes clear that Rule 3.8 supplements rule 3.6 and is not intended to restrict statements that comply with rule 3.6.

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**(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense....**

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Ceballos concluded that the defense attorney who approached him to review the affidavit supporting the search warrant was correct in his assertion that the affidavit was inaccurate. In hindsight he was wrong, but at the time he was recommending that the case be dismissed he was acting consistent with the ethical duty imposed on him by Model Rule 3.8(a).

A prosecutor plays a unique role in the justice system; he or she is a “minister of justice.” A prosecutor has a duty “to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”<sup>84</sup> The classic description of the prosecutor's anomalous role comes from *Berger v. United States*, 295 U.S. 78 (1935):

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>85</sup>

The ethical obligations delineated in Rule 3.8 are partly grounded in constitutional protections afforded criminal defendants. Rule 3.8(d), for example, gives expression to the rule of *Brady v. Maryland*. It was his duty under *Brady*, as Ceballos understood it, that led him to share his disposition memorandum with defense counsel, which in turn led

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<sup>84</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. [1] (2002).

<sup>85</sup> See Brenner & Durham, *Toward Resolving Prosecutor Conflicts of Interest*, 6 GEO.J. LEGAL ETHICS 514 (1993) (prosecutors charged with three inherently conflicting roles: politician, advocate, and "administrator of justice"). See generally Gershman, *The Prosecutor's Duty to Truth*, 14 GEO.J. LEGAL ETHICS 309 (2001); Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB.L.J. 607 (1999); Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S.CAL.L.REV. 951 (1991); McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L.REV. 1453 (2000); Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000); Symposium, *Prosecutorial Ethics*, 53 U. PITT. L. REV. 271 (1992).

to his being called as a witness at the hearing on the defense motion.

In hindsight, Ceballos was wrong, at least from the perspective of the trial judge, in his conclusion about the affidavit and about the exculpatory value of his investigation into the underlying facts. However, remembering that Ceballos was an experienced prosecutor in his own right, he was acting on his what he understood to be his ethical obligation in the circumstances. Subsequent events showed that doing so afforded him no protection from adverse action.

The reality is that prosecutors need the cooperation and good will of the police to do their job effectively. Once the police lost confidence in an ADA in a sensitive position and who, in effect, had accused them of lying, Garcetti had to take some action to make amends.

#### **Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers**

**(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.**

**(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.**

**(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:**

**(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or**

**(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

Although couched in the language of private practice, the duty imposed by this rule applies to other lawyers with general supervisory powers, including heads of government offices. Supervisory lawyers have a duty to see that subordinates act in an ethical manner, but as Rule 5.2 makes clear, the subordinate cannot escape responsibility for unethical behavior simply because the supervisor judges it to be ethical.

## Rule 5.2 Responsibilities of a Subordinate Lawyer

**(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.**

**(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.**

Comment 2 to Model Rule 5.2 provides:

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

The terms “arguable question of professional responsibility” and “reasonable resolution” are subject to debate and interpretation.<sup>86</sup> Rule 5.2 may provide false comfort to a junior lawyer and certainly provides no protection where the junior lawyer disagrees with his supervisor’s resolution and acts on his own understanding of his ethical obligation.<sup>87</sup>

## V. Conclusion

While many governments exercise the “good judgment” in which the court puts its faith, lawyers in government know from personal experience that many do not. To suggest then that government employers are adequately protected by whistleblower

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<sup>86</sup> Legal Ethics Deskbook at 897.

<sup>87</sup> Some commentators have taken the rule to task. See Fox, *Save Us from Ourselves*, 50 RUTGERS L. REV. 2189 (1998) (decrying failure of Rule 5.2(a) to impart senior lawyers' responsibility for their own actions to newer associates); Keatinge, *The Floggings Will Continue until Morale Improves: the Supervising Attorney and His or Her Firm*, 39 S.TEX.L.REV. 279 (1998) (suggesting effect of Rule 5.2 may be to reduce vigor of associates' examination of questionable ethics); Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887 (1997) (criticizing Rule 5.2 (b) for providing "Nuremberg defense" for subordinate lawyers).

statutes and rules of conduct turns out to be wishful thinking. The court's decision in *Garcetti* will make it even harder than it already is to attract talented, conscientious people to work in government.