
THIS IS JUST NOT WORKING FOR US:
WHY AFTER TEN YEARS ON THE JOB- IT IS TIME TO FIRE
GARCETTI

By: Jason Zenor

ABSTRACT

In Lane v. Franks, the U.S. Supreme Court held that public employees who give truthful testimony in court are protected so long as it was outside their ordinary job duties.¹ This issue arose after ten years of the Garcetti rule which does not protect employee speech pursuant to their job duties- a nebulous topic in the digital era.² In applying Garcetti, lower courts have extended it to include any speech that is a product of job duties, even if it would serve the public interest.³ In Lane v. Franks, the Court amended the employee speech doctrine to protect subpoenaed testimony that is outside the employee's job duties.⁴ This article applauds the new exception, but argues that the Court's ruling was too narrow. Using the principles espoused in the case, this article argues that the Court should have amended the Garcetti rule and refocused the test on the public trust rather than the employee-employer relationship.

I. INTRODUCTION

Recently, two disparate conflicts arising from public employee speech were in the news. The first story was about Jason Jackler, a probationary officer in Middletown, New York.⁵ He had been present during an arrest when a fellow officer assaulted a suspect who was in handcuffs.⁶ Jackler followed protocol and reported what he had witnessed.⁷ However, in the department's attempt to cover-up the abuse, Jackler was pressured by his superiors to withdraw the statement.⁸ When Jackler refused to do so, he was summarily fired.⁹

The second story was the story Andrew Shirvell who worked as an Assistant Attorney General for the State of Michigan.¹⁰ Shirvell went on social

¹ Lane v. Franks, 134 S. Ct. 2369, 2378 (2014).

² Garcetti v. Ceballos, 547 U.S. 410, 423 (2006)

³ Lane, 134 S. Ct. at 2376.

⁴ Id. at 2374 –75.

⁵ Jackler v. Byrne, 658 F.3d 225, 229 (2d Cir. 2011).

⁶ Id. at 230.

⁷ Id.

⁸ Id. at 231.

⁹ Id. at 231-32.

¹⁰ See Tim Martin, *Andrew Shirvell, Mich Asst. AG Accused of Harassing Student, Fired*, HUFFINGTON POST, May 25, 2011, http://www.huffingtonpost.com/2010/11/08/andrew-shirvell-mich-asst_n_780587

media and attacked the student body president of the University of Michigan for being gay.¹¹ The comments went viral and created a media firestorm.¹² Shirvell was soon after fired for his comments.⁹

In both cases, the employee sued for retaliation based upon protected speech.¹³ At the trial court level, one of the individuals won his case and the other lost when the courts applied the public employee speech doctrine.¹⁴ Jackley, who had refused to lie in an official report in order to cover up agency abuse, lost his case because he was considered to be speaking within his official duties.¹⁵ Shirvell, who spewed hatred toward a class of people he was charged with protecting, won his case because he was not speaking pursuant to his official duties.¹⁶ Eventually, on appeal, both decisions were reversed, but not after thousands of dollars were spent, and personal and professional lives were devastated.¹⁷

Public employee speech on matters of public concern is an essential component to the freedom of speech.¹⁸ Public employees have a privileged insight into the inner workings of our government policy and its implementation, including instances of gross mismanagement, abuse, or criminal wrongdoing.¹⁹ Because of this position, public employees have the unique

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¹¹ *Id.*

¹² The Michigan Attorney General's Office received over 20,000 complaints. See Ed White, *Shirvell's Anti-Gay Rants Not Protected, Court Says*, DETROIT FREE PRESS, Jan. 10, 2015, <http://www.freep.com/story/news/local/michigan/2015/01/10/anti-gay-attorney-appeal/21549113>.

¹³ See *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011); *Shirvell v. Dep't of Attorney Gen.*, 866 N.W.2d 478 (Mich. Ct. App. 2015).

¹⁴ See *Jackler v. Byrne*, 708 F. Supp. 2d 319 (S.D.N.Y. 2010); *Shirvell v. Dep't of Attorney Gen.*, 866 N.W.2d 478 (Mich. Ct. App. 2015).

¹⁵ See *Jackler v. Byrne*, 708 F. Supp. 2d 319 (S.D.N.Y. 2010).

¹⁶ *Shirvell* was a matter of public concern. See *Shirvell v. Dep't of Attorney Gen.*, 866 N.W.2d 706, 735 (Mich. Ct. App. 2015).

¹⁷ See *Jackler*, 658 F.3d at 228 (2d Cir. 2011). Cf. *Bowie v. Maddox (Bowie II)*, 653 F.3d 45, 48 (D.C. Cir. 2011) (holding that employee termination based upon her refusal to testify falsely in favor of his employer was not protected because it was within her job duties to testify) (“[T]he illegality of a government employer's order does not necessarily mean the employee has a cause of action *under the First Amendment* when he contravenes that order.”).

¹⁸ *Lane v. Franks*, 134 S. Ct. 2369, 2373–83 (2014) (holding that a public employee's truthful testimony compelled by subpoenaed and outside the of ordinary job duties is protected by the First Amendment).

¹⁹ E.g. U.S. MERIT SYS. PROT. BD., *BLOWING THE WHISTLE: BARRIERS TO FEDERAL EMPLOYEES MAKING DISCLOSURES* 4 (2011), <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475> (referencing a 2010 survey of 40,000 federal workers, 11.1% of respondents claimed to have observed wasteful activity in their agency within the last 12 months); ETHICS RES. CTR., *NATIONAL GOVERNMENT ETHICS SURVEY: AN INSIDE VIEW OF PUBLIC SECTOR ETHICS 1-2* (2008), <http://www.whistleblowers.org/storage/whistleblowersdocuments/ethicsresourcecentersurvey.pdf> (refer-

ability to inform the public and help the public hold the government accountable.²⁰ Ten years ago, the United States Supreme Court narrowed protection for public employees, offering no First Amendment protection when the employee spoke pursuant to his or her job duties.²¹ The *Garcetti* rule exempting speech made “pursuant to his or her job duties”²² was meant to create a bright-line rule as to when an employee is not protected. But in the current work environment, ‘job duties’ is a nebulous concept and has only made it more difficult for public employees to discern if they have any free speech protection.²³ Lower courts have extended this exception greatly and in many cases where employee speech would be in the public interest, the speech is not protected.²⁴ Essentially, public employees now give up their free speech rights when they take employ with the government,²⁵ and it is the public that pays the price.²⁶

In the recent case of *Lane v. Franks*, the U.S. Supreme Court did not address the *Garcetti* dilemma. Instead the Court created only a narrow exception for when employees truthfully testify in court.²⁷ This exception is laudable and a step in the right direction, but the court did not answer the fundamental problems with the public employee speech doctrine, post-*Garcetti*.²⁸

Accordingly, this article examines the Court’s most recent public employee speech case and argues that the Court should revisit the *Garcetti* rule. First, the article outlines the case of *Lane v. Franks* and the new exception to the *Garcetti* rule.²⁹ Then the article discusses the public employee speech doctrine and the narrowing of protection for public employee speech

encing a study that found nearly 60% of public employees surveyed had claimed to witness at least one incident of mismanagement in the last 12 months).

²⁰ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968) (holding that teachers who are informed about school funding are essential to the public debate on the matter).

²¹ *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that speech made pursuant to official job duties did not receive First Amendment protection).

²² *Id.* at 423.

²³ *See* discussion *infra* Part III.C.

²⁴ *See* discussion *infra* Part III.C.

²⁵ *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

²⁶ *See* discussion *infra* Part III.C; *see also Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting) (stating that the ruling “provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors,” the opposite of what is meant to balance free speech with government efficiency).

²⁷ *See Lane v. Franks*, 134 S. Ct. 2369, 2378–79 (2014).

²⁸ *See* discussion *infra* Part IV.

²⁹ *See* discussion *infra* Part II.

on matters of public concern after *Garcetti*.³⁰ Finally, the article argues that the principles espoused in *Lane* point toward a need to modify *Garcetti* further and offers a new legal test for public employee speech.³¹

II. THE TRUTHFUL TESTIMONY EXCEPTION: *LANE V. FRANKS*

Edward Lane worked for Central Alabama Community College (CACC) as its Director of Community Intensive Training for Youth (CITY).³² He oversaw the operations of the program including hiring and firing and decisions regarding its finances.³³ The program had significant financial difficulties, so Lane decided to audit it.³⁴ The audit revealed that an employee who was on the CITY payroll as a counselor was not reporting to her job.³⁵ Lane reported this issue to the president of CACC and its counsel and told them that he wanted to fire the employee.³⁶ The president and council warned against it, fearing that it would have negative repercussions on the organization and Lane—as the counselor in question was also an Alabama State Representative.³⁷

Nonetheless, Lane moved forward and contacted the Representative and told her that she had to report her job, but she refused to do so.³⁸ Subsequently, Lane fired the employee.³⁹ The Representative's termination prompted an FBI investigation into her employment with the organization.⁴⁰ As a result, Lane was subpoenaed to appear in front of a grand jury to testify as to why he fired the Representative.⁴¹

The grand jury eventually indicted the Representative on charges of mail fraud and theft concerning a program that receives federal funding.⁴² She

³⁰ See discussion *infra* Part III.

³¹ See discussion *infra* Part IV.

³² See *Lane*, 134 S. Ct. at 2375. (stating that Lane worked with underprivileged youth in the CITY Program).

³³ *Id.* (noting that Lane was hired on a probationary basis).

³⁴ *Id.*

³⁵ See *id.*

³⁶ *Id.*

³⁷ *Lane*, 134 S. Ct. at 2375. The Alabama State Representative was named Suzanne Schmitz. *Id.*

³⁸ *Id.*

³⁹ *Id.* (indicating that the representative told another CITY that she was going to get back at Lane by denying any money requests that the organization made to the legislature).

⁴⁰ *Id.*

⁴¹ *Lane*, 134 S. Ct. at 2375.

⁴² *U.S. v. Schmitz*, 634 F.3d 1247, 1256–1257 (11th Cir. 2011).

had allegedly collected over \$175,000 of federal funds, though she had not performed any tasks.⁴³ During the trial, Lane was again subpoenaed to testify.⁴⁴ The Representative was eventually found guilty on all but one count and she was sentenced to 30 months in prison and to pay back all funds she received.⁴⁵

During the legal proceedings for the Representative, Franks had become the president of CACC.⁴⁶ Lane remained with the CITY program, but the organization continued to have financial difficulties.⁴⁷ As a result, Lane recommended to Franks that he make layoffs.⁴⁸ Franks took the advice and terminated 29 probationary employees- including Lane.⁴⁹ Franks eventually rescinded all but 2 of the terminations,⁵⁰ with Lane's termination remaining in effect.⁵¹ Franks justified Lane's termination by arguing that Lane was a member of management, not an hourly employee.⁵²

Lane sued Franks in federal court alleging "retaliation for his testimony against [the Representative]."⁵³ The District Court granted Franks' summary judgement.⁵⁴ The court applied the *Garcetti* rule and held that Franks had qualified immunity from damages because "a reasonable government official in his position would not have had reason to believe that the Constitution protected [Lane's] testimony."⁵⁵ The court argued that Lane was act-

⁴³ See generally *Lane*, 134 S. Ct. at 2375 (noting that a jury failed to reach a verdict in Schmitz's first trial, at which Lane testified, and Schmitz was retried six months later, at which Lane was again subpoenaed to testify); *Id.* at 1256-1257.

⁴⁴ *Lane*, 134 S. Ct. at 2375.

⁴⁵ *Id.* at 2375; *Schmitz*, 634 F.3d at 1258 (sentencing Schmitz to thirty months' imprisonment on each count of conviction, to run concurrently, for a total of thirty months and ordering Schmitz to pay restitution in the amount of \$177,251.82).

⁴⁶ *Lane*, 134 S. Ct. at 2376 (stating that Steven Franks became president of CACC in January 2008).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Lane*, 134 S. Ct. at 2376 (noting that Franks rescinded the terminations of the other employees "because of an 'ambiguity in [those other employees'] probationary service").

⁵² *Id.* at 2376 (noting that Franks claimed that he did not rescind Lane's termination because Lane was a managerial employee and not an hourly employee, who cannot be terminated without cause. The CITY program was subsequently eliminated, all employees were let go, and Franks retired).

⁵³ *Id.* at 2376; see *id.* at 2376 n.2 (noting that Lane also brought suit under a state whistleblower statute, ALA. CODE § 36-26A-3 (2013)).

⁵⁴ *Lane*, 134 S. Ct. at 2372.

⁵⁵ *Id.* at 2376 (applying *Garcetti*, 547 U.S. 410).

ing within his official duties because he had learned the information while working for CITY.⁵⁶

On appeal, the Eleventh Circuit upheld the ruling stating that even if the speech is not required as part of his official duties, the speech is a product of his official duties.⁵⁷ The court held that Lane's speech was about his investigation of the Representative while he was her supervisor, thus it was a product of his official duties.⁵⁸ Lane then appealed the case to the U.S. Supreme Court which granted certiorari.⁵⁹

The U.S. Supreme Court held that the First Amendment protected public employees from retaliation when they were subpoenaed to testify and provide truthful information, if it was outside the course of their ordinary job duties.⁶⁰ In its analysis, the Court applied the public employee speech doctrine. First, it examined whether court testimony in a case of federal fraud against a state representative is "a matter of public concern."⁶¹ The Court said that sworn testimony is the "quintessential" form of speaking as a citizen and is independent of an employee's obligation to his or her employer.⁶² To illustrate the point, the Court cited the federal perjury statute: "Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth."⁶³

Next, the Court examined whether the speech was pursuant to the job duties.⁶⁴ The Court clarified the *Garcetti* rule stating that "speech that simply relates to public employment or concerns information learned in the course of public employment"⁶⁵ is not necessarily free from protection. The crux of the *Garcetti* rule is that speech falls within a person's job duties, not that the speech is a product of a person's job duties.⁶⁶ The Court then distinguished

⁵⁶ *See id.*

⁵⁷ *Id.* at 2372.

⁵⁸ *Id.*

⁵⁹ *See Lane*, 134 S. Ct. at 2377.

⁶⁰ *Id.* at 2369, 2377 (stating that the lower courts have been divided, and that the Supreme Court granted certiorari, resolving the issue on whether public employees may suffer adverse employment consequences for providing truthful subpoenaed testimony).

⁶¹ *See id.* at 2379 (citing 18 U.S.C. § 1623, which criminalizes false statements under oath, and elaborating on how this applies to Lane).

⁶² *Lane*, 134 S. Ct. at 2379.

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See id.*

Lane's case from *Garcetti v. Ceballos*. In *Garcetti*, the employee prepared an internal memo which he was paid to do.⁶⁷ Lane was testifying in court, which was "outside the scope of his ordinary job duties."⁶⁸ Finally, the Court examined whether the government employer had a legitimate reason for treating the employee differently than an ordinary citizen.⁶⁹ The Court referred back to *Connick v. Myers*⁷⁰ and stated that "a stronger showing [of government interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern."⁷¹ The Court held that the government employer showed no evidence that Lane's testimony contained sensitive information or was not truthful.⁷² Thus, the Court overturned the Eleventh Circuit's ruling and created a narrow exception for truthful testimony compelled by subpoena that is outside the employee's ordinary job duties.⁷³

III. EVOLUTION OF THE EMPLOYEE SPEECH DOCTRINE

Traditionally, public employees had no job protection and could be fired at will.⁷⁴ Oliver Wendell Holmes expressed the view of the judiciary of the era: "a policeman may have a constitutional right to talk politics, but has no constitutional right to be a policeman."⁷⁵ Essentially, the government forced employees to trade their constitutional rights for their jobs.⁷⁶ There was a constitutional right to free speech, but no constitutional right to work for the government.⁷⁷

⁶⁷ See *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006).

⁶⁸ *Lane*, 134 S. Ct. at 2374–75 (2014).

⁶⁹ *Id.* at 2380 (holding that an assistant district attorney's questionnaire about workplace satisfaction was not speech on a matter of public concern) (internal citations omitted).

⁷⁰ *Connick v. Myers*, 461 U.S. 138 (2016).

⁷¹ *Lane*, 134 S. Ct. at 2381.

⁷² *Id.* (dealing with qualified immunity for Franks and holding that since no courts had ruled on this issue, Franks could not have been aware of the Lane's protection, thus he had qualified immunity. The Court upheld the 11th Circuit's decision).

⁷³ See *id.* at 2383.

⁷⁴ *Connick*, 461 U.S. at 183. "[T]he unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Id.*

⁷⁵ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (holding that a police officer could not be fired for joining political activist group).

⁷⁶ See *id.*

⁷⁷ *Alder v. Bd. of Educ.*, 342 U.S. 485, 492 (1952) ("We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service."); *Garner v. Bd. of Pub. Works of Los Angeles*, 341

1. EXPANDING PUBLIC EMPLOYEE SPEECH PROTECTION

Through the 1950s, government employees had absolutely no free speech protections, including being forced to sign ‘loyalty oaths,’ stating that they were not Communists, as a condition of employment.⁷⁸ A line of United States Supreme Court cases in the 1960s overturned state statutes that required loyalty oaths as a condition of employment, and for the first time the Court recognized public employees maintained a right to free speech.⁷⁹ In 1968, the United State Supreme Court addressed the conflict between the government’s desire for efficiency and the bureaucrat’s dual role as citizen and employee. In *Pickering v. Board of Education*, a public school teacher was fired for writing a letter that criticized the school board’s managing of financial resources.⁸⁰ The Court held that without proof that the statements were false, the teacher could not be dismissed from public employment for making comments of public concern.⁸¹ The Court noted that public employees do not give up their First Amendment rights when they take a government position.⁸²

In *Pickering*, the Court forwarded a balancing test for employee speech: the interests of government employees (commenting on matters of public concern) must be balanced against the interests of the government employer (promoting efficiency of public services).⁸³ The Court found that school financing was a matter of public concern on which the teacher could speak informatively.⁸⁴ Furthermore, her letter was not person specific, thus, daily school operations would not be affected.⁸⁵ The Court also rejected the gov-

U.S. 716, 719 (1951) (stating the city could require its employees to divulge past or present membership in the Communist Party).

⁷⁸ See Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 44 n.10 (1988).

⁷⁹ See generally *Wiemann v. Updegraff*, 344 U.S. 183 (1952); *Cramp v. Bd. Of Pub. Instruction*, 368 U.S. 278 (1961); *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589 (1967). The following year, the Court used similar language to protect the political speech of high school students. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

⁸⁰ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

⁸¹ *Id.* at 574.

⁸² *Id.*

⁸³ *Id.* at 568.

⁸⁴ *Id.* at 569–70.

⁸⁵ *Pickering v. Board of Education*, 391 U.S. 563, 569–70 (1968).

ernment's argument that the teacher had a working relationship with the school board that required loyalty.⁸⁶

The concept of a public employee speaking on a matter of public concern was not new to the high court. In *Garrison v. Louisiana*, the Court used this analysis to overturn defamation charges against a state attorney general who had called a panel of judges 'lazy.'⁸⁷ The Court argued that the judges' truancy had been the cause of a great backlog of cases and it was a matter of public concern.⁸⁸ In *Wood v. Georgia*, the Court used the same legal concept to overturn a contempt charge against a sheriff who was reprimanded for criticizing a racist judge's grandstanding in court for political gain.⁸⁹

Over the next twenty years, the U.S. Supreme Court continued to apply the *Pickering* test in favor of free speech rights. In *Perry v. Sindermann*,⁹⁰ a college professor at a Texas public junior college had picketed to have the college become a four year institution.⁹¹ He was subsequently fired by the administration for his actions.⁹² The Court held that despite being on a one year contract, renewal could not be denied based solely upon the employee's speech on a matter of public concern.⁹³ In *Givhan v. W. Line Consol. Sch. Dist.*, a Mississippi teacher was fired after he went to the principal's private office to complain about the alleged racist policies of the school district.⁹⁴ The Court held that public employees do not lose their constitutionally protected speech rights when they communicate with their employer privately.⁹⁵

In *Rankin v. McPherson*, the plaintiff, considered an officer of the law, upon hearing of the attempted assassination of President Reagan, told a co-worker that if there was another attempt, she hoped that "they get him."⁹⁶

⁸⁶ *Id.* at 570.

⁸⁷ See *Garrison v. Louisiana*, 379 U.S. 64 (1964).

⁸⁸ See *Pickering*, 391 U.S. at 574 (citing *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964); *Wood v. Georgia*, 370 U.S. 375 (1962))("[S]tatements ... on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.").

⁸⁹ See *Wood v. Georgia*, 370 U.S. 375 (1962).

⁹⁰ *Perry v. Sindermann*, 408 U.S. 593 (1972).

⁹¹ *Id.* at 595.

⁹² *Id.*

⁹³ See *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996) (extending this protection to include independent contractors hired by the government); see also *Perry v. Sindermann*, 408 U.S. 593, 596 (1972).

⁹⁴ See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

⁹⁵ *Id.* at 415-16.

⁹⁶ *Rankin v. McPherson*, 483 U.S. 378, 381 (1987).

The co-worker reported the comments to the officer's supervisor and the speaker was subsequently fired.⁹⁷ The Court held that an employee's free speech protection includes controversial topics and reversed the decision.⁹⁸ While these cases show the *Pickering* test allowed the courts to expand protected speech for public employees, the Court would soon rein in the scope of protected speech.

2. NARROWING PUBLIC EMPLOYEE SPEECH PROTECTION

In *Connick v. Myers*,⁹⁹ assistant district attorney Myers had worked in the office for many years.¹⁰⁰ Connick had been recently elected to be attorney general and decided to reorganize the office.¹⁰¹ Myers circulated a flyer claiming that the reorganization was politically motivated.¹⁰² Connick felt the flyer was insubordination and fired her.¹⁰³ Myers brought suit believing that she was fired for exercising her free speech rights.¹⁰⁴

In a 5-4 decision, the U.S. Supreme Court rejected the claim of free speech protection,¹⁰⁵ and modified the *Pickering* test. The new legal test became: 1.) the employee must demonstrate that the speech was a matter of public concern. If that is not affirmed, then 2.) the government employer must establish the speech was also disruptive to the operation.¹⁰⁶ The Court stated that in order to decide whether speech is on a matter of public concern, a court must examine "content, form and context" of the speech.¹⁰⁷ In *Connick*, the Court held that the employee failed on the first prong of the test as the flyer did not contain speech on a matter of public concern.¹⁰⁸

⁹⁷ *Id.* at 381–382.

⁹⁸ *See id.* at 392, 384 ("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 employee's speech.").

⁹⁹ *Connick v. Myers*, 461 U.S. 138 (1983).

¹⁰⁰ *Id.* at 140.

¹⁰¹ *See id.* at 140–141.

¹⁰² *Id.* at 141.

¹⁰³ *Id.*

¹⁰⁴ *Connick v. Myers*, 461 U.S. 138, 141 (1983).

¹⁰⁵ *Id.* at 139.

¹⁰⁶ *See id.* at 152–154.

¹⁰⁷ *Id.* at 147–48.

¹⁰⁸ *Id.* at 147 ("We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.").

In *Waters v. Churchill*,¹⁰⁹ an employer overheard a nurse make a negative comment about the public hospital at which she worked. The nurse was fired for her speech, despite the fact that what she said was in dispute.¹¹⁰ The Court determined that an employee can be terminated if an employer had a ‘good faith’ belief that he or she actually made the comments.¹¹¹ However, the burden of proof rests upon the government to show ‘good faith.’¹¹² In *San Diego v. Roe*, a police officer sued for retaliation after he had been fired for selling a homemade sex video in which he appeared dressed as a police officer.¹¹³ The officer claimed that he could not be fired for speech that he made during his own time and not pertaining to his job.¹¹⁴ The Court disagreed and held that this speech was related to his job and was detrimental to the department.¹¹⁵ The modification of the *Pickering* test in *Connick* marked the end of broad speech protections for public employees and ushered in a more narrow interpretation of First Amendment protection for public employee speech. The Court would modify the rule of law even further in *Garcetti v. Ceballos*.

3. JOB DUTIES THRESHOLD: GARCETTI V. CEBALLOS

Ceballos was the supervising district attorney in the Los Angeles (CA) County Office.¹¹⁶ His duties required him to review prosecutions pursued by the office.¹¹⁷ Ceballos reviewed an affidavit from the Sheriff about a search and found flaws in the document.¹¹⁸ He reported his findings in a memo to the District Attorney and alleged wrongdoing by the Sheriff.¹¹⁹ The District Attorney ignored Ceballos’ memo and continued the prosecution and the trial court decided to let in the evidence recovered by the Sheriff.¹²⁰ Subsequently, Ceballos was demoted.¹²¹ Ceballos claimed that he was demoted because of his speech in the memo and sued the county for

¹⁰⁹ *Waters v. Churchill* 511 U.S. 661 (1994).

¹¹⁰ *Id.* at 666.

¹¹¹ *Id.* at 677.

¹¹² *See id.*

¹¹³ *City of San Diego v. Roe*, 543 U.S. 77, 78 (2004).

¹¹⁴ *Id.* at 79–80.

¹¹⁵ *Id.* at 81.

¹¹⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

¹¹⁷ *Id.* at 413–14.

¹¹⁸ *Id.* at 414.

¹¹⁹ *Id.* at 414.

¹²⁰ *Id.* at 414–15.

¹²¹ *Garcetti v. Ceballos*, 547 U.S. 410, 415 (2006).

violating his free speech rights.¹²²

In a 5-4 decision, the Supreme Court held that Ceballos' free speech rights were not violated because he made his remarks in his official capacity as an employee, and employees do "not speak[] as citizens for First Amendment purposes."¹²³ Justice Kennedy noted that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."¹²⁴ The person is no longer acting as a citizen as he or she is now a paid employee.¹²⁵ Nonetheless, public employees still retain broader rights of free speech outside the scope of employment.¹²⁶

Garcetti modified the public employee speech doctrine so that before the content of the speech is analyzed to determine if it is a matter of public concern, courts must first examine whether the speaker was acting within his or her official duties.¹²⁷ If an employee speaks in his or her official capacity, then there is no First Amendment protection.¹²⁸ Note, the courts have not clearly defined the scope of employ, but listed job duties has often been cited.¹²⁹

If the employee was not speaking pursuant to his or her job duties, then courts are to apply the *Pickering/Connick* test. So, if the employee's speech is not a matter of public concern, then there is no First Amendment protection.¹³⁰ Public concern is usually determined in a case-by-case basis, but past examples have pertained to systemic behaviors in an agency, such as discrimination or corruption.¹³¹ If the speech is of public concern, then it may be protected. This type of speech may include content that is offensive

¹²² *Id.* at 415.

¹²³ *Id.* at 421.

¹²⁴ *Id.* at 418.

¹²⁵ *Id.* at 418–19 ("[G]overnment offices could not function if every employment decision became a constitutional matter." (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

¹²⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

¹²⁷ *Id.* at 418.

¹²⁸ *Id.*

¹²⁹ Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 BERKELEY J. EMP. & LAB. L. 175, 212–13 (2008). (noting that the Court in *Garcetti* presented several phrases that may describe the term "employee," including "professional responsibilities," "professional capacity," "performing . . . job duties," "tasks . . . paid to perform," "official duties," "official responsibilities," and "employment duties.").

¹³⁰ *Connick v. Myers*, 461 U.S. 138, 143 (1983).

¹³¹ David Hudson, *Balancing Act: Public Employees and Free Speech*, 3 FIRST REPORTS 1, 24–25 (2002), <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.PublicEmployees.pdf>.

and speech from private conversations.¹³²

Only if the above tests are met does a court compare the interests of the employer with the importance of the speech.¹³³ For example, speech pertaining to whistle blowing would usually outweigh any government interest (and is statutorily protected in 49 states and the Federal Government).¹³⁴ In this step, a court will look at the context of the speech to evaluate if the time, place or manner of the speech disrupted the employer's objective.¹³⁵ Examples of disruptions include impairing the harmony among co-workers, impairing necessitated loyalty, or interfering with operations.¹³⁶

An employee's speech on a matter of public concern can be reprimanded, without First Amendment implication, so long as the punishment is not a discharge, demotion or transfer.¹³⁷ Additionally, if the speech of public concern is only one component that led to the punishment, and the government can show that the employee would have been fired absent the speech, then there is no First Amendment claim.¹³⁸

4. *GARCETTI* DILEMMA: PROTECTING EMPLOYER RETALIATION

Since *Garcetti*, lower courts have used the 'scope of employment' prong extensively.¹³⁹ The most difficult application of this prong are cases where job descriptions are not well defined.¹⁴⁰ But, if courts can find the speech has the slightest connection to job duties, then the plaintiff rarely pre-

¹³² Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L. J. 43, 43–45 (1988).

¹³³ *Connick v. Myers*, 461 U.S. 138, 142 (1983).

¹³⁴ See Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of 'Efficiency'*, 23 OHIO N.U. L. REV. 17, 68 (1996).

¹³⁵ *Connick*, 428 U.S. at 153.

¹³⁶ *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974).

¹³⁷ See Hudson, *supra* note 131 at 32.

¹³⁸ *Mt. Healthy Sch. Dist. v. Doyle*, 429 U.S. 274, 285 (1977) (holding that the government show by a preponderance of the evidence that it would have come to the same decision to terminate despite the constitutionally protected speech).

¹³⁹ At the end of 2015, *Garcetti* had been cited in over 2,500 cases, Citing References: *Garcetti v. Ceballos*, WESTLAW (last visited Jan. 5, 2016).

¹⁴⁰ Thomas Keenan, *Circuit Court Interpretations of Garcetti v. Ceballos and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841, 842 (2011) (noting that circuit courts held "concluding that an employee's speech falls within or without his or her official duties has become an indeterminate affair."). See generally Mary L. Conrow, *Managing Municipal Employee and Employer Rights in the Technological Age, in Navigating Municipal Employment Issues*, ASPATORE, 2011 WL 6740830 (Dec. 2011) (detailing the nebulous concept of job duties in the digital age).

vaits.¹⁴¹ The following cases blur the already uncertain line between what is in public interest and what is managerial prerogative.

a. Law Enforcement Cases

The Southern District of New York upheld the termination of a safety officer that was disciplined for writing a report detailing health and environmental threats to the community.¹⁴² The court held that since employee was the precinct's safety officer, his reports were within his official duties.¹⁴³ In Ohio, the federal court upheld the termination of a police officer that was fired for complaining about cuts in canine-training.¹⁴⁴ The court held that, as chief canine officer, his complaint was within his official duties.¹⁴⁵ In Maryland, one federal court upheld the firing of a police chief, who while off-duty but at the station, had sent an e-mail to the mayor complaining about misuse of fleet vehicles.¹⁴⁶ The court determined the off-duty email was a continuation of an earlier discussion about the fleet that was under his command and therefore within the scope of his employment.¹⁴⁷ The majority of post-*Garcetti* cases involving law enforcement have held that investigations of misconduct are part of law enforcement's job and thus any related speech is not protected.¹⁴⁸

b. Speech Through Official Channels

The Tenth Circuit upheld the termination of a superintendent of schools who reported to the school board violations of state and federal law in the Head Start program.¹⁴⁹ The superintendent also instructed subordinates to report the violations.¹⁵⁰ The court reasoned that supervising the Head Start program was within the superintendent's job duties.¹⁵¹ However, the court determined the superintendent's speech to the District Attorney about the

¹⁴¹ See Keenan, *supra* note 140.

¹⁴² Ruotolo v. New York, No. 03 Civ. 5045, 2006 WL 2033662 (S.D.N.Y. July 19, 2006).

¹⁴³ *Id.* at 1.

¹⁴⁴ Haynes v. City of Circleville, 474 F.3d 357 (6th Cir. 2007).

¹⁴⁵ *Id.* at 364.

¹⁴⁶ Franklin v. Clark, 454 F. Supp. 2d 356, 359–61, 372 (D. Md. 2006).

¹⁴⁷ *Id.* at 360–61.

¹⁴⁸ See generally, Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33 (2008) (outlining several cases of public employee speech from the law enforcement context).

¹⁴⁹ Casey v. West Las Vegas Indep. Sch. Dist., 473 F.3d 1323 (10th Cir. 2007).

¹⁵⁰ *Id.* at 1326.

¹⁵¹ *Id.* at 1329.

school board's violation of open meeting laws was protected because it was outside of her job duties.¹⁵²

The Tenth Circuit also upheld a city council's termination of police officers who had reported that the police chief had improperly influenced criminal charges against family and friends to disappear.¹⁵³ The officers had first reported the misconduct to a union representative who then reported it to the state attorney general's office.¹⁵⁴ The court held that it was part of the officers' job duties to report to the attorney general's office, thus they were speaking within their official capacity and not protected.¹⁵⁵ If an employee's job duties requires he or she to report to officials, the speech will not be protected even if it serves the public interest.

c. Speech Concerning Public Safety

The Seventh Circuit held that a prison guard was speaking in her official capacity when she reported to her supervisor that colleagues were possibly smuggling contraband, since her job duties included prison security.¹⁵⁶ Therefore, she could not proceed on a retaliation charge against her internal transfer.¹⁵⁷ The Eastern District Court of Michigan upheld the termination of an employee that complained to a county labor relations director about a co-worker's safety violation.¹⁵⁸ The plaintiff had already reported to her employer about the safety violations and stated that she believed the employee would not be punished because that employee was having an affair with the supervisor.¹⁵⁹ The plaintiff was subsequently fired for creating a disrespectful work environment.¹⁶⁰ The court held that she was not protected under the whistleblower's act because she did not report it to a public body, it was not a matter of public concern, and the government employer had substantial reason to terminate her.¹⁶¹

In *Foley v. Randolph*, a fire chief in Randolph, Massachusetts held a

¹⁵² *Id.* at 1332–33.

¹⁵³ *Cheek v. City of Edwardsville*, 324 F. App'x. 699 (10th Cir. 2008).

¹⁵⁴ *Id.* at 700.

¹⁵⁵ *Id.* at 701.

¹⁵⁶ *Spiegla v. Hull*, 481 F.3d 961, 965 (7th Cir. 2007).

¹⁵⁷ *Id.* at 967.

¹⁵⁸ *Jennings v. Cty. of Washtenaw*, 475 F. Supp. 2d 692 (E.D. Mich. 2007).

¹⁵⁹ *Id.* at 698.

¹⁶⁰ *Id.* at 700.

¹⁶¹ *Id.* at 706–07, 714 (“The point of protection afforded public employees is to allow public employees a voice on issues actually affecting and of interest to the community at large.”).

press after a fire that claimed the lives of two children.¹⁶² The State Fire Marshal, with the help of Foley and Sgt. Frank McGinn, held a press conference so that the press could inform the public of the incident.¹⁶³ Shortly after the press conference, the fire chief received a 15-day suspension without pay.¹⁶⁴ He sued the city claiming that he was a citizen speaking on a matter of public concern.¹⁶⁵ The First Circuit upheld the suspension claiming that holding a press conference was part of his “official duties” as a fire chief.¹⁶⁶ All of these cases show the job duties threshold of the *Garcetti* rule can lead to varying results for public employees and does not clearly show what speech is protected under the First Amendment.

IV. LANE V. FRANKS: WHAT COULD HAVE BEEN

In *Lane*, the Court reiterated the well-settled principle that there is significant value in allowing public employee speech because they are often in the best position to report government maleficence.¹⁶⁷ Public employees “are uniquely qualified to comment” on “matters concerning government policies that are of interest to the public at large.”¹⁶⁸ Moreover, the public’s interest in “addressing official wrongdoing and threats to health [and] safety...outweighs the government’s stake in [efficiency.]”¹⁶⁹ Protecting public employee speech is not about protecting the employee’s First Amendment right, as much as it is about protecting “the public’s interest in receiving informed opinion”¹⁷⁰ about the government that it elects, funds, and empowers.

¹⁶² *Foley v. Randolph*, 598 F.3d 1 (1st Cir. 2010).

¹⁶³ *Id.* at 2.

¹⁶⁴ *Id.* at 4.

¹⁶⁵ *Id.* (claiming a first amendment violation requires that Foley was speaking about a matter of public concern in his role as a citizen).

¹⁶⁶ *Id.* at 10.

¹⁶⁷ *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion)). The Court argued that public employee speech holds “special value” because the employees gain critical information due to their privileged position in the government. *Id.* at 2379.

¹⁶⁸ *Id.* at 2380. (stating that this principle is even stronger in cases of public corruption as is found in *Lane v. Franks*).

¹⁶⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 428 (2006).

¹⁷⁰ *Lane*, 134 S. Ct. at 2377 (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam)). Erwin Chemerinsky, *The Rookie Year of the Roberts Court & a Look Ahead: Civil Rights*, 34 PEPP L. REV. 535, 539 (2007) (arguing that *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.”).

Despite the rhetoric of protecting the public interest, the Court wrote a narrow opinion in *Lane*, which only applied to “[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties.”¹⁷¹ The decision gives an important exception to *Garcetti* and it is to be applauded. However, the Court has not corrected the problem of limiting employee speech based upon the nebulous definition of job duties. Now, the Court will have to continue, on a case-by-case basis, to decide whether public employee speech that is a product of employment, and deals with matters of public concern, is protected.

1. IMPLIED RECOGNITION OF THE *GARCETTI* DILEMMA

In its analysis of the case, the Court in *Lane* did not start with the first prong of the public employee speech doctrine created in *Garcetti*. Instead, the Court first analyzed whether or not Lane’s testimony was a matter of public concern. The Court focused on the importance of testimony in court as “quintessential speech as a citizen that outweighs any obligation to his employer.”¹⁷² The Court impliedly dismissed the primacy of the job duties element by claiming that “*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment.”¹⁷³ It seems as though the Court was creating an exception to circumvent the concept of “job duties,” which the lower courts have extended to include speech that is a product of one’s employ.¹⁷⁴

In *Garcetti*, Justice Stevens wrote in dissent: “[t]he notion that there is a categorical difference between speaking as a citizen and speaking in the course of one’s employment is quite wrong.”¹⁷⁵ Despite the Court’s interpretation in *Lane*, the rule of *Garcetti* is clear in that the determination of speech protection is based upon whether the employee spoke as an employee at all.¹⁷⁶ It does not matter if the person was in some degree speaking

¹⁷¹ *Lane*, 134 S. Ct. at 2378.

¹⁷² *Lane*, 134 S. Ct. at 2379.

¹⁷³ *Id.*

¹⁷⁴ *Adams v. N.Y. State Educ. Dep’t*, 752 F. Supp. 2d 420, 427 (S.D.N.Y. 2010) (citing *Weintraub v. Board of Educ.*, 593 F.3d 196, 203 (2d Cir. 2010)) (holding “speech can be made ‘pursuant to’ a public employee’s job duties even though it is not required by, or included in, the employee’s job description, or in request by the employer”).

¹⁷⁵ *Garcetti v. Ceballos*, 547 U.S. 410, 427 (2006).

¹⁷⁶ *See id.*; see also Eric Marshall, *Rescuing the Union Grievance from the Shoals of Garcetti: A Call for the Return to Reason in Public Workplace Speech Jurisprudence*, 57 N.Y.L. SCH. L. REV. 905, 907 (2013) (arguing that *Garcetti* misconstrued *Pickering* by claiming that the ‘citizen’ requirement implied the ‘job duties’ exception to First Amendment protection).

as a citizen.¹⁷⁷ There is no balancing test: if the person was speaking as an employee, at all, then there is no protection.¹⁷⁸ But this dichotomy is false as, more often than not, when an employee speaks about matters pertaining to his or her job, then it is going to have some degree of public concern.

But too often, lower courts are using this ‘bright-line’ rule of whether the employee was acting within his or her duties as the sole determinate as to whether speech is protected. This rule assumes that a public employee ceases to be a citizen when he or she is working, which goes against the well-established principles of the public employee speech precedence.¹⁷⁹ As the facts of *Lane* illustrate, this dichotomy is rarely the case. It is difficult to determine, or believe, that Lane fired the Representative solely because it was within his job duties. It is just as reasonable that Lane believed the Representative was wasting taxpayer money by committing fraud.

Moreover, “formal job description[s] often bear little resemblance to the duties an employee actually is expected to perform.”¹⁸⁰ The Court in *Lane*, alluded to this when it spoke about the difference in speech pursuant to job duties and speech that is a product of your job duties.¹⁸¹ The holding in *Lane* is that the former is never protected and the latter can be protected.¹⁸² Yet, the majority gives no real distinction as to when public employee speech is one and not the other. Presumably, the Court was unwilling to elucidate this, as it is rarely clear because employees do so much work beyond their official job duties.¹⁸³ In *Lane*, the Court should have given clearer directions as to when speech derived from one’s employ is protected. Instead, all we know is that truthful testimony will be protected.¹⁸⁴

2. SOLVING THE *GARCETTI* DILEMMA: A NEW PUBLIC EMPLOYEE SPEECH TEST

Government agencies do need some control over their employees in or-

¹⁷⁷ *Garcetti*, 547 U.S. at 427.

¹⁷⁸ *Garcetti*, 547 U.S. at 427 (Souter, J., dissenting).

¹⁷⁹ Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions. *Id.* at 419.

¹⁸⁰ *Id.* at 424–25.

¹⁸¹ *See Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014).

¹⁸² *Id.*

¹⁸³ *See id.*

¹⁸⁴ *Id.*

der for the government to function efficiently.¹⁸⁵ However, interest in efficient government should counterbalance, not outweigh the public's interest in receiving information about the government.¹⁸⁶ When discussing matters of public concern, employees should always have First Amendment protection.¹⁸⁷ There was no previous constitutional basis for creating a categorical line that does not protect a public employee when acting pursuant to his or her official duties as the Court did in *Garcetti*.¹⁸⁸ It is only speech that is not of a matter of public concern or that poses a serious threat to the administration of the government, which should not be protected.¹⁸⁹

The U.S. Supreme Court should modify the public employee speech doctrine and reconsider the Constitutional principles it is trying to promote. The first prong of the public employee speech doctrine should return to: 1.) whether the employee speaking on a matter of public concern.¹⁹⁰ If the employee was not speaking on a matter of public concern, then there should be no constitutional protection for the employee.¹⁹¹

If the employee was speaking on a matter of public concern, then the next question should be: 2.) whether the employee speaking solely as a citizen.¹⁹² If the employee was speaking solely as a citizen, then the speech should be protected unless there was articulable evidence that the speech would do serious harm to the public interest in government operation. If the employee was not speaking purely as a citizen, then there should be lesser

¹⁸⁵ Lane v. Franks, 134 S. Ct. at 2380 (quoting *Garcetti*, 547 U.S. at 418).

¹⁸⁶ Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill., 391 U.S. 563, 568 (1968).

¹⁸⁷ *Garcetti v. Ceballos*, 547 U.S. 410, 428–29 (2006) (Souter, J. dissenting) Justice Souter added: “[O]n a significant public issue” unless that speech is “too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit...[then] there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him.” *Id.*

¹⁸⁸ *Id.* at 435 (Stevens, J. dissenting).

¹⁸⁹ *Garcetti*, 547 U.S. at 435 (Stevens, J. dissenting) (“[O]nly comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor”).

¹⁹⁰ David Hudson, *Balancing Act: Public Employees and Free Speech*, 3 FIRST REPORTS, 25 (2002), <http://www.firstamendmentcenter.org/public-employee-speech> (arguing that defining what speech is a matter of public concern is not an exact science).

¹⁹¹ See *City of San Diego v. Roe*, 543 U.S. 77 (2004).

¹⁹² Steven J. Stafstrom, Jr., *Government Employee, Are You A "Citizen"?: Garcetti v. Ceballos and the "Citizenship" Prong to the Pickering/Connick Protected Speech Test*, 52 ST. LOUIS U.L.J. 589, 610 (2008) (discussing the balancing of employer and citizen rights in the Connick/Pickering test). This would be similar to the first prong of intermediate scrutiny. See *United States v. O'Brien*, 391 U.S. 367 (1968) (holding that regulation against destroying draft card survived intermediate scrutiny and was incidental to the speech).

scrutiny and the question becomes: 3) whether the government agency had an important “justification for treating the employee differently from any other member of the general public.”¹⁹³

This new test would put the focus back on the “matter of public concern” element, rather than the “citizen” element of the doctrine.¹⁹⁴ Furthermore, the test would still make a distinction between speech that is product of employ versus speech as a citizen, but speech that derives from employment could receive protection. It would also remove the nebulous “job duties” concept.¹⁹⁵ The last prong of the test would reassert the *Pickering* balancing test to allow for government efficiency. But, in this new balancing test, the focus would be on the public’s interest in effective government versus the agency’s self-interest in avoiding embarrassment or criticism.

Thus, in cases of citizen speech, the speech would have a preferred position over the management’s prerogative, unless the citizen speech would harm the public interest in government efficacy.¹⁹⁶ So, in the case of Andrew Shirvell and his attack on the University of Michigan president, there is a strong argument that his homophobic speech, which he did as a citizen, was disruptive to the public interest in the operation of that office, because that office is charged with enforcing anti-discrimination laws.¹⁹⁷

¹⁹³ See Curtis R. Summers, *U.S. Supreme Court Clarifies First Amendment Citizen Speech Protections for Government Employees*, HUSCH BLACKWELL: BUSINESS INSIGHTS (Jan. 23, 2016, 7:00 PM), <http://www.huschblackwell.com/businessinsights/us-supreme-court-clarifies-first-amendment-citizen-speech-protections-for-government-employees> (alerting the public of the Court’s ruling in *Lane*, stating that if the employee was speaking solely as a citizen, then the speech should be protected unless there was articulable evidence that the speech would do serious harm to the public interest in government operation. If the employee was not speaking purely as a citizen, then there should be lesser scrutiny and the question becomes: whether the government agency had an important “justification for treating the employee differently from any other member of the general public”).

¹⁹⁴ See Eric Marshall, *Rescuing the Union Grievance from the Shoals of Garcetti: A Call for the Return to Reason in Public Workplace Speech Jurisprudence*, 57 N.Y.L. SCH. L. REV. 905, 912–13 (2013).

¹⁹⁵ Government agencies should put into place proper internal channels that offer legitimate protection to employees who reasonably believe that there is mismanagement to report it. However, under *Garcetti*, such channels may be interpreted as part of an employee’s “job duties”

and then the employee loses constitutional protection. Thus, the employee is safer reporting the mismanagement to external sources like the media. See *Garcetti v. Ceballos*, 547 U.S. 410 at 435.

¹⁹⁶ See *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Marsh v. State of Ala.*, 326 U.S. 501, 509 (1946) (“When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.”). Note, the public employee speech cases use the word ‘efficiency’ when discussing balancing the government and employee interests. The author purposely chose ‘efficacy,’ because stifling speech may make the government run smoother, but it may not be as effective in serving the public need. See *infra*.

¹⁹⁷ See *supra* note 5–6 and accompanying text; see e.g. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 42

Finally, in cases of speech that is a product of one's employment, the interests will be balanced and the government would only need to show an important justification to act.¹⁹⁸ This would protect cases where employees report government gross mismanagement, violations or public safety concerns. The speech will be protected as it outweighs the government's managerial prerogative and promotes public interest in effective government. The proposed test may also protect other speech that is critical of an employer that is a matter of public concern, if that is the sole grounds for dismissal (such as critiquing personnel decisions and funding).¹⁹⁹

V. CONCLUSION

The First Amendment was created "to assure unfettered interchange of ideas for the bringing about of political and societal change desired by the people."²⁰⁰ Over the last, fifty years, the U.S. Supreme Court has deeply integrated this principle into its public employee speech doctrine.²⁰¹ The Court has consistently held that "[t]here is considerable value . . . in encouraging, rather than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work."²⁰²

In the last decade, the *Garcetti* rule has limited public employee speech that pertains to matters of public concern as its expansive application did not protect speech that was a product of job duties. This created a conflict as the application of *Garcetti* erased the principles espoused in the public employee speech cases. This dilemma was clearly illustrated in *Lane*, as he felt that he was fired for truthfully testifying in court.²⁰³ The U.S. Supreme Court agreed that such action would violate the First Amendment, so it created a narrow exception to *Garcetti*. But the Court did not go far enough. The employee speech doctrine still relies on the nebulous concept of job duties. It still allows for lower courts to extend the definition of job duties to

U.S.C. 2000E-2 (West 2014).

¹⁹⁸ See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (holding that the government must with a "preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct").

¹⁹⁹ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 (1968).

²⁰⁰ *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Roth v. United States*, 354 U.S. 476 (1957)).

²⁰¹ See *supra* Part IV.1.

²⁰² *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994)).

²⁰³ *Id.* at 2376.

include speech that is a product of one's employ (with the exception of subpoenaed testimony). It still does not protect truthful testimony if it is pursuant to one's job duties.

This article argued that the Court should have gone beyond drafting such a narrow exception. The Court should have refocused the emphasis of the employee speech doctrine back toward whether or not the speech was a matter of public concern. Then there should be two levels of scrutiny depending on whether the speech was made as a citizen or if it was a product of employment. This would protect speech that serves the public interest, while maintaining some prerogative for government management.

Ultimately, a public employee does works for a government and does give up some rights in fulfilling his or her job duties.²⁰⁴ But, the employee's duty should not be to the individual government manager or agency. Instead, the public employee's duty should be to the public to whom that government answers.²⁰⁵

²⁰⁴ See *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

²⁰⁵ Similarly, in defending his actions of revealing state secrets, Edward Snowden argued that the federal employee's "oath of allegiance is not an oath of secrecy [but rather] an oath to the Constitution." Barton Gellman, *Edward Snowden, After Months of NSA Revelations, Says His Mission's Accomplished*, WASH. POST, Dec. 23, 2013, <http://wapo.st/K0zB1H>.