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# TENDING TO POTTED PLANTS: THE PROFESSIONAL IDENTITY VACUUM IN *GARCETTI V. CEBALLOS*

Jeffrey W. Stempel\*

As people my age probably recall, Washington lawyer Brendan Sullivan<sup>1</sup> briefly became a celebrity when defending former Reagan White House aide Oliver North before a Senate investigation. Senator Daniel K. Inouye (D-Haw.) was questioning Colonel North when Sullivan objected. “Let the witness object, if he wishes to,” responded Senator Inouye, to which Sullivan famously replied, “Well, sir, I’m not a potted plant. I’m here as the lawyer. That’s my job.”<sup>2</sup>

The episode was captured on live television and rebroadcast repeatedly, making Sullivan something of a hero to lawyers,<sup>3</sup> even moderates and liberals

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<sup>1</sup> Sullivan was a partner in the Washington, D.C. firm Williams & Connolly, a firm with a sophisticated practice and prestigious reputation, particularly in the area of white-collar criminal defense. *See Brendan V. Sullivan Jr., Partner, WILLIAMS & CONNOLLY LLP*, <http://www.wc.com/bsullivan> (last visited Mar. 9, 2012). Founding partner Edward Bennett Williams is perhaps best known as a lawyer for his successful defense of Teamster’s Union head Jimmy Hoffa as well as defense of other public figures charged with crimes or corruption. *See Firm Overview, WILLIAMS & CONNOLLY LLP*, <http://www.wc.com/about.html> (last visited Mar. 9, 2012).

<sup>2</sup> *See* KIM EISLER, *MASTERS OF THE GAME: INSIDE THE WORLD’S MOST POWERFUL LAW FIRM* 141 (2010) (internal quotation marks omitted); LAWRENCE E. WALSH, *FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP* 133 (1997) [hereinafter WALSH, *FIREWALL*]; *see also* John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 282–86 (1989) (describing Sullivan’s handling of another verbal “altercation” between Sullivan and Chief Senate Counsel Arthur L. Liman during the Iran-Contra hearings).

<sup>3</sup> *See* EISLER, *supra* note 2, at 141 (“With that line, Sullivan vaulted from the case files in the law library into the reference pages of Bartlett’s Quotations. . . . Sullivan immediately and unexpectedly became one of the most recognizable attorney names in the world.”); OLIVER L. NORTH WITH WILLIAM NOVAK, *UNDER FIRE: AN AMERICAN STORY* 363 (1991) (“Who could have guessed that a throwaway line about foliage would capture the imagination of the American public? That afternoon, we returned to the law firm to find dozens of potted plants. By the next day, there were potted plants everywhere—in the lobby, in the corridors, and especially in Brendan’s office, which . . . resembled a terrarium.”); Aaron Epstein, *Ollie North’s Mouthpiece Lawyer Brendan V. Sullivan Jr. Played The Heavy In the 1987 Iran-contra Hearings. These Days, He’s Using A Different Strategy. Still, You’ll Never Confuse Him With A Potted Plant*, PHILA. INQUIRER, Mar. 24, 1989, [http://articles.philly.com/1989-03-24/news/26128966\\_1\\_north-trial-brendan-sullivan-s-iran-contra](http://articles.philly.com/1989-03-24/news/26128966_1_north-trial-brendan-sullivan-s-iran-contra) (“With a single phrase, the man by North’s side burst into public attention as a lawyer who couldn’t be cowed.”). Of course, as well-put by the photographer Weegee, “You’re as good as your last

who had little use of Colonel North's conservative politics and the Iran-Contra scheme that funded anti-communist guerillas in Central America through the proceeds of weapon sales to Iran.<sup>4</sup> Whatever the merits or demerits of Colonel North as a client (seen by some as a patriot, others as a criminal or even a traitor),<sup>5</sup> people instinctively realized that persons facing congressional investigation/inquisition were entitled to competent, even combative counsel.

Although Sullivan's potted plant remark did not quite reach the level of Joseph Welch's "Have you no sense of decency, sir, at long last? Have you left no sense of decency?" that helped to wake the nation from the fog of McCarthyism,<sup>6</sup> it was a good example of a lawyer doing his job, protecting his client, willing to confront power without backing down, and using some humor to boot. History and literature are festooned with similar examples of lawyers taking a stand for their clients and justice in the face of mob insanity and government oppression: Lord Brougham,<sup>7</sup> Thomas More,<sup>8</sup> Andrew Hamilton,<sup>9</sup>

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picture. One day you're a hero, the next day you're a bum." Jan Morris, *New York's Golden Age: 'Manhattan '45'*, N.Y. MAG., Oct. 6, 1986, at 48, 56 (internal quotation marks omitted). The *American Lawyer* described Attorney Sullivan's less successful outing representing a product manufacturer in tort litigation a few months after the North hearing but noted that prospective jurors recognized him favorably as "Ollie North's lawyer." See Tim O'Brien, *Brendan Sullivan Bombs in Brooklyn*, AM. LAWYER, Sept. 1988, at 119, reprinted in STEVEN BRILL, TRIAL BY JURY 181 (1989).

<sup>4</sup> See LAWRENCE E. WALSH, IRAN-CONTRA: THE FINAL REPORT xiii (1994) [hereinafter WALSH, FINAL REPORT]. According to the Independent Counsel's report:

The Iran/contra affair concerned two secret Reagan Administration policies whose operations were coordinated by National Security Council staff. The Iran operation involved efforts in 1985 and 1986 to obtain the release of Americans held hostage in the Middle East through the sale of U.S. weapons to Iran, despite an embargo on such sales. The contra operations from 1984 through most of 1986 involved the secret governmental support of contra military and paramilitary activities in Nicaragua, despite congressional prohibition of this support.

The Iran and contra operations were merged when funds generated from the sale of weapons to Iran were diverted to support the contra effort in Nicaragua.

*Id.* at xv.

<sup>5</sup> See *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), modified in part, *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (overturning conviction of North on the basis of immunity granted in return for his congressional testimony). Compare WALSH, FINAL REPORT, *supra* note 4, at 105-22 (1994) (Independent Counsel Lawrence Walsh's report describing the prosecution of Oliver North), with WALSH, FIREWALL, *supra* note 2, at 133 ("[T]he marine and his image had achieved overwhelming popularity. North's military bearing, the look of sincere conviction in his frequently moist gray eyes, the apparent candor of his admissions—all these factors and more—evoked a near tidal wave of public support.").

<sup>6</sup> See *Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel and Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr: Hearing Before the Special Subcomm. on Investigations of the Comm. on Gov't Operations*, 83d Cong. 2429 (1954) (statement of Joseph N. Welch, special counsel for the Army); see also Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CAL. L. REV. 1387, 1402 ("It was the moment that finally and indelibly exposed Joseph McCarthy for what he was: a bully willing to tear apart anyone who tried to stop his crusade. In the weeks after the hearings, his popularity plummeted." (footnotes omitted)).

<sup>7</sup> Lord Henry Brougham was a prominent English barrister probably best known for his defense of Queen Caroline on charges of adultery, during which he famously stated that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client" and that in representing the client a lawyer must disregard the interests of third

Clarence Darrow,<sup>10</sup> Atticus Finch,<sup>11</sup> most of the legal cast of *Law & Order*, most of the time. All resonate as lawyers trying to achieve justice while upholding the rules of the game, which guarantee rights to even the unjust. Notwithstanding the modern spoliage of the brand by the likes of Kobayashi,<sup>12</sup> Arnie Becker,<sup>13</sup> Denny Crane,<sup>14</sup> or (most recently and God-awfully) Franklin &

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persons and social institutions even if in arguing for his client it should be “his unhappy fate to involve his country in confusion.” See STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 23–24 (2009) (quoting Brougham from the TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821)); see also JANE ROBINS, *THE TRIAL OF QUEEN CAROLINE* (2006).

The episode is usually invoked to illustrate Brougham’s willingness to take on the crown and attack the King’s own conduct as necessary. It was also probably blackmail of sorts suggesting that if the King wanted to question the Queen’s fidelity, his own and the state of the royal union generally would also be examined by Brougham at a public trial. But in any event, Brougham’s dictum about a lawyer having absolute loyalty to clients even in the face of powerful adverse forces has become part of the legal profession’s self-image.

<sup>8</sup> Thomas More was the Lord Chancellor of England and defied King Henry VIII when the King sought to obtain an invalid annulment, an expression of integrity that cost More his life. The story was immortalized in Robert Bolt’s popular play, *A Man for All Seasons* in which More famously upbraids another who would “cut down every law in England” to defeat the Devil, to which More notes that if laws are “cut down” there will be nothing to protect society from moments of madness “in the winds that would blow then.” ROBERT BOLT, *A MAN FOR ALL SEASONS* 66 (Vintage Int’l 1990).

<sup>9</sup> Andrew Hamilton was a Philadelphia lawyer who successfully defended newspaperman John Peter Zenger when Zenger was accused of publishing “seditious” matter critical of the Crown, a case that is regarded as a great victory for freedom of the press and a precursor to the First Amendment. See Dwight L. Teeter, Jr., *Andrew Hamilton*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 246 (Roger K. Newman ed., 2009); JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL* (Stanley Nider Katz ed., 2d ed. 1972).

<sup>10</sup> Clarence Darrow was a prominent early Twentieth Century lawyer who represented a variety of unpopular defendants, often successfully. He is perhaps best known as the model for the character Henry Drummond, who defended a Tennessee science teacher prosecuted for teaching evolution in violation of a state law. See JEROME LAWRENCE & ROBERT E. LEE, *INHERIT THE WIND: THE POWERFUL DRAMA OF THE GREATEST COURTROOM CLASH OF THE CENTURY* (1955). The play is based on the actual trial in which Darrow represented actual school teacher Richard Scopes in what is commonly referred to as the “Scopes Monkey Trial.”

<sup>11</sup> Atticus Finch is the fictional hero of Harper Lee’s *To Kill A Mockingbird*, a novel in which small town attorney Finch defends a poor black man falsely accused of rape. The Finch stereotype of a courageous lawyer willing to represent unpopular (but innocent) clients is ubiquitous among lawyers. See MIKE PAPANTONIO, *IN SEARCH OF ATTICUS FINCH* (1996) (modern lawyer invokes Finch as archetype of lawyer professionalism). More critical reviews of Lee’s book have questioned the pedestal on which Finch is placed, arguing that it simply reflects a more genteel version of a blameworthy class structure based on racism. But perception is reality. Even if Lee’s version of a liberal crusader seems like too establishmentarian to some modern readers, Finch—or at least the perception of Finch as a lawyer who stands up for principles even in the face of social condemnation and mob psychology—is enshrined in American legal lore.

<sup>12</sup> Kobayashi (first name never revealed), played marvelously by the late Pete Postlethwaite, was attorney to Kevin Spacey’s ruthlessly homicidal Keyser Soze in *THE USUAL SUSPECTS* (MGM Studios 1995) and arranged elimination of Keyser’s enemies as well as bailing the deceptively diminutive Keyser out of jail.

<sup>13</sup> Arnie Becker, portrayed by Corbin Bernsen, was a matrimonial lawyer in the fictitious *LA Law* (20th Century Fox Television 1986–94) television series. Becker regularly lied,

Bash,<sup>15</sup> the image remains resilient even if lawyers as a group are often the object of jokes regarding their alleged aggression or avarice.

The noble view of the attorney in action, despite being overly romanticized at times, resonates because at least the more learned elements of society understand that this aspect of lawyering plays a vital role in social functioning. Sure, lawyers are good to have for drawing wills, memorializing contracts, incorporating entities, and similar work of a transaction catalyst (not to mention good fodder for jokes and the occasional television series). But they are perhaps even more important for providing a full and fair hearing, even to those with whom we disagree.<sup>16</sup>

The model of the lawyer as champion for the client is well-known. Less fully appreciated but equally important is the model of the lawyer as an officer of the court and a faithful and fair steward of public and private power. Although the lawyer-as-whistleblower genre gets less attention and respect than the lawyer-as-champion model, lawyers protecting the integrity of the legal, political, and social system have played a vital role as well. Thomas More opposed the King's effort to obtain the convenience of an illegal divorce.<sup>17</sup> Elliot Richardson and William French Smith refused President Richard Nixon's command to fire Watergate Special Prosecutor Archibald Cox.<sup>18</sup> Leonard Garment prevented the destruction of tape recordings of Oval Office conversations in the Nixon White House.<sup>19</sup> Roger Tuttle exposed the fraud on the court by

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cheated and otherwise violated the rules of lawyer professional conduct (e.g., becoming sexually involved with clients or opponents).

<sup>14</sup> Denny Crane, played by Priceline pitchman and former Star Trek commander William Shatner, was a lawyer in the television series *Boston Legal* (20th Century Fox Television 2004–08) in which Crane regularly dispensed with the niceties of legal ethics.

<sup>15</sup> *Franklin & Bash* (Fan Fare Productions, Four Sycamore, & Left Coast Productions 2010), a cable television series that commenced in June 2011 is a particularly juvenile and poorly done version of the “macho lawyer as party animal” legal series reflected in substantial portions of programs such as *Boston Legal*, *LA Law*, and *The Practice*.

<sup>16</sup> Full disclosure: I am among those with a rather negative view of Colonel North. I cannot even make it through one of his introductions to *War Stories*, his television show on the Fox News network—but like everyone else, he is entitled to a competent lawyer able to object to perceived improper questions. Sullivan was right to act like a loyal attorney in the face of questioning, despite the lack of merit of some of his objections (e.g. suggesting that briefing book used by North to present his testimony was immune from production due to attorney-client privilege).

<sup>17</sup> The divorce the King sought was illegal, of course, because of the Canon Law of the Roman Catholic Church, which explains why Thomas More is a saint to Roman Catholics as well as an archetypical courageous lawyer/hero to others, even those quite in disagreement with the Church's historical and theological views about marriage and divorce.

<sup>18</sup> See KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 354–58 (1997). After Richardson and French Smith refused to fire Cox, then-Solicitor General Robert Bork did, an action he described as averting a constitutional crisis but which was widely criticized. It came back to haunt Bork nearly 15 years later when Bork's nomination to the Supreme Court was rejected by the U.S. Senate, in significant part because of Bork's actions. See *id.* at 418–22 (describing discussions of Bork's firing of Cox during the Senate confirmation hearings); ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 94 (1989) (describing Senator Ted Kennedy's call to Cox to gauge his interest in participating in the Bork confirmation battle).

<sup>19</sup> See GILLERS, *supra* note 7, at 457–61 (describing consideration by Nixon Administration of destroying tapes and White House Counsel Leonard Garment's advice, contrary to that of

Dalkon Shield manufacturer A.H. Robins.<sup>20</sup> Frederick Aiken was willing to defend the very unpopular Mary Surratt, who sheltered Lincoln assassin John Wilkes Booth in her boarding house and was accused of being part of the assassination conspiracy.<sup>21</sup>

Richard Ceballos may or may not have been a small bore Thomas More. We'll never know for certain because the U.S. Supreme Court ruled that his employer, Los Angeles District Attorney Gil Garcetti, was free to fire Assistant District Attorney Ceballos without question in alleged retaliation for Ceballos calling the DA's office into account for alleged use of a falsified affidavit designed to obtain an improper conviction.<sup>22</sup>

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some on the Nixon team, that destruction of the tapes would be criminal because they were certain to be sought as evidence); *see also* LEONARD GARMENT, *CRAZY RHYTHM* 280–83 (1997) (autobiographical discussion of the episode).

<sup>20</sup> Tuttle had been an in-house lawyer at A.H. Robins during the time of the Dalkon Shield's development and the early years of litigation before subsequently becoming a law professor at Oral Roberts University. He described his role in destroying incriminating Robins' documents, paving the way for increased success of plaintiffs' claims. *See* Charles Alexander et al., *Robins Runs for Shelter*, *TIME*, Sept. 2, 1985, [www.time.com/time/printout/0,8816,959726,00.html](http://www.time.com/time/printout/0,8816,959726,00.html) ("Roger Tuttle, a former attorney for the company, testified that he had destroyed internal documents relating to the Dalkon Shield on orders from his bosses. Robins flatly denied Tuttle's testimony, but it helped produce the largest jury verdict against the company to date: a \$9.2 million award in May to a Wichita woman who had to undergo a hysterectomy after using the Dalkon Shield."); Barry Siegel, *The Right Question: One Man's Effort to Tell Dalkon Story*, *L.A. TIMES*, Aug. 22, 1985, [http://articles.latimes.com/print/1985-08-22/news/mn-2247\\_1\\_dalkon](http://articles.latimes.com/print/1985-08-22/news/mn-2247_1_dalkon) (describing testimony of Tuttle, a born-again Christian, who after "misplaced zeal" in defending Robins over which he came to "hang my head in shame," described the document destruction; also noting that the "impact [of the testimony] has been considerable, and it has played a role in forcing Robins to seek protection in bankruptcy court."); Jane Sims Podesta, *After a Lawyer Turns Whistle-Blower, the Company That Made the Dalkon Shield Warns Women of Its Dangers*, *PEOPLE*, Jan. 14, 1985, [www.people.com/people/archive/article/0,,2009069.00.html](http://www.people.com/people/archive/article/0,,2009069.00.html) (quoting Professor Tuttle as telling his students, "Stalk out in a rage if you believe a client's wishes are unethical. Don't hang around.").

<sup>21</sup> This historical episode recently reached a mass audience through the Robert Redford-directed movie *THE CONSPIRATOR* (The American Film Company & Wildwood Enterprises), released in 2011, which starred James McAvoy as attorney Aiken, who, despite being an ardent unionist and Lincoln supporter, sought to insure a fair trial for Surratt (played by Robin Wright). Regardless of whether the movie accurately portrays Aiken, it serves to illustrate a longstanding theme of American law and society: the attorney willing to take a stand for fairness and justice in the face of emotion and even mob hysteria.

<sup>22</sup> Outside the arena of their litigation, both Ceballos and Garcetti seem to be living rather productive lives notwithstanding some criticism (discussed at greater length below). Ceballos continues as a deputy DA and as a community activist as well as a tequila distributor. *See Richard Ceballos Resume and Biography*, available at [www.law.uci.edu/pdf/ceballosCV.pdf](http://www.law.uci.edu/pdf/ceballosCV.pdf) (last visited Mar. 9, 2012); Richard Ceballos, Opinion, *Don't Replace Pomona Police*, *INLAND VALLEY DAILY BULL.*, July 25, 2010; Richard Ceballos, Letter to the Editor, *Don't Charge For Lanes*, *SAN GABRIEL VALLEY TRIB.*, June 17, 2009 (praising newspaper article favoring greater whistleblower protection and contending that Los Angeles County has a "custom and habit of ignoring the warnings of corruption, waste, and fraud brought forward by . . . employees" and that often "reaction is to label the conscientious employee as insubordinate, a troublemaker, or malcontent"); Richard Ceballos, Opinion, *Prop. 5 A Misguided Initiative*, *SAN GABRIEL VALLEY TRIB.*, Oct. 23, 2008 (opposing proposed legislation that would "effectively provide narcotic offenders with virtual 'get-out-of-jail' cards, prohibiting judges from incarcerating those who continue to commit crimes in order to support

In *Garcetti v. Ceballos*,<sup>23</sup> the United States Supreme Court ruled that even if Ceballos was completely correct and that he had spotted chicanery by the Sheriff's Department in falsifying an affidavit used to obtain a criminal conviction, DA Garcetti was entitled to take adverse job action against Ceballos and that this was not impermissible government punishment for Ceballos' exercise of his First Amendment rights.<sup>24</sup>

For reasons well said in the dissenting opinions of Justices Stevens, Souter, Ginsburg, and Breyer, *Garcetti v. Ceballos* is poorly reasoned as a matter of First Amendment doctrine.<sup>25</sup> But for purposes of this Symposium, I wish to focus on what makes *Garcetti* one of the Court's "worst" from my perspective—the Court's failure to recognize and appreciate—at least in its formal disposition of the case—that Richard Ceballos was more than a public employee voicing concern over an important failing of the workplace that affected the public interest (although that still should have given him more protection to speak what he regarded as the truth) but was an attorney sworn to act as an officer of the Court and required to follow a professional responsibility code that not only permitted but required him to blow the whistle on false affidavits used by prosecutors.<sup>26</sup>

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their drug habits"); Richard Ceballos, *Whistleblower Richard Ceballos Letter to Congress*, PUBLIC CITIZEN (May 14, 2007), <http://www.citizen.org/Page.aspx?pid=2348> (stressing need for greater whistleblower protection). Ceballos also ran unsuccessfully for Pomona City Council. See Monica Rodriguez, *Some Pomona Residents Hinting Recall After Romero's Ouster*, INLAND VALLEY DAILY BULL., Dec. 16, 2008.

Garcetti, after his defeat for re-election as District Attorney in 2000, became a prominent photographer as well as a producer of the TNT television series *The Closer* and served on the Los Angeles Ethics Commission. He was also profiled on a May 2006 segment of the CBS News Program *Sunday Morning* with Charles Osgood. See, e.g., Beth Barrett, *Garcetti's Take Heat Over Plan: Pair's Actions on Term-Limit Measure Drawing Criticism*, L.A. DAILY NEWS, Aug. 9, 2006, at N1 (noting Garcetti's chairpersonship of Ethics Commission and son Eric's status as L.A. City Council President but focusing on allegations that they unfairly attempted to push through amendment of term limits restrictions); Suzanne Muchnic, *The Picks of Their Pics: Members of LACMA's Photographic Counsel Share Favorites From Their Diverse Personal Collections*, L.A. TIMES, Aug. 14, 2010, at D1 (noting Garcetti's "success in his second career as an urban photographer").

<sup>23</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>24</sup> See *id.* at 420–24.

<sup>25</sup> See *id.* at 426 (Stevens, J., dissenting); *id.* at 427 (Souter, J., dissenting, joined by Stevens and Ginsburg); *id.* at 444 (Breyer, J., dissenting).

<sup>26</sup> As discussed below, only Justice Breyer's dissenting opinion provides any real discussion of Ceballos' status as an attorney and his corresponding duties to the justice system. The Court was of course aware that Ceballos was an attorney and that attorneys have certain obligations to refrain from bringing tainted prosecutions and to be candid with courts. See Transcript of Oral Argument at 6–7, *Garcetti v. Ceballos*, 547 U.S. 410 (Oct. 12, 2005) (No. 04-473) (question of Justice Ginsburg) [hereinafter Transcript A], *id.* at 17–18 (colloquy between Justice Souter and Garcetti counsel Cindy S. Lee, Esq.) (discussing prosecutor's obligations under *Brady v. Maryland* to disclose evidence tending to exonerate defendants), and Transcript of Oral Re-argument at 8–9, *Garcetti v. Ceballos*, 547 U.S. 410 (March 21, 2006) (No. 04-473) (question of Justice Scalia) [hereinafter Transcript B], *id.* at 9–10 (colloquy between Justice Ginsburg and Lee); *id.* at 53–55 (answer of Ceballos' counsel Bonnie Robin-Verger, Esq. to question of Justice Souter addresses attorney professional ethics, whistleblowing, and "up ladder" reporting of improprieties to superiors); see also Transcript B, *supra*, at 38–39 (question of Justice Scalia expressing concern that "loose cannons" in DA's office might be "accusing perfectly honest and respectable police officers of violating

Mr. Ceballos could, of course, have been wrong about whether the Sheriff erred. Mr. Ceballos might also have been unduly bellicose and counter-productive in the manner in which he raised the issue (although that seems unlikely from the limited facts recited in the case). We will never know about the bona fides of the Ceballos claims and contentions because the Court essentially smothered his claim at birth with its overbroad ruling essentially stating that public employees have no First Amendment rights to criticize occurrences in the workplace—at least unless they are willing to be fired for speaking out, no matter how important the workplace failings may be to the public interest. That ruling, as the dissenters pointed out, was unwise and incorrect as a matter of constitutional law. It also failed to appreciate the zone of freedom required of attorneys working for organizations if lawyers are to properly fulfill their role as officers of the court and occasional guardians of judicial fairness as well as their role as partisan advocates.

Depressingly, only Justice Breyer's dissent even touched upon the matter of Mr. Ceballos as a lawyer as well as a dissident.<sup>27</sup> More important, Mr. Ceballos was a lawyer for the government and for the prosecution, entities empowered to deprive persons of life and liberty and entities restricted in their power by the Due Process Clause of the Fourteenth Amendment. If anyone should have freedom to speak out internally against perceived police and prosecutorial abuse without fear of job retaliation, it should have been attorneys like Richard Ceballos—even if they are incorrect.

Instead of recognizing this, the Court majority relegated Deputy DA Ceballos to the role of a mere functionary on an assembly line, someone who could be fired merely because the boss disliked his taste in music, film, or professional sports. Although one now almost expects laypersons to misunderstand or under-appreciate the role of the lawyer as a guardian of the system's integrity, it is particularly shocking that the Court as a whole failed so badly in this regard.

The Ceballos saga began when Mr. Ceballos, a “calendar” deputy or supervising attorney in the DA's Pomona branch office was contacted by a defense attorney contending that there were inaccuracies in a search warrant used by police<sup>28</sup> to “obtain a critical search warrant.”<sup>29</sup> Rather than disregarding defense counsel, as one might cynically expect from prosecutors in an adver-

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the law,” a sentiment arguably reflecting excessive concerns for inconvenience or difficulty for law enforcement officials as compared to harm suffered by defendants through wrongful prosecution or conviction).

Despite being at least somewhat aware of the professional responsibility implications of the *Garcetti* case, nearly all Justices chose not to address its implications for the decision. <sup>27</sup> *Garcetti*, 547 U.S. at 446 (“[T]he speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished.”); see also *id.* at 447 (quoting Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 172 (1996) (“[P]rofessionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards.”)).

<sup>28</sup> The investigation and warrant activity in question was conducted by the L.A. County Sheriff, but for each reference I will refer to law enforcement activity in the case as being conducted by the “police.”

<sup>29</sup> *Garcetti*, 547 U.S. at 413.



sary system, Ceballos took the report seriously enough to investigate, visiting the physical location involved and concluding that the police affidavit contained “serious” errors amounting to “misrepresentations” to the court and that the errors were likely not the result of mere inadvertence.<sup>30</sup>

Ceballos then pursued the matter with his supervising attorneys (Carol Najera and Frank Sundstedt), drafting a “disposition memorandum” that recommended dismissal of the case. The supervising attorneys and the police opposed Ceballos, with “one lieutenant sharply criticizing Ceballos for his handling of the case” and Sundstedt deciding to proceed with the case unless defendant’s motion challenging the affidavit succeeded.<sup>31</sup> At the motion hearing, Ceballos testified in favor of the defense motion but the trial court rejected the challenge to the affidavit.<sup>32</sup> Two of the three defendants (Randy Longoria and Douglas

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<sup>30</sup> The problems Ceballos found with the affidavit’s accuracy were not trivial. The police appear to have taken substantial liberty in stretching the description of the physical area in order to paint a picture more conducive to obtaining a search warrant. *See id.* at 414 (According to Ceballos, the police “affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit’s statement that tire tracks [found on the defendant’s property] led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway’s composition in some places made it difficult or impossible to leave visible tire tracks.”).

While it is of course possible that Ceballos was making a mountain out of a molehill, it seems at least equally likely that he is describing excessive police liberty with the facts designed to secure an improper search that could lead to a wrongful conviction. The true version of facts or characterization of the Ceballos concerns is a question of fact. By declaring blanket Section 1983 immunity to prosecutors suppressing attorney speech of this type, the Court prevents this necessary factual inquiry and creates a situation where it can become standard DA practice to twist facts to obtain convictions. A deputy DA who believes that improprieties have taken place and wishes to speak out as required by the rules of attorney professional conduct must do so at the risk of arbitrary dismissal.

<sup>31</sup> *See id.* at 414–15.

<sup>32</sup> *See id.* The Ninth Circuit’s account of the entire incident is considerably more detailed than that of the Supreme Court and paints the DA defendants, and the performance of the DA’s office and the judicial system, in a considerably less flattering light.

Ceballos discussed the problems arising from this investigation with others in the Office, including his immediate supervisor, Carol Najera and the then-Head Deputy District Attorney Frank Sundstedt. *Everyone agreed that the validity of the warrant was questionable.* On March 2, 2000, Ceballos sent Sundstedt a memorandum discussing his determination that the affidavit was falsified and recommending that the case be dismissed. Sundstedt instructed Ceballos to revise the memorandum to make it less accusatory of the deputy sheriff. Ceballos rewrote the memorandum, and a meeting was held . . . with representatives from the Sheriff’s Department, Sundstedt, Najera, Ceballos and another deputy district attorney.

Following the meeting with the Sheriff’s Department, Sundstedt was not certain that [*People v.*] *Cusky* [the underlying case] should be dismissed and decided to proceed with the case pending the outcome of a motion challenging the search warrant, which had already been filed by the defense. Ceballos informed defense counsel that he believed the affidavit contained false statements, and defense counsel subpoenaed him to testify at the hearing. Ceballos told Najera that pursuant to *Brady v. Maryland* and other case law, he was obliged to turn over to the defense the memoranda he had prepared regarding his opinion of the legality of the search warrant. *Ceballos contends that Najera instructed him to edit the memorandum to include statements by only one detective and to limit his in-court testimony.* When Ceballos testified at the hearing on the motion, the *Cusky* court sustained the prosecution’s objections to several questions defense counsel asked him. *Ceballos maintains that, as a result, he was unable to tell the court certain of his conclusions (and the reasons therefore) regarding the accuracy of the warrant.* The defen-

Ojala) pled guilty to charges of illegal possession of weapons and methamphetamine while defendant Michael Cuskey stood trial and was convicted.<sup>33</sup>

After losing in his bid to prevent a prosecution he regarded as improper, Ceballos claimed “he was subjected to a series of retaliatory employment actions” that “included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion.”<sup>34</sup> He filed a grievance that was denied on the ground of insufficient retaliation and then sued pursuant to 42 U.S.C. § 1983 alleging violation of his First and

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dant’s motion was denied, and the prosecution proceeded. Having testified for the defense,

Ceballos was removed from the *Cuskey* prosecution team.

Ceballos v. Garcetti, 361 F.3d 1168, 1170–71 (9th Cir. 2004) (emphasis added) (footnote omitted).

Najera, who was involved in the famous Menendez Brothers prosecution, and remains a deputy DA, apparently is seen by some as very aggressive. See *Menendez Brothers on Trial: Juror Speaks Out*, CNN.COM, Dec. 10, 2007 (reporter asks juror whether Najera was “overbearing at times” during trial, an assertion denied by the juror, who described Najera as “very soft spoken”). Sundstedt, a 29-year veteran of the DA’s office, joined his brother’s law firm in March 2001, approximately a year after the dust-up with Ceballos. See LAW OFFICES OF MICHAEL J. SUNDSTEDT, [www.sundlaw.com](http://www.sundlaw.com) (last visited Mar. 9, 2012) (also noting that Frank E. Sundstedt, Jr., participated in more than 175 criminal jury trials and was selected to the prestigious American College of Trial Lawyers in 1996).

An even more pro-Ceballos account that reads quite damningly toward his antagonists is found in Jim Crogan, *Soft on Crime Fighters*, LA WEEKLY, Dec. 22, 2000, at 22. Sundstedt in particular looks excessively heated when quoted calling Ceballos a “goddamn liar” who Sundstedt accuses of bringing the Section 1983 litigation as a “thinly veiled, politically motivated attempt to affect the outcome of the [2000] election for D.A.” because the suit was filed on October 18, 2000. Garcetti was defeated in November 2000. *Id.* In response to the Ceballos concerns that the police affidavit was inaccurate, Sundstedt is quoted saying that “no one ever elected [Ceballos] judge and jury.” *Id.* True enough, but Sundstedt as an experienced lawyer surely understands that attorneys are constantly making assessments of the type proffered by Ceballos in order to properly exercise prosecutorial discretion and to comply with ethics-in-litigation directives such as Fed. R. Civ. P. 11. Although the *LA Weekly* article is clearly sympathetic to Ceballos, if accurate, it presents a picture of Sundstedt protesting way too much and in that sense gives credence to the Ceballos claims.

<sup>33</sup> See Crogan, *supra* note 32, at 22. Defendant Ojala pled guilty prior to the court proceedings involving the Ceballos testimony while Defendant Longoria pled guilty after the unsuccessful motion to quash the search warrant. All three defendants received “a six-month sentence with the option of either doing Caltrans roadwork or reporting to the county’s tree farm.” *Id.* at 23.

The Crogan article also provides somewhat more detail about the nature of Cuskey’s property (the site of the search) and gives further description of the discrepancies between the police affidavit (involving deputies Daniel Spitulski and Murray Simpkins as well as detective Keith Wall) and Ceballos’ observations about the property. According to Ceballos “the so-called ‘driveway’ [leading directly to Cuskey’s house] was actually an access road shared by all the residents on the street” and “was a mixture of asphalt, gravel and dirt, making it impossible for anyone to follow tracks along its surface.” *Id.* Further, “an abandoned truck [(described in the affidavit)] was found about 400 feet away from Cuskey’s property, not the 30 feet later claimed in court by these deputies during the hearing to dismiss the search warrant.” *Id.* Also, the police “got the address wrong on the search warrant.” See *id.* at 23. These discrepancies and the fact that Cuskey and his property had been targeted for some time led Ceballos to conclude that the “deputies’ real purpose was always to look for narcotics, and they used the abandoned truck as a red herring to disguise their intention.” See *id.* at 23 (quoting Ceballos).

<sup>34</sup> *Garcetti*, 547 U.S. at 415.

Fourteenth Amendment rights due to the retaliation.<sup>35</sup> The District Attorney (Gil Garcetti<sup>36</sup>), in addition to contending that there had been no retaliation, also argued that Ceballos' conduct was not protected speech because he had spoken as a deputy DA and county worker rather than as a public citizen addressing matters of general public concern.<sup>37</sup> The trial court rejected the Ceballos claim but the Ninth Circuit reversed, setting the stage for the Supreme Court's opinion.<sup>38</sup>

The Supreme Court rejected the Ninth Circuit view that Ceballos had a viable Section 1983 claim, largely applying the First Amendment doctrine set

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<sup>35</sup> See *id.* The retaliatory actions of which Ceballos complained "included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion." *Id.* In addition to asserting that Ceballos enjoyed no First Amendment protection for his statements, the District Attorney contended that "all [of] the actions of which [Ceballos] complained were explained by legitimate reasons such as staffing needs." *Id.* The Ninth Circuit opinion presents in greater detail the nature of the retaliation alleged by Ceballos, listing eight particulars. See *Garcetti*, 361 F.3d at 1171–72; see also Crogan, *supra* note 32, at 22–24.

<sup>36</sup> Prior to becoming a celebrated photographer, Garcetti was Los Angeles DA from 1992 to 2000 and is most prominently known as the District Attorney during the notoriously failed prosecution of former football star O.J. Simpson for the murder of his estranged wife Nicole Brown Simpson and her friend Ron Goldman. He was defeated in the 2000 election by challenger Steve Cooley in a campaign where the failed Simpson prosecution was a significant political issue adversely reflecting on Garcetti's competence. As noted above, he subsequently began a second career of sorts as a photographer, and was involved as an actor and collaborator with several television crime shows. See *Gil Garcetti*, WIKIPEDIA, [http://en.wikipedia.org/http://en.wikipedia.org/wiki/Gil\\_Garcetti](http://en.wikipedia.org/http://en.wikipedia.org/wiki/Gil_Garcetti) (last visited Mar. 9, 2012); see also Suzanne Muchnic, *Quick Takes: Garcetti Photos at U.N.*, L.A. TIMES, July 4, 2009, at D2 (describing Garcetti as a "prominent photographer" presenting exhibits of his work at the United Nations General Assembly).

It has long been local lore among Los Angeles lawyers that Garcetti insisted that the Simpson trial be held in downtown L.A. rather than the nearer to the Brentwood location where the killings occurred. In doing so, Garcetti gave himself a better vantage point for monitoring the proceedings but did so at the cost of ensuring a substantially more African-American jury, which proved to be unduly sympathetic to Simpson's claim that he was railroaded because of the racist tendencies of the L.A. police. See, e.g., GILLERS, *supra* note 7, at 469–70 ("Moving Pictures" note); Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 37 (describing court-permitted jury visit to Simpson's home prior to which Simpson counsel had replaced evidence of Simpson's ties to white America with substantial Africanization of the home's décor to emphasize Simpson's roots and status as a prominent black American).

Of course, permitting the jury to visit the unsecured Simpson home was only one of a number of terribly wrong aspects of the Simpson prosecution, some of which must be attributed to Garcetti and the prosecution team as well as to the star-struck trial judge Lance Ito. Certainly, this particularly awful episode cannot be laid solely at the feet of Garcetti and his prosecutors generally (who opposed the visit but apparently lacked the presence of mind to obtain an injunction that the Simpson home not be altered prior to the visit). But revisiting the serial bungling of the OJ prosecution prompts at least some concern that the Garcetti DA's office might indeed have been sufficiently ill-managed to overlook valid attorney complaints about police misconduct and to punish whistleblowers rather than seeking to rectify whistleblower complaints.

<sup>37</sup> *Garcetti*, 547 U.S. at 415.

<sup>38</sup> *Id.*

forth in *Connick v. Myers*,<sup>39</sup> and *Pickering v. Board of Education*.<sup>40</sup> The Court majority read those precedents as imposing a bright line distinction between government employee speech on the job about their job (which was not protected) and a government employee speaking as a citizen (or perhaps other activities in other parts of the employer's organization), which was subject to protection. "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."<sup>41</sup> But where "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>42</sup>

The majority sought through this bright line position "both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions."<sup>43</sup> According to the majority,

Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.<sup>44</sup>

Cynics among us might read this paragraph as one giving the green light to employers to smash employees who have the temerity to deviate from the employer's party line or to question the propriety of employer practices. This is regrettable enough where the government employer and activity involve activities such as paving roads, landscaping parks, or processing licenses. It becomes truly mischievous where that government employer's activity is prosecution of crime with the potential consequence of incarceration of a defendant on the basis of falsified information.

The *Garcetti* majority has it completely backwards. The law should not give employers "heightened interests in controlling speech made by an employee in his or her professional capacity" but rather should give professionals adequate breathing space to properly discharge their professional obligations—to both employers and to the law.

Where the government task is prosecution, the employer's need for "consistency and clarity" must yield to the truth. Consistent and clear railroading of defendants is hardly in the public interest and lawyers like Richard Ceballos

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<sup>39</sup> *Connick v. Myers*, 461 U.S. 138 (1983). The *Connick* of the opinion is long-time New Orleans District Attorney Harry Connick, who is perhaps better known as the father of musician and actor Harry Connick, Jr. See *Harry Connick, Sr.*, WIKIPEDIA [http://en.wikipedia.org/wiki/Harry\\_Connick,\\_Sr.](http://en.wikipedia.org/wiki/Harry_Connick,_Sr.) (last visited Mar. 9, 2012).

<sup>40</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

<sup>41</sup> *Garcetti*, 547 U.S. at 419.

<sup>42</sup> *Id.* at 421.

<sup>43</sup> *Id.* at 420.

<sup>44</sup> *Id.* at 422–23.

should be permitted to speak up to prevent perceived injustice, even if this results in “heated” exchanges with supervisors. The prosecutor/employer “mission” is not simply making the prosecutorial trains run on time, it is ensuring that the process is fair and does not treat defendants and other participants in the system (e.g., jurors, witnesses, counsel) unfairly.

This value is strong enough to tolerate the occasional errors of some whistleblowing attorneys. If a dissident like Ceballos is a poor worker, he can readily be disciplined or discharged for legitimate reasons and any subsequent 1983 litigation is unlikely to be successful or particularly taxing to the government. As a practical matter, all but the crankiest of cranks will be reluctant to take a stand against his or her work hierarchy without reasonably strong evidence of impropriety. Although *Garcetti* arguably spares the government the costs and inconvenience of weak First Amendment wrongful discharge claims, it does so at the cost of deterring potentially valuable input from lawyers fairly and accurately seeking to discharge their ethical obligations.

Further, the issue of whether an employee’s work demonstrates “sound judgment” or is “inflammatory” or “misguided” does not logically give the prosecutor/employer carte blanche to discharge or discipline the employee who finds prosecutorial abuse and speaks out about it. At a minimum, the employee should have the chance to show that the adverse job action was in retaliation for speech (particularly speech that calls the professional employer into account for professional failings) rather than due to some deficiency of job performance. Similarly, the employer seeking to discharge or discipline the subordinate attorney who dares to speak out should have a better reason for the adverse job action than merely that the employee’s speech and actions have made the boss uncomfortable.

Overlooked by the Court majority opinion and dissents, save for that of Justice Breyer, is that under the relevant ethical rules to which Ceballos was subject, he was essentially required to protest as he did once discovering the problems with the police affidavit at issue.<sup>45</sup> An array for legal ethics rules and

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<sup>45</sup> As noted in note 26, *supra*, the Court at oral argument was aware that Ceballos, as an attorney, had particular ethical responsibilities. See Transcript A, *supra* note 26, at 7; Transcript B, *supra* note 26, at 9. But in the course of deciding the case, only Justice Breyer’s dissent addressed this concern at any length. Perhaps even more than the disappointing majority opinion that emphasizes employer prerogatives and a perceived need for top-down control of workers, the Transcripts are replete with concern that lazy or “insubordinate” workers will undermine the employer and that the employer will face undue burdens in disciplining or discharging such workers.

The Court’s concern is overstated in that it paints too gloomy a picture of the costs of defending employee retaliation suits. To a large degree, defending such claims is simply the modest cost of giving workers rights and fostering the public’s right to know. As a practical matter, these cases are unlikely to take much time or energy of the defendants unless the allegations have significant merit, a fact noted by Justice Souter at both oral argument and in his *Garcetti* dissent. See *Garcetti*, 547 U.S. at 435–36 (Souter, J., dissenting, joined by Stevens and Ginsburg, JJ.); Transcript A, *supra* note 26, at 3–4; see also Transcript B, *supra* note 26, at 34 (colloquy between Justice Scalia and Ceballos counsel on this issue).

In addition, the Court, particularly the *Garcetti* majority, seems to misunderstand the nature of public employment. The Los Angeles DA’s office is not the functional equivalent of a small family business, rock band, or movie cast where a recalcitrant dissident can thwart the objectives of the entity whose members have an almost unfettered right to do things as

norms reflected in the American Bar Association's Model Rules of Professional Conduct practically mandated that Ceballos act upon his belief that the policy affidavit was defective.<sup>46</sup>

Rule 3.1 requires that attorneys put forth only "meritorious claims and contentions."<sup>47</sup> If the police affidavit was defective, the prosecution's case was non-meritorious, at least in some part. Rule 3.3 requires that attorneys display "candor toward the tribunal."<sup>48</sup> If the policy affidavit was inaccurate as posited by Ceballos, the DA's office was not being candid with the court. Rule 3.8 posits that there are "special responsibilities of a prosecutor" and provides that a prosecutor "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause" as well as imposing other requirements such as disclosure of information tending to exculpate the defendant and to alert the court to potential wrongful convictions.<sup>49</sup>

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they see fit (subject to outright concerns of illegality that may permit whistleblowing even in these situations). Rather, professionals working in the public sector have independent professional obligations to serve the public at large rather than merely the constituents who have managerial authority over a government entity.

Gil Garcetti was of course the DA, just as Frank Sundstedt and Carol Najera were employees of higher rank than Ceballos. But none of these persons were really the entity to whom Ceballos and other lawyer employees owe allegiance. That entity was the County of Los Angeles as an amalgamation of the citizens of the County. Where an employee accurately sees the managerial constituents violating duties to the entity, the employee is hardly being an "insubordinate" or "loose cannon" but instead is being a faithful steward of the citizenry. Add to that the obligations of a government lawyer to the judicial system and the need to be fair to opponents and third parties and the result is a potent formula for protecting the rights of dissidents like Ceballos unless it can be demonstrated that their contentions are unreasonable or made in an unnecessarily disruptive manner. But under *Garcetti*, these harder questions are not addressed and the constituent "bosses" of the public entity enjoy immunity.

<sup>46</sup> The ABA has been promulgating rules of legal ethics since 1908. These model codes do not automatically have the force of law but must be enacted by the relevant state supreme court or legislature, as California has done in essentially codifying the ABA Rules. Because the wrongfulness of the *Garcetti* decision for lawyers is national in scope, I dwell on the ABA Rules rather than their California counterparts, even though it is these counterparts that are technically the positive law applicable to Ceballos and other members of the California Bar.

The Model Rules of Professional Conduct were initially released in 1983 and have been updated repeatedly, with the most extensive recent revisions taking place in 2002 as part of the ABA's "Ethics 2000" project. Although the ABA does not have direct regulatory authority over lawyers, the Model Rules (and before that the Model Court of Professional Responsibility (1969) and its Canons of Ethics (1908)) have been enormously influential.

As noted above, before an ethical rule has the force of law, it must be adopted by a state's high court or enacted by a state legislature. The current Model Rules have been essentially adopted verbatim in nearly every state, with some states displaying some significant deviation regarding isolated aspects of a particular rule or subtopic. For the most part, however, the ABA Model Rules are the "law of the land" regarding lawyer professional responsibility and reflect the attorney's obligations to clients, opponents, third parties, and the justice system.

<sup>47</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2006).

<sup>48</sup> See *id.* R. 3.3.

<sup>49</sup> See *id.* R. 3.8(a), (d), (g) & (h).

Importantly, Rule 3.4 requires that lawyers display “fairness to [the] opposing party and counsel.”<sup>50</sup> If the police affidavit used to obtain a search warrant was materially inaccurate, the DA’s office was not being fair to the defendant or defense counsel. Specifically, Rule 3.4 states that an attorney shall not “falsify evidence, counsel or assist a witness to testify falsely, or . . . knowingly disobey an obligation under the rules of a tribunal.”<sup>51</sup> To the extent that the police affidavit at issue would be used in court, Rule 3.4 was strongly implicated and Ceballos was obligated to speak out if he found significant problems with the affidavit or the prosecution generally.

Apart from the black letter rules, the ABA Model Rules also reflects a general ethic of the profession, counseling that lawyers are more than litigation gladiators whose only job is to pursue victory. The Preamble to the Model Code regarding “A Lawyer’s Responsibilities” states that an attorney is not only a “representative of clients” but is also “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>52</sup> Further, “[a] lawyer should demonstrate respect for the legal system” because it is both a “lawyer’s duty, when necessary, to challenge the rectitude of official action” and to “uphold [the] legal process.”<sup>53</sup>

Although the lawyers’ roles as a representative of a client and an officer of the legal system and public citizen are “usually harmonious,” lawyers must also be willing to challenge improper government action.<sup>54</sup> Nowhere in the Model Code is there the suggestion that these attorney duties dissolve when the government is the attorney’s “client” or employer. Further, the Model Rules are “rules of reason,” that must be given a sensible and functional construction.<sup>55</sup> This suggests that the attorney role of zealous advocate logically yields where counsel has genuine concern about the accuracy or fairness of litigation, particularly when counsel acts as a government prosecutor.

Case law reflects the prevailing view that, contrary to the majority’s suggestion in *Garcetti*, lawyers seeking to uphold professional standards should be given both breathing space and protection from adverse job action. For example, New York law firm associate Howard Wieder, who had retained another attorney in the firm to represent him during a condominium purchase, concluded that the attorney had lied to him and reported the matter to the firm, insisting that the incident be reported to state bar regulators. The firm eventually complied but fired Wieder, who then sued for wrongful discharge on public policy grounds. New York’s highest court agreed that his action could proceed.<sup>56</sup>

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<sup>50</sup> See *id.* R. 3.4.

<sup>51</sup> See *id.* R. 3.4(b) & (c).

<sup>52</sup> See *id.* pmbl. [1].

<sup>53</sup> See *id.* pmbl. [5].

<sup>54</sup> See *id.* pmbl. [8], [9], [11].

<sup>55</sup> See *id.* Scope [14].

<sup>56</sup> See *Wieder v. Skala*, 609 N.E.2d 105 (N.Y. 1992); accord *Kelly v. Hunton & Williams*, No. 97 CV 5631, 1999 Westlaw 408416 (E.D.N.Y. June 17, 1999). The *Wieder* Court’s appreciation of lawyer professional responsibility is especially notable because New York law generally has been reluctant to create public policy exceptions to the general rule that at-will employees may be fired for any reason, even arbitrary or reprehensible reasons. See

Similarly, whistleblowing in-house lawyers usually have not been stripped of their rights to sue for wrongful discharge merely because as lawyers they owe duties of confidence and loyalty to their single employer clients.<sup>57</sup> Although there are cases to the contrary<sup>58</sup> as well as cases inconsistent with *Wieder* and arguably more *Garcetti*-like in tone and outcome,<sup>59</sup> it appears that the law of a private lawyer's rights to sue for adverse job actions related to the attorney's stand in favor of professional obligations is considerably more protective than the rights of a government attorney to assert a constitutional tort under *Garcetti*. Logically, public prosecutors subject to the standard ethical obligations of counsel and the special responsibilities of a prosecuting attorney should have more protection than private lawyers who are not part of an office wielding the coercive legal and political power of the state.

Under *Garcetti* and its categorical distinctions between speech in the workplace (even if a professional workplace) and speech in society at large, the prosecutor/employer is given the right to take even arbitrary adverse employment actions when the attorney/employee is simply doing what is professionally required. In effect, the *Garcetti* DA's office was allowed to arbitrarily punish Richard Ceballos even if Mr. Ceballos was being a good, conscientious, and responsible attorney.<sup>60</sup> Whatever the merits of the constitutional law as

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GILLERS, *supra* note 7, at 579; *see also, e.g.,* Sabetay v. Sterling Drug, Inc., 506 N.E.2d 919 (N.Y. 1987).

To be clear, the decision does not necessarily mean that *Wieder*'s claim was factually accurate (although the law firm's reporting of the matter to the bar suggests *Wieder* was on to something). Attorneys who claim misconduct by other attorneys must still sustain the burden of demonstrating the factual bona fides of the charges.

<sup>57</sup> *See, e.g.,* Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852 (Tenn. 2002) (in-house counsel contending improper firing due to complaint about ethics violation of superior may bring cause of action for wrongful discharge; no bar merely because employee was in-house lawyer subject to ethical rules regarding use of ethically protected client confidences); Burkhardt v. Semitool, Inc., 5 P.3d 1031 (Mont. 2000); GTE Products Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995); Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994) (same, but confidentiality duties of attorney place some restraint on proof that attorney may present in wrongful discharge litigation). The leading case to the contrary, *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991), has been criticized by many commentators, but has its defenders. *See* GILLERS, *supra* note 7, at 578–79 (citing to cross-section of articles) and following note.

<sup>58</sup> *See, e.g., Balla*, 584 N.E.2d at 104 (in-house attorney may not bring wrongful discharge suit for firing related to complaints about safety of employer's product because litigation of action would require attorney to disclose client confidences); *see also* GILLERS, *supra* note 7, at 578–79 (citing to cross-section of articles). *Balla*, however bad a decision I might think it to be, has more intellectual credibility than *Garcetti* because Attorney *Balla*'s corporate employer was at substantial economic risk from the disclosures of in-house counsel that were fueled by information protected by the ABA Model Rule 1.6 duty not to disclose ethically protected information. By contrast, the police affidavit that Ceballos viewed as inaccurate was in the public domain. Further, the Ceballos complaint to his superiors was "in-house" whistleblowing. He never took his concerns over the accuracy and fairness of the prosecution to the media or other third parties and attacked the affidavit through the judicial process.

<sup>59</sup> *See, e.g.,* Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998) (associate attorney alleging firing by law firm due to complaints about unethical billing by partner may not bring wrongful discharge action).

<sup>60</sup> Subsequent events suggest that Mr. Ceballos was indeed something more than a crank or disgruntled employee. He continues to hold a position in the DA's office and appears to have



enunciated in the *Connick-Pickering-Garcetti* line of cases for lay government workers, it is an affront to the legal profession and public policy when applied to attorneys working for the government.

Various definitions of professionalism exist that emphasize different aspects of the concept but all generally agree that professionals are workers who have substantial education and training in a reasonably sophisticated field of technical knowledge, with control over entry to the profession, admission and certification requirements, ongoing regulation by the profession itself, and required adherence to a code of professional conduct and a body of professional norms.<sup>61</sup> Although the modern era has brought a tendency to try to treat too many workers as professionals (e.g., the hairdresser or landscaper who speaks of his “clients” who are really better described as “customers” if we still take professionalism seriously), most agree that the true professionals of society are its traditional five professions (law, medicine, clergy, military, and university teaching) and probably the emerging modern professions of engineering, accounting, and architecture as well.<sup>62</sup>

Without denigrating any of the traditional professions or the modern emerging professions, one can say (I hope without controversy) that lawyers and the legal profession hold a particularly important place in society’s system of justice. Lawyers represent those prosecuting and defending criminal and civil matters. Lawyers sit as judges adjudicating these matters and have substantial authority to overturn or disregard the views of lay jurors. Although the traditional role of lawyers in state legislatures and Congress has diminished during the past four decades, lawyers still play a crucial role in making the law beyond standard common law adjudication.

Recognizing the role of the attorney and the need for lawyer professionalism, American law has for more than a century codified expectations of lawyers that include a command that lawyers not only serve clients but also safeguard the judicial system. Today, that ethos is embodied in the ABA Model Rules of Professional Conduct and countless judicial opinions and state bar ethics opinions.

I am not naïve enough to suggest that, as an empirical matter, lawyers wake up every morning with thoughts of serving the system foremost in the frontal lobes of their brains. A *New Yorker* cartoon from the 1970s featuring a mythical senior partner and associate at a cocktail party (“We practice law to

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significant involvement in public issues through expressing opinions in the local media on topics such as whether to abolish the Pomona California police department and seeking (apparently unsuccessfully) a seat on the Pomona City Counsel. See Rodriguez, *supra* note 22.

<sup>61</sup> See ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 59 (1986); GILLERS, *supra* note 7, at 15–16 (discussing professionalism); see also EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS (Cornelia Brookfield trans., Routledge 2d ed. 1992); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977); ELIZABETH WOLGAST, ETHICS OF AN ARTIFICIAL PERSON (1992); Talcott Parsons, *The Professions and Social Structure*, 17 SOCIAL FORCES 457 (1939).

<sup>62</sup> See generally sources cited *supra* note 61.

make money, Hawkins. If you can think of a better reason, let's hear it")<sup>63</sup> captures rather well the work-a-day necessity of being a lawyer, at least in private practice. For government prosecutors on a fixed salary, the mantra often becomes that the prosecutor practices law to "obtain convictions" or "put bad guys away" or simply to "win."

But the slouching of the daily reality of law practice from its more noble aspirations of justice and fairness should not obscure that lawyers who occasionally "blow the whistle" on unfair or illegal practices, even if incorrect in their assessment, are simply doing their jobs every bit as much as the zealous advocate or the loyal subordinate lawyer is doing his or her job. If anything, the reality of daily practice should be cause for celebrating the lawyer willing to be the "house crank" about the niceties of procedural fairness. Even if this lawyer is wrong, he or she performs a valuable public service. More important, it is a public service that is part and parcel to the lawyer's job description.

The Supreme Court (save for Justice Breyer) overlooked this aspect of lawyer professionalism, with the *Garcetti* majority seeming to take the view that lawyers taking their ethical responsibilities seriously are bugs to be swatted and squished with impunity by their employers. That a group of lawyers could hold such an impoverished view of lawyering is what makes *Garcetti v. Ceballos* such a bad Supreme Court opinion.

Instead of celebrating (or at least tolerating) the efforts of Richard Ceballos to be an officer of the court rather than a cog in the prosecutorial machine, the *Garcetti* majority treated him as if he were a Bolshevik seeking to disturb the essential order of the universe. The majority's rhetoric about employer control of workers, the need for consistency and avoiding dissent in the workplace smacks more of a plantation than an office of legal professionals. By the majority's reasoning, dissenting justices should be fired—or at least would have no claim for relief if evicted from their chambers and relocated to portable trailers in the RFK Stadium parking lot.<sup>64</sup>

<sup>63</sup> The quote and description of the cartoon is from memory but was previously memorialized closer to the time I first saw the cartoon. See Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 45, n.82 (1999).

<sup>64</sup> I realize that courts, government law offices, and lawyers in private practice have different jobs. Most prominently, courts are set up so that they (at least in theory) have no "clients" and no allegiance to anything but fair and just application of the law. But this difference between judges and lawyers, like most anything else in the world, is a matter of degree rather than a day/night distinction. The Court, or at least Justice Breyer, seemed to appreciate this at the initial oral argument in *Garcetti*. See Transcript A, *supra* note 26, at 31–32 (suggesting that Court's law clerks would be addressing matters of public concern every day on the job). The implication, of course, is that if deputy DA Ceballos can have a Section 1983 cause of action for protesting perceived professional misconduct, the same regime would obtain for a law clerk who was fired for protesting internally a Justice's breach of judicial ethics or violation of the law. Although this might seem disastrous to the *Garcetti* majority, it seems the correct rule to me (and the prospect at least did not prevent Justice Breyer from supporting the Ceballos position in his dissent). Society has a strong interest in having the professional staff of judges bring such issues to the attention of judges and in protecting such staff from retaliation when staffers attempt to prevent breaches of judicial ethics or other law. Lawyers should not be cheating, and lawyers who see cheating in their law office or government agency should be speaking out against it and trying to stop it. Government lawyers, who as agents of the state wield the awesome power of the state, have

As noted above, Mr. Ceballos was perhaps a misguided crank. But whether he was a loose cannon or a stalwart of fairness in an agency that had lost its way is a fact question. If he suffered adverse job action merely for trying to protect the fairness of the system, he should have a claim for relief against his superiors who punished him for attempting to prevent the railroad-ing of a criminal defendant. If he was badly off base and there were valid reasons for the adverse job action, the defendants should prevail. But under *Garcetti*, the defendants need not even be called to account for their action. Even blatant punishment of the honest and good district attorney is immunized.

Ironically, the *Garcetti* majority immunizes such terrible behavior on the ground that the attorney who is obligated to speak up against injustice spoke up on the job rather than on a soapbox in MacArthur Park. This type of addled, excessively formal, Catch-22 type of reasoning further emphasizes the badness of *Garcetti v. Ceballos*. In effect, the Supreme Court permitted a district attorney to punish a deputy for disagreeing with the police and getting in the way of a supervisor who perhaps wanted a conviction more than to observe the rules of fair play regarding probable cause.

In a clash between two lawyers, the DA might reasonably side with the senior attorney—although this still does not justify retaliation. More troublesome is that the DA appears to be siding with the police over what appears to be a sincere and well-founded concern of a lawyer in the office. I like cops as well as the next guy, but if there is a dispute about the legal propriety of an affidavit and a warrant, logic would seem to suggest that the lawyer is more likely to be correct than is the cop, absent strong evidence that the attorney is off base. Instead, it appears that the *Garcetti* DA's office had it backwards. Under these circumstances, one has a right to ask who is in charge regarding questions of law: the lawyers or the cops?<sup>65</sup>

*Garcetti* has been almost uniformly condemned in newspaper editorials and scholarly articles.<sup>66</sup> Not surprisingly, most attack its constitutional reason-

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enhanced responsibilities. They are not—or at least should not be—the cogs in the machine portrayed by the *Garcetti* majority.

<sup>65</sup> I am taking a bit of liberty here by perhaps understating the role of assistant DAs Carol Najera and Frank Sundstedt, who apparently disagreed with Ceballos as to the alleged problems with the police affidavit. See *Garcetti v. Ceballos*, 547 U.S. 410, 414 (2006). However, my reading of the Supreme Court's description of the aftermath of the Ceballos complaints to these colleagues is that they essentially defended the "warrant affiant and other employees from the sheriff's department" who attended the meeting spurred by the Ceballos complaints. See *id.* There is no indication of any particular legal assessment or factual investigation by Sundstedt or Najera, which leads me to believe that they in essence took the police side of the argument and dismissed the accuracy of the Ceballos concerns. But see Crogan, *supra* note 32 (description of intra-office conflict between Ceballos and Najera/Sundstedt suggesting more disagreement over correctness of Ceballos legal analysis).

<sup>66</sup> A June 15, 2011 Lexis search revealed approximately one hundred law review or bar journal articles discussing the case as some length. With the exception of law firm newsletter-type articles or straight accounts of the case without commentary, the legal literature was almost uniform in addressing *Garcetti* negatively. A similar pattern is reflected in news articles and editorials about *Garcetti*. See, e.g., Troy Anderson, *Employees Who Blow the Whistle Contend They Are Left Whistling in the Wind*, INLAND VALLEY DAILY BULL., June 8, 2009; Kenneth F. Bunting, Editorial, *Court Makes Strange, Illogical Ruling*, SEATTLE POST-INTELLIGENCER, June 2, 2006, at B6; Editorial, *Blow the Whistle! Court Gets Ruling Wrong*, CHICAGO SUN-TIMES, June 1, 2006, at 29; Linda Greenhouse, *Some Whistle-Blowers Lose*

ing,<sup>67</sup> with significant criticism focusing on insufficient respect for workers' rights.<sup>68</sup> Only a few have attacked its failure to accord attorneys the professional breathing space they need and deserve if they are to be officers of court serving the justice system.<sup>69</sup> Unfortunately, *Garcetti* has been as embraced by the judiciary as it has been shunned by the academy and the press. The decision has been cited nearly 3,000 times, usually it appears (I have not attempted to review every case citing *Garcetti* in great detail) in aid of dismissing a worker's claim of retaliatory discharge arising out of whistleblowing.<sup>70</sup> In the battle for social control, *Garcetti* appears to have become a significant arrow in the quiver of the power elite who wish to muffle criticism.

*Garcetti* continues to work its mischief. In its most recent term, the Court decided *Connick v. Thompson*,<sup>71</sup> another shamefully bad opinion that is a contender for the Court's worst case. In *Thompson*, the Court stripped a wrongfully convicted plaintiff of a \$14 million jury award arising out of his unfair treatment by the New Orleans DA's office led by the same Harry Connick, Sr. who was part of *Connick v. Myers*. John Thompson, whose "story reads like a real-life plot out of a John Grisham novel," was erroneously convicted of murder, with the DA's office knowingly failing to disclose evidence tending to exonerate Thompson.

In 1985, he and another man were arrested and charged in the murder of a New Orleans businessman. In their investigation, Orleans Parish prosecutors linked Thompson to the armed robbery of three siblings committed three weeks after the December 1984 murder. During that robbery, the assailant's blood stained one of the victim's pant legs. A swatch was tested by a crime lab, but the results (which tended to exculpate Thompson; more on that below) were never revealed by prosecutors to Thompson's attorneys.

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*Free-Speech Protections*, N.Y. TIMES, May 31, 2006, at A16; *ACLU Denounces Supreme Court Ruling in Whistleblower Case*, TARGETED NEWS SERVICE, May 30, 2006.

<sup>67</sup> See, e.g., Matthew R. Schroll, Note, *Garcetti v. Ceballos: Misconstruing Precedent to Curtail Government Employees' First Amendment Rights*, 67 MD. L. REV. 485, 485, 501, 507–08 (2008); Susan Stuart, *Shibboleths and Ceballos: Eroding Constitutional Rights Through Pseudocommunication*, 2008 B.Y.U. L. REV. 1545, 1559–62 (2008); Margaret Tarkington, *Government Speech and the Publicly Employed Attorney*, 2010 B.Y.U. L. REV. 2175, 2175–79 (2010).

<sup>68</sup> See, e.g., Ruben J. Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMEND. L. REV. 22, 25–26 (2008); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 209–10, 218–20, 229–30 (2008); Robert S. Rosborough IV, A "Great" Day for Academic Freedom: The Threat Posed to Academic Freedom by the Supreme Court's Decision in *Garcetti v. Ceballos*, 72 ALB. L. REV. 565, 592 (2009).

<sup>69</sup> See, e.g., Orly Lobel, *Lawyer Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1262–63 (2009); Bruce A. Green, *Prosecutors' Professional Independence: Reflections on Garcetti v. Ceballos*, CRIM. JUST., Summer 2007, at 4, 6.

<sup>70</sup> LexisNexis Search, June 15, 2011. See, e.g., JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post-Garcetti Jurisprudence*, 63 U. MIAMI L. REV. 761, 790–91 (2009) (reviewing cases from one court of appeals and finding substantial adverse impact of *Garcetti* precedent on employee claims).

<sup>71</sup> *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

Prosecutors chose first to try Thompson in the armed robbery, for which a conviction could be invoked in support of the death penalty (for Thompson in the murder case). At least four prosecutors in the Orleans Parish district attorney's office knew of the blood evidence, but none of them disclosed that to the defense. And just before the trial one of the prosecutors, Assistant District Attorney Gerry Deegan, removed the bloody swatch from the evidence in the case to keep its existence unknown to the defense.

Thompson was convicted of the armed robbery and later of the separate murder, and still the blood evidence went unknown to his lawyers.<sup>72</sup>

While he was on death row, Thompson's conviction was challenged. Weeks before he was scheduled for execution, a private investigator discovered the blood sample—which showed that the blood type of the armed robber was Type B while Thompson's was Type O—evidence strongly suggesting that Thompson was not the robber (or at least that the DA was wrong about him being the robber), that he in turn was not the murderer, and that even if he was the murderer, the tainted robbery conviction should not have been used to obtain a death penalty sentence.<sup>73</sup>

Notwithstanding this evidence both of Thompson's innocence and heinous prosecutorial misconduct, the DA tried Thompson again for the murder after Thompson's successful habeas corpus petition—and he was quickly acquitted. Thompson in turn sued for violation of his civil rights, alleging that he had been denied due process by government actors. The jury agreed and rendered a \$14 million verdict.<sup>74</sup> The Supreme Court vacated the judgment in Thompson's favor, ruling that his was not a proper Section 1983 claim because there was insufficient evidence that his civil rights were violated because of a policy of the prosecutor's office rather than the isolated misconduct of employees of the prosecutor's office.<sup>75</sup> Under 42 U.S.C. § 1983, government officials cannot be held liable on respondeat superior grounds but the plaintiff must show that his injury stemmed from a policy of the defendant.<sup>76</sup> Thompson alleged that the defective policy was failure of the DA to train personnel in the proper application of *Brady v. Maryland*,<sup>77</sup> which requires that prosecutors disclose to defense counsel evidence tending to exonerate a criminal defendant.

According to the *Thompson* majority, "Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range" of cases where Sec-

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<sup>72</sup> Mark Walsh, *A Real-Life Grisham Story: Denial of Jury Award Marks Disappointing Postscript to Death Row Release*, A.B.A. J., June 2011, at 19–20. In what some might consider poetic justice, prosecutor Deegan was afflicted with a terminal illness. After this diagnosis, apparently wishing to clear his conscience, Deegan confided to a friend his suppression of the evidence in Thompson's armed robbery case. But in spite of his impending death, Deegan refused to disclose his wrongdoing and its impact on Thompson. Shockingly, neither Deegan's confidant nor any other attorney in the DA's office came clean about the withheld evidence and what some might regard as the frame-up of Thompson. If Thompson's own investigator had not discovered the truth, Thompson would have been wrongfully executed. *See also Thompson*, 131 S. Ct. at n.1.

<sup>73</sup> *See Thompson*, 131 S. Ct. at 1356, Walsh, *supra* note 72, at 20.

<sup>74</sup> *See Thompson*, 131 S. Ct. at 1357–58, Walsh, *supra* note 72, at 20.

<sup>75</sup> *See Thompson*, 131 S. Ct. at 1365–66, Walsh, *supra* note 72, at 20.

<sup>76</sup> *See Thompson*, 131 S. Ct. at 1358–61.

<sup>77</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

tion 1983 liability can arise from a single *Brady* violation causing injury to a defendant.<sup>78</sup> Amazingly, a significant part of the majority's justification for waiving off the problems created by a DA's office that failed to train its lawyers adequately about one of the most important rules of criminal procedure was the fact that lawyers come to the DA's office with legal training, including training in rules of professional conduct which they are obligated to follow.

Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both. These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules.

Nor does professional training end at graduation. Most jurisdictions require attorneys to satisfy continuing-education requirements. Even those few jurisdictions that do not impose mandatory continuing-education requirements mandate that attorneys represent their clients competently and encourage attorneys to engage in continuing study and education. . . .

Attorneys who practice with other attorneys, such as in district attorney's offices, also train on the job as they learn from more experienced attorneys. For instance, here in the Orleans Parish District Attorney's Office, junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial, and trial chiefs oversaw the preparation of the cases. Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments.

In addition, attorneys in all jurisdictions just satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession's standards. Trial lawyers have a 'duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.' Prosecutors have a special 'duty to seek justice, not merely to convict. Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the defense. An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.

In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations . . . .<sup>79</sup>

The *Thompson* majority's "ode to attorney training and professionalism" coupled with the same group's failure to even nod to Richard Ceballos status as a lawyer in *Garcetti* is nothing short of amazing. Where it serves the majority's purpose of finding no liability for a DA, lawyer professionalism is front-and-center to its analysis. But when lawyer professionalism strengthens the case for

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<sup>78</sup> See *Thompson*, 131 S. Ct. at 1361.

<sup>79</sup> *Id.* at 1361–63 (citations omitted) (footnotes omitted).

liability of a DA, the *Garcetti/Thompson* majority has no time for questions of lawyer role.<sup>80</sup>

The particular application of this inconsistency is embarrassing when applied to the facts of the two cases. *Garcetti* stands for the proposition that where a lawyer takes his job seriously, including its command that he act as an officer of the court, he buys a ticket to discipline or dismissal. But when a group of lawyers in the DA's office (one particularly egregiously) violates the rules of professional conduct and ironclad, well-known constitutional law, the lawyer's fractured "professionalism" insulates the DA from liability. A visitor from another planet would undoubtedly be surprised that legal professionalism can be such a heads-the-government-wins, tails-the-employee-or-defendant-loses proposition.<sup>81</sup>

Perhaps the most supportive thing to be said for the *Thompson* majority decision is that the violation of Mr. Thompson's *Brady* rights by deputy DA Deegan and others was so egregious that one does wonder why specific training in *Brady* should have been necessary—or whether it would have done any good for the likes of Deegan and the other prosecutors in Orleans Parish who managed to keep quiet about this railroading of a criminal defendant.<sup>82</sup>

Although questions of lawyer professional responsibility can be complex in many cases, a huge number of legal ethics questions are answered by the simple rubric that a lawyer should not lie, cheat or steal. Attorney Deegan did all three. Failing to disclose exculpatory *Brady* material was clearly cheating. He effectively stole the blood sample evidence from safekeeping by hiding it so that it would not be found by Thompson. He constructively lied to Thompson and the court by continuing to prosecute the case knowing of this evidence that he had spirited away from the prosecution's evidence file in Thompson's case. It was despicable attorney conduct, conduct that not even his impending death prompted him to fully rectify—if it could be fully rectified at all once Thompson was wrongfully subjected to the harms of incarceration.

*Thompson* clearly seems a bad decision, as well-articulated by the four dissenting Justices. But at least *Thompson* addressed the issue of attorney professionalism while *Garcetti* ignored it.<sup>83</sup> Ironically, neither the *Thompson*

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<sup>80</sup> And it was the "same" majority in both cases. In *Garcetti*, Justice Kennedy wrote the opinion joined by Justices Scalia, Thomas, Roberts, and Alito (the dissenters were Justices Stevens, Souter, Ginsburg, and Breyer). See *Garcetti v. Ceballos*, 547 U.S. 410, 412 (2006). In *Thompson*, Justice Thomas wrote the opinion, joined by Justices Kennedy, Scalia, Roberts, and Alito (the dissenters were Justices Ginsburg, Breyer, Sotomayor, and Kagan). See *Thompson*, 131 S. Ct. at 1355.

<sup>81</sup> Like *Garcetti*, *Thompson* was widely criticized in the media. See, e.g., Walsh, *supra* note 72, at 19–20; Editorial, *Failure of Empathy and Justice*, N.Y. TIMES, April 1, 2011, at A26.

<sup>82</sup> Perhaps the policy of the New Orleans DA's office that deserved challenge was not failure to establish sufficient training about *Brady v. Maryland* but creation of a culture in which deputy prosecutors so easily disregarded the ethical rules they were supposed to be bringing to the job and which (in the view of the *Thompson* majority) insulated the department from Section 1983 liability. The latter type of informal policy of overzealous commitment to conviction rather than procedural fairness is much harder to prove than the simple absence of a *Brady* training program.

<sup>83</sup> Although perhaps straining Section 1983 doctrine, a better theory of the case for plaintiff Thompson might argue that the unconstitutional "policy" of the Orleans Parish DA's office was not so much its lack of more formal *Brady* training but its culture of seeking convictions

majority nor the *Thompson* dissenters cite *Garcetti*. The Court fails to acknowledge that the cases are of a piece.<sup>84</sup> As noted above, the five-justice majority that produced these poor opinions was self-servingly selective in their invocation of attorney professionalism. When it can be a shield for powerful government defendants, attorney professionalism is emphasized. When it supports the less powerful attorney-dissident, attorney professionalism is ignored.

The legal realist common thread running through these two cases is almost subservient deference to authority and protection of authority from even awful consequences of its misuse, even when the actions of the powerful run counter to the professed norms of the justice system.

As bad as *Thompson* may be, *Garcetti* stands as a particularly bad decision not only for its failings of doctrine, logic, and public policy but because of what it reveals about the Court, particularly five justices of the Court.

One can reasonably debate whether a supervising attorney or government agency should be constitutionally liable for this type of misconduct by an attorney-employee in the absence of evidence of repeated problems. One might also reasonably debate whether constitutionalization of the job complaints of a government employee is wise. But whatever the merits of the constitutional law debate, it should be conducted with full appreciation and open acknowledgment that the conduct at issue was that of attorneys, officers with professional obligations different from those of the ordinary lay employee. *Garcetti*'s failure to address these issues makes it even worse than *Thompson* as a matter of judicial craft even though Mr. Thompson suffered considerably more than did Attorney Ceballos.

The *Garcetti* (and *Thompson*) majority is particularly blameworthy in that it appears to regard its mission as enhancement of the establishment and protection of the powerful. Critics, even those basing criticism on professional obliga-

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without regard to constitutional requirements and concern for fairness to the defendant as well as what seems to be a culture of failing to speak out when a colleague commits constitutional infractions. A closer examination of the culture of the DA's office might well reveal sufficient evidence of these attitudes to qualify as a policy, pattern, or practice sufficient to subject the DA to Section 1983 liability on the ground that the misconduct of Deegan and his colleagues cannot be considered isolated, episodic, or unexpected by the DA.

<sup>84</sup> In perhaps bitter irony, one finds references in the *Garcetti* oral argument to a prosecutor's *Brady v. Maryland* obligations that were at issue in *Thompson* and a disturbing tendency of the government to regard the rights of supervisors as superior to those of a criminal defendant entitled to *Brady* material. See Transcript A, *supra* note 26, at 17 (statement of *Garcetti* counsel in response to question of Justice Souter) ("*Brady* disclosures are the obligations of the district attorney's office. So, in this case, when the deputy district attorney believed that it should be disclosed, his supervisor had an absolute right to, say, on behalf of the DA's office, challenge that decision to disclose."); Transcript B, *supra* note 26, at 9–10 (statement of *Garcetti* counsel in response to question by Justice Ginsburg) ("If the boss makes a determination that 'This is not *Brady* materials. I don't want disclosed,' and the employee goes ahead and discloses it, our position is, that would not be protected First Amendment speech.").

A Court more sensitive to the professional obligations of even lower ranked lawyers in a government office would have stomped out this bit of government hubris rather than indirectly blessing it in *Connick v. Thompson*. The attitude of *Garcetti* counsel toward *Brady* obligations had a certain "I am the law" tone reminiscent of totalitarian dictatorships rather than the lawyer professionalism we traditionally associate with American democracy. Those chickens came home to roost five years later in *Thompson*.



tions, are not to be suffered while the controlling elite is given the widest of unquestioned latitude to ensure that employees tow whatever party line desired by those in control.

Even for the dissenting justices in (save for Justice Breyer in *Garcetti*), their self-imposed role appears to be one of constitutional law technician with little or no appreciation of the importance of their profession and its norms “on the ground” of adjudication. In particular, the notion of lawyers as honest brokers who act as officers of the court and guardians of justice—even when it is not in the interests of their career advancement—seems to have been accorded little significance by any member of the Court other than Justice Breyer. Lawyers in the eyes of the Court, while perhaps rising above the level of potted plants, are not treated as professionals with duties to the justice system (*Garcetti*). But because lawyers have technical training, the government offices in which they work are permitted—through the efforts of several lawyers—to essentially frame a criminal defendant but suffer no consequences (*Thompson*).

Because it is so demoralizing a picture of the Court’s approach to its own profession, *Garcetti* stands out as a particularly bad decision. As noted at the outset of this Symposium, cases making the “worst” list need not necessarily implicate grave wrongs in the nature of *Dred Scott* or *Plessy v. Ferguson*. As noted above, Richard Ceballos remains a deputy DA and seems to have recovered well from the alleged retaliation suffered, which although condemnable fell short of firing or the grave physical or mental abuse visited on some tort victims or incarcerated defendants. But regardless of the degree of harm suffered by Ceballos, his case reflects the Court in a most disappointing light.<sup>85</sup>

For those of us who wish the bench would appreciate the higher calling of lawyers rather than simply reflecting sympathy for lawyer-defendants (and government defendants generally), *Garcetti* earns a place as one of the modern Court’s “worst” decisions notwithstanding that there may generally be legitimate concerns about how far to extend the Constitution into workplace personnel matters. The decision reflects a Court lacking in both professional consciousness and professional conscience, one that prefers its lawyers to be potted plants when faced with prosecutor miscues but is only too happy to immunize supervising attorneys and department heads when they are accused of failing to uphold professional standards.

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<sup>85</sup> *Garcetti* is depressing as well in that although the Court largely missed the professionalism implications of the decision, its problematic First Amendment holding was a near-miss. The case was originally argued when Justice Sandra Day O’Connor was on the Court. After her resignation and replacement by former Third Circuit Judge Samuel Alito, the case was reargued, with Alito providing the crucial fifth vote for the *Garcetti* majority (and eventually the *Thompson* majority as well). See David L. Hudson Jr., *Free Speech Case Points Up Change in Court*, 5 ABA JOURNAL EREPORT 22 (June 2, 2006); Nina Totenberg, *All Things Considered: High Court Tightens Rule on Workplace Speech* (National Public Radio broadcast May 30, 2006). Totenberg, a veteran reporter with extensive Supreme Court contacts, noted that the Souter dissent “had all the earmarks of what may once have been a majority opinion” that became the dissent when Alito replaced O’Connor, a view echoed during the broadcast by Georgetown Law Professor Martin Lederman. *Id.*