

**TRUTHFUL TESTIMONY AS THE “QUINTESSENTIAL  
EXAMPLE OF SPEECH AS A CITIZEN”: WHY *LANE V. FRANKS*  
LAYS THE GROUNDWORK FOR PROTECTING PUBLIC  
EMPLOYEE TRUTHFUL TESTIMONY**

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I. INTRODUCTION

In 2006, a divided United States Supreme Court decided *Garcetti v. Ceballos*, declaring that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>1</sup> The decision considerably narrowed the scope of public employees’ First Amendment protections by making all speech made pursuant to official job duties government speech, and thus not entitled to protection. This sparked substantial debate and confusion given that the Court did not provide much guidance as to when a public employee acts pursuant to official duties.<sup>2</sup> In particular, lower courts disagreed over whether the majority’s categorical “never” should apply when the speech in question is in the context of truthful testimony.<sup>3</sup> The decision is troublesome because every year, thousands of police

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<sup>1</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

<sup>2</sup> *See id.* at 424.

<sup>3</sup> Compare *Chrzanowski v. Bianchi*, 725 F.3d 734, 741 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2870 (2014) (citing *Fairley v. Andrews*, 578 F.3d 518, 524–25 (7th Cir. 2009)), *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007), and *Reilly v. Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008), with *Lane v. Cent. Ala. Cmty. Coll.*, 523 F. App’x 709, 712 (11th Cir. 2013) (per curiam), *aff’d in part, rev’d in part and remanded sub nom. Lane v. Franks*, 134 S. Ct. 2369, 2375 (2014), *Huppert v. City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009), *overruled in part by Dahlia v. Rodriguez*, 735 F.3d 1060, 1071 (9th Cir. 2013) (en banc) (overruling *Huppert* “to the extent that it improperly relied on a generic job description and failed to conduct the ‘practical,’ fact-specific inquiry required by *Garcetti*”), and *Green v. Barrett*, 226 F. App’x 883, 887 (11th Cir. 2007) (per curiam).

officers, detectives, and investigators, among other law enforcement officers, take the stand and testify as part of their job duties.<sup>4</sup>

In a recent case, *Lane v. Franks*, the Court addressed the issue and held that the First Amendment protects a public employee who provides sworn testimony, compelled by subpoena, outside the course of his ordinary job duties.<sup>5</sup> In doing so, the Court provided some guidance as to when *Garcetti*'s "pursuant to official duties" standard should apply. The Court, however, left open the question of whether that protection applies to public employees, such as police officers or crime scene investigators, who often provide sworn testimony as part of their ordinary duties.<sup>6</sup>

This Comment argues that even though the Court did not reach this question, *Lane* lays the foundation for finding that public employees' sworn testimony pursuant to ordinary job duties is protected citizen speech. First, *Lane* refines and narrows *Garcetti*'s "pursuant to official duties" standard, thereby limiting the ability of lower courts to read *Garcetti* too broadly. Second, key language in Justice Sotomayor's majority opinion provides the impetus for finding that sworn testimony must always be considered citizen speech. Specifically, this Comment will argue that the *Garcetti* rationales do not apply when the speech in question is sworn testimony because: 1) every citizen has a right and duty to testify in court, and the application of *Garcetti* in this context infringes on liberties that the public employee would otherwise enjoy as a citizen; 2) not protecting that right will undoubtedly undermine the societal value of testimony by causing public employees to self-censor; and 3) protecting public employee sworn testimony will not commit the courts to a new intrusive role, since courts already hold the sole authority over witnesses and their testimony.

Part II will provide a brief overview of the history of First Amendment protections for public employees. Special attention will be given to the two primary Supreme Court cases on the subject, as

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<sup>4</sup> See, e.g., *Police and Detectives: What Police and Detectives Do—Occupational Outlook Handbook, 2014–15 Edition*, U.S. BUREAU OF LABOR STATISTICS (Jan. 8, 2014), <http://www.bls.gov/ooh/protective-service/police-and-detectives.htm#tab-2> (noting that uniformed police officers, detectives, and investigators typically testify in court as part of their duties). In 2014, federal, state, and local agencies employed over 844,000 detectives, investigators, and police officers. See *Household Data Annual Averages: 11b. Employed Persons by Detailed Occupation and Age*, U.S. BUREAU OF LABOR STATISTICS (2014), <http://www.bls.gov/cps/cpsaat11b.pdf> (indicating that in 2014, these agencies employed 164,000 detectives and criminal investigators, and 680,000 police and sheriff's patrol officers).

<sup>5</sup> *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014).

<sup>6</sup> *Id.* at 2378 n.4, 2384 (Thomas, J., concurring).

well as the circuit split that occurred following the *Garcetti* decision. Part III will discuss the importance of truthful testimony to the judicial system by exploring the common law duty and right of all citizens to testify, and the protections afforded to witnesses. Part IV will analyze the recent Supreme Court decision in *Lane v. Franks*. Finally, Part V will argue why the *Lane* decision laid the groundwork for protecting public employees' sworn testimony, since it limited the scope of *Garcetti* and highlighted truthful testimony as inherently citizen speech. As such, truthful testimony must always be considered citizen speech because the rationales behind *Garcetti* fail in this circumstance. Part VI will conclude.

## II. THE ROAD TO *LANE*: A BRIEF HISTORY OF PUBLIC EMPLOYEE FIRST AMENDMENT PROTECTIONS

It is a bedrock principle of American jurisprudence that “Congress shall make no law . . . abridging the freedom of speech.”<sup>7</sup> The Supreme Court has long emphasized the importance of allowing a free exchange in the marketplace of ideas to our democratic government.<sup>8</sup> As Justice Brandeis once opined, the Founding Fathers knew that:

[O]rder cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.<sup>9</sup>

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<sup>7</sup> U.S. CONST. amend. I.

<sup>8</sup> See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972) (“To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.”); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that there is a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.”).

<sup>9</sup> *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

Early on, however, the Court carved out an exception to this principle in situations in which the government acted as an employer based largely on Justice Holmes' rationale that government employment is a privilege, not a right.<sup>10</sup> Under this view, when the government acts as an employer, it is free to dictate the terms of employment and can discharge an employee at will, even if it infringed on otherwise constitutionally protected rights.<sup>11</sup> After all, the government employer has a substantial interest in maintaining workplace efficiency.<sup>12</sup> Thus, the Court relied on this unchallenged dogma for much of the twentieth century, denying public employees their First Amendment rights when they accepted employment with the government.<sup>13</sup>

A. *The Rise of Public Employee First Amendment Protection: the Pickering-Connick Test*

Beginning in the early 1950s, however, the Court began to chip away at Holmes' theory.<sup>14</sup> Although still recognizing the government

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<sup>10</sup> *McAuliffe v. New Bedford*, 29 N.E. 517, 517 (1892) (“[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”).

<sup>11</sup> *See, e.g., Adler v. Bd. of Educ.*, 342 U.S. 485, 492 (1952); *McAuliffe*, 29 N.E. at 517; *see also* Cynthia K.Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CALIF. L. REV. 1109, 1112–13 (1988).

<sup>12</sup> *See Connick v. Myers*, 461 U.S. 138, 150–51 (1983) (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882)) (“One hundred years ago, the Court noted the government’s legitimate purpose in ‘[promoting] efficiency and integrity in the discharge of official duties, and [in] [maintaining] proper discipline in the public service.’”).

<sup>13</sup> *See id.* at 143–44 (collecting cases); *see, e.g., Adler*, 342 U.S. at 492 (upholding a New York statute that allowed for the termination of public teachers who were members of the Communist Party); *Garner v. Bd. of Pub. Works*, 341 U.S. 716, 720–21 (1951) (upholding a City of Los Angeles ordinance requiring public employees to take oaths that they had not been members of organizations like the Communist Party as a “reasonable regulation to protect the municipal service”); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 103 (1947) (upholding provision of Hatch Act that prohibited federal public employees from taking active part in political management or political campaigns); *Ex Parte Curtis*, 106 U.S. at 375 (upholding federal statute prohibiting public employees from contributing, requesting, or receiving donations for political purposes).

<sup>14</sup> *See Lee, supra* note 11, at 1112–15. *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 597–610 (1967) (invalidating two statutes prohibiting hiring or retaining employees of educational institutions who belong to identified “subversive” organizations or who make “treasonable or seditious” statements); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 900 (1961) (Brennan, J., dissenting) (noting that the government could not deny employment because of a person’s political affiliation); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (invalidating a requirement that public school teachers periodically disclose the organizations to which they have belonged or have made a contribution); *Wiemann v. Updegraff*, 344 U.S. 183, 191 (1952) (holding that a state could not require its employees to establish their loyalty by extracting an

employer's interest in workplace efficiency, by the time the Court decided *Keyishian v. Board of Regents*, "the theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, ha[d] been uniformly rejected."<sup>15</sup> Thus, during its 1968 term, the Court dealt the final blow to the view that government employers had unfettered authority to disregard public employees' constitutional rights in the landmark case *Pickering v. Board of Education*.<sup>16</sup> In doing so, the Court announced a balancing test where courts must balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>17</sup>

Marvin Pickering, a schoolteacher in Will County, Illinois, wrote and published a letter to the local newspaper criticizing the Board of Education and the superintendent for the way they mishandled proposals to raise funds for the schools.<sup>18</sup> Subsequently, the Board fired Pickering claiming that the letter was "detrimental to the efficient operation and administration of the schools of the district."<sup>19</sup> Pickering sued, alleging that the First Amendment and the Fourteenth Amendment protected the speech within his letter, but the Illinois Supreme Court rejected the claim.<sup>20</sup>

The United States Supreme Court reversed and remanded, stating that a public employee does not relinquish his or her First Amendment rights as a citizen to comment on matters of public concern by merely holding government employment.<sup>21</sup> First, the Court determined that Pickering's letter constituted speech on a matter of public concern, given that "free and open debate is vital to informed decision-making by the electorate," and that Pickering, as a teacher, was one of the members of the community "most likely to have informed and definite opinions" on how to best operate the schools.<sup>22</sup> The Court determined that this interest was so important under the First Amendment that "it [was] necessary to regard [Pickering,] the teacher[,] as the member of the general public he seeks to be."<sup>23</sup>

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oath denying past affiliation with Communists).

<sup>15</sup> *Keyishian*, 385 U.S. at 605–06 (citation and internal quotation marks omitted).

<sup>16</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

<sup>17</sup> *Id.* at 568.

<sup>18</sup> *Id.* at 564.

<sup>19</sup> *Id.* at 564 (internal quotation marks omitted).

<sup>20</sup> *Id.* at 567–68.

<sup>21</sup> *Id.* at 574–75.

<sup>22</sup> *Pickering*, 391 U.S. at 571–72.

<sup>23</sup> *Id.* at 574.

At the same time, the Court recognized the Board's prerogative to regulate an employee's speech in the interest of its efficient and proper functions.<sup>24</sup> The Court determined, however, that under the facts at bar, the Board's interest in limiting Pickering's speech was "not significantly greater than its interest in limiting a similar contribution by any member of the general public."<sup>25</sup> Particularly, while Pickering's statements were critical of the Board, they did not impede his daily functions as a teacher or interfere with the school's operation.<sup>26</sup> Additionally, the Court recognized that the threat of dismissal from public employment served as a potent means of inhibiting speech.<sup>27</sup> Thus, absent proof of false statements, it was Pickering's right as a citizen to speak on matters "of public importance," and this right trumped the school's interest of functioning efficiently.<sup>28</sup>

Fifteen years later, in *Connick v. Myers*, the Court clarified *Pickering* by holding that the "public concern" element is a threshold inquiry.<sup>29</sup> Sheila Myers, an assistant district attorney, circulated an intra-office questionnaire after her supervisor told her that she was being transferred to a different department.<sup>30</sup> Mayer's supervisor subsequently terminated her.<sup>31</sup> The Court found Myer's speech unprotected because all but one of the questions related to internal workplace grievances, which are not a matter of public concern.<sup>32</sup> The Court noted that *Pickering* had not held that all statements by public employees were entitled to balancing, but that rather, as a threshold matter, the employee has to show that the speech regarded a matter of public concern.<sup>33</sup> In particular, the Court made clear that when an employee's speech cannot be fairly characterized as constituting speech on a matter of public concern, there is no balancing and the government employer has wide latitude to make management decisions free from "intrusive oversight by the judiciary in the name of the First Amendment."<sup>34</sup>

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<sup>24</sup> *Id.* at 568.

<sup>25</sup> *Id.* at 573.

<sup>26</sup> *Id.* at 572–73.

<sup>27</sup> *Id.* at 574.

<sup>28</sup> *Pickering*, 391 U.S. at 574.

<sup>29</sup> *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>30</sup> *Id.* at 140–41.

<sup>31</sup> *Id.* at 141.

<sup>32</sup> *Id.* at 148–49. To determine whether speech concerns a matter of public concern, *Connick* directs courts to examine the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147–48.

<sup>33</sup> *Id.* at 146.

<sup>34</sup> *Id.*

In short, *Pickering* and *Connick* acknowledged a public employee's right to speak only on matters of public concern, but the Court was careful to require that this right must be balanced against the government employer's interest in administrative efficiency.

B. *Garcetti v. Ceballos* and “The Pursuant to Official Duties” Standard

For the next two decades, the Court and lower courts applied the *Pickering-Connick* test, first determining whether the speech qualified as a matter of public concern, and if so, then balancing it against the government employer's interest in administrative efficiency.<sup>35</sup> Then, in 2006, the Court narrowed *Pickering* significantly by adding a new threshold test to determine whether the employee's speech qualified for First Amendment protection.<sup>36</sup>

Robert Ceballos, a calendar deputy district attorney, wrote an internal memorandum advising his supervisor that the affidavit used to obtain a search warrant contained “serious misrepresentations[,]” and recommending dismissal of that case.<sup>37</sup> Garcetti, Ceballos's supervisor, decided to pursue the case despite Ceballos's findings.<sup>38</sup> In the aftermath, Garcetti allegedly subjected Ceballos to numerous retaliatory actions, and Ceballos sued, claiming violation of his First Amendment right.<sup>39</sup>

In ruling in favor of Garcetti, a 5-to-4 Supreme Court found that the controlling factor in the case was that Ceballos spoke as an employee, not as a citizen, when he wrote the memorandum because he wrote it “pursuant to his duties as a calendar deputy.”<sup>40</sup> In so doing, the Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for

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<sup>35</sup> See, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 84–85 (2004) (holding that no *Pickering* balancing was needed and that the First Amendment did not protect a police officer fired for selling pornography on eBay depicting him masturbating after undressing from a fake police uniform, because plaintiff did not show his speech was on a matter of public concern); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (“The threshold question in applying this balancing test is whether McPherson's speech may be ‘fairly characterized as constituting speech on a matter of public concern.’”) (quoting *Connick*, 461 U.S. at 146); see also *Mullin v. Town of Fairhaven*, 284 F.3d 31, 37 (1st Cir. 2002) (treating the public concern prong as a threshold question to the *Pickering* balancing test); *Clue v. Johnson*, 179 F.3d 57, 60 (2d Cir. 1999); *Vojvodich v. Lopez*, 48 F.3d 879, 884–85 (5th Cir. 1995); *Flanagan v. Munger*, 890 F.2d 1557, 1562 (10th Cir. 1989).

<sup>36</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

<sup>37</sup> *Id.* at 414.

<sup>38</sup> *Id.* at 414–15.

<sup>39</sup> *Id.* at 415.

<sup>40</sup> *Id.* at 421.

First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>41</sup> Therefore, the Court did not need to reach the question of whether the memorandum involved a matter of public concern. Thus, in order for a court to even consider whether the public employee’s speech is protected under the *Pickering-Connick* test, the employee must meet a threshold question by showing that he spoke as a citizen and not pursuant to official duties. The Court effectively added another step to the inquiry—one that significantly limits potential First Amendment protection.

Justice Kennedy, writing for the majority, relied on three main lines of reasoning to support the holding. First, restrictions on speech made pursuant to official duties “do[] not infringe any liberties the employee might have enjoyed as a private citizen” and only reflect an employer’s exercise of control over what the employer paid the employee to do or create.<sup>42</sup> For example, the President’s press secretary is paid to articulate and disseminate the President’s views, not to offer his own opinions on the topics of the day.

Second, refusing to recognize First Amendment protection to a public employee’s work product—speech made pursuant to official duties—in no way undermines “the potential societal value of employee speech,” since public employees “retain the prospect of constitutional protection for their contributions to the civic discourse.”<sup>43</sup> Thus, while Ceballos’s work product, the memorandum, was subject to government supervision, he could still join a political party and voice his opinion about any issue just like a regular citizen.

Finally, the majority reasoned that a contrary approach to speech made pursuant to official duties would commit the courts “to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business.”<sup>44</sup> Such displacement of public employers’ managerial discretion, the Court stated, found no support in its precedent and would violate “sound principles of federalism and the separation of powers.”<sup>45</sup>

*Garcetti* significantly diminished the scope of a public employee’s First Amendment rights. From then on, public employees seeking First Amendment protection would need to first show that they spoke in

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<sup>41</sup> *Id.* at 421.

<sup>42</sup> *Garcetti*, 547 U.S. at 421–22 (citation and internal quotation marks omitted).

<sup>43</sup> *Id.* at 422.

<sup>44</sup> *Id.* at 423.

<sup>45</sup> *Id.*



their role as citizens, not as a public employee. Then, the employees would need to show that their speech was a matter of public concern. Only after providing sufficient evidence to satisfy these two threshold questions would the *Pickering* balancing test kick in.

### C. Post-Garcetti Discord and Confusion

Although the *Garcetti* decision made clear that by writing the memorandum, Ceballos spoke pursuant to his official duties, the Court did not address the issue of whether Ceballos's truthful testimony qualified as protected speech. In his dissenting opinion, Justice Souter specifically cautioned that "the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process."<sup>46</sup> This very issue went on to cause much confusion among the lower courts, leading to a circuit split.

#### 1. Sworn Testimony as Protected Citizen Speech

Some circuit courts opined that truthful testimony falls outside the scope of the *Garcetti* test since every citizen is obligated to testify truthfully at judicial proceedings.<sup>47</sup> Consequently, when a public employee testifies, he "is not simply performing his . . . job duties; rather, the employee is acting as a citizen and is bound by the dictates of the court."<sup>48</sup>

For example, in 2011, Kirk Chrzanowski served as an assistant state's attorney in the McHenry County State Attorney's Office when a special prosecutor began investigating suspected wrongdoing by Chrzanowski's supervisor, Louis Bianchi.<sup>49</sup> Pursuant to a subpoena, Chrzanowski testified before a grand jury regarding allegations that Bianchi improperly influenced the handling of a case involving his relatives and political allies.<sup>50</sup> Chrzanowski also testified at Bianchi's trial, again pursuant to a subpoena.<sup>51</sup> During this period, Bianchi began placing negative comments on Chrzanowski's file, which had

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<sup>46</sup> *Id.* at 444 (Souter, J., dissenting).

<sup>47</sup> *See, e.g.,* Chrzanowski v. Bianchi, 725 F.3d 734, 741 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2870 (2014) (citing Fairley v. Andrews, 578 F.3d 518, 524–25 (7th Cir. 2009)); Reilly v. Atlantic City, 532 F.3d 216, 231 (3d Cir. 2008) (explaining that a police officer's trial testimony was protected by the First Amendment because the officer had an "independent obligation as a citizen to testify truthfully"); Morales v. Jones, 494 F.3d 590, 598 (7th Cir. 2007) (concluding that a public employee's subpoenaed deposition testimony about speech he made pursuant to his official duties was protected by the First Amendment).

<sup>48</sup> *Reilly*, 532 F.3d at 231 (citation and internal quotation marks omitted).

<sup>49</sup> *Chrzanowski*, 725 F.3d at 736.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 736–37.

little relation to his job performance.<sup>52</sup> A few months after the trial, Bianchi fired Chrzanowski.<sup>53</sup>

In finding that Chrzanowski's sworn testimony was protected speech, the Seventh Circuit emphasized that pursuant to *Garcetti*, the question of whether the public employee speaks as a citizen or employee requires a practical inquiry.<sup>54</sup> The court found that giving truthful testimony pursuant to a subpoena was not part of Chrzanowski's daily job duties, and thus, he had spoken as a citizen when he testified.<sup>55</sup>

The Seventh Circuit further reasoned that even if Chrzanowski had testified pursuant to his official job duties, he had nonetheless spoken as a citizen. Particularly, the court emphasized that when a public employee gives testimony pursuant to a subpoena, he is fulfilling the general duty of every citizen "to appear before a grand jury or at trial," and thus, "he speaks as a citizen for First Amendment purposes[,] not as an employee."<sup>56</sup> As a result, the Seventh Circuit held that *Garcetti* could not apply in this context. First, the rationale that restrictions on public employees' speech "do not infringe on any liberties" enjoyed as private citizens is inapposite, since anyone compelled to testify has a strong interest in telling the truth—under the law, failure to testify truthfully can result in sanctions, including incarceration.<sup>57</sup> Second, given "the longstanding principle that the public . . . has a right to every man's evidence," restrictions on compelled testimony undermine the societal value and interest in hearing such speech.<sup>58</sup> Finally, protecting sworn testimony would not commit the courts to an "intrusive role" in the communications between Chrzanowski and Bianchi, since the employer had no legitimate managerial interest in dissuading the testimony.<sup>59</sup> Therefore, the court held that the *Garcetti* rationales are inapplicable in the context of compelled sworn testimony, and thus a public employee who gives compelled testimony always speaks as a citizen.<sup>60</sup>

Similarly, in *Reilly v. City of Atlantic City*, the Third Circuit went much further.<sup>61</sup> Robert Reilly, a police officer in the vice and

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<sup>52</sup> *Id.* at 737.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 738.

<sup>55</sup> *Chrzanowski*, 725 F.3d at 740.

<sup>56</sup> *Id.* at 741 (citation and internal quotation marks omitted).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 742 (citation and internal quotation marks omitted).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008).

intelligence units for the Atlantic City Police Department, obtained information about possible corruption in the department while working as an investigator.<sup>62</sup> During the subsequent trial, which involved his supervisor, the prosecution called Reilly as a witness and he testified.<sup>63</sup> In the aftermath, Reilly's supervisors charged him with several disciplinary violations, including making disparaging comments to a colleague.<sup>64</sup> An independent hearing officer recommended suspending Reilly for four days, but his two supervisors demoted him instead.<sup>65</sup> Reilly filed suit, alleging violation of his First Amendment rights.<sup>66</sup>

The Third Circuit relied on the settled principle that the "duty to testify has long been recognized as a basic obligation that every citizen owes his government," and held that a public employee's trial testimony is citizen speech.<sup>67</sup> The court reasoned that even though "an employee's official responsibilities provided the initial impetus to appear in court[,] [it] is immaterial to his/her independent obligation as a citizen to testify truthfully."<sup>68</sup> The court concluded that a public employee's trial testimony is citizen speech because his duty to testify as a citizen outweighs his employee duties.<sup>69</sup> Finally, the Third Circuit distinguished the *Garcetti* decision because the Court had only dealt with the issue of whether Ceballo's memorandum was protected speech, remanding the issue of whether Ceballo's testimony was protected speech.<sup>70</sup> In short, even if an employee's official responsibilities compel him to appear in court, testimony under oath is the sort of conduct performed by citizens and protected by the First Amendment. As such, truthful testimony is always citizen speech, even if the person goes to court under the guise of official job duties.

## 2. All Speech Made Pursuant to Official Duties, Including Sworn Testimony, is Unprotected

Other circuits, however, interpreted *Garcetti* to mean that all speech made pursuant to a public employee's official duties, including sworn testimony, is speech that belongs to the government employer,

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<sup>62</sup> *Id.* at 220.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 221.

<sup>65</sup> *Id.* at 221–22.

<sup>66</sup> *Id.* at 222.

<sup>67</sup> *Reilly*, 532 F.3d at 231 (quoting *United States v. Calandra*, 414 U.S. 338, 345 (1974)) (internal quotation marks omitted).

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

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

<sup>70</sup> *Id.*

and thus, not protected despite its context.<sup>71</sup>

In *Green v. Barret*, the Eleventh Circuit followed this strict construction of *Garcetti*.<sup>72</sup> Shirly D. Green, the Chief Jailer at the Fulton County jail, testified under subpoena at an emergency hearing in Fulton County Superior Court.<sup>73</sup> Jacquelyn Barrett, the County Sheriff, had requested the hearing to assess whether the jail was a safe place to keep a convicted murderer, who had attempted to escape a week earlier.<sup>74</sup> Green testified that the cell doors had problems and were not secure, and the next day Barret fired her.<sup>75</sup> Green filed suit claiming Barret had violated her First Amendment rights, and Barret moved for summary judgment claiming qualified immunity.<sup>76</sup>

In finding for Barret, the Eleventh Circuit held that it did not need to reach the qualified immunity issue since Green's testimony was unprotected under *Garcetti*.<sup>77</sup> The court explained that *Garcetti* created a distinction between speech as a citizen and speech pursuant to official job duties, and "[t]his distinction [was] not affected by the fact that the plaintiff made the statements in testimony."<sup>78</sup> Because Green's testimony arose from her position as Chief Jailer, she spoke pursuant to her official duties, and therefore, her speech was unprotected.

The Ninth Circuit reached a similar conclusion in *Huppert v. City of Pittsburg*.<sup>79</sup> Ron Huppert began working as a patrol officer for Pittsburg Police Department ("PPD") in 1991, and later became an inspector after a promotion.<sup>80</sup> While working for the PPD, the Contra Costa County District Attorney's Office called Huppert to assist in the investigation of corruption at the Pittsburg Public Works Yard.<sup>81</sup> A year later, Huppert scored highly in the sergeant's exam, but his supervisors denied him the promotion.<sup>82</sup> In 2001, Huppert assisted the Federal

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<sup>71</sup> See, e.g., *Lane v. Cent. Ala. Cmty. Coll.*, 523 F. App'x 709, 712 (11th Cir. 2013) (per curiam), *aff'd in part, rev'd in part and remanded sub nom. Lane v. Franks*, 134 S. Ct. 2369, 2375 (2014); *Huppert v. City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009), *overruled in part by Dahlia v. Rodriguez*, 735 F.3d 1060, 1071 (9th Cir. 2013) (en banc); *Green v. Barrett*, 226 F. App'x 883, 887 (11th Cir. 2007) (per curiam).

<sup>72</sup> *Green*, 226 F. App'x at 886.

<sup>73</sup> *Id.* at 884.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 884–85.

<sup>77</sup> *Id.* at 886.

<sup>78</sup> *Green*, 226 F. App'x at 886.

<sup>79</sup> *Huppert v. City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009), *overruled in part by Dahlia v. Rodriguez*, 735 F.3d 1060, 1071 (9th Cir. 2013) (en banc).

<sup>80</sup> *Id.* at 698.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 699.

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Bureau of Investigation (“FBI”) in a case regarding alleged corruption within the police department, and his supervisors subsequently transferred him to an undesired building in the PPD.<sup>83</sup> By 2004, Huppert was a gang investigator when the court subpoenaed him to testify before a civil grand jury in charge of investigating corruption within the PPD.<sup>84</sup> Shortly thereafter, Wayne Derby, Huppert’s supervisor, eliminated Huppert’s position and transferred him to a position investigating fraud and forgeries, increasing his workload while maintaining the same pay.<sup>85</sup> Huppert claimed that his new supervisor, William Addington, subjected him to constant harassment, and after Addington “attempted to replace Huppert’s ‘superlative’ yearly evaluation” with an evaluation Addington had prepared, Huppert filed a grievance against the PPD, and then retired in late 2004.<sup>86</sup>

In finding Huppert’s sworn testimony unprotected, the Ninth Circuit relied on California precedent predating *Garcetti* for the proposition that a police officer’s official duties included testifying in court.<sup>87</sup> The court reasoned that because Huppert was a police officer, he testified pursuant to his official job duties and, under *Garcetti*, he had spoken as a public employee, not as a citizen.<sup>88</sup> The court declined to follow decisions like *Reilly*, claiming that its rationale impermissibly chipped away at the clear distinction created by *Garcetti*.<sup>89</sup> Moreover, the court found that other avenues, such as whistle-blower statutes, were available to people who faced reprisal from reporting government corruption.<sup>90</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 700.

<sup>85</sup> *Huppert*, 574 F.3d at 700.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 707.

<sup>88</sup> *Id.* at 708.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 709–08.

### III. THE IMPORTANCE OF TRUTHFUL TESTIMONY TO THE JUDICIAL SYSTEM

It is axiomatic that truthful testimony is a bedrock principle of the proper function of the American judicial system.<sup>91</sup> Among the primary missions of our judicial system is to ensure justice under the law, which is only possible by searching for and discovering the truth.<sup>92</sup> Truthful testimony “constitutes one of the Government’s primary sources of information,”<sup>93</sup> and our judicial system would not function without it.<sup>94</sup>

#### A. *The Right to Every Man’s Evidence: The Development of the Duty to Testify*

##### 1. Witness Testimony at Common Law

The common law duty to testify truthfully has long been established in Anglo-American jurisprudence.<sup>95</sup> The modern use of witness testimony before a jury became prevalent in England as early as 1500, and by 1562, statutes established the power of courts to compel persons to testify.<sup>96</sup> By early 1600, Lord Bacon observed that all subjects

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<sup>91</sup> See, e.g., *United States v. Thoms*, 684 F.3d 893, 903 (9th Cir. 2012) (“The longstanding and repeated invocations in caselaw of the need of district courts to hear live testimony so as to further the accuracy and integrity of the factfinding process are not mere platitudes. Rather, live testimony is the bedrock of the search for truth in our judicial system.”).

<sup>92</sup> *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989) (quoting *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987)) (“Our judicial system is designed to resolve disputes, to right wrongs. We encourage uninhibited testimony, under penalty of perjury, in an attempt to arrive at the truth.”).

<sup>93</sup> *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 93–94 (1964) (White, J., concurring).

<sup>94</sup> *Wilson v. United States*, 221 U.S. 361, 372 (1911) (quoting *Amey v. Long* [1808] 103 Eng. Rep. 653, 657 (K. B.)) (“[T]estimony seems essential to the very existence and constitution of a Court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them.”).

<sup>95</sup> See *Ullmann v. United States*, 350 U.S. 422, 439 n.15 (1956) (“But it is every man’s duty to give testimony before a duly constituted tribunal unless he invokes some valid legal exemption in withholding it.”); *Blair v. United States*, 250 U.S. 273, 281 (1919) (noting that “it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned”). See generally 4 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 648–52 (Little Brown and Co. 1923), <http://galenet.galegroup.com.ezproxy.shu.edu/servlet/MOML?af=RN&ae=F3753216404&srchtp=a&ste=14> (discussing the general duty to testify that every citizen owes to society).

<sup>96</sup> See Statute of Elizabeth, 5 Eliz., c. 9, § 12 (1562); 4 WIGMORE, *supra* note 95 § 2190, at 644.

owed the King their “knowledge and discovery,”<sup>97</sup> and by 1742, common law courts considered the general principle that “the public has a right to every man’s evidence” an “indubitable certainty” that “[could not] be denied.”<sup>98</sup> Concurrently, common law courts used judicial oaths as a way of reminding witnesses that they had a duty to tell the truth.<sup>99</sup> By early 1800, it was well-established that oaths were “a method of reminding the witness strongly of the Divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to speak only the truth as he saw it.”<sup>100</sup>

Additionally, truthful and complete testimony was so important at common law that witnesses enjoyed absolute immunity from civil damage liability for their testimony in court.<sup>101</sup> This immunity extended even to false testimony.<sup>102</sup> The courts granted immunity to avoid witness self-censorship. Specifically, the prospect of liability could make a witness reluctant to come forward to testify at all and even if the witness came forward, the threat of liability could lead to the witness distorting his testimony.<sup>103</sup>

## 2. Recognition and Adoption of the Duty to Testify in American Jurisprudence

The English common law was “assumed by the courts of justice, or declared by statute” as the law of every original colonial state.<sup>104</sup> Thus, it is to no surprise that the Framers and the First Congress recognized the duty to testify and the power of the courts to compel

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<sup>97</sup> *Blair*, 250 U.S. at 280 (quoting Countess of Shrewsbury’s Case, 2 How. St. Tr. 769, 778 (1612)).

<sup>98</sup> *Kastigar v. United States*, 406 U.S. 441, 443 n.5 (1972) (quoting 12 T.C. HANSARD, THE PARLIAMENTARY HISTORY OF ENGLAND 675, 693 (1812)).

<sup>99</sup> See Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 19–37 (2009) (providing a concise history of the use of judicial oaths in the Anglo-American judicial system).

<sup>100</sup> 3 WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1816, at 857–58 (Little Brown and Co. 1923).

<sup>101</sup> See *Briscoe v. LaHue*, 460 U.S. 325, 330–31 (1983) (collecting cases); *Dawkins v. Lord Rokeby* [1866] 176 Eng. Rep. 800, 812 (C. P.); *Henderson v. Broomhead* [1859] 157 Eng. Rep. 964, 968 (Exch.); *Anfield v. Feverhill* [1614] 80 Eng. Rep. 1113 (K. B.); *Cutler v. Dixon* [1585] 76 Eng. Rep. 886 (Q. B.).

<sup>102</sup> See *Briscoe*, 460 U.S. at 331–32.

<sup>103</sup> *Id.* at 333 (citing *Henderson*, 157 Eng. Rep. at 968; *Barnes v. McCrate*, 32 Me. 442, 446 (1851)).

<sup>104</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 473 (12th ed., O.W. Holmes, Jr. ed., 1873). See also 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 157, at 104–05 (3rd ed. Little Brown 1858) (stating that the English common law is our “birthright and inheritance,” and that the “whole structure of our present jurisprudence stands upon the original foundations of the common law”).

testimony by adopting the Sixth Amendment,<sup>105</sup> and later through the Judiciary Act of 1789.<sup>106</sup> Likewise, the early American judicial system borrowed and adopted judicial oaths from common law,<sup>107</sup> and by 1900, most states had adopted legislation regarding the oath requirement.<sup>108</sup>

Today, the notion that all citizens owe an independent societal duty to aid law enforcement, including testifying in court proceedings, is well grounded in Supreme Court precedent.<sup>109</sup> As Justice Gray announced in 1895, “[i]t is the duty and the right . . . of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States.”<sup>110</sup> By adopting the common law principle that the public has a right to “every man’s evidence,” the Court infused every citizen with the civic duty and the right to testify.<sup>111</sup>

Truthful testimony is so important to our judicial system that courts can compel citizens to come forward and speak even when they may not necessarily want to—thus transforming the civic duty to testify into a legal one.<sup>112</sup> This is contrary to the general principle that the

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<sup>105</sup> U.S. CONST. amend. VI. (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .”).

<sup>106</sup> Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 30 (“And any person may be compelled to appear and depose as aforesaid in the same manner as to appear and testify in court.”); *id.* § 33 (stating that “the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment”).

<sup>107</sup> See Milhizer, *supra* note 99, at 28. As Milhizer points out, the Framers “held [oaths] in such high regard . . . that a bill regarding oaths of office was the first legislation passed by the inaugural Congress and signed by President Washington.” *Id.* at 30–31. Additionally, the Constitution incorporates oath requirements, though not in the testimonial context, in four places: U.S. CONST. art. I, § 3, cl. 6; art. II, § 1, cl. 8; art. VI, cl. 3; and amend. IV.

<sup>108</sup> 3 WIGMORE, *supra* note 100, § 1828, at 877.

<sup>109</sup> See *United States v. New York Tel. Co.*, 434 U.S. 159, 175 n.24 (1977) (“The conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions . . .”); *Ullmann v. United States*, 350 U.S. 422, 439 n.15 (1956); *Blair v. United States*, 250 U.S. 273, 281 (1919).

<sup>110</sup> *In re Quarles*, 158 U.S. 532, 535 (1895).

<sup>111</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citing *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Blackmer v. United States*, 284 U.S. 421, 438 (1932)); see also *Blair*, 250 U.S. at 281.

<sup>112</sup> See *Branzburg*, 408 U.S. at 688; see also *Gravel v. United States*, 408 U.S. 606, 615 (1972) (“The [C]onstitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses.”). There are a few exceptions, not applicable in this context, which the courts have narrowly construed. See, e.g., *id.* at 615–16 (holding that the Speech or Debate Clause exempts members of Congress and their aids from being questioned about their speeches or debates made in Congress); *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (stating that the Fifth



government cannot force a person to speak. A citizen who is subpoenaed has the legal obligation, “which every person within the jurisdiction of the Government is bound to perform,” to come before the court as a witness.<sup>113</sup> And in the role of a witness, a citizen is not entitled to object and cannot interfere with the court’s authority “or to set limits to the investigation that the grand jury may conduct.”<sup>114</sup>

Additionally, regardless of whether a person is subpoenaed or voluntarily complies with the citizen’s duty to testify, he is bound by the legal duty to testify truthfully. In serving as a witness, a citizen has the solemn and fundamental duty to tell the truth.<sup>115</sup> Truthful testimony is “so necessary to the administration of justice” that the witness’s personal interest in privacy must yield to the public’s overriding interest in full disclosure.<sup>116</sup> Additionally, no one, not even the government, can tell a witness what to say in court, or prevent a witness from testifying against them.<sup>117</sup> Instead, the witness must tell the truth as he knows it.

Moreover, Congress has provided the courts with broad powers to enforce and control the “the performance of this duty.”<sup>118</sup> For instance, the court may punish a witness by “fine or imprisonment, or both, at its discretion” for failure to comply with a subpoena.<sup>119</sup> Similarly, Federal Rule of Evidence 603 codifies the requirement that every witness must swear an oath or affirm that he will testify truthfully,

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Amendment is a guarantee against testimonial compulsion of self-incrimination). Indeed, Wigmore condemned such exemptions as “so many derogations from a positive general rule,” and as “obstacle[s] to the administration of justice.” 4 WIGMORE, *supra* note 95, § 2192, at 649, 651.

<sup>113</sup> *Blair*, 250 U.S. at 281; *see also* *New York v. O’Neill*, 359 U.S. 1, 11 (1959) (“A citizen cannot shirk his duty, no matter how inconvenienced thereby, to testify in criminal proceedings and grand jury investigations in a State where he is found.”); *Blackmer*, 284 U.S. at 438 (“It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned[,] . . . [a]nd the Congress may provide for the performance of this duty and prescribe penalties for disobedience.”) (internal citation omitted).

<sup>114</sup> *United States v. Calandra*, 414 U.S. 338, 345 (1974) (quoting *Blair*, 250 U.S. at 282).

<sup>115</sup> *See* 18 U.S.C.S. §§ 1621, 1623 (LexisNexis 2014); *Blair*, 250 U.S. at 282 (“[T]he witness is bound . . . to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.”).

<sup>116</sup> *Calandra*, 414 U.S. at 345 (quoting *Blair*, 250 U.S. at 281).

<sup>117</sup> *See* 18 U.S.C.S. § 1512(b).

<sup>118</sup> *Blackmer*, 284 U.S. at 438 (“And the Congress may provide for the performance of this duty and prescribe penalties for disobedience.”).

<sup>119</sup> *See* 18 U.S.C.S. § 401; 28 U.S.C.S. § 1826(a) (LexisNexis 2014) (“Whenever a witness . . . refuses without just cause shown to comply with an order of the court to testify . . . the court . . . may summarily order his confinement . . .”).

in a “form designed to impress that duty on the witness’s conscience.”<sup>120</sup> Failure to tell the truth is not only a punishable offense,<sup>121</sup> but the Supreme Court has held that in the judicial process of obtaining a witness’s testimony, perjury “simply has no place whatever.”<sup>122</sup>

Courts have routinely relied on the witness’s independent duty to testify to reject attempts by citizens, regardless of their role in society, to circumvent their obligation to comply with the judicial process. For example, in *United States v. Nixon*, the Court required President Nixon to comply with a subpoena reasoning that “[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.”<sup>123</sup> A court’s authority to compel testimony is “imperative to the function of courts” and to “ensure that justice be done.”<sup>124</sup> At the same time, citizens who have failed to comply with the court’s orders (or who lie while testifying) have met stringent punishments.<sup>125</sup>

Lastly, in an effort to keep judicial testimony free from outside pressures, the Supreme Court recognized the common law civil damage immunity afforded to witnesses. In *Briscoe v. LaHue*, the Court held that a police officer was immune from civil liability suits under 42 U.S.C. § 1983 based on his allegedly perjurious testimony at a criminal trial.<sup>126</sup> The plaintiff, previously convicted of burglarizing a house trailer, claimed that the defendant lied during trial by testifying that plaintiff was one out of 50 to 100 people “whose prints would match a partial thumbprint” found at the crime scene.<sup>127</sup> The plaintiff insisted that the testimony was false because the FBI and state police had deemed the partial thumbprint evidence unreliable.<sup>128</sup>

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<sup>120</sup> FED. R. EVID. 603 (2011).

<sup>121</sup> 18 U.S.C.S. § 1621 (“Whoever having taken an oath before a competent tribunal . . . that he will testify, declare, depose, or certify truly, . . . [states] willfully and contrary to such oath. . . any material matter which he does not believe to be true . . . is guilty of perjury and shall . . . be fined . . . or imprisoned not more than five years, or both.”).

<sup>122</sup> *United States v. Mandujano*, 425 U.S. 564, 576 (1976).

<sup>123</sup> *United States v. Nixon*, 418 U.S. 683, 709 (1974).

<sup>124</sup> *Id.*; see also *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972) (holding that the general obligation of every citizen to testify outweighs the newsman’s privilege).

<sup>125</sup> See *United States v. Wilson*, 421 U.S. 309, 319 (1975) (affirming criminal contempt conviction of a citizen who refused to testify); *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (same); *United States v. Burge*, 711 F.3d 803, 815 (7th Cir. 2013) (affirming a four-and-a-half-year conviction for perjury and obstruction of justice of former Chicago police commander).

<sup>126</sup> *Briscoe v. LaHue*, 460 U.S. 325, 330–31 (1983).

<sup>127</sup> *Id.* at 326–27.

<sup>128</sup> *Id.* at 327.

The Court found that Congress intended this section of the Civil Rights Act of 1871 to include the same protections afforded to witnesses at common law for civil damage claims.<sup>129</sup> The Court reasoned that “the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.”<sup>130</sup> Specifically, the *Briscoe* Court found that when citizens are called to be witnesses, they have a non-negotiable duty to testify, making their protection from civil liability essential.<sup>131</sup>

In sum, the testimonial process is a bedrock principle of our judicial system. The Supreme Court has continually recognized it as such, whether by adopting the common law axiom that society is entitled to every man’s testimony, or by maintaining the testimonial process as free from outside pressures as possible. Thus, it came as no surprise that the Court recognized truthful testimony as a “quintessential example of speech as a citizen” when deciding the next public employee speech case, *Lane v. Franks*, in June 2014.<sup>132</sup>

#### IV. *LANE V. FRANKS*: PURSUANT TO “ORDINARY” JOB DUTIES STANDARD

While conducting a financial audit, Edward Lane, a program director at a community college, discovered that Suzanne Schmitz, a state representative employed by the college, was committing fraud and fired her.<sup>133</sup> This spawned an investigation by the FBI leading to a grand jury proceeding and later a trial, where Lane testified about his reasons for terminating Schmitz.<sup>134</sup> Subsequently, Steve Franks, president of the college, fired twenty-nine employees, including Lane, but later rescinded all terminations except Lane’s and that of another employee.<sup>135</sup> Lane sued claiming that Frank had fired him, in violation of the First Amendment, due to his testimony against Schmitz.<sup>136</sup>

The district court granted summary judgment for the defendant, finding Lane’s testimony unprotected under *Garcetti* because he “had learned of the information that he testified about while working as Director . . . such that his speech [could] still be considered as part of his official job duties and not made as a citizen on a matter of public

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<sup>129</sup> *Id.* at 334.

<sup>130</sup> *Id.* at 332–33 (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (Wis. 1860)).

<sup>131</sup> *Id.* at 333.

<sup>132</sup> *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014).

<sup>133</sup> *Id.* at 2375.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 2376.

<sup>136</sup> *Id.*

concern.”<sup>137</sup> The Eleventh Circuit affirmed, holding that Lane spoke as an employee and not a citizen because he acted “pursuant to his official duties when he investigated Schmitz[‘s] employment, spoke with Schmitz and [college] officials regarding the issue, and terminated Schmitz.”<sup>138</sup> Since his testimony owed its existence to his professional responsibilities, under *Garcetti*, it constituted the product commissioned by his employer. Therefore, the Eleventh Circuit found that Lane spoke as an employee and not as a citizen when he took the stand.<sup>139</sup> Additionally, the court held that in any event, the defendant was entitled to qualified immunity.<sup>140</sup>

The Supreme Court granted certiorari “to resolve discord among the Court of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities.”<sup>141</sup> In a unanimous opinion by Justice Sotomayor, the Court reversed in part and remanded, holding that Lane’s testimony constituted protected citizen speech but agreeing with the Eleventh Circuit that the defendant was entitled to qualified immunity.<sup>142</sup> The Court observed that *Garcetti* “said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment.”<sup>143</sup> As such, the Eleventh Circuit read *Garcetti* far too broadly by treating as dispositive the fact that “Lane learned of the subject matter of his testimony in the course of his employment.”<sup>144</sup> Rather, the proper inquiry was “whether the speech at issue is itself *ordinarily within the scope* of an employee’s duties.”<sup>145</sup>

In finding Lane’s speech to be citizen speech, the Court emphasized the fact that the speech at issue was sworn testimony in judicial proceedings.<sup>146</sup> The Court observed that the Eleventh Circuit had given “short shrift to the nature of sworn judicial statements and

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<sup>137</sup> *Id.* (internal quotation marks omitted).

<sup>138</sup> *Lane*, 134 S. Ct. at 2377.

<sup>139</sup> *Id.* at 2376–77.

<sup>140</sup> *Id.* at 2377.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 2383.

<sup>143</sup> *Id.* at 2379.

<sup>144</sup> *Lane*, 134 S. Ct. at 2379.

<sup>145</sup> *Id.* (emphasis added). It was undisputed that Lane’s ordinary job duties did not include testifying, thus the Court chose not to directly address whether truthful testimony made pursuant to ordinary job duties would constitute citizen speech. *See id.* at 2378 n.4. As explained in Part V, *infra*, however, the Court’s analysis and language provide the foundation for answering that question in the affirmative.

<sup>146</sup> *Id.* at 2378–79.

ignored the obligation borne by all witnesses to testify under oath.”<sup>147</sup> Particularly, the Court noted that “[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”<sup>148</sup> Thus, a public employee who testifies in judicial proceedings has an independent duty to testify truthfully that exists separate and apart from any other duty he may owe to his employer. The Court found that this “independent obligation renders sworn testimony speech as a citizen and *sets it apart from speech made purely in the capacity of an employee.*”<sup>149</sup>

Justice Thomas, joined by Justice Scalia and Justice Alito, concurred by stating that answering Lane’s question “require[d] little more than a straightforward application of *Garcetti*.”<sup>150</sup> Justice Thomas further opined that the question whether a public employee speaks as a citizen on a matter of public concern when the employee gives truthful testimony under oath in the course of his ordinary job responsibilities, was a “quite different question” left for another day.<sup>151</sup>

#### V. *LANE* AS THE FOUNDATION FOR COMPLETELY PROTECTING PUBLIC EMPLOYEE SWORN TESTIMONY

Although *Lane* does not expressly discuss whether the First Amendment protects sworn testimony made pursuant to ordinary job duties, the decision lays the foundation for protecting such speech by narrowing and refining *Garcetti*’s “pursuant to official duties” standard, as well as by holding that truthful testimony is inherently citizen speech.

##### A. *Lane* Reins in the Scope of *Garcetti*

Key language in *Lane* reins in the scope of *Garcetti* so that only on rare occasions will truthful testimony fall within the ordinary job duties of public employees.<sup>152</sup> In *Garcetti*, the Court did not provide a

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 2379.

<sup>149</sup> *Id.* (emphasis added).

<sup>150</sup> *Lane*, 134 S. Ct. at 2383 (Thomas, J., concurring).

<sup>151</sup> *Id.*

<sup>152</sup> In the months since the Court’s decision, several lower courts have interpreted *Lane* as narrowing *Garcetti*’s reach. *See, e.g.*, *Mpoy v. Rhee*, 758 F.3d 285, 295 (D.C. Cir. 2014) (“[T]he use of the adjective ‘ordinary’—which the court repeated nine times—could signal a narrowing of the realm of employee speech left unprotected by *Garcetti*.”); *Hagan v. City of New York*, 39 F. Supp. 3d 481, 510 (S.D.N.Y. 2014) (stating that *Lane* can be understood as narrowing *Garcetti*, and that “the focus is on [the employee’s] ‘ordinary’ job responsibilities”); *Holt v. Commonwealth*, No. 10-5510,

framework for defining the scope of an employee's duties. But the majority stated that job descriptions are "neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes."<sup>153</sup> Instead, the Court emphasized the need for a practical inquiry.<sup>154</sup>

The *Lane* Court again emphasized the need for a practical inquiry. Justice Sotomayor's opinion, however, does more than pay lip service to *Garcetti*; *Lane* refines and narrows *Garcetti*'s "pursuant to official duties" standard in two ways. First, the Court's use of the term "ordinary" to qualify "official duties," which does not appear in *Garcetti*'s majority opinion, both sharpens the inquiry and narrows the realm of employee speech left unprotected by *Garcetti*. Under *Lane*, the question is not whether an employee speaks pursuant to *any* official duty, but whether the *speech* is made pursuant to one of the *ordinary* official duties. Thus, *Lane* mandates that the speech act itself constitute part of the public employee's routine or "ordinary" job duties.

Second, *Lane* provides guidance as to what constitutes speech made *pursuant* to official duties. An employee does not speak pursuant to official duties simply because the speech "concerns information related to or learned through public employment."<sup>155</sup> This language also narrows the reach of *Garcetti*. An employee does not speak pursuant to his ordinary duties simply because the content of his speech relates to, or is something learned while conducting, official job duties. Thus, the fact that Lane learned about Schmitz's fraud while conducting one of his ordinary duties (a financial audit) as the school's program director, or that his testimony related to this duty, does not mean Lane testified "pursuant to" his official duties. Clearly, Lane's ordinary official duties did not include providing sworn testimony about fraud under subpoena. Instead, an employee speaks pursuant to job duties only when the conduct is part of what the employee was ordinarily employed and paid to do.

These refinements severely limit the possibility of courts reaching decisions such as those in *Huppert* and *Green*. For example, Huppert was a gang investigator within the Pittsburgh Police Department when the court subpoenaed him to testify before a civil grand jury in charge

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2014 U.S. Dist. LEXIS 113409, at \*14 (E.D. Pa. Aug. 14, 2014) (stating that *Lane* brought the Supreme Court precedent in line with the Third Circuit *Reilly* decision).

<sup>153</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

<sup>154</sup> *Id.* at 424.

<sup>155</sup> *Lane*, 134 S. Ct. at 2377.

of investigating corruption in the PPD.<sup>156</sup> Huppert claimed that his supervisor retaliated against him for his testimony.<sup>157</sup> Applying *Garcetti*, the court held that Huppert had spoken as an employee because testifying was part of his official duties as a police officer.<sup>158</sup>

Under *Lane*, however, the result is much different. Even assuming that Huppert's official job duties as a gang investigator included testifying in court, the courts must apply *Lane*'s refinements. That is, was testifying in court and civil grand juries one of Huppert's ordinary duties? And was his testimony made "pursuant to" that ordinary duty, or did his testimony merely concern information related to or learned through his employment?

As a gang investigator, Huppert's ordinary duties would have likely included monitoring gang members, investigating gang-related crimes, apprehending perpetrators and confiscating the fruits of their crimes, writing reports related to these activities, and perhaps testifying in court about said arrests.<sup>159</sup> Thus, for example, assume that after conducting an extensive investigation of a suspected gang member, Huppert discovers a drug ring and apprehends the perpetrators in the act. Huppert's testimony in court addressing the methods he used, and how and why he arrested the defendant gang members, would arguably be speech made pursuant to his ordinary job duties.<sup>160</sup>

Applying *Lane*'s framework to the facts in *Huppert*, however, leads to a different conclusion. Unlike Huppert's hypothetical testimony regarding the gang-related crimes, Huppert's testimony before the grand jury relating to possible corruption within the PPD falls under speech that "concerns information related to or learned through public employment." That testimony is in no way "pursuant to" his job duties or part of his "ordinary" job duties as a gang investigator. Unlike *Garcetti*, where Ceballos's job ordinarily required him to prepare internal memorandums, Huppert's job did not ordinarily require him to testify about possible corruption within the police department

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<sup>156</sup> Huppert v. City of Pittsburg, 574 F.3d 696, 700 (9th Cir. 2009).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 707.

<sup>159</sup> See, e.g., *Gang Investigations Unit*, SAN JOSE POLICE DEP'T, [http://www.sjpd.org/BOI/Gang\\_Investigations.html](http://www.sjpd.org/BOI/Gang_Investigations.html) (last visited Oct. 25, 2014); *Police Gang Unit Careers and Job Description*, LAWENFORCEMENTEDU.NET, <http://www.lawenforcementedu.net/police-officer/police-gang-unit/> (last visited Oct. 25, 2014). I rely here on a simple job description merely to illustrate a point. Under *Lane* and *Garcetti*, the job description is not dispositive, and courts must conduct a fact intensive "practical inquiry" in order to reveal an employee's true ordinary official duties.

<sup>160</sup> As will be explained in Part V.B, *infra*, this speech should still be protected given the countervailing interests.

before a civil grand jury; the PPD did not employ or pay Huppert to do that. Like Lane's testimony, Huppert's testimony owed its existence to his willingness to perform his civic duty as a citizen. It is, therefore, clearly protected citizen speech.

Similarly, in *Green*, Chief Jailer Green testified at an emergency hearing in Fulton County Superior Court to determine whether the jail was sufficiently safe to keep a convicted murderer who had recently attempted to escape.<sup>161</sup> Green testified that the cell doors had problems and were not secure, and the next day the Sheriff fired her.<sup>162</sup> Relying on *Garcetti's* broad language, the Eleventh Circuit held that because Green's testimony arose from her position as Chief Jailer, she spoke pursuant to her official duties, and therefore, her speech was unprotected by the First Amendment.<sup>163</sup>

Undoubtedly, *Green's* testimony related to her job as Chief Jailer. Applying *Lane's* refined test, however, the fact that her speech relates to her job or contained information learned on the job is not dispositive.<sup>164</sup> Green's ordinary job duties were to maintain the jail, not to testify or appear in hearings about the jail, meaning that her testimony about the cell doors fell outside her ordinary job duties. Similarly, Green did not testify pursuant to her ordinary duties, but rather, her testimony "concern[ed] information related to or learned through [her] public employment."<sup>165</sup> Thus, *Lane* undercuts the reach of *Garcetti* and reinvigorates First Amendment protections for public employees.

B. *Truthful Testimony Made Pursuant to Ordinary Job Duties Should be Protected as a "Quintessential Example of Speech as a Citizen"*<sup>166</sup>

Even with *Lane's* refinement and narrowing of *Garcetti*, there may be thousands of public employees for whom testifying will constitute speech made pursuant to an ordinary job duty. In 2014, the Bureau of Labor Statistics estimated that federal, state, and local agencies employed over 844,000 detectives, investigators, and police officers.<sup>167</sup> For most, if not all, of these public employees, testifying is often one of

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<sup>161</sup> *Green v. Barrett*, 226 F. App'x 883, 884 (11th Cir. 2007) (per curiam).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 886.

<sup>164</sup> *See Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 2379.

<sup>167</sup> *See Household Data Annual Averages*, *supra* note 4, at 6 (indicating that in 2014 these agencies employed 164,000 detectives and criminal investigators, and 680,000 police and sheriff's patrol officers).



their official duties.<sup>168</sup> Yet, sworn testimony is clearly citizen speech—speech grounded in independent civic duties that can have a substantial impact on how a jury or judge decides matters affecting a person’s life, liberty, and property. Justice Sotomayor’s opinion in *Lane* expressly recognized it as such by declaring that sworn testimony is “a quintessential example of speech as a citizen.”<sup>169</sup> Thus, while the Court did not expressly reach this question, Justice Sotomayor’s language lays the foundation for a future Court to find sworn testimony made pursuant to ordinary job duties to always be protected citizen speech.

A closer look at *Garcetti* reveals the likelihood of this result. Justice Kennedy and the majority in *Garcetti* rested the Court’s opinion as to why speech made pursuant to official duties is always unprotected employee speech on three main rationales. First, the majority reasoned that restrictions on speech made pursuant to public employee job duties “do[] not infringe any liberties the employee might have enjoyed as a private citizen.”<sup>170</sup> Second, this restriction in no way undermines “the potential societal value of employee speech,” since employees “retain the prospect of constitutional protection for their contributions to the civic discourse.”<sup>171</sup> Finally, the majority reasoned that granting First Amendment protection to public employee speech made pursuant to ordinary job duties would “commit state and federal courts to a new, permanent, and intrusive role, mandating oversight of communications between and among government employees and their superiors in the course of official business,” and would “displace[] . . . managerial discretion.”<sup>172</sup> Thus, for the majority, when an employee speaks pursuant to official duties, that speech is *never* afforded protection under the First Amendment.

As the dissenting Justices warned, however, “[‘never’], in [their] view, is too absolute.”<sup>173</sup> Particularly, Justice Souter’s dissent, joined by Justices Stevens and Ginsburg, specifically cautioned that “the claim

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<sup>168</sup> See, e.g., *Police and Detectives*, *supra* note 4 (noting that uniformed police officers, detectives, and investigators typically testify in court as part of their duties). As illustrated by the hypothetical *Huppert* scenario, see *supra* text accompanying note 160, testimony from law enforcement employees regarding the methods, reasons, and how a particular investigation occurred will likely meet the *Garcetti* test, even under *Lane*’s refinements.

<sup>169</sup> *Lane*, 134 S. Ct. at 2379.

<sup>170</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 423.

<sup>173</sup> *Id.* at 446 (Breyer, J., dissenting); see also *id.* at 426 (Stevens, J., dissenting) (“The proper answer to the question . . . is ‘Sometimes,’ not ‘Never.’”).

relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.”<sup>174</sup> And for good reason, as the Seventh Circuit laid out, the *Garcetti* rationales lose traction when the speech in question implicates the citizen duty and right to testify truthfully.<sup>175</sup>

1. Not Protecting Sworn Testimony Made Pursuant to Ordinary Job Duties Infringes a Citizen’s Duty and Right to Testify

In *Garcetti*, the majority reasoned that restrictions on speech made pursuant to public a employee’s job duties “do[] not infringe any liberties the employee might have enjoyed as a private citizen.”<sup>176</sup> After all, Ceballos prepared the speech in question (an internal memorandum) because it was part of his daily duties as a calendar deputy—what he was paid to do. No citizen would prepare such a memorandum, meaning that even though a public employee does not cease to be a citizen simply because his employment, Ceballos did not lose a liberty he otherwise enjoyed as a citizen when his employer disciplined him for preparing the memo.

Truthful testimony, however, involves far greater countervailing interests. First, unlike the internal memo at issue in *Garcetti*, testimony in a judicial proceeding owes its existence to the right and civic duty of every citizen to aid law enforcement, not to a job duty imposed by an employer. By adopting the common law principle that the public has a right to “every man’s evidence,” the Framers, Congress, and the Court infused every citizen with the ordinary duty and the right to testify.<sup>177</sup> As Justice Gray announced in 1895, “[i]t is the duty and the right . . . of every citizen[] to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States.”<sup>178</sup> When a public employee testifies, he does so because that is his civic duty and right, not because it is his job. Thus, a public employer who threatens retaliation against an employee who wants to exercise his right and duty as a citizen to testify in court violates a liberty that the employee enjoyed as a private citizen—the duty and right to participate in the judicial process, and thus, the democratic process.

<sup>174</sup> *Id.* at 444 (Souter, J., dissenting).

<sup>175</sup> *See* *Chrzanowski v. Bianchi*, 725 F.3d 734, 741–42 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2870 (2014).

<sup>176</sup> *Garcetti*, 547 U.S. at 422.

<sup>177</sup> *See* *United States v. New York Tel. Co.*, 434 U.S. 159, 175 n.24 (1977) (“The conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions . . .”).

<sup>178</sup> *In re Quarles*, 158 U.S. 532, 535 (1895).

Second, when the court subpoenas a citizen, this ordinary duty becomes an enforceable legal obligation “which every person within the jurisdiction of the Government is bound to perform.”<sup>179</sup> And in the role of a witness, a person is not entitled to object and cannot interfere with or set limits to the court’s authority.<sup>180</sup> Thus, when a public employee has been subpoenaed, the law requires him to come before the court and testify, or face fines and even imprisonment.<sup>181</sup> A public employer threatening retaliation for the employee’s appearance in a judicial proceeding places the employee in an “impossible position, torn between” complying with a court order and facing retaliation from the employer, or violating the subpoena and facing legal penalties.<sup>182</sup> Thus, unlike retaliation for work product like an internal memo, the prospect of facing these penalties infringes the employee’s right as a citizen to his property and his liberty.

Finally, regardless of whether the court subpoenas the public employee or he voluntarily complies with the citizen’s duty to testify, he is bound by the legal duty to always testify truthfully. In serving as a witness, a person “has the solemn and fundamental duty to tell the truth”<sup>183</sup> and must swear or affirm to do so before being permitted to testify.<sup>184</sup> Indeed, *Lane* recognized that “[a]nyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”<sup>185</sup> Additionally, failure to comply can result in substantial penalties, including incarceration.<sup>186</sup> This means that a public

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<sup>179</sup> *Blair v. United States*, 250 U.S. 273, 283 (1919); *see also* *New York v. O’Neill*, 359 U.S. 1, 11 (1959); *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

<sup>180</sup> *See* *United States v. Calandra*, 414 U.S. 338, 345 (1974) (quoting *Blair*, 250 U.S. at 281–82).

<sup>181</sup> *See* 18 U.S.C.S. § 401 (LexisNexis 2014). *See, e.g.*, Jesse McKinley, *8-Month Jail Term Ends as Maker of Video Turns Over a Copy*, N.Y. TIMES, Apr. 4, 2007, at A9 (freelance journalist held for 224 days for “refusing to turn over a videotape” of demonstration); Kim Murphy, *Two Freed in Anarchist Case*, L.A. TIMES, Mar. 1, 2013, at A8 (“Two activists . . . held for more than five months, mostly in solitary confinement[,] to pressure them to testify about suspected anarchists.”).

<sup>182</sup> *See* *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014).

<sup>183</sup> *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass’n*, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994), *aff’d in part*, 117 F.3d 1328 (11th Cir. 1997); *see also Blair*, 250 U.S. at 282.

<sup>184</sup> FED. R. EVID. 603.

<sup>185</sup> *Lane*, 134 S. Ct. at 2379 (citing 18 U.S.C.S. § 1623); *see also* *United States v. Mandujano*, 425 U.S. 564, 576 (1976) (plurality opinion) (“Perjured testimony is an obvious and flagrant affront to the basic concept of judicial proceedings.”).

<sup>186</sup> *See* 18 U.S.C.S. § 1621 (“Whoever having taken an oath before a competent tribunal . . . that he will testify, declare, depose, or certify truly . . . [states] willfully and contrary to such oath . . . any material matter which he does not believe to be true . . . is guilty of perjury and shall . . . be fined . . . or imprisoned not more than five years, or both.”); *Mandujano*, 425 U.S. at 576 (“In this constitutional process of securing a

employee who testifies, whether pursuant to ordinary job duties or not, is bound by law to do so truthfully. This too, places the employee in a no-win position, torn between telling the truth and facing the employer's wrath, or lying and facing the high burdens of perjury. Again, the prospect of facing these penalties infringes the employee's liberty as a citizen to be free from government sanctions.

Therefore, the application of *Garcetti* to truthful testimony made pursuant to ordinary job duties places the public employee in a precarious lose-lose situation. The employee will be forced to choose between telling the truth and losing his job, or not complying with the court orders and/or lying and facing substantial legal penalties. This dilemma violates not only the public employee's right as a citizen to property and liberty, but also his right to contribute to the public discourse in judicial proceedings. As Justice Sotomayor stated in *Lane*, the presence of the independent obligation and right to testify, and to testify truthfully, not only changes *Garcetti*'s calculus, but also "renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee."<sup>187</sup>

## 2. Application of *Garcetti* in This Context Undermines the Societal Value of Truthful Testimony

The majority in *Garcetti* further reasoned that refusing to recognize First Amendment protection for a public employee's work product—speech made pursuant to official duties—in no way undermines "the potential societal value of employee speech," since public employees "retain the prospect of constitutional protection for their contributions to the civic discourse."<sup>188</sup> In other words, the fact that Ceballos's job required him to write memoranda did not stop him from joining a political party or speaking his mind about a political issue. He could still contribute to society.

This rationale, however, does not follow when the speech in question is truthful testimony. As discussed *supra*, testimony in judicial proceedings owes its existence to the right and civic duty of every citizen to aid law enforcement, not merely an *employee's* job duty. Unlike the internal memo at issue in *Garcetti*, testimony is not a work product, something an employer commissions and pays an employee to do. Rather, testimony in judicial proceedings arises from the common law principle that "the public has a right to every man's evidence."<sup>189</sup>

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witness' testimony, perjury simply has no place whatever.").

<sup>187</sup> See *Lane*, 134 S. Ct. at 2379 (emphasis added).

<sup>188</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006).

<sup>189</sup> *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (citing 12 T.C. HANSARD, THE

Moreover, *Lane* recognized that sworn testimony—the bedrock of our judicial system—has an immeasurable societal value.<sup>190</sup> The Framers understood the need to secure “every man’s evidence” by adding the Sixth Amendment to the Constitution.<sup>191</sup> And Congress implemented the principle through statutes creating the extraordinary power to fine and jail those that refuse to cooperate with court orders or defy their obligation to testify truthfully.<sup>192</sup> Indeed, truthful testimony is “so necessary to the administration of justice” that the witness’s personal interest in privacy must yield to the public’s overriding interest in full disclosure.<sup>193</sup> It is because of this substantial value to society that the *Briscoe* Court recognized, as the common law courts did, that truthful testimony must be free from outside pressures.<sup>194</sup> By adopting the civil liability immunity given to witnesses at common law, the *Briscoe* Court highlighted that such external pressures cause witnesses to self-censor, to the detriment of the judicial process.

Not extending First Amendment protection to truthful testimony made pursuant to ordinary job duties undoubtedly chills the public employee’s valuable “contributions to the civic discourse” in one of the most important forums, the courtroom. Given that witnesses have a non-negotiable duty to testify truthfully,<sup>195</sup> without First Amendment protections for truthful testimony made pursuant to ordinary job duties, public employees will be placed in “an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs”<sup>196</sup> causing a chilling effect on speech.

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PARLIAMENTARY HISTORY OF ENGLAND 675, 693 (1812)); *see also* 4 WIGMORE, *supra* note 95 § 2192, at 651 (“From the point of view of society’s *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an institution, and from law and order as indispensable elements of civilized life.”) (emphasis added).

<sup>190</sup> *Lane*, 134 S. Ct. at 2379 (“Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court *bears an obligation, to the court and society at large, to tell the truth.*”) (emphasis added).

<sup>191</sup> U.S. CONST. amend. VI. (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .”).

<sup>192</sup> *See* 18 U.S.C.S. §§ 401, 1621 (LexisNexis 2014).

<sup>193</sup> *United States v. Calandra*, 414 U.S. 338, 345 (1974). *See also* 4 WIGMORE, *supra* note 95 § 2192, at 651 (noting that the testimonial process is “a pulse of air in the breathing organs of the community”).

<sup>194</sup> *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983) (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)).

<sup>195</sup> *See Briscoe*, 460 U.S. at 333.

<sup>196</sup> *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014).

First, subpoenaed employees will self-censor their testimony as they walk the thin line between complying with the court's orders and not angering their employers. Second, employees who would otherwise want to voluntarily testify will choose not to do so if an employer threatens retaliation, since they know that once they are in court they will have a legal obligation to tell the truth.

This chilling effect is particularly troublesome given that, as the Court noted in *Pickering* and its progeny, public employees are “the members of the community most likely to have informed and definite opinions” on the subject.<sup>197</sup> Police officers, detectives, and other similarly situated public employees are the members of our society most likely to have informed opinions as to what the facts of a particular investigation are, or whether a particular suspect truly is guilty or not. If a public employer acts to protect a suspect, say similar to what Bianchi did in *Chrzanowski*,<sup>198</sup> that obviously chills the well-informed opinion of the officer who conducted the investigation and discovered the criminality of Bianchi's family members. This is precisely the type of adverse influence that courts at common law and the Court in *Briscoe* tried to avoid by providing civil damage immunity for truthful testimony. The great constitutional and public interest to “every man's evidence” requires “that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.”<sup>199</sup> Not protecting the sworn testimony of a public employee undoubtedly places substantial obstructions in this path.

Further, a government employer will rarely have a compelling managerial interest in censoring a public employee from testifying. On the other hand, the constitutional rights of due process of law place an overwhelming social value on this speech. This is because unlike an internal memorandum made pursuant to ordinary duties, a witness's truthful testimony can decide the outcome of a case: it can mean the difference between awarding damages in a simple tort case, or an individual losing his rights to life, liberty, or property in a

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<sup>197</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

<sup>198</sup> *Chrzanowski v. Bianchi*, 725 F.3d 734, 736 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2870 (2014).

<sup>199</sup> *Briscoe*, 460 U.S. at 337. By adopting this common law principle, the *Briscoe* Court understood that such outside pressures on the testimonial process would serve only to undermine the “vital process of justice” which “must continue unceasingly; a single cessation typifies the prostration of society; a series would involve its dissolution.” 4 WIGMORE, *supra* note 95, § 2192, at 651; *see also id.* § 2195, at 659 (arguing that the duty to testify is temporarily paramount and witnesses “should be encouraged, by the removal of all obstacles, to fulfill it freely and promptly”).

criminal case.<sup>200</sup> It is in this respect, that sworn testimony is essential to our self-governance.<sup>201</sup>

Perhaps in some rare circumstance, such as in the realm of national security, the government in its role as an employer may articulate an important government interest requiring utmost confidentiality. And under such circumstances, the government employer may truly possess a strong managerial discretionary interest in curtailing the public employee's speech. But as shown by the Court in *Nixon*, such national security interests must be balanced against the interests of the public in due process of law and justice. The Court can provide a bright-line exception when such high stakes are present. By and large, however, application of the *Garcetti* rule to a public employee's truthful testimony completely denies speech in the name of a disputable managerial interest. As such, contrary to *Garcetti*'s reasoning, it chills the public employee's ability to contribute to the public discourse and, as a result, undermines the significant societal value contained in the testimonial process. Therefore, public employees testifying pursuant to ordinary duties must speak as citizens.

### 3. The Courts Already Control the Testimonial Process

Finally, the majority in *Garcetti* reasoned that extending First Amendment protection to public employee speech made pursuant to official duties would commit the courts "to a new, permanent, and intrusive role," of constant "oversight of communications between and among government employees and their superiors in the course of official business."<sup>202</sup> This, the majority found, would be "inconsistent with sound principles of federalism and the separation of powers."<sup>203</sup> In effect, the Court favored a bright-line rule fearing that a case-by-case *Pickering-Connick* balancing approach in such situations would create unnecessary entanglement.

But this rationale is inapposite in the context of truthful testimony. Unlike an internal memorandum written pursuant to daily employment responsibilities, truthful testimony made pursuant to ordinary job duties has a very "relevant analogue to speech by citizens

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<sup>200</sup> See, e.g., *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 94 (1964), *abrogated by* *United States v. Balsys*, 524 U.S. 666, 688 (1998) (noting the importance of testimony in the discovery of "certain crimes for which evidence would not otherwise be available").

<sup>201</sup> See *Murphy*, 378 U.S. at 93-94. See also 4 WIGMORE, *supra* note 95, § 2192, at 651 ("The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness.").

<sup>202</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

<sup>203</sup> *Id.*

who are not government employees.<sup>204</sup> Regardless of whether a public employee testifies pursuant to an ordinary job duty or not, it is within the sole discretion of the courts, not the government employer, when and how a witness may testify in a judicial proceeding.<sup>205</sup>

For instance, the courts, through the statutory power of subpoena, have the sole authority to compel citizens to appear in a judicial proceeding and may enforce this compulsory process through the power of contempt.<sup>206</sup> Once a citizen is in court, the courts control what the witness may say through mechanisms such as the Federal Rules of Evidence and the duty to testify truthfully.<sup>207</sup> Additionally, it is also axiomatic that no one, not even the government in its capacity as an employer, can force a witness to not testify or to lie during testimony.<sup>208</sup>

Thus, it is clear that testimony in judicial proceedings is not determined by a government employer's managerial discretion. Only the courts can compel citizens to testify, provide the procedures for allowing what witnesses may or may not say, and discipline witnesses for not complying with its rules. Coupled with the fact that the government employer cannot influence or tell its employee what to say in court, it is evident that protecting truthful testimony would not "commit state and federal courts to a new, permanent, and intrusive role,"<sup>209</sup> as *Garcetti* posited. To the contrary, to permit a government employer to dictate when, how, and to what a public employee may testify would intrude upon the judicial branch's authority. As such, by carving a new bright-line rule out of *Garcetti* that protects testimony made pursuant to ordinary job duties, the Court will not be creating entanglement, but rather, will be eliminating it. Therefore, a government employer's "managerial discretion" can never pierce a court's authority to control the testimonial process and as a result, when a public employee provides sworn testimony, he speaks as a citizen, not a public employee.

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<sup>204</sup> *Id.* at 424.

<sup>205</sup> *See Blair v. United States*, 250 U.S. 273, 280 (1919) (noting that at the foundation of the federal government "the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States"); *see also* 4 WIGMORE, *supra* note 95, § 2195, at 653.

<sup>206</sup> *See* FED R. CIV. P. 45; FED R. CRIM. P. 17. *See also* 28 U.S.C.S. § 1826 (LexisNexis 2014); 18 U.S.C.S. § 401 (LexisNexis 2014).

<sup>207</sup> *See, e.g.*, 18 U.S.C.S. § 1621; *United States v. Mandujano*, 425 U.S. 564, 576 (1976) (plurality opinion) ("Perjured testimony is an obvious and flagrant affront to the basic concept of judicial proceedings.").

<sup>208</sup> *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) (citing 18 U.S.C. § 1512).

<sup>209</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).



## VI. CONCLUSION

Justice Sotomayor's *Lane* opinion paves the way for finding that when a public employee provides truthful testimony pursuant to ordinary job duties, he speaks as a citizen, not an employee. *Lane* narrows *Garcetti*'s reach by adding the qualifier "ordinary" and by providing guidance as to what constitutes speech made "pursuant to" those ordinary duties. Under these refinements, only on rare occasions will a public employee provide truthful testimony pursuant to ordinary job duties, limiting the lower court's ability to reach decisions such as *Huppert* and *Green*.

Additionally, even on those occasions where public employees testify pursuant to ordinary job duties, such as the thousands of police officers, detectives, and investigators that take the stand every year, the courts must extend First Amendment protections. *Lane*'s recognition of the independent citizen duty to testify provides the foundation needed for a future Supreme Court to find this speech protected, particularly because the *Garcetti* rationales do not apply in this context. Application of *Garcetti* violates a public employee's rights and liberties as a citizen given that sworn testimony made pursuant to ordinary job duties has a very "relevant analogue to speech by citizens who are not government employees"<sup>210</sup>—the right and duty to provide truthful testimony. The duty to provide truthful testimony is essential to our judicial system and not extending First Amendment protection to it will undoubtedly undermine its fundamental societal value by causing public employees, the members of society who are most likely to be well informed in the subject, to self-censor. Finally, it cannot be said that extending First Amendment protections to public employees in this context will commit the courts to a new intrusive role—the courts already hold the sole authority over witnesses and their testimony. To the contrary, allowing government employers to dictate the testimonial process will undermine the judiciary's authority and thus, will violate "sound principles of federalism and separation of powers."<sup>211</sup> By carving a bright-line rule out of *Garcetti* that protects testimony made pursuant to ordinary job duties, the Court will not open the door to entanglement, but rather, will be eliminating it.

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<sup>210</sup> *Id.* at 423.

<sup>211</sup> *Id.*