



2010

Huppert v. City of Pittsburg: The Contested Status of Police Officers' Subpoenaed Testimony After *Garcetti v. Ceballos*

Leslie Pope

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylj>

Recommended Citation

Leslie Pope, *Huppert v. City of Pittsburg: The Contested Status of Police Officers' Subpoenaed Testimony After Garcetti v. Ceballos*, 119 *YALE L.J.* (2010).

Available at: <https://digitalcommons.law.yale.edu/ylj/vol119/iss8/8>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

COMMENT

Huppert v. City of Pittsburg: The Contested Status of Police Officers' Subpoenaed Testimony After Garcetti v. Ceballos

Over forty years ago, *Pickering v. Board of Education* established that the speech of government employees who address a matter of public concern may be protected under the First Amendment.¹ In 2006, the Supreme Court significantly reduced the scope of that protection with its holding in *Garcetti v. Ceballos* that a government employee is not insulated from employer discipline for statements made pursuant to his official duties.² After *Garcetti*, the lower courts have had to determine, as a threshold inquiry, whether government employees who seek the protection of the First Amendment spoke as employees or as citizens.³

The Ninth Circuit's recent decision in *Huppert v. City of Pittsburg* has created a circuit split as to whether a police officer who testifies truthfully regarding information learned on the job in response to a subpoena speaks as a citizen or as an employee.⁴ In the immediate aftermath of *Garcetti*, the Third and Seventh Circuits each held that a police officer who testifies truthfully in

-
1. 391 U.S. 563, 574 (1968); see also *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465-66 (1995); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 142-43 (1983).
 2. 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").
 3. See, e.g., *Chaklos v. Stevens*, 560 F.3d 705, 711-12 (7th Cir. 2009) ("*Garcetti* requires a threshold determination regarding whether the public employee spoke in his capacity as a private citizen or as an employee.").
 4. 574 F.3d 696 (9th Cir. 2009).

response to a subpoena about information learned on the job speaks as a citizen and, therefore, his testimony is protected under the First Amendment.⁵ In *Huppert*, the Ninth Circuit rejected the reasoning of its sister circuits and held that such an officer speaks as an employee. The underlying disagreement among the courts of appeals is whether a police officer who testifies truthfully does so pursuant to the duty every citizen has to provide truthful testimony⁶ or pursuant to an overlapping duty police officers have in virtue of their employment as police officers.

Judge William Fletcher's dissenting opinion in *Huppert* invites a narrow holding not adopted by any circuit: classify a government employee's testimony as the speech of a citizen when the employee's subpoenaed testimony bears on a fellow employee's corruption. This Comment argues that this subset of testimony should be eligible for First Amendment protection under *Garcetti*. Part I reviews the majority and dissenting opinions in *Huppert* and criticizes these opinions for failing to grapple with the possibility that police officers may have a duty to give testimony in response to a subpoena both in virtue of their citizenship and in virtue of their employment as police officers. Part II argues that, under *Garcetti*'s distinction between citizen and employee speech, testimony should be classified as citizen speech. Part III recognizes that the "purpose of *Garcetti* was to allow government employers greater influence over speech that owes [its] existence to a public employee's professional responsibilities and that is damaging to the government's capacity to conduct public business"⁷ and argues that a government employer's interest in controlling employee speech is at its lowest ebb when employees give truthful testimony that sheds light on the corruption of colleagues in response to a subpoena.

I. HUPPERT V. CITY OF PITTSBURG

In 2004, Ron Huppert, a thirteen-year veteran of the Pittsburg, California Police Department (PPD) was subpoenaed to testify before a grand jury investigating corruption within the PPD. Although an FBI Agent working on the case assured Huppert that his actions in connection with the investigation

5. *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008); *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007).

6. *See, e.g., Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law.").

7. *Morales*, 494 F.3d at 598.

“were as an individual and not in [his] capacity as a member of the PPD,”⁸ the fact of Huppert’s testimony was well known within the PPD. The Chief of Police for the PPD “told [Huppert] he knew [Huppert] had testified before the grand jury.”⁹ Sometime after Huppert testified before the grand jury, he was transferred from gang crime to frauds and forgeries, a less desirable assignment. Huppert’s new supervisor instituted a policy requiring Huppert to write a report to close every case, criticized Huppert for minor errors, refused to allow Huppert to wear an outdated badge although other officers were permitted to do so, joked about firing Huppert, and removed a positive yearly evaluation from Huppert’s file. Huppert brought a § 1983 suit alleging that the police department had violated his First Amendment rights by retaliating against him in response to his grand jury testimony. The district court held that because Huppert’s grand jury testimony was the speech of an employee and, therefore, not protected by the First Amendment under *Garcetti*, he had no § 1983 claim. The Ninth Circuit affirmed.

A. Judge Tallman’s Majority Opinion

The Ninth Circuit, in an opinion by Judge Tallman, held that Huppert’s grand jury testimony was the speech of an employee because Huppert had a duty, as a police officer, to testify in front of a grand jury investigating crime.¹⁰ To support the proposition that such a duty exists, Judge Tallman cited an “oft-quoted passage”¹¹ from a 1939 California Court of Appeal opinion, *Christal v. Police Commission of City and County of San Francisco*,¹² that includes among the duties of a police officer the duty to “testify freely” about incriminating facts in front of a grand jury investigating crime.¹³ Reasoning from the premise that Huppert’s employment as a police officer generated a duty to testify in front of the grand jury, Judge Tallman concluded that “any speech Huppert

8. *Huppert*, 574 F.3d at 713.

9. *Id.* at 700.

10. *Id.* at 707.

11. *Id.*

12. 92 P.2d 416 (Cal. Ct. App. 1939).

13. *Id.* at 419 (“When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury. It is for the performance of these duties that police officers are commissioned and paid by the community . . .”).

gave during his grand jury testimony was ‘pursuant to his duties as a police officer’” and, therefore, not protected by the First Amendment.¹⁴

Judge Tallman explicitly rejected the Third Circuit’s approach in *Reilly v. City of Atlantic City*.¹⁵ In *Reilly*, an Atlantic City police officer testified against another police officer accused of running a prostitution ring. Because the substance of the officer’s testimony was learned on the job, the question presented by *Reilly* was “whether truthful trial testimony arising out of [an] employee’s official responsibilities constitutes protected speech.”¹⁶ The Third Circuit held that because offering truthful testimony at trial is the responsibility of every citizen, a government employee who testifies “is not simply performing his or her job duties; rather, [he or she] is acting as a citizen.”¹⁷ In other words, if a government employee has both a duty as an employee and a duty as a citizen to give truthful testimony, his testimony will be citizen speech under *Reilly*. Judge Tallman argued that the Third Circuit’s decision to classify *all* truthful testimony as citizen speech, regardless of whether the testimony arose out of the witness’s job duties, is incompatible with *Garcetti*, which “drew a distinct line between speech pursuant to one’s job duties and speech in a private capacity.”¹⁸ He accused the *Reilly* court of “chipping away at the plain holding” of *Garcetti*.¹⁹ He failed to acknowledge or engage with the question of whether citizenship gives rise to a duty to give

-
14. *Huppert*, 574 F.3d at 708. Judge Tallman’s reliance on *Christal* and its progeny is surprising given that, as he recognizes, *Garcetti* instructed that any inquiry into whether an employee spoke pursuant to his official duties should be “practical and look beyond the job description to the duties the employee actually performs.” *Id.* at 704. In *Garcetti*, the Supreme Court indicated that “the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task in an employee’s professional duties for First Amendment purposes.” *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). It is not obvious that a police officer has a duty, as a police officer, to report or testify about corruption within the police department that employs him. In *Morales v. Jones*, a police officer “testified that, as a police officer, he could not do anything with his information or his suspicions” of corruption within the police department; he “had to give [the evidence of police corruption] to someone outside the police department.” 494 F.3d 590, 600-01 (7th Cir. 2007) (Rovner, J., concurring in part and dissenting in part). The Chief of Police of the same department, an alleged participant in the corruption, agreed that officers were not expected to report corruption within the department to a superior. *Id.* But see *Christal*, 92 P.2d at 419 (“When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors . . .”).
 15. 532 F.3d 216 (3d Cir. 2008).
 16. *Id.* at 230.
 17. *Id.* at 231 (internal quotations and citations omitted).
 18. *Huppert*, 574 F.3d at 708.
 19. *Id.*

truthful testimony and, if so, whether a police officer can ever give testimony in a criminal case pursuant to that duty.

Judge Tallman sought to distinguish the Seventh Circuit’s decision in *Morales v. Jones* on the grounds that the testimony at issue there was given during a civil, rather than criminal, proceeding.²⁰ In *Morales*, a Milwaukee police officer testified about a chief of police’s mistreatment of a fellow officer in a civil suit. Although the Seventh Circuit observed in *Morales* that testifying in a civil suit in response to a subpoena is “unquestionably” not among a police officer’s job duties,²¹ it did not regard this finding to be dispositive of the question of whether Morales’s testimony was the speech of a citizen or employee. The question presented in *Morales* was whether the fact that Morales had testified about statements he had made “pursuant to his official duties” transformed his otherwise protected testimony into unprotected employee speech.²² Because the Seventh Circuit held that it did not, *Morales*, like *Reilly*, stands for the proposition that the fact that the substance of a police officer’s testimony arose out of the performance of his job duties does not render his testimony employee speech.

B. Judge Fletcher’s Dissent

In his dissent, Judge Fletcher argued that Huppert’s grand jury testimony ought to be classified as citizen speech. Observing that a government employee has “a duty as a citizen” to give grand jury testimony in response to a subpoena that is “independent of any duty he or she might also have as an employee” to give the same testimony, Judge Fletcher reasoned that a government employee who testifies in front of a grand jury is “not performing an official duty within the meaning of [*Garcetti*].”²³ Rather, the testifying government employee is “exercising a right guaranteed to any citizen in a democratic society regardless of his status as a government employee.”²⁴ He characterized *Morales* and *Reilly* as standing for the proposition that a government employee who has an “independent legal duty” to speak “has First Amendment protection for speech uttered in the performance of that independent legal duty.”²⁵ Judge Fletcher, like the majority, failed to grapple with the possibility that Huppert may have

20. 494 F.3d 590 (7th Cir. 2007).

21. *Id.* at 598.

22. *Id.*

23. *Huppert*, 574 F.3d at 721 (Fletcher, J., dissenting).

24. *Id.* at 722 (internal quotation marks omitted).

25. *Id.*

had a freestanding duty to testify truthfully in front of the grand jury from two different sources, namely, his position as a police officer and his status as a citizen. However, Judge Fletcher's description of the duty an employee has as a citizen to give testimony as distinctly "independent" suggests that he may believe this duty outweighs any overlapping duties the employee has in virtue of his employment for the purposes of determining whether an employee's testimony is citizen speech or employee speech under *Garcetti*. Although Judge Fletcher's argument is capable of supporting the broad claim that all testimony should be classified as citizen speech, he concluded only that the majority should have held that "when an officer testifies before a grand jury pursuant to a subpoena concerning corruption by his or her fellow officers, the officer is not performing an official duty within the meaning of [*Garcetti*]." ²⁶

II. THE POLICE OFFICER AS WITNESS

Garcetti created an "artificial dichotomy" between a government employee in the role of citizen and in the role of employee.²⁷ *Huppert* is a hard case because a police officer arguably has both a duty as a citizen and a duty as an employee to provide truthful testimony about information learned on the job in response to a subpoena.²⁸ Consequently, he can be seen as adopting either or both roles while on the stand. If the officer's testimony must be classified as either citizen or employee speech under *Garcetti*, the question presented by *Huppert* is not "Which duty-generating role gave rise to the duty to speak in this case?" but rather, "Which duty-generating role controls in this case?" This Part argues that when a police officer provides truthful testimony, he should be understood to speak as a citizen under *Garcetti*.

The view that a police officer who gives testimony speaks as an employee is motivated by the idea that an employee cannot speak as a citizen about

26. *Id.*

27. Ramona L. Paetzold, *When Are Public Employees Not Really Public Employees? In the Aftermath of Garcetti v. Ceballos*, 7 FIRST AMENDMENT L. REV. 92, 96 (2008); see also Erwin Chemerinsky, *The Kennedy Court: October Term 2005*, 9 GREEN BAG 2d 335, 340 (2006) (describing the distinction between individuals speaking as citizens and as employees as "false and unprecedented"). Others have observed that public employees identify as both citizens and public employees even when performing their official duties. See Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 153; Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 455 (2009).

28. For a discussion of the duty of citizens to give testimony when called upon to do so regardless of occupation, see *United States v. Nixon*, 418 U.S. 683, 708-10 (1974); and *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972).

information he had an obligation to gather and use on the job. In *Garcetti*, the Supreme Court observed that a government employee does not act as a citizen when he engages in daily professional activities. A government employee who goes to work and performs the tasks he is paid to perform acts as an employee. Restricting speech that “owes its existence” to a government employee’s professional activities “does not infringe any liberties the employee might have enjoyed as a private citizen” because these limitations merely “reflect[] the exercise of employer control over what the employer itself has commissioned or created.”²⁹ Although it would be strange to consider Huppert’s testimony as “commissioned” by the PPD or as “work product” that he created in the course of the daily, professional activities for which he was paid by the PPD, it is evident that but for being a police officer Huppert would not have been in a position to provide useful testimony regarding corruption within the PPD. In this sense, the substance of Huppert’s testimony “owe[d] its existence” to Huppert’s job as a police officer.

A police officer who gives truthful testimony acts primarily as a citizen even if the substance of his testimony is fairly characterized as “ow[ing] its existence” to his employment as a police officer. As Judge Fletcher signaled in his dissent to *Huppert*, a police officer’s duty as a citizen to provide testimony can be described as distinctly “independent” because it preexists his adoption of the role of police officer and cannot be overridden by his superiors. Because “the citizen’s obligation to testify truthfully is no weaker when one is employed by the government,”³⁰ an officer’s superiors’ ability to influence his testimony flows in only one direction. While the officer’s superiors can impose a repetitive layer of duty on top of the officer’s preexisting obligation to provide truthful testimony, they cannot impose a contrary duty on the officer to lie or disobey the subpoena.

The Supreme Court has clearly stated that public employees do not shed their First Amendment rights simply because they are employed by the government.³¹ It would be incongruous for an employer’s decision to include fulfilling a preexisting duty to speak among an employee’s job duties to entitle the employer to retaliate against the employee for speech that would otherwise

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

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

31. *See, e.g., Connick v. Myers*, 461 U.S. 138, 142 (1983) (“[A] State cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.”); *cf. Reilly*, 532 F.3d at 231 (“[T]he First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one’s status as a public employee.”).

be protected by the First Amendment.³² An employer should not be permitted to weaken the protections available to an individual by creating a repetitive layer of duty that does not add to the employee's actual job duties.

Moreover, *Garcetti's* explication of the distinction between citizen and employee speech supports the view that testimony is citizen speech. In *Garcetti*, the Supreme Court assumed that "[w]hen a public employee speaks pursuant to his employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees."³³ Government employees' public statements made "outside the course of performing their official duties" are protected by the First Amendment "because [making public statements] is *the kind of activity engaged in by citizens who do not work for the government.*"³⁴ This explanation of the boundaries of protected speech suggests that giving testimony should not be understood to be employee speech because there is a relevant analogue to speech by citizens who are not government employees; citizens who are and who are not government employees have a duty to, and regularly do, testify in front of grand juries in response to subpoenas.³⁵ More broadly, these statements suggest that an employee who speaks as part of an activity that all citizens have a duty to engage in speaks as a citizen.

III. GOVERNMENT EMPLOYERS' INTEREST IN INFLUENCING EMPLOYEE SPEECH

The unique strength of Judge Fletcher's proposed holding is that it singles out the subset of testimony by government employees for which the policy rationale for leaving employee speech unprotected is weakest.³⁶ The Supreme

32. See *Huppert v. City of Pittsburg*, 574 F.3d 696, 722 (9th Cir. 2009) (Fletcher, J., dissenting) ("The fact that the employer may require its employees to obey a law that exists independent of the employment relationship does not allow the employer to retaliate against an employee for obeying that law."); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 581 (2008) (expressing concern that public employers will be able to "have it both ways: they can require their employees to report official misbehavior and illegal conduct, and at the same time avoid First Amendment protection for employees who do so").

33. *Garcetti*, 547 U.S. at 424.

34. *Id.* at 423 (emphasis added).

35. At least one lower court has read *Garcetti* this way. See *Skrutski v. Marut*, No. 3:CV-03-2280, 2006 WL 2660691, at *10 (M.D. Pa. Sept. 15, 2006) (finding that a public employee speaks as a citizen when a private citizen "possibly could" have engaged in the same speech).

36. George Rutherglen has suggested that a "realistic goal" of First Amendment jurisprudence might be to "identify those management interests that actually and legitimately support

Court observed in *Pickering* that the challenge presented by government employee speech cases “is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through employees.”³⁷ In *Garcetti*, the Supreme Court explained that this balance is achieved when government employees who speak on matters of public concern “face *only* those speech restrictions that are necessary for their employers to operate efficiently and effectively.”³⁸ This Part argues that government employers’ ability to discipline employees who testify about the corruption of colleagues in response to a subpoena does not significantly promote the efficient and effective working of government, but rather risks undermining it by suppressing truth telling.

In *Garcetti*, the Supreme Court held that a deputy district attorney’s memorandum recommending that his office drop a case because of police misconduct constituted employee speech and, hence, was not protected by the First Amendment. Writing for the majority, Justice Kennedy offered three policy reasons for leaving employee speech unprotected. First, government employers, “like private employers, need a significant degree of control over their employees’ words and actions.”³⁹ If the First Amendment were interpreted to give government employees “a right to perform their jobs however they see fit”⁴⁰ and thereby to “constitutionalize the employee grievance,”⁴¹ there would be “little chance for the efficient provision of public services.”⁴² Second, government employers must be able to ensure that communications by employees whose speech will be, or is likely to be, interpreted as official speech are “accurate, demonstrate sound judgment, and

government restrictions on the speech of its employees.” George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129, 168 (2008).

- 37. 391 U.S. 563, 568 (1968). In *Pickering*, the speech at issue was a teacher’s letter to a local newspaper addressing issues such as the funding policies of the school board. Because the letter had not been shown to interfere either with the teacher’s performance of his daily duties or the regular operation of the schools, the Court concluded that “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.” *Id.* at 573.
- 38. *Garcetti*, 547 U.S. at 419 (emphasis added).
- 39. *Id.* at 418.
- 40. *Id.* at 422.
- 41. *Id.* at 420 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)).
- 42. *Id.* at 418.

promote the employer's mission."⁴³ Accordingly, a supervisor ought to have "the authority to take proper corrective action" if an employee's speech is "inflammatory or misguided."⁴⁴ Third, displacing government employers' managerial discretion with judicial supervision "would commit state and federal 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."⁴⁵

Classifying a government employee's subpoenaed testimony about the corruption of colleagues as citizen speech would not implicate either the second or third of the Court's policy reasons for leaving employee speech unprotected in *Garcetti*. The tableau of colleagues testifying for or against one another in front of a jury suggests an atmosphere of internal conflict within a government department. The department would be free to claim that neither the defendant nor the witness represented the views of the department. Or, the department could support one employee and not the other. Furthermore, while a rule prohibiting government employers from disciplining an employee who gives testimony about the corruption of colleagues would displace a manager's discretion under a clearly defined set of facts, courts would not have to adopt a "permanent" and "intrusive" role in overseeing communications between government employees and their supervisors. At most, courts would oversee communications between government employees and their supervisors when an employee has been subpoenaed to testify about the corruption of a colleague. A court might limit its inquiry to cases in which there is evidence that the supervisor is aware of the subpoena or of the fact that the employee has given testimony against a colleague.

Only the first of *Garcetti*'s policy reasons for leaving employee speech unprotected—that a government employer must be able to control its employees in order to effectively and efficiently provide government services to the public—is potentially furthered by the Ninth Circuit's holding in *Huppert*. In *Huppert*, the PPD and the FBI disagreed as to whether Huppert's testimony enhanced the efficient and effective provision of police protection to the public (by bringing to light corruption within the PPD) or undermined it (by

43. *Id.* at 422-23. Lawrence Rosenthal has observed that *Garcetti* is "premised on a recognition that some public institutions cannot achieve otherwise constitutionally legitimate objectives—and therefore cannot be fairly held politically accountable for the manner in which they pursue such objectives—unless they are afforded the ability to control the speech of those within those institutions." Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 86-87 (2008).

44. *Garcetti*, 547 U.S. at 423.

45. *Id.* at 424.

disrupting the internal workings of the PPD). There is good reason to believe that subpoenaed testimony about the corruption of close colleagues is especially likely to bring to light corruption and unlikely to undermine the internal workings of a government employer. The testimony of the subpoenaed government employee has the potential to be uniquely useful to the factfinder. In contrast to the whistleblower who comes forward after being terminated, demoted, or denied a promotion, the subpoenaed employee is a reluctant whistleblower whose testimony is likely untainted by personal grievances, and because the subject of this testimony is the on-duty conduct of his colleagues, he is uniquely positioned to provide incriminating information.⁴⁶ Moreover, because the subpoena is by its nature coercive, the vexing choice between defection and silence in the face of misconduct is not the employee's own; accordingly, there is less reason for his employer and colleagues to interpret his testimony as disloyalty. Thus, while the risk that an employee's unapproved speech will be disruptive to the internal workings of his employer is not zero in the case of the employee who testifies about the corruption of colleagues, it is sufficiently low as to be easily outweighed by the gain to efficiency and effectiveness that results from having rooted out a corrupt employee or group of employees.

The *Huppert* decision leaves government employees with the “catch-22” of either not complying with a subpoena and being found in contempt of court, or testifying only to be the subject of retaliation. Judge Tallman claimed that state whistleblower statutes would fully protect government employees from the harsh consequences of this “catch-22.”⁴⁷ But, even if state whistleblower statutes do fully protect government employees against retaliation, Judge Tallman's acknowledgment that these statutes are needed to prevent injustice demonstrates that *Huppert* failed to “arrive at a balance” between the interests of government employees and the interests of the government as an employer.⁴⁸ *Huppert* sanctioned discipline that is not necessary for the efficient

46. See Amanda C. Leiter, “Whistle . . . and You've Got an Audience,” 36 *FORDHAM URB. L.J.* 747, 761 (2009) (arguing that the most useful whistleblowers have access to relevant information, have no political or personal axe to grind, and remain in good standing with their employer).

47. *Huppert v. City of Pittsburgh*, 574 F.3d 696, 710 (9th Cir. 2009). *But see Garcetti*, 547 U.S. at 440 (Souter, J., dissenting) (describing existing statutory whistleblower protections as “a patchwork, not a showing that worries may be remitted to legislatures for relief”); Ruben J. Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protection for Public Employees*, 7 *FIRST AMENDMENT L. REV.* 22, 25 (2008) (arguing that “statutory protection for whistleblowers can be ineffective and sometimes counterproductive for public employees”).

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

and effective working of government and, if unchecked by state whistleblower statutes, allows government employers to retaliate against employees who have had the bad luck of witnessing the corruption of colleagues and have been subpoenaed to testify about it.

CONCLUSION

In *Huppert*, the Ninth Circuit created a circuit split by classifying a government employee's subpoenaed testimony regarding the corruption of colleagues as employee speech. This Comment has argued that *Huppert* was wrongly decided under *Garcetti*. Not only is *Garcetti*'s distinction between citizen and employee speech best read as requiring that testimony be classified as citizen speech, but the policy reasons that motivated *Garcetti*'s holding that employee speech is unprotected by the First Amendment are also at their lowest ebb when a government employee gives subpoenaed testimony about the corruption of colleagues.

LESLIE POPE