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Cover Page Footnote

Associate Professor of Law, University of San Diego; S.J.D., 2006, LL.M., 2000, Harvard University; LL.B., 1998, Tel-Aviv University. I thank Bruce Green and Russ Pearce for inviting me to the Fordham Symposium and for their comments on my paper. I also thank Fred Zacharias and the other participants in the Symposium for their valuable insights. I presented parts of this essay at the law faculties of U.C. Hastings and Hebrew University and I am thankful to the participants of those workshops for their comments.

LAWYERING LOYALTIES: SPEECH RIGHTS AND DUTIES WITHIN TWENTY-FIRST-CENTURY NEW GOVERNANCE

*Orly Lobel**

INTRODUCTION

New governance approaches to regulatory policy and the internalization of law enforcement activities within corporations have altered the rules of the game. Employees must be loyal to their organization and obey the rules set by their employer, but they must also recognize that employment entails serving two masters—their organization and the legal regime that constitutes it.¹ Acting legally is within the reasonable role construction of any organizational player. Professional life in general requires both ethical and organizational obligations, establishing dual membership and placing restrictions on an organization's claim over the individual.² For lawyers in particular, being an organizational player, a responsible citizen, and an ethical professional may present significant challenges. Further, such dilemmas may also constrain the decisions and disclosures made by the attorney's employer. Although the right to discharge one's attorney has always been almost absolute, a growing body of federal and state law protects whistleblowers from being discharged for reporting organizational misconduct. While the traditional view has been to exclude attorneys from such protections, an increasing number of jurisdictions have begun to include them.³ Moreover, new federal and state regulations impose direct duties on lawyers to act as gatekeepers over their companies.

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1. Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 96 CAL. L. REV. (forthcoming 2009).

2. W. Richard Scott, *Professionals in Bureaucracies—Areas of Conflict*, in PROFESSIONALIZATION 265–75 (Howard M. Vollmer & Donald L. Mills eds., 1966).

3. See *infra* text accompanying note 87 on the shift from the Illinois paradigm in *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991), which excludes in-house lawyers from protections, to extending wrongful termination protections to lawyers in various states including Texas, Massachusetts, Pennsylvania, Alabama, Connecticut, Florida, Kansas, Montana, New York, New Jersey, Tennessee, Texas, Utah, and Virginia. *Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005) (Texas); *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7

In analyzing these developments, this essay studies competing notions of lawyer loyalty. It aims to illuminate a paradigm shift in the law's conception of the attorney-client relationship, from one of absolute privilege to a more complex set of competing obligations. Part I begins by describing the increased expectations from organizations to self-regulate and monitor their own legal compliance and ethical practices. Part II then discusses developments in whistleblower protections and reporting duties for both public sector attorneys and in-house corporate counsel. In particular, this essay critiques the recent Supreme Court decision in *Garcetti v. Ceballos*,⁴ which restricted the speech rights of government prosecutors. This section also discusses the split in the courts over the whistleblower protections afforded to private counsel. Part III develops the argument that internal channels of reporting misconduct to supervisors or boards strike the best balance between new governance approaches to regulation and client-attorney privileges. Consequently, the law should support such reporting structures and discourage other forms of more disruptive disloyalty. Within organizational practices that rely on self-regulation, lawyers must take a broader perspective than merely their client's immediate requests. At the same time, emphasizing internal communication within the corporation or government agency allows the organization to localize the investigation and to build an environment of trust and ethical conduct.

I. NEW GOVERNANCE APPROACHES TO ORGANIZATIONAL COMPLIANCE

In recent years, a new approach to regulation has emerged in both practice and in scholarly inquiry that is often referred to as "New Governance."⁵ This vision of regulatory governance attempts to reconcile the tension between regulatory inefficiency by big government and the continuing need for public response to social challenges. Politically, national governments, fraught with budgetary constraints and interest-based

(1st Cir. 1998) (Massachusetts); *Kachmar v. Sunguard Data Sys. Inc.*, 109 F.3d 173 (3d Cir. 1997) (Pennsylvania); *Goffer v. Marbury*, 956 F.2d 1045 (11th Cir. 1992) (Alabama); *Lewis v. Nationwide Mut. Ins. Co.*, 2003 WL 1746050 (D. Conn. Mar. 18, 2003) (Connecticut); *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So. 2d 607 (Fla. Dist. Ct. App. 2004) (Florida); *Heckman v. Zurich Holding Co. of Am.*, 242 F.R.D. 606 (D. Kan. 2007) (Kansas); *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161 (Mass. 1995) (Massachusetts); *Burkhart v. Semitool Inc.*, 5 P.3d 1031 (Mont. 2000) (Montana); *Van Asdale v. Int'l Game, Tech.*, 498 F. Supp. 2d 1321 (D. Nev. 2007) (Nevada); *Parker v. M & T Chems., Inc.*, 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989) (New Jersey); *Wieder v. Skala*, 609 N.E.2d 105 (N.Y. 1992) (New York); *Meadows v. Kindercare Learning Ctrs.*, 2004 U.S. Dist. LEXIS 20450 (D. Or. Sept. 29, 2004) (Oregon); *Crews v. Buckman Labs Int'l Inc.*, 78 S.W.3d 852 (Tenn. 2002) (Tennessee); *Willy v. Coastal States Mgmt. Co.*, 939 S.W.2d 193 (Tex. Ct. App. 1996) (Texas); *Spratley v. State Farm Mut. Auto Ins. Co.*, 78 P.3d 603 (Utah 2003) (Utah); *U.S. ex rel. Doe v. X Corp.*, 862 F. Supp. 1502 (E.D. Va. 1994) (Virginia).

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

5. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) [hereinafter Lobel, *The Renew Deal*]; Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498 (2004).

resistance, aim to benefit from the cost sharing and increased efficiency that results from this relationship with private organizations. Scholars therefore describe the recent “rise of a ‘new regulatory state,’ where states do not so much run things as regulate them or monitor self-regulation.”⁶ In the legal academic literature, new governance scholarship is an effort to synthesize insights from the empirical field of regulatory research with the changes in the new economy. It signifies the range of regulatory approaches that can help to enhance industry cooperation and self-regulation.⁷ In other words, new governance is “an umbrella term covering a kind of interaction between the state, regulated entities, and other stakeholders that has a number of desiderata—public participation, data provision, transparency, benchmarking, sharing of best practices, fora for deliberation on ends and means, and autonomy and flexibility for those subject to regulation.”⁸

New governance scholars suggest that instead of focusing on substantive prohibitions and adversarial enforcement, regulators can actively involve firms in the legal process, including the processes of interpreting and complying with legal norms. Moving beyond theory, many administrative agencies are currently experimenting with such shifts from extensive elaboration of prohibitive standards and high rates of inspection to facilitation of self-regulation and programs of collaborative, semivoluntary compliance.⁹ The reasons for encouraging collaborative experimentation are multiple. Advocates of new governance view adversarial relations as potentially reducing the willingness of firms to share information and search in good faith for mutually beneficial compliance systems. To this end, agencies enlist private corporations to self-regulate actively by self-identifying problems and risks and formalizing possible solutions. In turn, the agency offers consultation and assistance, as well as practical and reputational rewards. Such incentives include safe havens from surprise inspections and sanctions, flexibility and variance accommodation, and public certification of exemplary practices. In order to allow such continuous improvement through the self-monitoring of corporations, government regulations are frequently phrased as norms rather than rigid rules. The norms are at times deliberately ambiguous and open-ended to allow flexibility in application. Instead of commanding specific details of corporate behavior, agencies increasingly prefer to use broad policy goals such as “risk management” that allow private entities to implement and

6. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 28 (2000).

7. See generally On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098 (2008); Lobel, *The Renew Deal*, *supra* note 5.

8. Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 834 (2008) (reviewing LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006); LISA HEINZERLING & MARK V. TUSHNET, *THE REGULATORY AND ADMINISTRATIVE STATE: MATERIALS, CASES, COMMENTS* (2006)).

9. Orly Lobel, *Governing Occupational Safety in the United States*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 8, at 269.

interpret these mandates.¹⁰ In addition, regulatory agencies encourage private participation by disseminating information to the public.

New governance approaches to regulation thus rely on organizations to assume the role of private enforcers who monitor compliance and engage in continuous learning about the best practices. Corporations are expected to undertake preventative and multilevel efforts rather than passively await top-down command and control regulation. New governance scholarship emphasizes, however, that if corporations fail in these tasks, the threat of traditional enforcement should still be available. In their book *Responsive Regulation*, Ian Ayres and John Braithwaite describe this regime as “enforced self-regulation”: where a regulatory agency negotiates particularized regulations with individual firms, but still retains the threat of imposing more coercive rules if the firm fails to self-enforce and cooperate.¹¹ *Responsive Regulation* depicts an advanced regulatory pyramid where self-regulation constitutes the base of the pyramid, moving up to escalated forms of enforcement, with command regulation and punishment at the top.¹² The pyramid supports company-specific regulatory plans and encourages innovation by allowing the company to choose the least costly solutions. The regulator asks corporations to take initiatives but then holds them accountable for their own self-regulation. Professor Christine Parker terms this type of ordering “meta-regulation,” where the law sets out to constitute corporate consciences by “getting companies ‘to want to do what they should do.’”¹³ In other words, the law becomes more process oriented, allowing government, industry, and civil society groups to share responsibility for achieving policy goals. Government agencies shift their role to facilitators of implementation while industry takes on a more active role of self-governance.

Building on organizational and motivational studies, regulators also increasingly focus on practical ways of fostering individual and institutional normative behaviors. There is growing empirical evidence that institutional culture and design have a significant impact on the likelihood that individuals will engage in unlawful behavior.¹⁴ Moreover, there are some indications, albeit limited, that an emphasis on a culture of regulatory compliance can carry over from one policy area to another. In this way, if a firm is focused on the legitimacy of a safe workplace, it may also be more

10. Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 380 (2006).

11. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 4–5, 35–41 (1992).

12. *Id.* at 39.

13. Christine Parker, *Meta-regulation: Legal Accountability for Corporate Social Responsibility*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 207, 208 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007) (quoting P. SELZNICK, *THE COMMUNITARIAN PERSUASION* 102 (2002)).

14. Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. & GOVERNANCE 165, 171–81 (2008) (demonstrating the impact of institutional processes on individual decisions about whether to blow the whistle on illegality).

likely to emphasize environmental responsibility.¹⁵ Agencies have begun to draw practical conclusions from these insights. For example, in the discrimination context, policymakers increasingly recognize that “[e]mployers’ organizational choices can both facilitate and constrain the development of discriminatory work cultures.”¹⁶ Therefore, the Equal Employment Opportunity Commission (EEOC) and some state civil rights agencies have recently guided workplaces to engage in prevention through recurrent antidiscrimination training programs. Similarly, the Occupational Safety and Health Administration (OSHA) offers programs requiring private companies to identify, investigate, and monitor their own safety risks and near-miss accidents in order to acquire certification as “beyond compliance” members of the OSHA collaborative.¹⁷ In addition to civil rights enforcement and health and safety regulation, other areas of regulation currently experimenting with new governance approaches include food safety control,¹⁸ endangered species regulations,¹⁹ tax programs,²⁰ and securities regulation.²¹ An example of new governance approaches can also be found in the Federal Organizational Sentencing Guidelines (OSG), which mitigate a corporation’s liability when the corporation demonstrates adequate internal processes for investigating wrongdoing.²²

The emphasis on self-regulation raises the significance of the individual employee’s ability to report illegal conduct. Even more than in the past, protections for employee whistleblowing are necessary to complement programs of systematic self-monitoring. Employees currently find protections against retaliation for blowing the whistle in a broad range of state and federal statutes and common-law doctrines. Yet, whistleblower protections have developed as a patchwork and, as a consequence, vary significantly in their scope and application.²³ At the state level, most statutory whistleblower protections and common-law wrongful termination doctrines include only external reporting, with variations as to which designated external recipient is included. However, more recent laws such as the Federal Sarbanes Oxley Act—enacted following the Enron debacle—

15. Lobel, *supra* note 1 (manuscript at 174).

16. Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 650 (2005).

17. Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1124 (2005).

18. William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 8, at 36, 55.

19. Craig W. Thomas, *Habitat Conservation Planning*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 144 (Archon Fung & Erik Olin Wright eds., 2003).

20. Sagit Leviner, *A New Era of Tax Enforcement: From ‘Big Stick’ to Responsive Regulation*, 42 U. MICH. J.L. REFORM (forthcoming).

21. Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1 *passim* (2008).

22. Lobel, *supra* note 1 (manuscript at 181).

23. *Id.*

also offer protection for internal reporting. These internal protections are particularly crucial in view of research findings that, contrary to the traditional legal approach to protections, employees are more likely to choose internal reporting systems. This is not surprising given that the negative individual and organizational consequences of this route are often less harsh than choosing external reporting.²⁴

Elsewhere I have argued that by emphasizing internal problem solving over top-down government enforcement, the approach of internal reporting sends a message that a culture of compliance can be created and maintained within corporations.²⁵ Organizations that emphasize internal procedural justice are likely to enhance their employees' willingness to follow corporate strategic policy decisions and abide by company rules.²⁶ Moreover, when employees view an internal reporting procedure as effective and fair, they are more likely to exercise individual dissent rather than opt for external reporting.²⁷ At the same time, I have argued that if it is likely that internal whistleblowing would result in an attempt to conceal the wrongdoing or induce retaliation, then external reporting should be permitted as a first step.²⁸ Such failed reporting systems are common where the body that receives reports does not have sufficient independence, such as when companies use the regular management channels as the single process for reporting concerns.²⁹ Recent laws attempt to address this concern by requiring that internal reporting systems institute channels that are outside of an employee's immediate chain of command. For example, under Sarbanes-Oxley, reports must go directly to the board of directors.³⁰ Additional employee protections are also provided by anonymous reporting³¹ and "bypass mechanisms,"³² which offer employees independent evaluations after they have reported violations by their direct supervisor.

24. See generally Feldman & Lobel, *supra* note 14.

25. Lobel, *supra* note 1 (manuscript at 173).

26. E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 187 (1988); Chan W. Kim & Renee A. Mauborgne, *Procedural Justice, Attitudes, and Subsidiary Top Management Compliance with Multinationals' Corporate Strategic Decisions*, 36 *ACAD. MGMT. J.* 502 (1993).

27. Elletta Sangrey Callahan & John W. Collins, *Employee Attitudes Toward Whistleblowing: Management and Public Policy Implications*, 11 *J. BUS. ETHICS* 939 (1992); Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 *AM. BUS. L.J.* 151, 165-66 (1994).

28. Lobel, *supra* note 1 (manuscript at 219-21).

29. *Id.*

30. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 *COLUM. L. REV.* 319, 375-76 (2005) (describing the Sarbanes Oxley Act's signaling effect in strengthening internal reporting systems).

31. Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. 78j-1 (2006).

32. Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 *U.C. DAVIS L. REV.* 529, 625-26 (2006).

These recent developments and programs signify the rise of a new approach to regulation that relies on internal monitoring, reporting, and problem solving. Lawyers are central actors within organizations and the need for their internal dissent exemplifies this goal of effective governance. The central risk of reliance on internal compliance mechanisms is that of cosmetic compliance—allowing corporations safe havens from regulatory enforcement without any real accountability or cooperation.³³ With recent scandals in both the private and public sectors being exposed by internal whistleblowers, courts emphasize that “[p]ublic policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy.”³⁴ Cases like *Garcetti v. Ceballos*³⁵ and *Balla v. Gamboro*,³⁶ discussed in Part II, exemplify circumstances of a lawyer caught “on the horns of a dilemma.”³⁷

II. HOBSON’S CHOICE: A TALE OF TWO SECTORS

A. Public Sector Attorneys

In May 2006, in a decision that has been described as the “worst” whistleblower decision,³⁸ the Supreme Court held that a district attorney who writes a memo to his supervisor about severe misrepresentations plaguing an affidavit is not constitutionally protected from retaliation. In a 5-4 decision, the majority of Justices stated 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.”³⁹ Just as state courts have been vastly divided on whether to extend external

33. Richard E. Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 1008–09 (2008) (citing Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. Q. 487, 497 (2003)).

34. *Joiner v. Benton Cmty. Bank*, 411 N.E.2d 229, 231 (Ill. 1980).

35. 547 U.S. 410 (2006); see *infra* Part II.A.

36. 584 N.E.2d 104 (Ill. 1991); see *infra* Part II.B.

37. Brief for Ass’n of Deputy Dist. Attorneys & Cal. Prosecutors Ass’n as Amici Curiae in Support of Respondent at 2, *Garcetti*, 547 U.S. 410 (No. 04-473), 2005 WL 1767121 [hereinafter Deputy Dist. Attorneys Amici Brief].

38. Joyce Howard Price, *Justices Ease Whistleblower Protections: Critics Say 5-4 Ruling Will Tie Hands of Civil Workers*, WASH. TIMES, May 31, 2006, at A1 (citing Stephen Kohn, chair of the board of the National Whistleblower Center, calling *Garcetti* the “worst Supreme Court ruling on whistleblowing in 50 years”). Representatives of the National Whistleblower Center testified before the U.S. House of Representatives Committee on Government Reform in response to *Garcetti v. Ceballos*: “The *Garcetti v. Ceballos* decision represents the most significant judicial threat to employee whistleblowers in nearly forty years, not only on the basis of its holding, but on the tone it has set for countless lower court rulings. Legislative action is now necessary.” *What Price Free Speech?: Whistleblowers and the Garcetti v. Ceballos Decision: Before the H. Comm. On Government Reform*, 109th Cong. 1 (2006) [hereinafter *Whistleblower Hearing*] (testimony of Stephen M. Kohn, Chair, Board of Directors, National Whistleblower Center), available at <http://www.whistleblowers.org/storage/whistleblowers/documents/ceballos.final.testimony.pdf>.

39. *Garcetti*, 547 U.S. at 421.

whistleblower protections provided to employees who report wrongdoing internally, the Supreme Court was split five to four on whether internal dissent of public employees should receive constitutional protection.

Garcetti has now become the leading Supreme Court decision on First Amendment speech in public sector employment. It is not surprising that the case concerned the speech of a government attorney, as attorneys are often faced with significant conflicts between their professional obligations and their role as employees. Like many prosecutors, Richard Ceballos found himself in a situation where his professional responsibilities required him to stand against his department supervisors. Ceballos was a supervising district attorney in Los Angeles when he was contacted by a defense council claiming that a warrant in his client's file contained serious misrepresentations. In his capacity, Ceballos exercised certain supervisory responsibilities over other lawyers. According to the facts of the case, it was not unusual for defense attorneys to ask deputy district attorneys to investigate pending cases. After receiving the call, Ceballos conducted his own investigation and determined that there were indeed serious misrepresentations and inaccuracies in the affidavit. He then wrote a memorandum recommending the dismissal of the case on the basis of governmental misconduct and later met with his supervisors to discuss the memo. According to Ceballos, the meeting quickly became heated and accusatory toward him. Following the meeting, Ceballos's supervisor made a decision to proceed with the prosecution and, during the trial, Ceballos was called by the defense to testify about his judgment that the warrant was unlawful. Although the trial court accepted the claims about misrepresentations in obtaining the search warrant, it denied the motion to suppress, finding grounds independent of the challenged material sufficient to show probable cause for the warrant.⁴⁰

After the trial, Ceballos claimed that his supervisor retaliated against him by reassigning his cases, transferring him to a distant courthouse, and denying him any promotion opportunities.⁴¹ In response, Ceballos brought a § 1983 claim asserting violation of First Amendment rights.⁴² The claim was dismissed by the district court on the grounds that the memorandum Ceballos wrote as a district attorney was not constitutionally protected.⁴³ The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the memo intended "to bring wrongdoing to light" and was "inherently a matter of public concern" subject to First Amendment protection.⁴⁴ The Ninth

40. *Id.* at 413–14.

41. *Id.* at 415.

42. *Id.*

43. *Id.*

44. *Ceballos v. Garcetti*, 361 F.3d 1168, 1174 (9th Cir. 2004). The U.S. Court of Appeals for the Ninth Circuit relied on *Roth v. Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1998), where an employee who was hired with the express purpose of reporting internal waste and corruption, was demoted in response to such reporting. In the *Roth* case, the Ninth Circuit held that, while Barry Roth's statements were made pursuant to his

Circuit proceeded to conduct a balancing test between employee speech and the interest of the employer. The court found that the balance fell in favor of Ceballos because his employer “failed even to suggest disruption or inefficiency in the workings of the District Attorney’s Office” as a result of the memorandum.⁴⁵

On appeal however, the Supreme Court, in a 5-4 decision, reversed the Ninth Circuit’s holding. The majority held that, when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes.⁴⁶ Because the memo was made pursuant to Ceballos’s duties as a deputy district attorney, the speech “owes its existence to a public employee’s professional responsibilities,”⁴⁷ and therefore restricting it does not violate the employee’s speech rights as a private citizen. The court elaborated that,

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.⁴⁸

The dissent rejected this interpretation, describing it as “senseless” to allow constitutional protections for “exactly the same words [to] hinge on whether they fall within a job description.”⁴⁹ Ceballos’s job was to “enforce the law by constitutional action: to exercise the county government’s prosecutorial power by acting honestly, competently, and constitutionally.”⁵⁰ As a government prosecutor, Ceballos worked under the Codes of Ethics for Federal Government Service, which state that “[a]ny person in Government service should . . . [p]ut loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department,” and shall “[e]xpose corruption wherever discovered.”⁵¹ The dissent explained

professional job responsibilities, his speech was protected because it was about a matter of public concern. *Ceballos*, 361 F.3d at 1175 (citing *Roth*, 856 F.2d at 1406).

45. *Ceballos*, 361 F.3d at 1180. In a concurring opinion, Judge Diarmuid O’Scannlain urged his court to revisit the precedent on which they relied so that, “when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right.” *Id.* at 1189 (O’Scannlain, J., concurring). Judge O’Scannlain distinguished between “speech offered by a public employee acting *as an employee* in carrying out his or her ordinary job duties” and speech “spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import.” *Id.* at 1186–87.

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

47. *Id.* at 411.

48. *Id.* at 422.

49. *Id.* at 427 (Stevens, J., dissenting).

50. *Id.* at 437 (Souter, J., dissenting).

51. Code of Ethics for Government Service, H.R. Con. Res. 175, 85th Cong. (1958). Justice David Souter offered examples of a public auditor who discovers the embezzlement of public funds; a building inspector who reports an attempt to bribe him, and a law enforcement officer who expressly balks at a superior’s order to violate constitutional rights he is sworn to protect—all of which would not be afforded First Amendment protection

that a government employee is first and foremost charged with respect to her obligations as a citizen:

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's "object . . . to unite [m]y avocation and my vocation;" these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.⁵²

Even though a government employer has an interest in effective governance and control over its employees, the dissent emphasized that the line between official job duties and private subject matter was "an odd place to draw a distinction."⁵³ Employers could in fact further restrict the rights of employees and avoid this distinction by creating excessively broad job descriptions.⁵⁴ Further, in the dissent's opinion, the majority created a "perverse" incentive for employees to bypass their employer-specified channels of resolution and voice their concerns publicly, namely through the media.⁵⁵ In his dissent, Justice Stephen Breyer suggested specifically that, when government employee speech is required by professional and special constitutional obligation, "the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available."⁵⁶ In particular, in this case, the speech in the memorandum fell

against retaliation under the majority ruling. *Garcetti*, 547 U.S. at 433–34 (Souter, J., dissenting).

52. *Garcetti*, 547 U.S. at 432 (Souter, J., dissenting) (alteration in original) (quoting ROBERT FROST, *Two Tramps in Mud Time*, in COLLECTED POEMS, PROSE, AND PLAYS 251, 252 (Richard Poirier & Mark Richardson eds., 1995)). Justice Souter continues by citing the job descriptions on the website of the District Attorney's office: "Not to put too fine a point on it, the Human Resources Division of the Los Angeles County District Attorney's Office, Ceballos's employer, is telling anyone who will listen that its work 'provides the personal satisfaction and fulfillment that comes with knowing you are contributing essential services to the citizens of Los Angeles County.'" *Id.* at 432 n.4 (citing Los Angeles County District Attorney's Office, Career Opportunities, <http://da.co.la.ca.us/hr/default.htm> (last visited Feb. 21, 2009)).

53. *Id.* at 430.

54. *Id.* at 424.

55. *Id.* at 427 (Stevens, J., dissenting). Early decisions had adopted a per se rule that public employees had no First Amendment rights as employees, reflecting Justice Oliver Wendell Holmes's famous assertion that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). Later decisions overturned the rule, recognizing that "[g]overnment employees are often in the best position to know what ails the agencies for which they work." *Waters v. Churchill*, 511 U.S. 661, 674 (1994). The leading ruling before *Garcetti* was that an employee speaks as a citizen when raising matters of public concern. The *Pickering* test balanced "the interests of the [employee], as a citizen, in commenting upon matters of public concern [against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Thus, the balancing test took into account the employer's institutional efficiency and the content, manner, time, and place of the speech. *Waters*, 511 U.S. at 674.

56. *Garcetti*, 547 U.S. at 447 (Breyer, J., dissenting).

within the scope of the attorney's professional obligations.⁵⁷ Justice Breyer thus emphasized that the speech was that of a lawyer subject to independent regulation by professional canons that provide an obligation to speak in certain instances, thereby diminishing the government's own interest in forbidding such speech. Justice Breyer cited prior decisions that emphasized this result. For example, in *Polk County v. Dodson*, the Court explained that "a public defender is not amenable to administrative direction in the same sense as other employees of the State."⁵⁸ Justice Breyer also emphasized that government professional employees have specific constitutional speech obligations: "A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession."⁵⁹

Finally, while the majority thought constitutional protections were unnecessary in light of the "powerful network of legislative enactments—such as whistleblower protection laws and labor codes—available to those who seek to expose wrongdoing,"⁶⁰ the dissent described existing statutory whistleblower protections as a "patchwork, not a showing that worries may be remitted to legislatures for relief."⁶¹ In particular, whistleblowers were often left unprotected because internal speech addressing government wrongdoing falls frequently outside the statutory and judicial definitions of whistleblowing, "defined in the classic sense of exposing an official's fault to a third party or to the public."⁶²

Since the *Garcetti* decision in 2006, courts have attempted to grapple with the breadth of the holding and its implications.⁶³ For example, in 2007, the Third Circuit dismissed a constitutional retaliation case by Delaware state troopers who reported safety issues to their commander.⁶⁴ The court relied on *Garcetti v. Ceballos* to bar the retaliation claim,

57. *Id.* at 446–47.

58. *Polk County v. Dodson*, 454 U.S. 312, 321 (1981); see also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) ("Restricting [Legal Services Corporation] attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys . . .").

59. *Garcetti*, 547 U.S. at 447 (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963)).

60. *Id.* at 425.

61. *Id.* at 440. Justice Souter further asserted that constitutional protections should not depend on "the vagaries of state or federal law." *Id.* (citing *Bd. of Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 680 (1996)).

62. *Garcetti*, 547 U.S. at 440.

63. For example, in *Ruotolo v. New York*, a safety officer drafted a report detailing significant health and environmental issues within his precinct. The officer claimed that the report led to retaliation against him, and he sued under the First Amendment. Dismissing the case, the court held that because Angelo Ruotolo was acting within the scope of his employment, his speech was not protected. In *Ruotolo*, the report contained information regarding serious health and environmental threats to the community, and Ruotolo, the person charged with the task of locating and reporting these problems, was fired for doing his job. 514 F.3d 184 (2d Cir. 2008).

64. *Foraker v. Chaffinch*, 501 F.3d 231, 247 (3d Cir. 2007).

reasoning that, because the troopers' job included reporting safety concerns, their speech was not constitutionally protected.⁶⁵ In another case, the Seventh Circuit denied constitutional speech rights to an employee upon determining that the speech occurred while the employee was "on duty, in uniform, and engaged in discussion with her superiors, all of whom had just emerged from [a] briefing."⁶⁶

The *Garcetti* decision has been highly criticized by scholars, activists, and the media, and there have been bills introduced to overturn the ruling. Steven Shapiro, Legal Director for the American Civil Liberties Union (ACLU), responded to the holding by stating the fear that "[i]n an era of excessive government secrecy, the [C]ourt has made it easier to engage in a government cover-up by discouraging internal whistle-blowing."⁶⁷ One scholar explains the problematic construction of the holding in the following way: "internal employee whistle-blowing and dissent often emerge from a deeply personal sense of civic and moral obligation, not just the dutiful performance of the job one is paid for."⁶⁸ Other commentators point to the socially charged context of retaliation in this case, noting that "Ceballos delivered a well-founded, professionally informed opinion to members of a law enforcement community still reeling from the Rampart scandal, in which Los Angeles police officers planted evidence and committed perjury to obtain convictions of innocent people."⁶⁹

The civic duty of public employees is particularly heightened in the case of prosecutors. As the brief of the Association of Deputy District Attorneys as amici curiae submitted in the *Garcetti* case explains, constitutional and professional obligations compel a prosecutor to disclose exculpatory evidence.⁷⁰ At the same time, supervisors put tremendous amounts of pressure on prosecutors to garner convictions. This raises the career stake for a government prosecutor, finding herself faced with the dilemma of either catering to the demands of her boss or following the path of the ethical demands of her profession.

During his testimony in June 2006 before the House Committee on Government Reform, Richard Ceballos described the predicament in which government employees now find themselves: to disclose fraud, corruption, waste, and mismanagement internally and risk retaliation, or "hold a press conference on the front steps of the government building and publicly

65. *Id.*

66. *Mills v. City of Evansville*, 452 F.3d 646, 648 (2006).

67. David G. Savage, *Supreme Court Limits Free Speech in Workplace for Public Employees*, SEATTLE TIMES, May 31, 2006, at A1 (quoting Steven Shapiro, Legal Director for the American Civil Liberties Union (ACLU)).

68. Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 152.

69. *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 273, 277 (2006) (citing Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 549 (2001)).

70. Deputy Dist. Attorneys Amici Brief, *supra* note 37, at 2.

embarrass government officials to assure themselves First Amendment protection.”⁷¹ Ceballos warned, however, that most employees will probably find a third option particularly appealing: “keep quiet, look the other way, [and] feign ignorance of the corruption, the waste, the fraud that they witnessed.”⁷² Ceballos further cautioned that, if this occurs,

not only public employees will have lost. More importantly, the public will have lost. The people will have lost their right to know what is happening in their own government; their right to know what their elected and non-elected public officials are doing in government; their right to know if their taxpayer money is being spent properly or being wasted; and their right to know if their public officials are engaged in corrupted or fraudulent conduct.⁷³

From the broader perspective of lawyering loyalties, *Garcetti* should be understood not simply as drawing constitutional boundaries for government employee speech, but also as delineating the competing conceptions of the role of professionals within their organizational and political environments. The next section demonstrates how similar competing conceptions are debated in the context of private sector attorneys.

B. *In-House Counsel and the Private Sector*

In *Balla v. Gambro*, Roger Balla, a general counsel of Gambro Inc., an Illinois-based subsidiary of a Swedish medical-technology company, was fired after insisting that he would do “whatever necessary” to stop the sale of kidney dialyzers that did not meet the Food and Drug Administration (FDA) regulations’ specifications, thereby presenting imminent danger to their users.⁷⁴ After first objecting to his company’s intention to sell the defective medical equipment, Balla turned to the company’s America-based president and believed that he had persuaded him to reject the European shipment of defective equipment.⁷⁵ A week later, however, the president informed Balla that he changed his mind and intended to proceed with the receipt of the shipment. When Balla’s pleas to his supervisors were ignored, he decided to inform the FDA of the defective dialyzer shipment from Germany, which the agency subsequently seized and confiscated.⁷⁶

The Illinois Supreme Court affirmed the lower state court holdings that Balla had no cause of action against his employer for his termination.⁷⁷ The court opined that allowing an in-house counsel to state a wrongful

71. *Whistleblowers Hearing*, *supra* note 38, at 72 (prepared statement of Richard Ceballos, Los Angeles Deputy District Attorney).

72. *Id.* If passed, the Whistleblower Protection Enhancement Act of 2007, H.R. 985, 110th Cong. (2007), is intended to strengthen federal employee protections by creating procedures for federal employee whistleblowers to have their cases heard in federal court, thereby overturning *Garcetti v. Ceballos*.

73. *Id.*

74. *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 106 (Ill. 1991).

75. *Id.*

76. *Id.*

77. *Id.* at 113.

termination tort claim would have a negative effect on the attorney-client relationship, compromising the confidentiality privilege and the strong presumption of at-will employment when it comes to lawyers.⁷⁸ The court rejected Balla's argument about facing a "Hobson's Choice" between saving lives and losing his job or keeping quiet and maintaining his position.⁷⁹ In fact, the court viewed Balla's situation as presenting no more than one clear choice: as an attorney, Balla had a duty to report under Rule 1.6(b) of the Illinois Rules of Professional Conduct, requiring him to reveal confidential client information when a client is about to commit an act that would result in death or serious bodily injury.⁸⁰ As the court explained, "In-house counsel do not have a choice of whether to follow their ethical obligations as attorneys licensed to practice law, or follow the illegal and unethical demands of their clients. In-house counsel must abide by the Rules of Professional Conduct."⁸¹ Illinois Rules of Professional Conduct require disclosure of future crimes or frauds that may result in death or serious bodily injury.⁸² The *Balla* majority thus reasoned that the threat of disbarment was enough to secure disclosure by attorneys regardless of employment protections.⁸³ In other words, in-house counsel did not need the protection of a retaliatory discharge tort claim because they were already obligated to report serious misconduct that presents future risks to the public. The *Balla* court also raised the concern that wrongful termination claims by attorneys would undermine privilege rights and cause clients to hesitate before consulting with their in-house counsel.⁸⁴ Specifically, the court warned that "extending the tort of retaliatory discharge might have a chilling effect on the communications between the employer-client and the in-house counsel."⁸⁵ The fear would be that attorneys would almost always have something to hold as threats against their clients so that they are not fired. In his dissent, Justice Charles Freeman noted that in-house counsel are just as tempted as any other employees to "ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed and support their families."⁸⁶

Since the Illinois Supreme Court's decision in *Balla*, however, several states have recognized tort claims by in-house counsel where the attorney blows the whistle on illegal behavior.⁸⁷ These courts have tried to balance

78. *Id.* at 111.

79. *Id.* at 109.

80. *Id.*; see also ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (2007).

81. *Balla*, 584 N.E.2d at 109.

82. *Id.*

83. *Id.* at 113.

84. *Id.* at 110.

85. *Id.*

86. *Id.* at 113 (Freeman, J., dissenting).

87. Oregon, Montana, Utah, Kansas, Connecticut, Florida, New Jersey, Nevada, Texas, Tennessee, Virginia, Massachusetts, and New York have recognized such claims. See *supra* note 3.

the interests of clients with the need to protect whistleblowers.⁸⁸ An example of a fairly limited protection was developed by the California Supreme Court. In *General Dynamics Corp. v. Superior Court*, an in-house counsel alleged retaliatory discharge after initiating investigations into the company's potential drug use, wiretapping, and wrongful employment practices.⁸⁹

Unlike *Balla*, the California Supreme Court saw

no reason inherent in the nature of an attorney's role as house counsel to a corporation that in itself precludes the maintenance of a retaliatory discharge claim, *provided* it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship.⁹⁰

The court reasoned that failing to allow in-house counsel a remedy against wrongful termination by their clients would lead to the degradation of their professional stature, forcing them to choose between their professional obligations and the illegal demands of their employers.⁹¹ The court warned that, without protections, in house counsel "will almost always find silence the better part of valor."⁹²

The court thus recognized a cause of action of an in-house lawyer who was fired for urging his company to behave legally.⁹³ Under the wrongful termination tort theory, where the attorney is fired for refusing to violate an ethical requirement (or where a nonattorney could equally bring such a claim) and the claim can be proven without violating attorney-client privilege, an attorney can successfully recover for retaliatory discharge. Still, this exception carved under *General Dynamics* is quite narrow. A lawyer has a cause of action for whistleblowing only if not blowing the whistle would violate "explicit and unequivocal ethical norms embodied in the Rules of Professional Responsibility and statutes."⁹⁴ The court emphasized that the

in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts. Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client.⁹⁵

While *General Dynamics* departs from the practice of Illinois and extends the public policy tort to in-house counsel, the practical consequences of the

88. *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994); *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161 (Mass. 1995); see also *Fox Searchlight Pictures, Inc. v. Paladino*, 106 Cal. Rptr. 2d 906 (Ct. App. 2001).

89. *Gen. Dynamics Corp.*, 876 P.2d 487.

90. *Id.* at 490.

91. *Id.* at 502.

92. *Id.*

93. See generally *id.*

94. *Id.* at 503.

95. *Id.*

decision for California attorneys remain limited. There are very few mandatory rules of conduct and statutory exceptions to attorney-client privilege in California, resulting in a narrow number of cases that would meet the two-prong inquiry.

Increasingly in the past five years, various state courts have sided with *Balla's* dissenting judge. These courts have found that lawyers' real economic dependency on their employers entitles them to the same protections as other employees.⁹⁶ Establishing stronger protections than the limited one developed in *General Dynamics*, these courts have been willing to uphold claims where the lawyer is discharged for "any reason which is violative of law, fraudulent, criminal, or incompatible with a clear mandate of [the State's] public policy concerning public health, safety or welfare."⁹⁷ For example, the Supreme Judicial Court of Massachusetts recognized an in-house counsel claim of retaliatory discharge, because "public interest is better served if in-house counsel's resolve to comply with ethical and statutorily mandated duties is strengthened by providing judicial recourse when an employer's demands are in direct and unequivocal conflict with those duties."⁹⁸ The court found it bizarre to deny "a lawyer employee, who has affirmative duties concerning the administration of justice . . . redress for discharge resulting from trying to carry out those very duties."⁹⁹ Similarly, the Tennessee Supreme Court allowed an in-house counsel to bring a wrongful termination claim, emphasizing the economic realities of contemporary in-house practice:

The pressure to conform to corporate misconduct at the expense of one's entire livelihood, therefore, presents some risk that ethical standards could be disregarded. Like other non-lawyer employees, an in-house lawyer is dependent upon the corporation for his or her sole income, benefits, and pensions; the lawyer is often governed by the corporation's personnel policies and employees' handbooks; and the lawyer is subject to raises and promotions as determined by the corporation. In addition, the lawyer's hours of employment and nature of work are usually determined by the corporation. To the extent that these realities are ignored, the

96. See, e.g., *Burkhart v. Semitool, Inc.*, 5 P.3d 1031 (Mont. 2000); *Parker v. M & T Chems., Inc.*, 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989); *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603 (Utah 2003).

97. *Parker*, 566 A.2d at 220; see H. Lowell Brown, *Ethical Professionalism and At-Will Employment: Remedies for Corporate Counsel When Corporate Objectives and Counsel's Ethical Duties Collide*, 10 GEO. J. LEGAL ETHICS 1, 4 (1996); Michael P. Sheehan, *Retaliatory Discharge of In-House Counsel: A Cause of Action—Ethical Obligations v. Fiduciary Duties*, 45 DEPAUL L. REV. 859, 863 (1996); Sally R. Weaver, *Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing—or Something?*, 30 U.C. DAVIS L. REV. 483, 491 (1997); Brett Lane, Comment, *Blowing the Whistle on Balla v. Gambro: The Emergence of an In-House Counsel's Cause of Action in Tort for Retaliatory Discharge*, 29 J. LEGAL PROF. 235 (2005).

98. *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161, 166 (Mass. 1995).

99. *Id.* (citation omitted).

analysis here cannot hope to present an accurate picture of modern in-house practice.¹⁰⁰

More broadly, both courts and scholars are increasingly questioning the benefits of strong attorney-client privileges.¹⁰¹ Courts have been split as to whether in-house counsel can reveal client confidences in order to prove wrongful termination claims. While some courts have held that confidential client information may never be used in such lawsuits,¹⁰² others are increasingly allowing the use of such information.¹⁰³ For example, in 2005, the U.S. Court of Appeals for the Fifth Circuit allowed the use of privileged information to prove a claim of retaliatory discharge under a federal environmental antiretaliation statute, provided that certain measures were taken to protect the privileged information.¹⁰⁴ Strengthening this trend, in 2001, the ABA's Committee on Ethics and Professional Responsibility issued a formal ethics opinion, stating that for the purposes of revealing confidential information, "a retaliatory discharge or similar claim by an in-house lawyer against her employer is a 'claim' under [Model] Rule 1.6(b)(2)."¹⁰⁵ The committee emphasized that confidential client information should be protected to the extent reasonably possible, and equitable measures to protect such information should be pursued.¹⁰⁶

Many states are currently looking at their ethics rules with regard to these questions on confidentiality.¹⁰⁷ Professor Kathleen Clark recently urged that the rules be revised to clarify that government lawyers have the discretion to disclose government wrongdoing.¹⁰⁸ Such proposals, however, remain highly controversial. For example, in 2002, the California legislature passed a whistleblower bill that would have authorized government lawyers that learn of improper governmental activity to urge reconsideration of the matter and to report the improper activity to a higher authority in the organization.¹⁰⁹ The bill was vetoed, however, by

100. *Crews*, 78 S.W.3d at 861 (citations omitted).

101. See Louis Kaplow & Stephen Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565 (1989).

102. *GTE Prods. Corp.*, 653 N.E.2d at 167.

103. See, e.g., *Hoffman v. Baltimore Police Dep't*, 379 F. Supp. 2d 778, 782 (D. Md. 2005); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603, 609 (Utah 2003).

104. *Willy v. Admin. Review Bd.*, 423 F.3d 483, 498 (5th Cir. 2005).

105. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-424 (2001). Model Rule 1.6(b)(2) permits an attorney's divulgence of client confidences in order to state a claim against the client. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.6 (2003).

106. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-424 (2001).

107. Lucian T. Pera, *Lawyers as Whistleblowers: A Quick Tour of the Emerging Law of Retaliatory Discharge of In-House Counsel*, in UNDERSTANDING DEVELOPMENTS IN WHISTLEBLOWER LAW 3 YEARS AFTER SARBANES-OXLEY 619 (2006).

108. Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1095 (2008).

109. The Public Agency Attorney Accountability Act, Assemb. B. 363, 2002 Assemb. (Cal. 2002) (vetoed Sept. 30, 2002).

Governor Gray Davis on the grounds that it would have interfered with attorney-client trust and confidentiality.¹¹⁰

The traditional stance in decisions such as *Balla v. Gambro* puts the burden of upholding public policy on the shoulders of attorneys. These decisions rest heavily on the expectation that in-house counsel will be willing to resist unethical conduct in the absence of any protections against employer retaliation. Traditionally, this view emphasizes the fundamental significance of attorney-client trust. Courts fear that protecting in-house counsel will discourage employers from disclosing information to the attorney. Such protections may even create a moral hazard by enabling in-house counsel to use any damaging information as a weapon to prevent their own firing.

Courts that dismiss retaliation claims by lawyers warn against turning lawyers into “government informants.”¹¹¹ This stance also relies on the notion of lawyering as a self-regulating profession and the idea that lawyers will abide by their professional codes even without legal protections. Yet, the realities of in-house counsel often do not support either the expectations or the fears expressed by this stance. First, it should be noted that, in reality, even when legal remedies are available, very few attorneys will choose to sue their employers. The social and financial consequences of such action are simply too dire. Unlike outside counsel, in-house counsel are corporate employees that experience considerable economic dependency on their employer. Moreover, the reality of the legal profession is such that lawyers are increasingly occupying positions inside corporations not just as in-house counsel but also in managerial and supervisory roles. Corporate counsel often have administrative, managerial, and compliance responsibilities that are outside the direct scope of their legal roles. The notion of a self-regulating profession is weakened where attorneys find themselves integrated in the daily managerial roles of their company. For these reasons, recent years have seen a shift to a more balanced approach that recognizes the complexities of professional duties.

Cases like *Garcetti v. Ceballos* and *Balla v. Gamboro* underscore the competing ethical and professional obligations that may arise during the course of employment. For Ceballos, failure to act on any of his duties as a government prosecutor could have exposed him to civil liability and disciplinary action by his employer and by a professional board. As an employee, Ceballos had a duty to inform his employer of facts that may jeopardize the job. As an attorney, Ceballos had a professional duty to comply with ethical rules. As a prosecutor, he was compelled to

110. *California Governor Unexpectedly Vetoes Government Attorney Whistleblower Bill*, 71 U.S.L.W. 2243 (Oct. 15, 2002).

111. *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996) (“This valuable social service of counseling clients and bringing them into compliance with the law cannot be performed . . . [if] lawyers will be turned into government informants.”).

communicate exculpatory information to the defense.¹¹² As a citizen and civil servant, Ceballos had a civic duty to speak out against public wrongdoing. As a government employee, Ceballos also had a duty to protect sensitive government information.¹¹³

Similarly, Balla faced the dilemmas of his multiple roles as a high ranked employee, as an attorney, and as a responsible citizen. Moreover, at least in the private sector, in-house counsel are increasingly viewed as gatekeepers, designated to monitor the compliance of their own companies. While the duties, rights, and protections for reporting misconduct are unsettled and there is great variation in the application of various state and federal statutes, recent years have witnessed a shift from the traditional approach to a more complex view of the role of lawyers in their organizations. As was explored in this section, many courts now recognize retaliation protections for employees as well as allow the use of privileged information to prove such claims. The next section discusses further legislative developments. Together, these changes signify the shift towards viewing lawyers not only as zealous advocates of their clients, but also as gatekeepers charged with monitoring ethical behavior.

III. PROFESSIONAL RESPONSIBILITY AND THE ROLE OF LAWYERS IN THEIR ORGANIZATIONS

Legal ethics provides a paradigmatic case for the difficulties of mediating conflicting obligations in professional settings. The question of how to reconcile an attorney's loyalty to the client with her duties to her profession and the public is at the center of numerous ethical debates.¹¹⁴ Professor Charles Fried poses the following dilemma: whether "a decent and morally sensitive person can conduct himself according to the traditional conception of professional loyalty and still believe that what he is doing is morally worthwhile."¹¹⁵ Fried views the dilemmas of a lawyer as similar to those of a friend. He argues that friendship and legal ethics present similar intrinsic values and obligations.¹¹⁶ The traditional view of the Supreme Court has been that the loyalty of lawyers to their clients is one of the strongest, possibly most absolute, commitments that must not be disrupted by conflicting obligations. Justice Warren Burger famously distinguished between the lawyer, a "loyal representative whose duty it is to present the client's case in the most favorable possible light," and the accountant, a "public watchdog" whose "ultimate allegiance [is] to the corporation's

112. Richard Ceballos indeed reported to his supervisor that a prior precedent, *Brady v. Maryland*, 373 U.S. 83 (1963), compelled him to turn over the memo he wrote on the government misconduct to the defense.

113. *United States v. Aguilar*, 515 U.S. 593 (1995).

114. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084-90 (1988).

115. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1065 (1976).

116. *Id.*; see also Ethan J. Leib, *Friendship and the Law*, 54 UCLA L. REV. 631 (2007).

creditors and stockholders, as well as to the investing public.”¹¹⁷ At the same time, as we have seen in the previous section, the absolute nature of attorney-client loyalty has been challenged in various ways. Importantly, if one adopts Justice Earl Warren’s view that creditors, shareholders, and the investing public are all excluded from the clientele of the corporate lawyer, only managers remain as the ultimate client. Professor Bill Simon argues against this result:

To preclude the lawyer from intervening to prevent lawless harm to the client would affront all the values that give dignity to the professional role.

There is thus a strong tension between the goal of managerial trust and that of corporate client loyalty. If managerial trust in lawyers is based on confidentiality, rather than a shared sense of loyalty to the organization’s goals and norms, it will have to come at the expense of client loyalty.¹¹⁸

Despite the fact that “[l]awyers have a strong tendency to identify their corporate clients with management,”¹¹⁹ client loyalty should in fact be understood as substantive compliance for the corporation at large:

The high road requires lawyers to interpret their professed commitment to law in terms of spirit and purpose rather than literal terms, and requires them to confront explicitly the tensions of organizational client loyalty, especially the tension between client loyalty and managerial trust.¹²⁰

This more complex construction of the attorney-client relationship is supported by more general notions of professional roles. As Professor Robert Post writes, all professionals, including lawyers, “must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards.”¹²¹ Discussing professional roles in general, Professor Arthur Applbaum explains that while roles can require what is permitted, they cannot permit what is forbidden:

Professional roles are powerful obligators. . . . But neither consent nor some version of the fair-play principle can bind an actor to an illegitimate or unjust role . . . lawyers and financiers, politicians and public servants, *are* responsible for the vice and stupidity of their trades, and *should* refuse to practice them in vicious and stupid ways.¹²²

As “the servant of two masters,” a lawyer can face two legitimately conflicting reasons to follow the actual prescription of her role or to disregard it. Importantly, both in the public and the private sector, knowledge about wrongdoing is likely to be in the hands of lawyers and

117. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817–18 (1984).

118. William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *FORDHAM L. REV.* 1453, 1468 (2006).

119. *Id.* at 1454.

120. *Id.* at 1471.

121. Robert C. Post, *Subsidized Speech*, 106 *YALE L.J.* 151, 172 (1996).

122. ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES* 259 (1999).

other professionals precisely because their position provides them both professional expertise and intimate exposure to the operations of the organization. A central insight from recent developments in new governance approaches to regulation is the significance of process-oriented mandates that help mitigate the inevitable tensions between conflicting role obligations. Following the financial debacles, the SEC declared that “lawyers who represent public companies should have responsibilities similar to those held by the corporation’s auditors.”¹²³ SEC General Counsel Giovanni Prezioso, speaking before the American Bar Association Business Law Section, described the corporate lawyer’s role when witnessing corporate fraud as similar to that of a trust account attorney who learns that the trustee is misappropriating funds. According to Prezioso, both situations require that the lawyer inform the beneficiaries of the trust/corporation of the fraud.¹²⁴ As one commentator describes,

At the dawn of the 21st Century, the role of the lawyer is shifting from counselor to counselor-watchdog. Increasingly, lawyers are expected to step back and take a broader perspective on their client’s transactions. “Technically correct” is insufficient, if not wrong. And many regulators expect lawyers to take affirmative steps to prevent their clients from engaging in wrongdoing rather than just refuse to affirmatively assist such conduct.¹²⁵

After the early twenty-first-century financial scandals, many pointed a blaming finger to the attorneys who had worked for the fallen corporations, arguing that the “[l]awyers’ negligence almost certainly contributed to the wave of corporate scandals that shook the securities markets in 2001 and 2002.”¹²⁶ As Professors Stephen Bainbridge and Christina Johnson note, “[a]ll too often, lawyers acted as facilitators and enablers of management impropriety.”¹²⁷ In view of these scandals, the Sarbanes-Oxley Act changed the attitude toward the obligations of attorneys representing publicly traded corporations. The SEC rules now permit lawyers to disclose a client’s “material violation” to the Commission, and failure to do so may carry significant sanctions. Further, according to the Sarbanes-Oxley attorney-reporting rules, attorneys appearing and practicing before the SEC in the representation of an issuer are required to elevate evidence of various “material violations” up to the corporation’s chief legal officer (CLO) or the chief executive officer (CEO), the audit committee, a

123. Allan Dinkoff, *Analyzing the Attorney Whistleblower Claim: A Modest Suggestion for the Twenty-First Century*, in UNDERSTANDING DEVELOPMENTS IN WHISTLEBLOWER LAW 2 YEARS AFTER SARBANES-OXLEY 371 (2005) (citing then-SEC Chairman Harvey Pitt).

124. *Id.* (citing Giovanni Prezioso, Gen. Counsel, Sec. & Exch. Comm’n, Remarks Before American Bar Association Section of Business Law (Apr. 3, 2004), available at www.sec.gov/news/speech/spch040304gpp.htm).

125. *Id.*

126. *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2169, 2227 (2004).

127. Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 301.

committee of independent directors, and eventually the Board of Directors if necessary.¹²⁸ In sum, lawyers are obligated to report up the ladder and permitted to report externally when they know of SEC violations. In 2003, the ABA Model Rules were similarly changed to require a reporting-up process.¹²⁹ Moreover, before Enron, the ABA Model Rules allowed attorneys to breach client confidentiality only in rare criminal cases, namely to prevent imminent death or substantial bodily harm.¹³⁰ The new ABA rules now support an attorney's right to breach privilege when needed for proof of a wrongful termination claim.¹³¹ As mentioned above, many jurisdictions are in the process of revising their confidentiality and disclosure rules accordingly, allowing in-house counsel to disclose client confidences in wrongful termination suits.¹³² The new federal sentencing guidelines also reward corporate "cooperation" and include within this definition the waiver of the attorney-client privilege.¹³³ Analyzing some of these developments, Bill Simon asserts that "[c]orporate confidentiality is dead."¹³⁴ The ABA Model Rules require a discharged lawyer to inform the board of the termination.¹³⁵ The SEC's Sarbanes-Oxley rules permit the same reporting by the lawyer to the board.¹³⁶ ABA Model Rule of Professional Conduct 1.6(b)(5) now allows disclosure "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to

128. The Securities and Exchange Commission (SEC) has requested comments on whether lawyers should be required to "report out" externally if the Board fails to respond to the lawyer's concerns in an appropriate fashion. Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, SEC (Jan. 30, 2003), <http://www.sec.gov/rules/proposed/33-8186.htm>. The SEC's Sarbanes-Oxley rules already permit an attorney to report out on a voluntary basis under certain circumstances, 17 C.F.R. § 205.3(d) (2008), as do the ABA Model Rules. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003).

129. MODEL RULES OF PROF'L CONDUCT R. 1.6 (disclosure of confidential client information); *id.* R. 1.13 (reporting up within an organizational client); see C. Evan Stewart, *Liability for Securities Lawyers in the Post-Enron Era*, 35 REV. SECS. & COMMODITIES REG. 171 (2002); C. Evan Stewart, *The Attorney-Client Privilege: The Best of Times, the Worst of Times*, PROF. LAW. 63 (1999); C.E. Stewart, *This Is a Fine Mess You've Gotten Me Into: The Revolution in the Legal Profession*, 110 N.Y. BUS. L.J. 15, 15 (2006).

130. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2001) (amended 2002).

131. AM. BAR ASS'N TASK FORCE ON CORP. RESP., FINAL RESPONSIBILITY 43-46 (2003); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-424 (2001).

132. *Mourad v. Auto. Club Ins. Ass'n*, 465 N.W.2d 395, 400 (Mich. Ct. App. 1991); *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002); Sara A. Corello, *In-house Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389, 389 (1992) (arguing that "in-house attorneys should have the right to sue for retaliatory discharge when they are dismissed for refusing to violate their professional ethics or for urging their employers to comply with the law"); Lisa Overall, *Retaliatory Discharge and In-House Counsel—A Comparative Analysis of State Law in the Wake of the Tennessee Supreme Court's Decision in Crews v. Buckman Laboratories*, 33 U. MEM. L. REV. 629 (2003).

133. Sentencing Guidelines for United States Courts, 69 Fed. Reg. 28,994, 29,019 (2004).

134. Simon, *supra* note 118, at 1454.

135. MODEL RULES OF PROF'L CONDUCT R. 1.13 (e) (2003).

136. 17 C.F.R. § 205.3(b)(10) (2008).

respond to allegations in any proceeding concerning the lawyer's representation of the client."¹³⁷ In 2001, the ABA issued an opinion that an in-house counsel's action for retaliatory discharge constituted a "claim" under Rule 1.6(b)(2), permitting the divulgence of client confidences in order to establish the action.¹³⁸ The ABA's opinion stated that "in pursuing a retaliatory discharge claim . . . the lawyer must limit disclosure of confidential client information to the extent reasonably possible."¹³⁹

All of these developments strengthen the idea of in-house attorneys as gatekeepers of organizational ethical behavior. The Sarbanes-Oxley Act and SEC's 2003 Rules of Professional Conduct signify a paradigm change in the concept of professional responsibility of attorneys.¹⁴⁰ This is particularly appropriate for in-house counsel, who assume personal responsibility and can be held personally liable for any misstatements they have signed as a senior officer of the company.¹⁴¹ The statutory federal regulations point to private sector attorneys as accountable actors, much like other corporate officers. Professor John Coffee argues that, compared to the outside attorney, "the in-house general counsel seems even less suited to play a gatekeeping role. . . . [T]he in-house counsel is less an independent professional—indeed he is far more exposed to pressure and reprisals than even the outside audit partner."¹⁴² Yet if the duties and protections granted to in-house counsel are formalized, there is a higher likelihood that their role as gatekeepers within the organization will be strengthened.¹⁴³ When in-house counsel and public sector attorneys are allowed recovery for their wrongful termination, more attorneys will be protected when they expose misconduct and become whistleblowers.¹⁴⁴

CONCLUSION

Professor Philip Selznick describes the democratic process as the means, instruments, and tools that "define the relation between authority and the individual."¹⁴⁵ Governments, strapped for resources, facing shrinking budgets, global competitive pressures to liberalize trade, and corporate regulatory resistance, are increasingly experimenting with approaches that rely on organizations themselves to complement standard-setting and enforcement activities. This means key actors within an organization must

137. ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 01-424 (2001)

138. *Id.*

139. *Id.*

140. *See supra* notes 128–43 and accompanying text.

141. 15 U.S.C. § 77k (2006).

142. JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 195 (2006).

143. Peter C. Kostant, *Sarbanes-Oxley and Changing the Norms of Corporate Lawyering*, 2004 MICH. ST. L. REV. 541, 542.

144. Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 224 (1995).

145. PHILIP SELZNICK, *TVA AND THE GRASSROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* 3 (Harper & Row 1966) (1949).

assume greater responsibility to ensure legal and ethical behavior. Lawyers, both those who work for government and those who work for private corporations, frequently find themselves in situations where they must resist illegal behavior. The traditional emphasis on absolute privilege to deny reporting and antiretaliation rights to attorneys no longer reflects these new realities. Even with protective legislation, whistleblowing is a risky business. A whistleblower often experiences isolation, retaliation, blacklisting, and psychological harm. Yet, if we take seriously the ideas of new governance, empowering individuals to take on the role of private attorneys general, who is better suited for such role than attorneys themselves? The Model Rules of Professional Responsibility obligate an attorney to serve both the client and society. Two centuries ago, the Supreme Court described the tension embedded in the attorney-client relationship: "There are few of the business relations of life involving a higher trust and confidence than that of attorney and client . . . few more anxiously guarded by the law, or governed by sterner principles of morality and justice."¹⁴⁶ In other words, lawyering is high on both demands—loyalty to the organization and loyalty to the greater good. Allowing attorneys to act in the interest of the organization as a whole, while at the same time empowering them to exercise vigorous internal dissent, best reflects the complexities of lawyering in the twenty-first century.

146. *Stockton v. Ford*, 52 U.S. (11 How.) 232, 247 (1850).