

2008

# Citizen Teacher: Damned If You Do, Damned If You Don't

Susan P. Stuart

*Valparaiso University School of Law*

Follow this and additional works at: [http://scholar.valpo.edu/law\\_fac\\_pubs](http://scholar.valpo.edu/law_fac_pubs)



Part of the [Constitutional Law Commons](#), [Education Law Commons](#), and the [First Amendment Commons](#)

---

## Recommended Citation

Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. Cin. L. Rev. 1281 (2008).

This Article is brought to you for free and open access by the Law Faculty Presentations and Publications at ValpoScholar. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



## CITIZEN TEACHER: DAMNED IF YOU DO, DAMNED IF YOU DON'T

*Susan P. Stuart\**

*The recent Supreme Court case of Garcetti v. Ceballos is becoming one of the most-used cases in its mere two-year history. It denies to public employees the protection of the First Amendment when speaking in their official duties. In reviewing the cases both leading up to and then relying on Garcetti, one is struck by the inherent conflict that now permeates some school board-employee relationships. Whereas preceding cases attempted to reach a balance between the school board and its employees' speech rights, bad management practices now seem to trump the First Amendment. Such practices have school boards discharging teachers and administrators for speaking out—truthfully—on matters of fiscal mismanagement, student discipline, and similar school district problems. In the context of those cases, this Article posits that being seduced by the weapon of Garcetti's absolute power will create unanticipated and legal consequences to both school boards and the educational institution itself.*

---

\* Associate Professor, Valparaiso University School of Law. The author taught in the public schools for six years before attending law school and represented Indiana State Teachers Association during nine years of private practice. Many thanks to Ezra Hurwitz for his exemplary work as my research assistant, and to Bill Gist, ISTA UniServ Director, and Dick Darko, ISTA General Counsel, for their willingness to assist in this project. Thanks also to Ivan Bodensteiner for our conversations comparing student speech with teacher speech. I was inspired by my father, Thomas Stuart, a high school principal who spoke truth to power and lost his job but regained his purpose as a guidance counselor, and by my mother, Mary Stuart, an elementary school teacher who always hoped for the best from school administrations but understood the balancing power of the union.



## INTRODUCTION

In perhaps one of the most extraordinarily ill-considered—and short-sighted—opinions penned by the United States Supreme Court in recent years, *Garcetti v. Ceballos*<sup>1</sup> is already having an adverse impact on teachers and school administrators. More importantly, *Garcetti* has the potential to gravely harm the way school districts discharge their educational function because of the case's adverse impact on school employees, especially teachers but also school administrators. If *Garcetti* is wielded by school boards, the fallout may also affect the efficient operation of the school district by impairing educators' duties to their students and to the public weal.

What exactly is the weapon that *Garcetti* gives to school boards that could do so much harm? In short, it allows school boards to retaliate without consequence against teachers for doing their jobs properly. Such retaliation may be as draconian as the educator's discharge. And it may already be too late to stop the trend, given the number of school boards relying on *Garcetti* to support adverse employment actions against teachers—and administrators—since it was handed down in 2006.

The remedy that the Supreme Court has removed from teachers' arsenal of protection is the long-recognized First Amendment right whereby an individual public employee's speech may be protected from the power of the state.<sup>2</sup> Where they might otherwise have a constitutional claim under the First Amendment for an adverse job action their employers have taken based on their speech, the Supreme Court now says they have no such thing if their words were uttered or their deeds done in the course of their employment duties.<sup>3</sup> Since May 30, 2006, a school board may lawfully retaliate against teachers who voice concerns about a school district's not serving disabled children adequately,<sup>4</sup> fraud and mismanagement in the operation of a federally funded program,<sup>5</sup> misuse of athletic funds,<sup>6</sup> and student discipline.<sup>7</sup>

1. 547 U.S. 410 (2006).

2. U.S. CONST. amend. I; see, e.g., *Public Employee Speech*, 120 HARV. L. REV. 273 (2006); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005).

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

4. See, e.g., *Houlihan v. Sussex Technical Sch. Dist.*, 461 F. Supp. 2d 252 (D. Del. 2006); *Yatzus v. Appoquinimink Sch. Dist.*, 458 F. Supp. 2d 235 (D. Del. 2006); *Ryan v. Shawnee Mission Unified Sch. Dist. No. 512*, 437 F. Supp. 2d 1233 (D. Kan. 2006), *reconsideration denied*, No. 05-2213, 2006 WL 2475326 (D. Kan. Aug. 25, 2006).

5. See, e.g., *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007); *Battle v. Bd. of Regents*, 468 F.3d 755 (11th Cir. 2006).

6. See, e.g., *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007).

7. See, e.g., *Cavazos v. Edgewood Indep. Sch. Dist.*, 210 F. App'x 414 (5th Cir. 2006).



More acts and deeds will surely be punished as administrators feel pressured by school boards to keep order in their schools. Ironically, the administrators who mete out these disciplinary actions on behalf of their employers are left in an even more tenuous position because they are equally affected by *Garcetti*, but generally they are not accorded the “just cause” contractual or statutory protections given to teachers, especially to those on tenure.

The cases keep rolling in as public employers take advantage of *Garcetti*'s ruling to justify retaliating against employees for doing their jobs. As of its first anniversary on May 30, 2007, 280 opinions have cited *Garcetti*, generally favorably in upholding the firing of any number of public employees including teachers. Prior to then, courts had relied primarily on *Connick v. Myers*<sup>8</sup> to determine the lawfulness of retaliatory acts under the First Amendment. Less than one-fourth as many cases—60 in all jurisdictions—cited to *Connick* in *Connick*'s first year.<sup>9</sup>

This trend portends danger for schools in general and for students in particular. The message the Supreme Court has sent to public employees, including teachers, is they can be fired even if they are doing their jobs correctly. Communicating is what teachers do for a living; communicating about the conditions of their schools and the needs of students is what teachers do as a profession. In light of the educator cases that have relied on *Garcetti*, three communication contexts can now jeopardize a teacher's job. The first type of communication for which a school board can retaliate against a teacher is communication classified as an official duty of the job, excluding instruction. Of the three types of speech involved, retaliation for this is probably the most grievous. Teachers can do their jobs perfectly and beautifully and still be punished. *Garcetti* does not even give teachers a legitimate choice: they can refuse to do their job—that is, refuse to communicate—and be punished; they can do their jobs and be punished.

Second in the courts' sights are communications that are job-related although not necessarily associated with enumerated, “official” duties. Such speech might include matters related to the interior workings of the school or other matters that do not pertain directly to a teacher's specific classroom job. This type of speech often arises for more altruistic

---

8. 461 U.S. 138 (1983).

9. In all fairness, one cause of the exploding number may be that the research database used to count those opinions—Westlaw—seems to have stored more unpublished opinions than in the years immediately succeeding *Connick*. But that circumstance cannot account for what appears to be an explosion in questionable management decisions in the recent years. By its second anniversary, the number of cases citing to *Garcetti* had more than doubled.



reasons than by compulsion of the job itself. For example, teachers who care enough about their profession and their students believe they should speak up about those matters as the right, the ethical, and the professional thing to do. However, the Court now says that teachers, as public employees, do not have the same protections as ordinary citizens when it comes to speech and acts otherwise protected by the First Amendment. *Garcetti* now forces teachers to choose between their professionalism and their livelihood. If teachers can be fired for caring about their jobs and their students, why should teachers continue to care?

Third is the type of speech that the *Garcetti* majority skirted: academic freedom. Although the Court assured the dissenting justices that the decision had no impact on educators' academic freedom in the classroom, a contrary trend may be emerging in some courts. That trend assures that school boards have complete control over speech in the classroom because of their supposed control over the content of the curriculum. Teachers may not be saying anything wrong or even outside the content of the curriculum, but the courts are interfering in discretionary teaching decisions and exerting an unwarranted paternalistic control over that skill for which teachers teach and that creativity to adapt their instruction to the needs of the classroom and the subject matter.

Several negative consequences necessarily arise from these decisions. One of those consequences is the attack on teacher morale and professionalism. A necessary adjunct of that consequence is that students no longer have the benefit of the best that teachers have to offer as civic role models: teachers will instead guard their job security by hewing to a "party" line rather than by offering the panoply of choices that only a democracy can offer. A second major consequence is the loss of the nature of the civic institution itself. Confining teachers to their oars rather than allowing them to rock the boat is anathema to the duty, responsibility, and nature of public schools. A third consequence is that teachers will start to air the school district's dirty laundry in public. Now that a school board can retaliate for on-the-job speech, teachers will resort to speaking out at public school board meetings or to the media to achieve the corrections they know must be implemented. Last, but not least, school boards and administrators will lose the inherent ability to hold teachers accountable for their work, especially in the classroom. Perhaps even worse, the door may be opened for asserting educational malpractice claims. If teachers do not have the discretion to do other than follow the direction of the school boards, then school boards and school administrators—not having delegated any real



teaching function—will be wholly responsible for the results, not the teachers themselves.

The overarching thesis, then, is that no good can come from school districts' using *Garcetti* to protect them from legitimate First Amendment claims by teachers. As the case analyses demonstrate, the vast majority of these cases arose from bad management, not from bad teaching. Ironically, justice serves those who do wrong rather than those who do right. In Part I, this Article briefly outlines the pre-*Garcetti* First Amendment protections for public employees and recounts, briefly, some of the ways teachers' First Amendment rights had been protected before May 30, 2006. Part I then explains the opinion in *Garcetti* itself. Part II analyzes the *Garcetti* progeny, including cases for both teachers and administrators. Part III addresses the official duties of teachers for which they might be punished under the First Amendment. Last, Part IV provides an analysis of the harms that will come to students, school boards, and the educational institution itself from school boards' relying on *Garcetti* to retaliate against teachers for doing their jobs.

#### I. PUBLIC EMPLOYEES' FIRST AMENDMENT RIGHTS CRASH AND BURN

Although a background survey of this issue might seem a bit unnecessary, rather than getting straight to the point in *Garcetti*, it is necessary when dealing with the First Amendment rights of teachers. This context is important in understanding the unique citizenship role of teachers, who are, as the background demonstrates, not just employees. Indeed, one might posit—from reading the effusive protections for teachers in these survey cases—that teachers should enjoy different First Amendment rights than other public employees. Regardless, teachers have played a critical role in the development of public employee First Amendment jurisprudence. And this historical background demonstrates how far the Court has strayed from a rational balance of the employer-employee relationship to a one-sided analysis of the interests of the employer over the good of the government institution.

As is their wont and perhaps their plight, teachers have been at the forefront of the First Amendment cases, pitting their right to speak against their employers' ability to fire them for that right. Indeed, teachers have been at the center of most of the First Amendment controversies that have arisen out of public employees' speech that have reached the Court for at least two reasons. First, teachers' stock in trade is speaking. It is also their stock in trade to teach, through instruction and example, young Americans to be good citizens, and a responsibility of citizenship is exercising one's freedom of speech. Second, teachers



view themselves as independent actors: they must make the day-to-day decisions to deliver the educational product in this important governmental enterprise. They neither welcome nor accept the contrary view that they are at the bottom of the educational bureaucracy, below school administrators and school boards in the hierarchy, particularly because they have as much professional education training as school administrators and more so than the vast majority of school board members. As a consequence, the relationship between the leading and the led is uneasy at best and volatile at worst. These tensions therefore make teachers particularly vulnerable to retaliation by their public employers—school administrators and, through administrators, school boards.

#### A. *The Launch*

Marvin Pickering was just such a teacher. He wrote a letter to the editor of his local paper.<sup>10</sup> It resulted from several years' worth of financial matters surrounding the building of two new schools in the district,<sup>11</sup> and in contrast to a series of letters ostensibly from the local teachers' union and favorable to the tax increase, Pickering's letter was critical of the school board and school superintendent, and of the tax increase, which later failed.<sup>12</sup> In particular, he targeted the school district's allocation of educational and athletic funding.<sup>13</sup> Pickering also wrote that the superintendent had threatened teachers with adverse consequences if they opposed the referendum<sup>14</sup> and that the letters ostensibly from the local teachers' unions had been vetted by the superintendent in accordance with school board policy requiring that anything submitted to local newspapers must first be checked by the building principal then submitted in triplicate to the school district's publicity coordinator.<sup>15</sup> However, Pickering's letter also contained carelessly researched and false claims that the school district had placed

---

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

11. First were two votes on bond issues to build the schools, the second of which passed. *Id.* at 565–66. Then three years later, the school board proposed two tax increases for increasing educational funding revenue. *Id.* at 566. Both were defeated. *Id.* The second of these tax increase proposals engendered a flurry of articles and letters in the local paper. *Id.*

12. *Id.* at 566.

13. *Id.*

14. *Id.* at 576, 580–81 (appendix to opinion of the court). Pickering accurately reported the superintendent's statement; the meaning of that statement, however, was never clear. *Id.* at 580–81 (appendix to opinion of the court).

15. *Id.* at 576–77, 581 (appendix to opinion of the court).



athletic expenditures as a higher priority than educational funding.<sup>16</sup> He closed with this statement: "I must sign this letter as a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?"<sup>17</sup> After his letter was published, Pickering was fired,<sup>18</sup> and he made history in *Pickering v. Board of Education*.

Pickering attacked the application of Illinois's teacher dismissal statute as unconstitutional under the First Amendment.<sup>19</sup> The Illinois Supreme Court ruled in favor of the school board; the U.S. Supreme Court reversed and stated,

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.<sup>20</sup>

The Court acknowledged, however, that a school district—as an employer—has different interests in regulating teacher speech than the government generally might have in regulating speech of the general citizenry.<sup>21</sup> This acknowledgment established the now-classic balance between the "interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>22</sup>

In addressing this balance in Pickering's case, the Court first concluded that "the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive."<sup>23</sup> The Court particularly noted that teachers—of all citizens—have definite and informed opinions about school funding and how those funds should be allocated because of their background and

---

16. *Id.* at 577–78, 581–82 (appendix to opinion of the court).

17. *Id.* at 578.

18. *Id.* at 566.

19. *Id.* at 565.

20. *Id.* at 568.

21. *Id.*

22. *Id.*

23. *Id.* at 571.



expertise.<sup>24</sup> To prevent them from speaking out would be a disservice to the public in general; indeed, they should be encouraged to speak out freely.<sup>25</sup>

As to the other part of the balancing test, the Court noted that Pickering's criticisms were not directed against anyone with whom he worked directly.<sup>26</sup> Instead, his criticisms were directed against the superintendent and school board with whom Pickering had no daily contact.<sup>27</sup> There was neither a disciplinary issue with an immediate superior nor harm to the working relationship of co-workers.<sup>28</sup> Despite the school board's argument that Pickering had violated his "duty of loyalty,"<sup>29</sup> the Court determined that his employee relationship with the superintendent and school board was rather attenuated and "not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."<sup>30</sup> Thus, the Court allowed that criticisms of "nominal superiors" may not be the basis for retaliation.<sup>31</sup> As a consequence, Pickering, while contributing to the debate on school board matters, stood in the same shoes as the general public: the state could afford the school board no greater right to punish Pickering than it could punish a member of the general public.<sup>32</sup>

In essence, the Court determined that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment" even if the speech is wrong.<sup>33</sup> Instead, the Court said,

What we . . . have before us is a case in which a teacher has made erroneous public statements upon issues *then currently the subject of public attention*, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to

---

24. *Id.* at 572.

25. *Id.*

26. *Id.* at 569–70.

27. *Id.* at 569.

28. *Id.* at 570.

29. *Id.* at 568.

30. *Id.* at 570.

31. *Id.* at 574.

32. *Id.* at 573. Furthermore, because most of the readers of Pickering's letter greeted it with "massive apathy and total disbelief," the statements were not per se harmful to the operations of the school district sufficient for the school board to prove the statutory grounds for Pickering's dismissal. *Id.* at 570–71. Equating its own interests with that of the school district it governed went beyond the purview of the school board's interest in controlling teacher speech—criticism of the school board was not criticism of the school district. *Id.* at 571.

33. *Id.* at 574.



have interfered with the regular operation of the schools generally. In these circumstances we conclude 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.<sup>34</sup>

Thus did the *Pickering* case enter the pantheon of First Amendment jurisprudence.

### B. *The Trajectory*

The Court reaffirmed the *Pickering* principle in dictum in *Perry v. Sindermann*,<sup>35</sup> a higher education case. Robert Sindermann was a rather incendiary young professor in the Texas state college system.<sup>36</sup> During the fourth of a series of one-year contracts at Odessa Junior College, Sindermann was elected president of the Texas Junior College Teachers Association.<sup>37</sup> During the course of those duties, he became embroiled in several disputes with the state Board of Regents and some of its policies, specifically criticizing the Board's opposition to making Odessa Junior College into a four-year institution.<sup>38</sup> Sindermann's contract was not renewed for a fifth year, ostensibly for insubordination.<sup>39</sup> The thrust of the Court's decision and the "teachable" moment arising from the case surrounded Sindermann's due process rights. And those due process rights arose from his claim that the Board of Regents improperly retaliated for Sindermann's constitutionally protected freedom of speech.<sup>40</sup> Relying on *Pickering*, the Court reminded the Board of Regents that "a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment."<sup>41</sup>

Not too long after *Perry v. Sindermann* came *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*.<sup>42</sup> Although not addressing an employer retaliation claim, the Court was very deferential to teachers' First Amendment rights because of their employment, and not just their status as citizens. In this case, a local

---

34. *Id.* at 572–73 (footnote omitted) (emphasis added).

35. 408 U.S. 593 (1972).

36. *Id.* at 594.

37. *Id.*

38. *Id.* at 594–95.

39. *Id.* at 595.

40. *Id.*

41. *Id.* at 598 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

42. 429 U.S. 167 (1976).



teachers union—Madison Teachers, Inc.—filed a complaint before the Wisconsin Employment Relations Commission. The complaint asserted that the Madison school board had committed a prohibited labor practice when it allowed a nonunion teacher to speak at a public school board meeting on a matter related to ongoing collective bargaining.<sup>43</sup> After determining that the teacher had not engaged in “negotiations” through his presentation, the Supreme Court held that a school board could not exclude teacher speech and thereby allow the union to monopolize the public debate: “He addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government.”<sup>44</sup> In once again affirming the contribution teachers make to public discourse, the Court asserted, “Where the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings.”<sup>45</sup> The Court explained, “Teachers not only constitute the overwhelming bulk of employees of the school system, but they are the very core of that system; restraining teachers’ expressions to the board on matters involving the operation of the schools would seriously impair the board’s ability to govern the district.”<sup>46</sup> Clearly, teachers could not be excluded from speaking out at public school board meetings on matters considered to be public concerns.

Then in 1977, along came Fred Doyle, a teacher who did not get tenure in part because of a telephone call to a local radio station about a memorandum circulated by his principal.<sup>47</sup> Doyle was in his fifth year of employment with the school district—three one-year contracts and one two-year contract—and was eligible for tenure at the school district.<sup>48</sup> During the first year of his two-year contract, Doyle served as president of his local teachers’ association, and he served on the association’s executive board the second year, a two-year period during which there was friction between the school board and the association.<sup>49</sup> Doyle also had a tendency to draw other unwanted attention to himself with poor anger management skills that led to dustups with a fellow

---

43. *Id.* at 170–71.

44. *Id.* at 174–75.

45. *Id.* at 175.

46. *Id.* at 177.

47. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

48. *Id.* at 281.

49. *Id.*



teacher, non-certified staff, and students.<sup>50</sup> The last straw came during his last semester of teaching.

During that semester, Doyle's principal circulated a memo suggesting that public support for school bond issues was directly related to teacher dress and appearance.<sup>51</sup> Doyle telephoned a local disc jockey and conveyed the substance of the memorandum.<sup>52</sup> The radio station ran the adoption of a new dress code for teachers as a news item.<sup>53</sup> Doyle apologized to his principal for the incident, conceding that he should have first addressed his concern to the principal rather than going first to the media.<sup>54</sup> A month later, when the superintendent made his annual recommendations to the school board for rehiring the next year, Doyle was among ten teachers he recommended not be rehired.<sup>55</sup>

Per the usual due process, Doyle requested the reasons for the non-renewal of his contract.<sup>56</sup> The superintendent responded that Doyle had "a notable lack of tact in handling professional matters" that left "much doubt" as to his "sincerity in establishing good school relationships."<sup>57</sup> In illustration of that professional failing, the superintendent cited a disciplinary incident with an obscene gesture and the telephone call to the radio station.<sup>58</sup> The school board adopted the superintendent's recommendations.<sup>59</sup> Doyle sued.<sup>60</sup>

Because Doyle was a non-tenured teacher at the time of his dismissal, he could have been non-renewed for no reason whatsoever but not in retaliation for his constitutionally protected right of speech under the First Amendment.<sup>61</sup> In reliance on its earlier reasoning in *Pickering*, the Supreme Court examined the balancing of the teacher's right as a citizen to comment on matters of public concern in tension with the school board's duty, as employer, to promote the efficiency of its educational

---

50. Doyle argued with another teacher who then slapped him. *Id.* The administration suspended both teachers for a day, but the association engaged in a walkout, resulting in the administration lifting the suspensions. *Id.* Doyle also argued with cafeteria employees about the amount of spaghetti they served him, referred to students as "sons of bitches" during a disciplinary incident, and gestured obscenely at a couple of girls who disobeyed him during his cafeteria duty. *Id.* at 281-82.

51. *Id.* at 282.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 282-83.

59. *Id.* at 282.

60. *See id.* at 283.

61. *Id.* at 283-84.



services.<sup>62</sup> The Court determined that Doyle had violated no school board policy when he passed along the substance of the memo and that the school board conceded that its retaliatory response was nothing other than a reaction to the memo's public disclosure.<sup>63</sup> Thus, the Court accepted the district court's determination that the First Amendment protected Doyle's speech.<sup>64</sup>

The point of departure between the district court and the Supreme Court was the weight to be given the school board's decision in light of the importance of retaining teachers. Indeed, Justice Rehnquist—writing for the Court—emphasized that, but for the school board's action, Doyle would have been granted tenure.<sup>65</sup> When such important decisions are made, he opined, the school board should be given the opportunity to justify its decision on lawful grounds; stated differently, he said the school board should be given the opportunity to show that it would have reached the same decision even without the First Amendment-related behavior.<sup>66</sup> The Court justified this shifting of burdens to prevent a teacher from taking advantage of a perhaps minor First Amendment issue to retain the same employment status, especially where, as in this case, a permanency of employment was at stake.<sup>67</sup> Thus, after a plaintiff-teacher carries his burden of proving that his conduct was protected by the First Amendment and that his conduct was a motivating factor in an adverse employment decision, the defendant school board must prove, by a preponderance of the evidence, that it would have reached the same employment decision in the absence of the protected conduct in order to prevail.<sup>68</sup> After deciding that teacher expression, like public statements, was protected by the First Amendment, the Court next turned to teacher speech on the job.<sup>69</sup>

In *Givhan v. Western Line Consolidated School District*, the non-renewal of Bessie Givhan's contract as a junior high English teacher was prompted by her complaints and criticisms of school district employment policies and practices that she perceived to be racially

62. *Id.* at 284.

63. *Id.*

64. *Id.*

65. *Id.* at 286.

66. *Id.* at 287. Rehnquist's statements are unclear on whether the fact that Doyle was on the cusp of tenure was significant, but it seemed to be.

67. *Id.* at 285.

68. *Id.* at 287. Ultimately, the school board was able to do just that, justified by the Sixth Circuit as Doyle's failing of having a "quick temper." *Doyle v. Mt. Healthy City Sch. Dist. Bd. of Educ.*, 670 F.2d 59, 61 (6th Cir. 1982).

69. 439 U.S. 410 (1979).



discriminatory.<sup>70</sup> The sticking point in what would ordinarily be an open-and-shut First Amendment retaliation case was that Givhan had made her complaints privately to her principal, behind closed doors, and those sessions were perceived by the principal as “petty and unreasonable,” “insulting,” “loud,” “arrogant,” and “hostile.”<sup>71</sup> The Fifth Circuit decision had favored the school district, in part because of the alleged effect the exchanges had on the working relationship between Givhan and her employer.<sup>72</sup> The Supreme Court, however, pointed out that the principal was not an unwilling participant in the exchanges, having invited Givhan into his office for these discussions.<sup>73</sup> Consequently, Givhan’s private expressions were constitutionally protected.<sup>74</sup>

So up to *Givhan*, teachers primarily, although not exclusively, had taken the lead in forging legal protections for public employees who engaged in First Amendment speech. An attorney case would throw a monkey-wrench in the works.

### C. *In-Flight Adjustments*

In 1983, *Connick v. Myers*<sup>75</sup> confused matters. *Connick* involved the firing of an Assistant District Attorney in the District Attorney’s Office in New Orleans.<sup>76</sup> Sheila Myers tried criminal cases as an Assistant in the New Orleans District Attorney’s Office for five and a half years when she was transferred to a different section of the criminal court.<sup>77</sup> She was unhappy about the transfer and made her views plain to several supervisors in the office, including Connick, the then-District Attorney.<sup>78</sup> As a part of these discussions, Myers expressed her concerns about other office matters.<sup>79</sup> During one such conversation,

---

70. *Id.* at 412–13.

71. *Id.*

72. *Id.* at 414–15.

73. *Id.* at 415.

74. The case was ultimately remanded for consideration under the *Mt. Healthy v. Doyle* principle to determine whether the school board’s non-renewal action was primarily motivated by Givhan’s protected expression. *Id.* at 417.

75. 461 U.S. 138 (1983).

76. Although assistant district attorneys served at the pleasure of the District Attorney, *id.* at 140, even attorneys serving at the will of their employer cannot be punished for exercising their constitutionally protected rights, *id.* at 142.

77. *Id.* at 140.

78. *Id.*

79. *Id.* at 141. When one of her supervisors disagreed that her concerns were shared by others in the office, Myers told him she would do research on the matter. *Id.* Later that night and during the next morning, Myers compiled a questionnaire about office morale, the office transfer policy, confidence in



Connick continued to urge her to accept the transfer.<sup>80</sup> Myers told Connick she would consider it, and Connick left the office.<sup>81</sup> Myers then distributed a questionnaire she had compiled on other office matters to fifteen other assistant district attorneys.<sup>82</sup> When one of the supervisors notified Connick that Myers was instigating a "mini-insurrection," Connick returned to the office and fired her for refusing to accept the transfer and for insubordination in her distribution of the questionnaire.<sup>83</sup> This questionnaire would become the cause célèbre in this case: was Myers exercising her First Amendment rights in the distribution of this questionnaire because it represented a matter of public concern?<sup>84</sup>

Justice White, in his majority opinion, started as the *Pickering* Court did, decrying the republic's early dogma that public employees owed a duty of loyalty to their employer.<sup>85</sup> This dogma came to a head in the 1950s and 1960s, in the wake of the "Red Scare," as states attempted to force public employees to sign loyalty oaths or otherwise face dismissal.<sup>86</sup> By then, the Court's jurisprudence protected the rights of public employees to participate in public affairs without fear of discharge or similar punishment: "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"<sup>87</sup> However,

---

supervisors, and similar concerns for distribution to other staff members, including "whether employees felt pressured to work in political campaigns." *Id.* Question 11 asked, "Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?" *Id.* at 155 (appendix to opinion of the court).

80. *Id.* at 141.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.* at 141-42.

85. *Id.* at 143-44. As famously stated by Justice Holmes, "[a] policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* (quoting *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892)). Holmes evidently envisioned the employment decision as being rather one-sided in favor of the employer:

There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here.

*McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (Mass. 1892). Ironically, Holmes was also an early proponent of the right of workers to organize into private associations. *See, e.g., Plant v. Woods*, 57 N.E. 1011, 1016 (Mass. 1900) (Holmes, J., dissenting); *Vegeahn v. Guntner*, 44 N.E. 1077, 1081-82 (Mass. 1896) (Holmes, J., dissenting).

86. *Connick*, 461 U.S. at 144; *see, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

87. *Connick*, 461 U.S. at 145 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).



Myers's speech hit a snag: it did not appear to fall under this general rubric of "public concern."<sup>88</sup>

Justice White's paradigm for protected speech included examining whether her speech was related to any political, social, or community concern worthy of protection.<sup>89</sup> If not, then a government employer had greater latitude in dismissing a government employee without the "intrusive oversight" of the courts:<sup>90</sup>

We hold . . . that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.<sup>91</sup>

White then outlined a process for determining when speech is a matter of public concern, a question of law for the court.<sup>92</sup> That process for reviewing the facts in the record required an inquiry as to the speech's content, form and context.<sup>93</sup> The record as a whole in the instant case indicated that most of the matters contained in Myers's questionnaire were not matters of public concern because they dealt with matters of internal office affairs.<sup>94</sup> One matter, however, touched on a public concern: whether the assistant district attorneys felt pressure to work on political campaigns.<sup>95</sup>

The next step of the inquiry was the balance of the government's interest dismissing the employee.<sup>96</sup> In making that assessment—also a question of law for the Court<sup>97</sup>—Justice White quoted Justice Powell from an earlier case:

To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can

---

88. *Id.* at 148.

89. *Id.* at 146.

90. *Id.* Speech on private matters might also be protected under circumstances not present in this case. *Id.* at 147.

91. *Id.* at 147 (citing *Bishop v. Wood*, 426 U.S. 341, 349–50 (1976)).

92. *Id.* at 147–48 & n.7.

93. *Id.* at 148.

94. *Id.* at 148–49.

95. *Id.* at 149. The problem hinted at coercion of public employees' beliefs for fear of retaliation. *Id.*

96. *Id.*

97. *Id.* at 150 n.10.



adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of any office or agency.<sup>98</sup>

In examining this management prerogative, the Court acknowledged that there was little evidence that Myers's questionnaire occasioned any disruption to the workplace.<sup>99</sup> In addition, its distribution did not disturb Myers's ability to function in her job.<sup>100</sup> However, the Court latched onto her supervisors' judgment that the questionnaire's distribution was "an act of insubordination which interfered with working relationships."<sup>101</sup> Ultimately, the questions themselves had the potential to sour what should otherwise be a close working relationship between and among attorneys and their supervisors.<sup>102</sup>

Thus, reduced to its essence, Myers's expression was merely "an employee grievance concerning internal office policy" for which she could be dismissed because of its disruptive potential.<sup>103</sup> Thus, a thin-skinned employer was granted greater credence than his employee's First Amendment rights in a matter of public concern.

The case that put some employee perspective into the analysis after *Connick's* employer perspective is *Rankin v. McPherson*.<sup>104</sup> Ardith McPherson was a nineteen-year-old deputy constable assigned to clerical work in the office of Constable Rankin of Harris County, Texas, on March 30, 1981.<sup>105</sup> On that day, John Hinckley, Jr. attempted to assassinate then-President Ronald Reagan.<sup>106</sup> After hearing the news on an office radio, McPherson discussed the news with a co-worker—who was also apparently her boyfriend—in the context of the President's efforts to cut back welfare payments, Medicaid benefits, and the food-stamp program.<sup>107</sup> At the tail end of the conversation, McPherson said something to the following effect: "I said, shoot, if they go for him

98. *Id.* at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result in part)).

99. *Id.* at 152.

100. *Id.* at 153.

101. *Id.* at 151. Myers's supervisors' notion of what constituted "insubordination" seems to have little connection to its meaning: "disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer." BLACK'S LAW DICTIONARY 550-51 (abr. 6th ed. 1991). The record before the Court provided no facts that would indicate Myers's questionnaire was insubordinate in that she refused no order.

102. *Connick*, 461 U.S. at 152.

103. *Id.* at 154.

104. 483 U.S. 378 (1987).

105. *Id.* at 380-81.

106. *Id.* at 381.

107. *Id.*



again, I hope they get him.”<sup>108</sup> Another co-worker overheard McPherson’s remark and told Constable Rankin.<sup>109</sup> Rankin summoned McPherson to his office whereupon McPherson admitted the statement, but qualified it by saying, “I didn’t mean anything by it.”<sup>110</sup> Constable Rankin fired McPherson on the spot.<sup>111</sup>

Ultimately ruling in favor of McPherson’s exercise of free speech, the Court again relied on *Pickering*, weighing “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>112</sup> Justice Marshall, writing for the Court, cautioned that the power of the state to fire employees is a potent method for stifling free speech: “Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”<sup>113</sup> Stated differently, under the First Amendment, employers may not fire employees merely to silence contrary points of view.

In addressing the threshold question of whether McPherson’s statement was a matter of public concern, the Court applied *Connick*’s content, form, and manner analysis to the record.<sup>114</sup> That analysis revealed that McPherson’s statement was a matter of public concern, imbedded as it was in the underlying conversation about the President’s policies and in the radio bulletin about the assassination attempt.<sup>115</sup> Although the comments were ill-advised and controversial, the character of the statement—insofar as it did not amount to an unlawful death threat—was well within the scope of acceptable debate in this country, where “[d]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>116</sup>

Completing the *Pickering* analysis was the Court’s examination of the state’s interest in McPherson’s expression and whether her speech interfered with the efficient provision of public services. The Court

---

108. *Id.*

109. *Id.*

110. *Id.* at 382.

111. *Id.*

112. *Id.* at 384 (alteration in original) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

113. *Id.*

114. *Id.* at 384–85.

115. *Id.* at 386–87.

116. *Id.* at 387 (second alteration in original) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).



reviewed the statement's manner, time, place, and context—whether her speech had a detrimental impact on any close working relationships dependent upon personal loyalty and confidence; whether it impeded her own duties; or whether it interfered with the regular operation of the office.<sup>117</sup> First, the record was devoid of evidence that McPherson's statement interfered with the workplace functions.<sup>118</sup> Indeed, Rankin testified that he had not even considered workplace functions in his dismissal decision.<sup>119</sup> In addition, McPherson's statement was made in a private conversation to which the public had no access.<sup>120</sup> But for a co-worker's overhearing the comment, it had no impact on the efficient functioning of the office.<sup>121</sup>

Rankin had merely decided that McPherson was unfit to work in his office because he disliked the content of her remark.<sup>122</sup> Such a bad management decision was insufficient state interest to support McPherson's discharge:

We cannot believe that every employee in Constable Rankin's office, whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency. At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee.<sup>123</sup>

As Justice Powell asserted in his concurring opinion, "The risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful."<sup>124</sup>

So the Court seemed to have reached a practical balance to free speech, recognizing that bad management practices should not govern whether public employees could feel free to speak. Rather, a mature inquiry into whether the speech actually affected the efficient functioning of the government office would dictate whether a government employee was being appropriately disciplined or inappropriately retaliated against. *Garcetti* changed that balance.

---

117. *Id.*

118. *Id.* at 389.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 390.

123. *Id.* at 391 (footnote omitted).

124. *Id.* at 393 (Powell, J., concurring).



*D. Losing the Tiles on Reentry*

In May 2006, the Court took the unprecedented step of allowing public employers to retaliate against public employees for speech-related activities, even if the speech was on a matter of public concern, if those activities arose during the course of their jobs.<sup>125</sup> *Garcetti* involved a dispute in the Los Angeles County District Attorney's Office where Richard Ceballos was a deputy district attorney.<sup>126</sup> Ceballos was a calendar deputy in the office's Pomona branch.<sup>127</sup> In February, 2000, a defense attorney advised Ceballos that an affidavit supporting a search warrant in a pending case was filled with inaccuracies and that he intended to challenge the warrant.<sup>128</sup> Because calendar deputies sometimes reviewed pending cases, Ceballos examined the affidavit in question and determined that it was replete with serious misrepresentations.<sup>129</sup> He followed up with the affiant, a deputy sheriff for the Los Angeles County Sheriff's Department, but was unsatisfied with the explanation for the inaccuracies in the document.<sup>130</sup> So Ceballos informed his supervisors of the issue then wrote a disposition memorandum of the problem.<sup>131</sup> A meeting was then convened to discuss the affidavit.<sup>132</sup> In attendance were Ceballos, his supervisors, and members of the sheriff's department.<sup>133</sup> The meeting became heated.<sup>134</sup> When the district attorney proceeded to prosecute the case despite the poor quality of the affidavit, the defense called Ceballos to testify about his concerns.<sup>135</sup> The trial court ultimately denied the defense's challenge to the warrant.<sup>136</sup> Afterward, Ceballos was subjected to several retaliatory employment actions, including reassignment, transfer, and the denial of a promotion.<sup>137</sup> Ceballos sued, asserting that his public employer had violated the First and Fourteenth Amendments.<sup>138</sup>

As usual, Justice Kennedy relied on the two-step *Pickering* balancing

---

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

126. *Id.* at 413.

127. *Id.*

128. *Id.* at 413–14.

129. *Id.* at 414.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 414–15.

136. *Id.* at 415.

137. *Id.*

138. *Id.*



analysis to set the threshold question in determining “whether [Ceballos] spoke as a citizen on a matter of public concern.”<sup>139</sup> If that threshold is crossed, then “[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”<sup>140</sup>

Justice Kennedy then divided the *Pickering* threshold analysis into an additional two-part inquiry: “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.”<sup>141</sup> If the employee cannot traverse that step, then there is no further inquiry and the speech is not protected.<sup>142</sup> In analyzing the facts in the record, the Court concluded that Ceballos composed his memorandum while acting within his professional duties: investigating charges, supervising attorneys, and preparing filings.<sup>143</sup> His memo was about the disposition of a pending case and therefore was within his official duties as a government employee.<sup>144</sup>

The Court did not “articulate a comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate.” The Court rejected, “however, the suggestion that employers can restrict employees’ rights by creating excessively broad job descriptions.”<sup>145</sup> What those official duties might be under any particular circumstance may be open for debate, but what had previously been a question of law in the first prong of the *Pickering* analysis became a question of fact:

The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.<sup>146</sup>

The Court’s analysis of Ceballos’s job situation and his speech provides some context. He could not be punished just for speaking in

139. *Id.* at 418 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

140. *Id.* (citing *Pickering*, 391 U.S. at 568).

141. *Id.* at 421 (emphasis added).

142. *See id.*

143. *Id.* at 422.

144. *Id.*

145. *Id.* at 424 (citing *id.* at 431 n.2 (Souter, J., dissenting)).

146. *Id.* at 424–25.



private rather than in public.<sup>147</sup> Nor could he be punished because the subject matter of his speech was within his employment.<sup>148</sup> “The controlling factor in Ceballos’[s] case is that his expressions were made pursuant to his duties as a calendar deputy. . . . Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case . . . .”<sup>149</sup> Thus, the employer’s ability to retaliate against an employee for such speech “simply reflects the exercise of employer control over what the employer itself has commissioned or created.”<sup>150</sup>

So in traversing the current First Amendment tenet, the courts have several steps to follow, most of which are dominated not by the speech or the employee’s rights but by the employer’s control of the workplace. First, a court will examine the facts for the *Garcetti* analysis: Did the employee speak pursuant to official duties? If not, then the court follows the *Pickering-Connick* analysis: Did the employee speak on a matter of public concern? If the employee spoke on a matter of public concern, then did the speech outweigh the employer’s interest in the efficient service of the governmental institution? If so, then the court applies the *Mt. Healthy* analysis: Would the public employer have punished the employee anyway? Somewhere in the evolution of this test, the matter of public concern has become submerged in the employer’s three bites at the apple. In the balance between the public employer’s management rights and the public employee’s speech rights, the Court greatly tipped the scales for employers.

## II. “WHEN THE [SCHOOL BOARD] DOES IT, THAT MEANS THAT IT IS NOT ILLEGAL”<sup>151</sup>

The *Garcetti* Court’s initial analysis on the official duties of a public employee in the First Amendment context has tested the abilities of courts to determine the exact nature of one’s “official” duties in any particular case, especially for school employees. In the near-universal absence of written job descriptions, the courts have a tendency to rely on the school employer’s characterization of the employee’s duties. Such analysis has garnered three broad categories of speech arising from

---

147. *Id.* at 420–21.

148. *Id.* at 421.

149. *Id.*

150. *Id.* at 422 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

151. A paraphrase of Richard M. Nixon’s interpretation of Executive power during a 1977 interview with David Frost: “When the President does it, that means that it is not illegal.” James M. Naughton, *Asserts U.S. Role Was Prolonged by Doves*, N.Y. TIMES, May 20, 1977, at A1.



“official” duties: speech the teacher must do to accomplish the job; speech that is job-related; and classroom speech, or academic freedom.<sup>152</sup>

### A. *Official-Duty Speech*

As discussed above, courts’ inquiries as to the official duties of a school employee is supposed to be a practical one. And although the Court eschewed the necessity of formal job descriptions to determine a public employee’s official duties, it also opened the door for school districts to provide a broad description of a school employee’s duties. In addition, some school employees acknowledged certain tasks were within their job duties—because they were proud of the care with which they did their job and because teachers had not yet been stung by *Garcetti* and the new rules of the game.

The following cases revolve around school employers’ retaliation for teacher speech that either fit within traditional official duties or arose out of tasks assigned by the employers. The collection primarily consists of teachers without tenure—relying on contract renewal for continuing employment—and school administrators. The status of these people, of course, makes them bigger targets for school boards because of the lack of contractual and statutory protections.<sup>153</sup>

---

152. There may have been other legitimate grounds for the dismissal or other punishment or discipline administered in these cases. However, this survey is limited to those matters related to First Amendment claims and *Garcetti* defenses.

153. Most of the teachers and administrators against whom school boards retaliated did not have sufficient tenure rights to protect them. Many teachers are protected from these actions in states where “just cause” is a statutory precondition for discharging or otherwise punishing teachers. In other states, teachers may be protected by collective bargaining agreements with “just cause” provisions for discharge and discipline. Unfortunately, not all teachers are covered by either state tenure or collective bargaining acts to protect their rights. Those are the most vulnerable to school board retaliation.

School administrators are even more vulnerable. Indeed, it is the rare occasion that a school administrator enjoys any of those protections; they generally are not considered to have any continuing contract rights in employment and are not members of any bargaining units that will otherwise protect their rights. To make matters worse, they do not have a powerful advocacy group that can take on the National School Boards Association like the teacher advocacy groups, National Education Association and American Federation of Teachers. Unfortunately, many school administrators align themselves with school board policy, often espoused by the school board’s attorney. But, when push comes to shove, the attorneys employed by a school board will heave the school administrator under the bus when things go wrong. And school administrator advocacy groups typically offer no more than \$10,000 worth of legal assistance for job protection attorney fees, apart from professional liability insurance. See American Association of School Administrators, Member Benefits and Services, <http://www.aasa.org/member/content.cfm?ItemNumber=2161&snItemNumber=5763> (last visited June 6, 2007); National Association of Elementary School Principals, Member Services & Benefits, <http://www.naesp.org/ContentLoad.do?contentId=377> (last visited Mar. 8, 2007); National Association of Secondary School Principals, Legal Fee Reimbursement Program, [http://www.principals.org/s\\_nassp/sec.asp?CID=1038&DID=54174](http://www.principals.org/s_nassp/sec.asp?CID=1038&DID=54174) (last visited Mar. 8, 2007). Unfortunately, that is a mere drop in the



Not atypical of the bunch is *Gilder-Lucas v. Elmore County Board of Education*.<sup>154</sup> Angela Gilder-Lucas was a non-tenured high school science teacher whose extracurricular duties included acting as sponsor of the junior varsity cheerleading squad.<sup>155</sup> After a couple of parents complained about the fairness of try-outs for the squad, Gilder-Lucas's principal asked her to complete a questionnaire that included questions concerning the try-outs; in response to the questions, Gilder-Lucas raised her own concerns about the try-outs.<sup>156</sup> The principal then told Gilder-Lucas her contract would not be renewed.<sup>157</sup> Gilder-Lucas filed suit.<sup>158</sup> The Eleventh Circuit, relying on *Garcetti*, determined that Gilder-Lucas had no First Amendment protections for her responses to the questionnaire—as requested by her supervisor—because she had been asked to fill out the questionnaire as the cheerleader sponsor and she was therefore not speaking as citizen.<sup>159</sup> Responding to a school administration-drafted questionnaire would hardly seem to be an official duty of any extracurricular faculty sponsor unless it was a common practice with the football coach, the Academic Decathlon supervisor, and the National Honor Society faculty advisor. However, refusing to respond to the questionnaire would have been insubordination. Consequently, whether this was really within her job description was irrelevant to the extent the school administration had expanded Gilder-Lucas's official duties by giving her a direct order she dared not refuse.

Naïve belief in the honor of doing one's job properly propelled several school employees into the unemployment line, especially over fiscal mismanagement. Accountability for expenditures under the Individuals with Disabilities Education Act (IDEA)<sup>160</sup> especially was the focus of a handful of retaliation cases. In *Yatzus v. Appoquinimink School District*, Olga Yatzus, a school psychologist with more than twenty years of experience, had been hired by Appoquinimink School District.<sup>161</sup> During the course of that employment, Yatzus openly expressed her concerns about the school district's special education

---

bucket to the taxpayer-funded legal representation school boards may access in legally justifying their retaliation. Administrators' tenuous job security may account for the fact that there are nearly as many administrators as teachers against whom school boards have retaliated for speaking on the job under *Garcetti*, particularly about matters that one would assume should be protected as matters of public concern.

154. 186 F. App'x 885 (11th Cir. 2006).

155. *Id.* at 886.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 887.

160. 20 U.S.C. §§ 1400–1482 (2000 & Supp. V 2005).

161. 458 F. Supp. 2d 235, 239 (D. Del. 2006).



program.<sup>162</sup> She wrote a letter to her superintendent about her concerns, emphasizing the school district was not complying with testing requirements for special education students.<sup>163</sup> Yatzus also corresponded through her personal e-mail to a group of parents of special education students and assisted them in claims filed with the federal Department of Education, Office of Civil Rights.<sup>164</sup> At the end of the school year, the school district's Human Resources director informed Yatzus that the school board had not renewed her contract for the following year.<sup>165</sup> Among other grounds, Yatzus sued the school district on First Amendment grounds, claiming the school district had retaliated for her correspondence to district administrators and her assistance to the parents group.<sup>166</sup> In her deposition, Yatzus asserted that her correspondence and her work with the parents were part of her job responsibilities as a school psychologist, "to report what [she] perceived as illegal behavior' and to assist parents with the [Office of Civil Rights] complaints."<sup>167</sup> That evidence was enough for the district court to determine, as a matter of law, that *Garcetti* compelled the same result for Yatzus: Yatzus was acting as a public employee during her official duties and not as a private citizen on a matter of public concern, and the school board was well within its rights to discharge her.<sup>168</sup>

Less than a month later, the same federal district upheld the contract non-renewal of another school psychologist in *Houlihan v. Sussex Technical School District*.<sup>169</sup> In *Houlihan*, the psychologist continuously tried to bring the attention of the school district as well as of the special education supervisor to deficiencies in the school's compliance with the IDEA.<sup>170</sup> The school board eventually voted to not renew her contract.<sup>171</sup> The district court ultimately granted the school district's motion to dismiss the psychologist's First Amendment

162. *Id.* at 241.

163. *Id.*

164. *Id.*

165. *Id.* at 242. In addition, Yatzus had the unfortunate experience of having her supervisor make unwanted sexual advances to her. *Id.* at 239. After the school district investigated and disciplined the supervisor, Yatzus's professional life took a turn for the worse, with the superintendent seeming to bird-dog her every move and issuing numerous reprimands to her file. *Id.* at 240-41.

166. *Id.* at 242.

167. *Id.* at 245 (first alteration in original).

168. *Id.* Yatzus's deposition was taken before *Garcetti* was handed down. *Id.* at 246. Obviously, Yatzus was attempting to establish that she was acting on a matter of public concern when she was deposed. *See id.* After *Garcetti*, Yatzus attempted to qualify the language in her deposition with an affidavit. *Id.* She was unsuccessful. *Id.* at 247.

169. 461 F. Supp. 2d 252 (D. Del. 2006).

170. *Id.* at 256.

171. *Id.*



retaliation claim because her complaint had alleged that “her job duties always entailed reporting alleged incidences of IDEA noncompliance.”<sup>172</sup> With such a clear-cut concession, her reports were deemed within her official duties, and *Garcetti* militated that she had no claim as a matter of law under the First Amendment.<sup>173</sup>

In *Ryan v. Shawnee Mission Unified School District No. 512*, similarly treated was a physical therapist who advocated for more physical therapy for special education students in her school district.<sup>174</sup> Her speech “owe[d] its existence to” her professional responsibilities, and hence she was speaking as an employee like Ceballos and not as a citizen.<sup>175</sup> She was not protected from retaliation under the First Amendment.<sup>176</sup>

Reporting mismanagement of funds in another federally funded program was also often within the official duties Barbara Casey, Superintendent of West Las Vegas Independent School District for about fifteen months.<sup>177</sup> One of her administrative responsibilities was acting as chief executive officer of the school district’s Head Start program.<sup>178</sup> During Casey’s tenure, the Head Start director passed along information concerning funding problems with the program because of participants’ underreporting income to become eligible.<sup>179</sup> Casey reported these problems several times to the school board president and the board itself.<sup>180</sup> When the school board failed to act, Casey instructed the director to report the problems to the federal Head Start regional office, which investigated and ordered the school district to reimburse more than half a million dollars.<sup>181</sup> For all her efforts, the school board demoted her to assistant superintendent then refused to renew her

---

172. *Id.* at 260.

173. *Id.* Ironically, the court refused to dismiss her complaint on the count asserting retaliation under the Rehabilitation Act because she was advocating on behalf of the disabled, actions protected from retaliation by the Act itself. *Id.* at 257–59; *see also* *Ryan v. Shawnee Mission Unified Sch. Dist. No. 512*, 437 F. Supp. 2d 1233, 1259 (D. Kan. 2006). In the *Ryan* case, a physical therapist was forced to resign after a series of events during which she advocated for increased services to special education students. *Id.* at 1239–45. These activities were protected from retaliation under the Rehabilitation Act, and summary judgment was entered in favor of the therapist. *Id.*

174. 437 F. Supp. 2d at 1249.

175. *Id.* at 1251. Her controversial speech occurred in several contexts, most of which were actually while doing her job: team meetings; phone calls and e-mails concerning student equipment needs; staff meetings; and the like in communicating information critical for her providing services. *Id.* at 1249–51.

176. *Id.* at 1251.

177. *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1325 (10th Cir. 2007).

178. *Id.*

179. *Id.* at 1326.

180. *Id.*

181. *Id.*



contract for the following year.<sup>182</sup> On the school board's motion for summary judgment, the United States Court of Appeals for the Tenth Circuit determined that *Garcetti* mandated Casey had no First Amendment protection for her reporting of the fiscal problems in the Head Start program.<sup>183</sup> Because she had a duty to report financial wrongdoing to the federal program, she was acting within her official duties.<sup>184</sup>

Another instance of punishing an educational employee for Head Start fiscal problems is *Dennis v. Putnam County School District*, where the fiscal officer of a Head Start program in Georgia was forced to resign her post.<sup>185</sup> She alleged she was being made a scapegoat for reporting her concerns that the Head Start director and his executive assistant made unauthorized purchases with federal funds.<sup>186</sup> The district court determined that, based on her duties as fiscal officer, reporting financial fraud was within her official—although unenunciated—duties as a matter of law because her report was “related” to her official tasks: paying bills, requesting funds, approving purchase requisitions and orders, reconciling bank statements, maintaining accurate records, and carrying out the day-to-day fiscal operations.<sup>187</sup> Furthermore, the fiscal officer conceded in her deposition that reporting financial misconduct was part of her job.<sup>188</sup> Consequently, *Garcetti* removed her First Amendment protection.<sup>189</sup>

Norma Cavazos was a high school principal against whom a school board retaliated when the board reassigned her to another school after she disciplined the son of the school board's vice president and reported him to the local police officials.<sup>190</sup> Because disciplining students was

---

182. *Id.* at 1327.

183. *Id.* at 1331.

184. *Id.*

185. No. 5:05-CV-07, 2007 WL 891517, at \*1–3 (M.D. Ga. Mar. 21, 2007).

186. *Id.*

187. *Id.* at \*4.

188. *Id.*

189. *Id.* at \*5. A similar result inured to a university employee whose official duties required she report mismanagement and fraud in student financial aid files. *Battle v. Bd. of Regents*, 468 F.3d 755 (11th Cir. 2006). Her contract was not renewed after she reported her concerns to the president of the university. *Id.* at 761–62.

190. *Cavazos v. Edgewood Indep. Sch. Dist.*, 210 F. App'x 414, 415 (5th Cir. 2006). This discipline was imposed after he was apprehended on school grounds with marijuana in his possession. *Cavazos v. Edgewood Indep. Sch. Dist.*, 400 F. Supp. 2d 948, 952–53 (W.D. Tex. 2005), *aff'd*, 210 F. App'x 414 (5th Cir. 2006). *See also* *Posey v. Lake Pend Oreille Sch. Dist.*, No. CV05-272, 2007 WL 420256 (D. Idaho Feb. 2, 2007) (holding that a school safety specialist's duties included speech about student safety and discipline); *Cole v. Anne Arundel County Bd. of Educ.*, No. CCB-05-1579, 2006 WL 3626888, at \*6 (D. Md. Nov. 30, 2006) (holding that a school bus driver was not protected under the First Amendment for her complaints about discipline problems and bus safety because they were



within her official duties as principal, Cavazos was unprotected pursuant to *Garcetti*.<sup>191</sup> Unfortunately, the fact-based analysis for this official duties analysis is unclear, even from the more detailed district court opinion, and was reached as a matter of law.<sup>192</sup>

In *Morris-Hayes v. Board of Education of Chester Union Free School District*, a New York court followed, more closely than the *Cavazos* court, the *Garcetti* caution to review the facts in the record to conduct an official duties analysis. In this case, a principal in New York had a couple of problems that resulted in her losing her job.<sup>193</sup> One of those problems was that, because of the potential for favoritism, she refused a school board member's request for special class placement.<sup>194</sup> In one of several opinions issued in that case, the Second Circuit remanded the matter to the district court for additional fact-finding to determine if the principal's acts were within her official duties for purposes of applying *Garcetti* to the proceedings.<sup>195</sup> Although it would seem fairly obvious that special class placements would be within a principal's typical official duties, the court at least did the principal the courtesy of treating the matter as a question of fact.

In *D'Angelo v. School Board*, the official duties fact inquiry resolved itself against the principal with his admission that, when he pursued charter conversion for his Florida high school, he was acting as a principal.<sup>196</sup> Because of an unsatisfactory appraisal of his school's performance, the newly hired D'Angelo pursued state procedures for converting to a charter school, including attending a seminar, leading staff meetings, and forming study committees.<sup>197</sup> He undertook these actions because "in good conscience [he] could not continue the practice of providing an inferior educational opportunity[, and he] would be remiss in [his] duties . . . if [he] did not explore any and all possibilities to improve the quality of education at [the school]."<sup>198</sup> He was terminated for his efforts then he filed suit, asserting that he was fired for his speech associated with his charter school conversion efforts. The

---

consistent with her official duties).

191. *Cavazos*, 210 F. App'x at 415.

192. *See Cavazos*, 400 F. Supp. 2d at 959–60. Perhaps of most significance is that the student's discipline was meted out in accordance with school district policy. *Id.* at 953. Otherwise, the Fifth Circuit seemed to determine Cavazos's duties as a matter of law, contrary to *Garcetti*'s instruction.

193. *Morris-Hayes v. Bd. of Educ.*, 423 F.3d 153, 155–156 (2d Cir. 2005).

194. *Id.* The principal was also a Major in the United States Army Reserve, and some individual school members expressed concerns about the amount of time her military obligations took. *Id.* at 155.

195. *Morris-Hayes v. Bd. of Educ.*, 211 F. App'x 28, 29 (2d Cir. 2007).

196. 497 F.3d 1203 (11th Cir. 2007).

197. *Id.* at 1206.

198. *Id.* (third, fifth, and sixth alterations in original).



Eleventh Circuit rewarded his conscientiousness by denying him First Amendment protection, holding that his admissions nullified the need to actually examine his official duties.<sup>199</sup>

Only federal law prevents a school board from retaliating against educators for actually fulfilling their duties. A small handful of federal civil rights statutes have anti-retaliation provisions: persons who have brought complaints under, or otherwise criticized the conduct of, a federal program may not be punished by their employer.<sup>200</sup> For instance, Olga Yatzus was unsuccessful in fending off discipline under the Individuals with Disabilities Education Act but was more successful in proceeding with her claim that the school district retaliated against her in violation of Title VII: she had reported her supervisor's sexual misconduct.<sup>201</sup> The IDEA does not have anti-retaliation provisions but Title VII does.<sup>202</sup>

Also inoculated from *Garcetti* by federal law was Cheryl Peters, Director of Gifted Education and Magnet Programs, whose contract was not renewed.<sup>203</sup> The impetus for the non-renewal was Peters's opposition to racially discriminatory school board practices.<sup>204</sup> Because Peters's lawsuit implicated both Title VI and First Amendment retaliation, the court refused to separate the two for purposes of the *Garcetti* analysis.<sup>205</sup> The court did not see *Garcetti*'s changing the Title VI jurisprudence on retaliation; hence, the court's threshold consideration had to hinge on the civil rights law and not on the First Amendment and the employee's official duties.<sup>206</sup>

Given how little time had passed between *Garcetti* and when these cases were handed down, the courts evidently had little time to prepare for the *Garcetti* inquiry into official-duty status of the speech. As a

199. *Id.* at 1210. This was clearly an instance where a plaintiff got caught in the notch between his termination in 2004 and *Garcetti*'s hand-down date. The principal and amici attempted to ameliorate the damage of his admissions by characterizing them as "moral obligations as a human being and not his responsibilities as a principal," but the court was having none of it, instead relying on the mechanical application of the official-duties analysis of *Garcetti*. *Id.* at 1210–11.

200. For example, under the Americans with Disabilities Act, "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a) (2000).

201. *Yatzus v. Appoquinimink Sch. Dist.*, 458 F. Supp. 2d 235, 244 (D. Del. 2006).

202. *See* 42 U.S.C. § 2000e-3(a) (2000).

203. *Peters v. Sch. Bd.*, No. 2:01cv120, 2007 WL 295618, at \*1 (E.D. Va. Jan. 26, 2007).

204. *Id.*

205. *Id.* at \*3.

206. *Id.* Other anti-retaliation provisions can be found under Title IX, 20 U.S.C. § 1681 (2000), the Rehabilitation Act, 29 U.S.C. §§ 791, 794 (2000 & Supp. V 2005), and the Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (2000 & Supp. V 2005).



consequence, some courts took liberties with the nature of the inquiry as a question of fact to reach ill-advised and presumptuous decisions as a matter of law. In addition, the respective plaintiffs often found themselves confronting a *Garcetti* defense mid-litigation, a defense for which they had clearly not prepared themselves, *viz.* many of them proudly conceded that these instances of speech arose out of their duties, taking pride in doing a job well done in the face of retaliatory actions by their employers. Now, much to their horror, they have to argue to the court—to save their jobs—that they have minimal job expectations and that they do only the minimal job expectations so that any speech for which they may be punished will not be characterized as official-duty speech. Chances are good that plaintiffs will become more sophisticated in the future. Chances are less good, unfortunately, that courts will be any better prepared to differentiate among educator tasks in order to winnow out only the official-duty speeches, perhaps because the whole exercise is so counterintuitive. This problem is especially exacerbated by the inability of courts to decide whether to protect job-related speech—as opposed to official-duty speech—or not.

B. “No Good Deed Goes Unpunished”:<sup>207</sup> Job-Related Speech

As alluded to in the previous section, courts since *Garcetti* have exhibited a willingness to stretch the meaning of a school employee’s official duties to justify school board retaliations. In doing so, they have created a twilight zone of speech that is not really official-duty speech. This category of job-related yet not official-duty speech has developed from either a too-broad job description by the employer<sup>208</sup> or from a decision by a court—as a question of law—as to what the employee *should* have done on the job rather than what the employee was *required* to do. The lengths to which courts went to justify the school boards’ actions are truly interesting. They went outside the traditional notion of school employees’ official duties and explained that those employees would not have had the wherewithal to speak on the subject matter at all but for their status as school employees.

Perhaps the starting point for demarcating job-related speech as distinct from official-duty speech is to examine cases in which the

---

207. This quotation has been variously attributed to Oscar Wilde, *see* The Phrase Finder, Re: “no good deed goes unpunished,” [http://www.phrases.org.uk/bulletin\\_board/27/messages/317.html](http://www.phrases.org.uk/bulletin_board/27/messages/317.html) (last visited June 4, 2007), and to Clare Booth Luce, *see* BrainyQuote, Clare Booth Luce Quotes, <http://www.brainyquote.com/quotes/quotes/c/clarebooth125511.html> (last visited June 4, 2007).

208. “We reject, however, the suggestion that employers can restrict employees’ rights by creating excessively broad job descriptions.” *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (citing *id.* at 431 n.2 (Souter, J., dissenting)).



educator prevailed. For instance, the district court in *Pittman v. Cuyahoga Valley Career Center* chose to interpret *Garcetti*'s official duties inquiry rather broadly in the case of a substitute teacher who, among other acts of expression, wrote a memorandum to his superintendent concerning parking lot safety.<sup>209</sup> The court decided that *Garcetti*'s inquiry mandated the court to look at whether the speech was required to determine whether it was an official duty.<sup>210</sup> Pittman's memorandum concerning parking lot safety was not required by his official duties, and therefore *Garcetti* did not apply.<sup>211</sup> Similarly decided was *McMahon v. New York City Board of Education*, where a high school chemistry teacher was not constrained by *Garcetti* inasmuch as his barrage of letters was not within his official duties and, but for a few instances dealing with matters of public concern, primarily dealt with his personal animus against school administrators.<sup>212</sup> And oddly decided was *Montle v. Westwood Heights School District*, in which a teacher's probationary contract was not renewed because he wore a T-shirt to school that said "Working Without a Contract."<sup>213</sup> The district court mentioned the recently decided *Garcetti* case, and then it proceeded to start the analysis from the point of establishing that Montle's speech was on a matter of public concern, presumably because—as a matter of law—union speech is not within a teacher's official duties.<sup>214</sup> These were the easier questions to resolve for the courts involved. Indeed, they seemed to conclude that these educators had spoken outside their official duties as a matter of law.

The more problematic cases are those where the speech is job-related: it arises out of information gleaned on the job, but the speech itself is not an official duty. In instances where the information was gathered on the job but such information-gathering was not an official duty, the courts tended to find that *Garcetti* did not foreclose First Amendment claims. For example, the district court in *Wilcoxon v. Red Clay Consolidated*

209. 451 F. Supp. 2d 905, 910–11 (N.D. Ohio 2006).

210. *Id.* at 929.

211. *Id.* The *Pittman* court used a "job-relatedness" analysis, *id.*, which would suggest that the court was seeking something beyond official duties to support the school board's position. In any event, the court proceeded to look at Pittman's official duties. *Id.* As it turned out, Pittman's memorandum was not on a matter of public concern so the court's *Connick* analysis prohibited Pittman from pursuing a First Amendment claim on this and other personal issues on which Pittman spoke. *Id.* at 929–30.

212. No. CV-01-6205, 2006 WL 3680624, at \*1, \*6–7 (E.D.N.Y. Dec. 12, 2006).

213. 437 F. Supp. 2d 652, 653 (E.D. Mich. 2006).

214. *Id.* at 654; see also *Bowers v. Rector & Visitors of Univ. of Va.*, No. Civ. 3:06CV00041, 2006 WL 3041269 (W.D. Va. Oct. 24, 2006) (university employee avoided *Garcetti*'s impact because the e-mail she transmitted from her work account was not within her official duties). Montle still lost under the *Connick* analysis, but the opinion suggests that matters of more urgent public concern, such as labor unrest, merit broader protections than *Garcetti* offers. *Montle*, 437 F. Supp. 2d at 654–55.



*School District Board of Education* determined that a physical education teacher's journal of a team-teacher's absences was outside *Garcetti's* reach: the teacher was not employed to monitor his fellow teacher and his official teaching duties did not mandate that he do so.<sup>215</sup> Similarly, in *Black v. Columbus Public Schools*, an assistant principal reported that her principal was having an affair with a parent volunteer.<sup>216</sup> Then she was transferred to a less prestigious school.<sup>217</sup> In analyzing the school board's motion to file a supplemental motion for summary judgment to account for the recently decided *Garcetti*, the court determined that, even if the school board had not waived the issue based on Sixth Circuit precedent, it still could not prevail because the assistant had no official duties that required her to supervise her principal or even to report misconduct of her principal.<sup>218</sup>

The court treated the job-related speech for which Superintendent Barbara Casey sought First Amendment protection in *Casey v. West Las Vegas Independent School District* in a similar manner to *Wilcoxon*.<sup>219</sup> Casey was concerned that the school board was violating the New Mexico Open Meetings Act by failing to give proper notice.<sup>220</sup> She filed a written complaint with the New Mexico Attorney General's Office when the school board failed to heed her concerns.<sup>221</sup> The Attorney General's Office determined that the school board had indeed violated the open meetings act and ordered it take corrective action.<sup>222</sup> In this instance, *Garcetti* did not foreclose Casey's reporting problems with the open meetings act because that was outside her official duties.<sup>223</sup> According to the record before the court, Casey had no responsibility for the board's meetings and was not responsible for the board's compliance with the act.<sup>224</sup> Hence, she was acting within her protected First Amendment right when she reported to the Attorney General's office.<sup>225</sup>

Perhaps of greater concern are the courts that examine "job-relatedness" to slot speech into a teacher's official duties<sup>226</sup> or the courts

---

215. 437 F. Supp. 2d 235, 243 (D. Del. 2006).

216. No. 2:96-CV-326, 2006 WL 2385359, at \*1 (S.D. Ohio Aug. 17, 2006).

217. *Id.* at \*2.

218. *Id.* at \*5.

219. 473 F.3d 1323 (10th Cir. 2007).

220. *Id.* at 1326.

221. *Id.*

222. *Id.*

223. *Id.* at 1332-33.

224. *Id.* at 1332.

225. *Id.* at 1332-33.

226. *See, e.g., Pittman v. Cuyahoga Valley Career Ctr.*, 451 F. Supp. 2d 905, 929 (N.D. Ohio 2006).



that strip protection from “speech [that has] official significance . . . and could not have been made by public citizens.”<sup>227</sup> Such analyses suggest that courts go beyond the employee’s official duties and analyze speech that is just related to employment, relying on information the employee would not have had but for the job. This speech is in no way required of the job and therefore not within an educator’s official duties. However, but for the job, the speech would not have occurred.

Illustrative of this elevation of job-related speech to official-duty speech is *Williams v. Dallas Independent School District*, where a report on the alleged misuse of athletic funds was grounds for discharge.<sup>228</sup> Gregory Williams was Athletic Director and Head Football Coach at a high school within the Dallas school district.<sup>229</sup> Williams, at various times, tried to get the office manager to inform him about the state of accounts for athletic expenditures, including by a memorandum copied to the school principal.<sup>230</sup> When Williams received no responses to his inquiries, he finally wrote, during football season, a memorandum concerning the finances of the athletic department to the principal himself.<sup>231</sup> Four days later the principal removed Williams as athletic director, and in the spring, the school district decided not to renew Williams’s contract.<sup>232</sup> Williams sued, asserting the school district had retaliated against him in violation of the First Amendment.<sup>233</sup> The Fifth Circuit affirmed the district court’s summary judgment in favor of the school district by relying on *Garcetti*.<sup>234</sup> Although the court determined that Williams’s official duties did not require him to write a memorandum to the principal about the athletic funds, his duties as athletic director did encompass the subject matter of the memorandum, the daily operations of the high school’s athletic department.<sup>235</sup> The budgetary concerns expressed in the memorandum were not expressed as those of a citizen but from a specialized knowledge he only had

---

227. *Cole v. Anne Arundel County Bd. of Educ.*, No. CCB-05-1579, 2006 WL 3626888, at \*6 (D. Md. Nov. 30, 2006); *see also Ward v. Bd. of Trs. of Chi. State Univ.*, No. 06 C 1360, 2007 WL 1512419 (N.D. Ill. May 22, 2007) (holding that university administrator’s retransmission of an e-mail she had received concerning criminal allegations about a dean was punishable by *Garcetti* as she had been targeted to receive the original e-mail because of her administrative position).

228. 480 F.3d 689 (5th Cir. 2007).

229. *Id.* at 690.

230. *Id.*

231. *Id.* at 690–91.

232. *Id.* at 691. The principal was apparently unhappy with the tenor of Williams’s memorandum when he suggested that he had “found that there is a network of friends and house rules, which govern practices here at L.G. Pinkston High School.” *Id.*

233. *Id.*

234. *Id.* at 692–94.

235. *Id.* at 694.



because of his job with the school district.<sup>236</sup> Thus, the court applied *Garcetti* and rejected Williams's claims.<sup>237</sup>

In one of the oddest cases of job-related retaliation, a middle school teacher was punished for filing a verbal complaint with the state's Department of Children and Families (DCF). Robert Pagani was a middle-school science teacher in Connecticut.<sup>238</sup> Two middle school students advised Pagani that a substitute science teacher had shared with students a photograph album that not only memorialized the teacher's European trip but also included a nude picture of him with two nude females.<sup>239</sup> Pagani reported the incident to his principal but was told not to report it to DCF.<sup>240</sup> Pagani did so anyway, and there followed a bizarre string of events demoting, reassigning, and finally reinstating Pagani.<sup>241</sup> The district court determined that Pagani was not protected because reporting child abuse is mandated by the Connecticut reporting statutes and is therefore a legal requirement of teachers' jobs.<sup>242</sup> According to the court, inasmuch as this duty is mandated for teachers, Pagani was not speaking as a citizen on a matter of public concern but was acting within his official job duties.<sup>243</sup>

The court's reasoning in relying on *Garcetti* to rule against Pagani's First Amendment claim is more than a little confusing. First, the facts revealed that Pagani's superiors had told Pagani not to file a report;<sup>244</sup> hence, Pagani's superiors believed such a report was not within his official duties. Second, Pagani—perhaps in a surfeit of moral concern and probably before *Garcetti* was handed down—conceded in his amended complaint that reporting child abuse incidents was part of his professional duties.<sup>245</sup> Last, the pertinent Connecticut reporting statute lists numerous individuals and entities, other than teachers, who are mandated to report child abuse.<sup>246</sup> The statute makes reporting a duty

---

236. *Id.*

237. *Id.*

238. Pagani v. Meriden Bd. of Educ., No. 3:05-CV-01115, 2006 WL 3791405, at \*1 (D. Conn. Dec. 19, 2006).

239. *Id.*

240. *Id.* at \*2.

241. *Id.* The factual record in the opinion is unclear, but apparently Pagani was tenured or had otherwise secured some sort of contractual or statutory job protection that prohibited his being dismissed. *Id.*

242. *Id.* at \*4.

243. *Id.* at \*4.

244. *Id.* at \*2.

245. *Id.* at \*3.

246. CONN. GEN. STAT. § 17a-101 (2007). This statute covers the following mandated reporters:

Any physician or surgeon licensed under the provisions of chapter 370, any resident physician or intern in any hospital in this state, whether or not so licensed, any registered



but does not make reporting a job requirement. In Connecticut, the statute imposes punishment for failure to report—fines and mandatory training—but not job discipline.<sup>247</sup> Although perhaps a too-fine point, state legislatures imposed this legal duty on numerous classes of citizens, including teachers, because of the information gleaned on the job, thereby making the statutory duty a condition of citizenship, not a condition of employment. This is particularly so when the penalty for failure to report in some states is punishable as a crime.<sup>248</sup> Thus, because information is gleaned because of the teacher's position, speech about the information may be punishable as an official duty.

The same lack of protection inured to New York City public school teachers who reported that their supervisor inappropriately touched and sexually harassed students and other teachers.<sup>249</sup> The supervisor was terminated when the allegations were substantiated; the teachers who reported these problems—along with numerous other matters—alleged they were retaliated against by being harassed then forced to resign.<sup>250</sup> In addressing their First Amendment claims, the court determined that the teachers' reports were not protected because school district policy mandated reporting.<sup>251</sup> As a consequence, the reports were undertaken as an official duty.<sup>252</sup>

---

nurse, licensed practical nurse, medical examiner, dentist, dental hygienist, psychologist, coach of intramural or interscholastic athletics, school teacher, school principal, school guidance counselor, school paraprofessional, school coach, social worker, police officer, juvenile or adult probation officer, juvenile or adult parole officer, member of the clergy, pharmacist, physical therapist, optometrist, chiropractor, podiatrist, mental health professional or physician assistant, any person who is a licensed or certified emergency medical services provider, any person who is a licensed or certified alcohol and drug counselor, any person who is a licensed marital and family therapist, any person who is a sexual assault counselor or a battered women's counselor as defined in section 52-146k, any person who is a licensed professional counselor, any person paid to care for a child in any public or private facility, child day care center, group day care home or family day care home licensed by the state, any employee of the Department of Children and Families, any employee of the Department of Public Health who is responsible for the licensing of child day care centers, group day care homes, family day care homes or youth camps, the Child Advocate and any employee of the Office of Child Advocate.

*Id.* § 17a-101(b) (footnote omitted). *See also* MASS. GEN. LAWS ch. 119, § 51A (2007) (obligating teachers, administrators, counselors, and day-care workers to report); NEB. REV. STAT. § 28-711 (2007) (any "school employee" has an obligation to report).

247. CONN. GEN. STAT. § 17a-101a (2007). *But see* FLA. STAT. § 1006.061 (2007) (child abuse reporting requirements must be posted in schools).

248. *See, e.g.*, IND. CODE § 31-33-22-1 (2007) (failure to report child abuse is Class B misdemeanor).

249. *Pearson v. Bd. of Educ.*, 499 F. Supp. 2d 575, 589 (S.D.N.Y. 2007).

250. *Id.* at 584, 589.

251. *Id.* at 589.

252. *Id.*



Somewhat similar is *Trujillo v. Board of Education* where a high school aerospace instructor in an Air Force ROTC program, Trujillo, filed suit after being placed on administrative leave for alleged misconduct.<sup>253</sup> In his First Amendment claim, Trujillo asserted that he had been punished for reporting his new superior's lack of certification from the Federal Aviation Administration and alleged abuse of students.<sup>254</sup> *Garcetti* was handed down in the midst of the suit and was latched onto by the supervisor as a defense to Trujillo's claim.<sup>255</sup> Although these two events could be split down the middle—the first being job-related speech and the other being official-duty speech—the Tenth Circuit Court of Appeals correctly remanded the case for fact-finding to make that determination.<sup>256</sup>

Divining a court's decision when job-related speech is involved is not easy; it is perhaps harder than deciding what a court will do with official-duty speech. As with its treatment of official-duty speech, the *Garcetti* decision created a vacuum for fact-finding inquiries in job-related speech cases. Exacerbating the problem is that some courts are making decisions as questions of law rather than engaging in fact-finding as set out in *Garcetti*. Furthermore, a significant time lag existed between the law and litigation strategy. The unfortunate outcome may be that, as school boards become more willing to expand the official duties of their employees to encompass job-related speech, the more teachers and administrators will refrain from doing all the little extras that make the school boards accountable to the public.

### C. "A Pall of Orthodoxy":<sup>257</sup> Academic Speech

One of the chief criticisms made by the dissenting Justices in *Garcetti* was the opinion's open threat to academic freedom.<sup>258</sup> Indeed, the Court's majority, sounding defensive in the face of this and other withering attacks by the dissenting Justices, cordoned off its decision from academic freedom:

There is some argument that expression related to academic scholarship

---

253. 212 F. App'x 760, 763 (10th Cir. 2007).

254. *Id.* at 764.

255. *Id.*

256. *Id.* at 764–65.

257. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

258. "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'" *Garcetti v. Ceballos*, 547 U.S. 410, 438–39 (2006) (Souter, J., dissenting) (citing *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003); *Keyishian*, 385 U.S. at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).



or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.<sup>259</sup>

Apparently, some courts paid no attention to this declaration.

The Fourth Circuit, no stranger to academic freedom disputes,<sup>260</sup> used *Garcetti* as a new weapon against a teacher's discretion in classroom instruction. In *Lee v. York County School Division*, a school administrator removed controversial materials from a Spanish teacher's classroom bulletin board.<sup>261</sup> The teacher wanted to post the materials, including a National Day of Prayer poster, a news article outlining religious differences between presidential candidates, a news article about the United States Attorney General's Bible study sessions, and news articles about the death of a missionary.<sup>262</sup> The teacher believed that these postings would be useful to his students.<sup>263</sup> The court determined that, because these materials were of a curricular nature—a fact that Lee had conceded—they were not matters of public concern as a matter of law.<sup>264</sup> Reinforcing Lee's concession, the court—also as a matter of law—determined they were curricular because they were posted and therefore had the imprimatur of the high school and were designed to teach.<sup>265</sup> Therefore, because the speech was curricular, it was employment-related and therefore not protected by the First Amendment.<sup>266</sup> The Fourth Circuit thus reduced the controversy from a First Amendment matter to a mere employment dispute, an odd result considering the materials really had nothing to do with teaching Spanish

259. *Id.* at 425 (majority opinion).

260. *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (en banc). In *Boring*, the Fourth Circuit conflated the *Pickering-Connick* analysis freedom of employee speech analysis with the freedom of student speech analysis in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Boring*, 136 F.3d at 368–69. In so doing, the court determined that a teacher's selection of a controversial play about a dysfunctional, single-parent family was inappropriate on the basis of one parental complaint after the parent had signed a permission statement to see the play. *Id.* at 366. The principal had notice that the teacher was doing the play under the then-extant school district procedures, but he had undertaken no independent study of the play. *Id.* The court determined this teacher's play selection was worthy of "discipline" because it involved nothing more than an employment dispute. *Id.* at 368. Perhaps more accurately, the dispute was an effort by the school principal and the county board of education to scapegoat the teacher to shield them from controversy. *Id.* at 374 (Hamilton, J., dissenting).

261. 484 F.3d 687, 690 (4th Cir. 2007).

262. *Id.*

263. *Id.* at 691–92.

264. *Id.* at 696–97.

265. *Id.* at 697–98.

266. *Id.* at 700.



and the teacher's employment was never in jeopardy—he had sued to be allowed to exercise his speech rights to post the materials.<sup>267</sup> The reasons for entangling academic freedom—even if by another name—are just not apropos.

Also oddly decided was *Caruso v. Massapequa Union Free School District*.<sup>268</sup> Jillian Caruso was an elementary teacher for a year and a half for the school district until she resigned from her third-grade position in January, 2005.<sup>269</sup> The event leading up to her resignation arose during the preceding fall's presidential campaign.<sup>270</sup> As an active member of the Republican Party and an ardent supporter of President George W. Bush, she talked to her third-grade class about her activities.<sup>271</sup> During that fall, Caruso posted an official White House photograph of Bush in her classroom.<sup>272</sup> She claimed her principal<sup>273</sup> made her remove the Bush photograph and forced her to resign her position, an act of constructive discharge.<sup>274</sup> The school district's version of events detailed how the third-grade classes participated in a mock election during that fall and that Caruso had been given the option of either removing the Bush photograph or of adding a photograph of Senator John Kerry, the other presidential candidate, for purposes of balance in that election.<sup>275</sup> On the school district's motion for summary

---

267. *Id.* at 691–92. An alternative decision might have been better premised on harassment or church-state arguments. *See, e.g.,* *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006). Martha Louise Piggee was a part-time cosmetology instructor at Carl Sandburg College who regularly interjected her religious beliefs into her instruction and regularly gave out religious tracts to selected students. *Id.* at 672. After she gave a gay student two religious tracts attacking the sinfulness of homosexuality during instructional time, the college decided not to retain her for violating its anti-sexual harassment policy. *Id.* at 668. Piggee's First Amendment claim asserted, in part, that she should be able to discuss religious matters with students. *Id.* at 670. The Seventh Circuit determined that *Garcetti* was inapplicable to this situation except to emphasize the public school employer's interest in ensuring that appropriate classroom instruction occur: the college was concerned that Piggee's religious activities impeded the instructional curriculum because so many students were uncomfortable with her proselytizing. *Id.* at 672. Having determined that Piggee's actions fell within the ambit of its anti-sexual harassment policy, the college was well within its rights to restrain Piggee's actions and thereafter refuse to keep her on its faculty. *Id.* at 673–74. Throughout, the Seventh Circuit was cautious to tiptoe around the academic freedom issues. *Id.* at 670–71. The distinction between the Seventh Circuit's decision here and its later decision in *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 160 (2007), is the difference between the higher education institution in *Piggee* and the K–12 public school corporation in *Mayer*.

268. 478 F. Supp. 2d 377 (E.D.N.Y. 2007).

269. *Id.* at 380.

270. *Id.*

271. *Id.*

272. *Id.*

273. Caruso alleged that the principal was married to a liberal elected official and kept a picture of Senator Hillary Clinton in her office. *Id.*

274. *Id.* at 380–81.

275. *Id.* at 381. The less glamorous problem was that Caruso was not a very good teacher. *Id.*



judgment against Caruso's First Amendment claim, the federal district court first considered the *Garcetti* analysis, addressing the problem as official-duty speech.<sup>276</sup> The district court gave lip-service to Justice Kennedy's caution about classroom instruction and then confused Caruso's classroom activities as something other than classroom instruction, going off on a short jaunt about job descriptions and official duties.<sup>277</sup> Then the court further confused the matter. It asserted that "whether an employee speaks pursuant to his official duties and whether such speech falls into the category of protected speech present questions of law for the court," but it ruled that summary judgment was inappropriate because there remained numerous questions of fact, especially concerning the nature of Caruso's duties pursuant to *Garcetti*.<sup>278</sup> As best can be wrested from this analysis, classroom speech may or may not be protected, but if it is part of a teacher's official duties, then it is not protected.

The Seventh Circuit was less ambiguous in *Mayer v. Monroe County Community School Corp.*, when it relied on *Garcetti* to uphold the dismissal of a probationary elementary teacher for her in-class instruction based on materials approved by the school district.<sup>279</sup> In doing so, the court left no doubt that kindergarten through twelfth-grade teachers within its jurisdiction have no academic freedom. Deborah Mayer, while teaching current events, was asked by one of her students whether she had participated in any political demonstrations.<sup>280</sup> The discussion surrounded instructional materials approved by the school district.<sup>281</sup> According to the court, she replied that "when she passed a demonstration against this nation's military operations in Iraq and saw a placard saying 'Honk for Peace', [sic] she honked her car's horn to show support for the demonstrators."<sup>282</sup> After "some parents" complained, Mayer's teaching contract was not renewed for a second year.<sup>283</sup>

---

276. *Id.* at 382–83.

277. *Id.*

278. *Id.* at 384. The court also suggested that if the *Garcetti*-employment analysis did not apply, then it would follow the *Connick-Pickering* analysis of citizen's speech on matters of public concern. *Id.* at 383.

279. 474 F.3d 477, 480 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 160 (2007).

280. *Id.* at 478.

281. *Mayer v. Monroe County Cmty. Sch. Corp.*, No. 1:04-CV-1695, 2006 WL 693555, at \*2 (S.D. Ind. Mar. 10, 2006), *aff'd*, 474 F.3d 477 (7th Cir. 2007).

282. *Mayer*, 474 F.3d at 478.

283. *Id.* The Seventh Circuit opinion is somewhat at odds with the undisputed facts elicited during the school district's motion for summary judgment and recounted by the district court. See *Mayer*, 2006 WL 693555, at \*2–9. According to those facts, Mayer taught in an alternative learning class for children in fourth through sixth grades, in Bloomington, Indiana, home of Indiana University. *Id.* at \*2. Every Friday, Mayer used a children's newsletter, *Time for Kids*, to discuss current events. *Id.*



Relying on *Garcetti* as the main impetus for its decision, the court discounted notions of academic freedom and ruled that Mayer's discussion of current events was within her official duties.<sup>284</sup> Because the school district had "hired" Mayer for her speech, the school district could restrict its teachers—as the basis of its curriculum—to teaching speech but not opinion speech.<sup>285</sup> However, Mayer engaged in only teaching speech, and she did not depart from the school-approved curriculum.<sup>286</sup> But just to be on the safe side, the court essentially quashed any notion that public school teachers have any academic freedom except within the context of the curriculum and therefore within the majority's rule because teachers' only employment is to be

---

*Time for Kids* was approved for use at her elementary school in general and in her classroom in particular. *Id.* The December 13, 2002 issue of *Time for Kids* featured peace marches in Washington, D.C. to protest U.S. involvement in launching a war on Iraq. *Id.* One of Mayer's students asked if she would participate in a peace march:

At that time I said, "Peace marches are going on all over the country. We even have demonstrations here in Bloomington, Indiana. When I drive past the courthouse square and the demonstrators are picketing I honk my horn for peace because their signs say, 'Honk for Peace.'["]

And then I went on to say that I thought that it was important for people to seek out peaceful solutions to problems before going to war and that we train kids to be mediators on the playground so that they can seek out peaceful solutions to their own problems and so they won't fight and hurt each other. And that was the extent of the conversation and the discussion.

*Id.* Her complaint further alleged that "[s]he stated that she thought peace was an option to war and that peaceful solutions should be sought before going to war." *Id.* After only one set of parents complained—several sets of parents complained about Mayer's teaching methods but only one set of parents complained about the First Amendment issue—the school principal issued a directive that, although the school would continue to promote peace in the classroom, teachers were not to promote any particular foreign policy view. *Id.* at \*3. He also cancelled the school's annual Peace Month. *Id.*

The *Time for Kids* article for December 13, 2002, *Searching Iraq*, included the following:

Opinion polls show that 58% of Americans would support such an attack. Still, many are speaking out against it. *A big antiwar rally is scheduled in Washington, D.C., this week.* "There are other ways to deal with [Hussein] besides bombing," says peace activist Elke Heitmeyer. "Wars will only create more violence."

Ritu Upadhyay, *Searching Iraq*, TIME FOR KIDS, Dec. 13, 2002 (alteration in original) (emphasis added), available at <http://www.timeforkids.com/TFK/teachers/wr/article/0,27972,397638,00.html>.

284. *Mayer*, 474 F.3d at 479.

285. *Id.*

286. *See id.* The court's hyperbolic attempt at analogy does not make its conclusion any more convincing. In erecting the straw-man bad teacher who would prevail if Mayer's innocuous statement were unpunished, the court asserted that school districts would have no authority to control teachers like a social studies teacher who teaches inaccurate statements that Benedict Arnold was not a traitor; a teacher who teaches religious theory rather than the text in violation of the separation of church and state; an English teacher who is hired to teach only *Moby Dick* but teaches *Cry, the Beloved Country* instead; and a math teacher who prefers to teach calculus over trigonometry. *Id.* The first teacher is incompetent while the other three are insubordinate; these straw-men do not raise curricular concerns to support the court's holding.



government speakers:<sup>287</sup> “[T]he first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.”<sup>288</sup>

Perhaps one saving grace of these decisions is that they seem limited to politically controversial matters rather than true controversy over curriculum. That is not to say that school boards will not use these cases as precedent to punish teachers for classroom speech. The reality is that these cases arise—although not always—when a school administrator is put into the hot seat by a couple of “offended” parents. The record reflects no general public outcry about the substance of what these teachers said or did in their classrooms, and a few parent complaints necessitate only a discussion about the appropriateness of presenting both points of view on religious and political materials. Rather than find themselves in a bind, however, the school administrators took action against the teacher to forestall the school boards’ going after them instead, especially if the teacher was in a more vulnerable employment position than the administrators. However characterized, these cases are about politics and not at all about the curriculum. Therefore, they were not really official-duty cases. Perhaps they can be cabined as outliers and not as academic freedom cases.<sup>289</sup>

The speech involved in the above cases clearly runs the gamut of activities in which teachers may be engaged as part of their jobs: official speech, speech based on information derived only from being on the job, and classroom speech. Setting aside for the moment classroom speech that would otherwise be protected under academic freedom, the dividing line between the other two types of speech is blurry. No trend is clear except that courts seem prone to allow school boards to punish teachers—and administrators—for anything said at work as necessarily arising from the fact of the employment and thereby becoming official-duty speech. This unfortunate tendency will lead to an ever-widening artificial range of official duties to justify these actions as “legitimate” punitive action rather than First Amendment retaliation.

On the other hand, perhaps the trend of courts’ allowing school boards to punish faculty for things said at work hides the real dilemma with which courts are wrestling—when are employees on the job not citizens and therefore punishable for official-duty speech? How does a court extrapolate a line between the employee and the citizen on the job?

---

287. *Id.* at 479–80.

288. *Id.* at 480.

289. However, one should not be hopeful because the *Mayer* opinion suggests that the Seventh Circuit is anxious to attack academic freedom at institutions of higher education also. *Id.* at 480.



That dilemma is perhaps more acute for teachers than for others, as evidenced by the mixed results of recent cases, because their stock in trade is speech; their entire work world requires speech. Perhaps that is the point: either school boards can always retaliate against teachers because they always speak only as employees, or perhaps the *Garcetti* analysis is an inappropriate fit and should not be applied to teachers at all.

### III. “BY THE WORK ONE KNOWS THE WORKMAN”<sup>290</sup>

#### A. Teachers’ Official Duties

An easy answer to the *Garcetti* inquiry into teachers’ official duties would be for schools to have written job descriptions. Other than the terms of a particular individual’s contract—start and end date, job assignment, supplemental assignments like coaching, and salary—a school board would then find it difficult to enumerate official duties it had assigned to any particular teacher. However, experienced teachers would be hard-pressed to produce job descriptions of the positions for which they were hired. Administrators may have an easier time of articulating the specific written responsibilities for which they have been hired and that they must fulfill to do their jobs competently.<sup>291</sup> But teachers have a hard time articulating what their official duties entail other than being teachers from the time they enter the door until the time they leave.

The question then remains, in an environment without specific, written job descriptions, how the parties to a *Garcetti* proceeding will define the undefined. Of course, school board witnesses’ testimony likely will broaden a teacher’s tasks to cover nearly all on-the-job

---

290. This quotation has been attributed to Jean de La Fontaine. See JOHN BARTLETT, FAMILIAR QUOTATIONS 983 (10th ed. 1919).

291. For example, Chicago Public Schools enumerates numerous requirements for its school principals, among them, the competencies to:

Assess the Quality of Classroom Instruction

- [1] Know and have the ability to direct the implementation of successful literacy and mathematic strategies school-wide
- [2] Possess expert knowledge of a range of effective learning theories and practices, with the ability to model practice, and coach and assist teachers to support instructional improvement
- [3] Have an understanding of and ability to lead standards-based instruction
- [4] Be able to use data to improve instruction and student achievement



speech, in the absence of any limiting direction, and especially sufficiently broadly to justify the school board's actions. Teachers, then, will have an incentive to testify that their official duties are narrow.

Courts inquiring into teachers' official duties should consider norms that state legislatures have used to limit school board power to fire at will. In other words, in the absence of an affirmative job description, teachers' official duties should be circumscribed by negative norms for which teachers may be discharged or disciplined.<sup>292</sup> Even more protective would be those norms spelled out in a collective bargaining agreement between the school board and its teachers because those norms are more protective than those minimal protections afforded by the state. Those statutory and contractual parameters would have the virtue of not being as subjective and self-serving as a school board's testimony to support its grounds for retaliating.

These negative norms are inexact, but the legislative language and the interpretive case precedent make them more exact. The fairly universal norms for which teachers can be disciplined are as follows: incompetence, neglect of duty, insubordination, immorality,<sup>293</sup> unfitness to teach, and unprofessional conduct.<sup>294</sup> Incompetence is the inability to do the job in the technical (not instructional) sense, such as being unable to conduct classes, unable to communicate effectively, unable to supervise the class, or deficient in the subject matter.<sup>295</sup> Incompetence is a comparative norm, viewing a particular teacher's performance in the classroom, in her professional relationships, and in her personal problems against the standard of other teachers' performance and professionalism.<sup>296</sup> Neglect of duty, on the other hand, is the failure to perform and is usually some type of dereliction of duty. Such neglect to carry out the duties of the job includes failure to turn in grades, tardiness, use of alcohol on the premises, and failure to supervise

292. See, e.g., CAL. EDUC. CODE § 89535 (West 2007); COLO. REV. STAT. § 22-63-301 (2007); GA. CODE ANN. § 20-2-940 (2007); MINN. STAT. § 122A.40 subdiv. 9 (2007); OR. REV. STAT. § 342.865 (2007).

293. See, e.g., JOSEPH BECKHAM, MEETING LEGAL CHALLENGES 70-77 (1996); NELDA H. CAMBRON-MCCABE, MARTHA M. MCCARTHY & STEPHEN B. THOMAS, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 412-20 (5th ed. 2004); RICHARD D. STRAHAN & L. CHARLES TURNER, THE COURTS AND THE SCHOOLS: THE SCHOOL ADMINISTRATOR AND LEGAL RISK MANAGEMENT TODAY 152-55 (1987).

294. CAMBRON-MCCABE, MCCARTHY & THOMAS, *supra* note 293, at 420-22. "[O]ther good and just cause" might pick up the more isolated and less easy-to-categorize event such as criminal conviction, *id.* at 422-23, lack of certification, improper discipline, repeated profanity in the classroom, and lying to a supervisor, see BECKHAM, *supra* note 293, at 77.

295. DAVID CARR, PROFESSIONALISM AND ETHICS IN TEACHING 151 (2000); STRAHAN & TURNER, *supra* note 293, at 154.

296. STRAHAN & TURNER, *supra* note 293, at 154.



students.<sup>297</sup> Insubordination is a willful act; it is a refusal to obey supervisor directives or school regulations. A single act is rarely insubordination. Rather, cause for discharge requires a pattern of refusing to comply with reasonable directives.<sup>298</sup> Immorality as grounds for teacher discharge is a rather broad term inasmuch as teachers are viewed as student role models. Hence, the threshold for determining when a teacher acts immorally is fairly low, although acts of moral turpitude, criminal convictions, and sexual misconduct with students are the typical grounds for immorality discipline.<sup>299</sup> Unfitness to teach is probably more a subset of “incompetence” than an independent norm; it covers such things as “conduct detrimental to the operation of the school,” “[e]vident unfitness for service,” and mental, emotional or physical incapacity.<sup>300</sup> Unprofessional conduct may encompass the behavior disciplined under other norms, such as neglect of duty or unfitness to teach.<sup>301</sup> Although school boards are wont to use this ground for termination broadly, its meaning really relies on some understanding of how teachers should comport themselves as professionals, perhaps according to some set of professional ethics.<sup>302</sup>

---

297. BECKHAM, *supra* note 293, at 75–76; CAMBRON-MCCABE, MCCARTHY & THOMAS, *supra* note 293, at 418–19; STRAHAN & TURNER, *supra* note 293, at 155.

298. BECKHAM, *supra* note 293, at 73–75; CAMBRON-MCCABE, MCCARTHY & THOMAS, *supra* note 293, at 416–18; STRAHAN & TURNER, *supra* note 293, at 154.

299. BECKHAM, *supra* note 293, at 70–73; CAMBRON-MCCABE, MCCARTHY & THOMAS, *supra* note 293, at 413–16; STRAHAN & TURNER, *supra* note 293, at 153–54.

300. CAMBRON-MCCABE, MCCARTHY & THOMAS, *supra* note 293, at 421–22 (quoting *Lombardo v. Bd. of Educ.*, 241 N.E.2d 495, 498 (Ill. App. Ct. 1968); *Woodland Joint Unified Sch. Dist. v. Comm’n on Prof’l Competence*, 4 Cal. Rptr. 2d 227 (Ct. App. 1992)).

301. *Id.* at 420–21.

302. *E.g.*, LOUIS FISCHER, DAVID SCHIMMEL & LESLIE R. STELLMAN, *TEACHERS AND THE LAW* 39 (6th ed. 2003). Some states even have a code of professional ethics for teachers. *E.g.*, MINN. R. § 8700.7500 (2007); STATE PROF’L STANDARDS AND PRACTICES BD. FOR TEACHING, N.Y. STATE EDUC. DEP’T, *NEW YORK STATE CODE OF ETHICS FOR EDUCATORS* (2002), available at <http://www.highered.nysed.gov/tcert/pdf/codeofethics.pdf> (stating that a code of professional ethics cannot be used as the basis for discipline). Most do not so teachers often rely on their own notion of professionalism from either an innate sense of ethics or something more tangible, like the *Code of Ethics of the Education Profession* espoused by the National Education Association. See NAT’L EDUC. ASS’N, *CODE OF ETHICS OF THE EDUCATION PROFESSION* (1975), available at <http://www.nea.org/aboutnea/code.html>.

This last ground for statutory and contractual discharge is unprofessional conduct and in itself illustrates the strange dynamic that *Garcetti* has imposed on the teaching profession. That code of professionalism—whatever its terms—often impels teachers to speak out about the nature of the job itself, especially matters of mismanagement or misconduct. This is surely what impelled some of the teachers in the *Garcetti* cases to insist that they had official obligations to speak because they sincerely believed their self-imposed sense of professional ethics demanded it. Indeed, they were proud to admit that they were so attentive to their professional responsibilities. With the continuing onslaught of *Garcetti* cases, however, teachers are going to begin retracting their notions of professionalism in their own self-interests.



A teacher's official duties therefore can be limited to behaviors for which the states have ascribed sufficient importance that, when performed badly, may result in discipline. Thus, a teacher's affirmative and official duties include the following: (1) be technically competent, which includes the physical, mental and psychological presence to conduct and supervise a class, to communicate effectively, and to be proficient in the subject area; (2) conform to the technical work-day requirements, like attendance, physical appearance, timeliness, recordkeeping, and fulfilling supervisory duties; (3) follow school district regulations and supervisors' directives, including handbooks and school board policies; (4) abide by and fulfill all responsibilities and duties imposed by all state and federal laws—common law, statutory and regulatory—applying to that position or that activity; (5) comport oneself in one's private life so as not to reflect poorly on the school district, particularly avoiding bringing one's private problems into the workplace; (6) treat colleagues and non-certified staff in a professional manner. Any speech in these areas would be official-duty speech.<sup>303</sup>

Cut and dried as they are, these guidelines reflect teachers' affirmative official duties for which a school board may hold them accountable as reflective of the considered wisdom of state legislatures. Hence, these should be the official duties for which a school board may retaliate even when a teacher speaks about them properly. Of course, retaliation will not accomplish the discharge of the statutorily or contractually protected teachers. But probationary teachers and administrators—without such protections—can be discharged under *Garcetti* within this framework. A school board attempting to go beyond this framework exceeds its license under *Garcetti* and treads on teachers' speech rights as citizens. Thus, assuming that *Garcetti* should even be imposed on teachers, its power should be limited by narrow job descriptions.

---

303. A case of hair-splitting that did not involve any real "official duties" of teachers is *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007); see also *Dillon v. Twin Peaks Charter Acad.*, 241 F. App'x 490 (10th Cir. 2007). In *Brammer-Hoelter*, the principal of a charter school retaliated against several teachers who met off-site to discuss concerns about the operation and management of the school. *Brammer-Hoelter*, 492 F.3d at 1198-1201. According to the court, unprotected official-duty speech included discussions about student discipline, curriculum, pedagogy, and equipment. *Id.* at 1204. Unofficial duty speech included teacher resignations, the Academy's teacher communication policy, staffing, salaries and bonuses, school board criticism, the principal's leadership failures, parent complaints, the renewal of the Academy's charter, and the pending school board elections. *Id.* at 1204-05. However, of these, the only matters of public concern were the Academy's communication policy, the principal's prior restraint of teacher speech, the charter renewal and the school board elections. *Id.* at 1206. This parsing of "official duties" and "matters of public concern" makes little sense, especially in light of the fact that many of these off-site meetings included participation by parents and other members of the public. *Id.* at 1199.



B. *The Supreme Art of the Teacher*.<sup>304</sup> *Academic Freedom*

*Garcetti* is also the wrong vehicle for retaliating against a teacher for classroom speech.<sup>305</sup> Classically considered a matter of a teacher's prerogative, efforts have been made to clothe the classroom speech of public school teachers—clearly an official duty—with a First Amendment academic freedom.<sup>306</sup> As the Court has stated,

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."<sup>307</sup>

Some learned analyses suggest that the instructional portion of a teacher's job has separate considerations under the First Amendment as academic freedom, apart from the employment speech line of cases represented by *Pickering*, *Connick*, and now *Garcetti*.<sup>308</sup>

However, the courts that have applied *Garcetti* to uphold retaliation decisions in classroom speech engage in an analysis reminiscent of *Hazelwood School District v. Kuhlmeier*.<sup>309</sup> *Hazelwood* offered a principle of limited tolerance for student-initiated speech in the context

304. "It is the supreme art of the teacher to awaken joy in creative expression and knowledge." This quotation has been attributed to Albert Einstein. See THE COLUMBIA WORLD OF QUOTATIONS (Robert Andrew et al. eds., 1996), available at <http://www.bartleby.com/66/85/18585.html>.

305. Note also that the statutory grounds for disciplining teachers and the cases arising therefrom rarely, if ever, mention classroom speech as a grounds for discipline. See, e.g., CAMBRON-MCCABE, MCCARTHY & THOMAS, *supra* note 293, at 412–23.

306. See, e.g., Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 39–51 (2001); see also J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251 (1989) (academic freedom in higher education); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793 (2007) (academic freedom in higher education). See generally Diane Heckman, Commentary, *The First Amendment and Academia: Twenty Years of Examining Matters of Public Concern*, 188 EDUC. L. REP. 585, 586–89 (2004); W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301 (1998).

307. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (alteration in original) (citation omitted) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

308. See, e.g., Daly, *supra* note 306, at 7–11; Wright, *supra* note 306, at 797–98.

309. 484 U.S. 260 (1988).



of a student newspaper. The school could regulate that speech because it was school-sponsored and could “fairly be characterized as part of the school curriculum.”<sup>310</sup> At least one court now applies that same reasoning to teacher’s classroom speech: A school district hires a teacher to convey school-sponsored speech, and as a consequence, the school district is not required to pay for a commodity it did not hire if the teacher strays from the “party” line.<sup>311</sup>

This type of analysis is a poor substitute for protection of teachers’ academic freedom because it is inexact and it fits the listeners—the teacher’s audience—not the speaker.<sup>312</sup> In addition, *Hazelwood* at least recognizes some speech is acceptable and worthy of protection whereas *Garcetti* makes the content irrelevant: all that is critical to the analysis is the employee-employer relationship. Consequently, there now appears to be a small and unfortunate trend to quash all independent teaching speech—the real skill for which teachers are hired—for uniformity in orthodoxy, contrary to that asserted by the Court in *Epperson v. Arkansas*:

The States are most assuredly free “to choose their own curriculums for their own schools.” A State is entirely free, for example, to decide that the only foreign language to be taught in its public school system shall be Spanish. But would a State be constitutionally free to punish a teacher for letting his students know that other languages are also spoken in the world? I think not.

It is one thing for a State to determine that “the subject of higher mathematics, or astronomy, or biology” shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a[n] . . . offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought. That kind of . . . law, I think, would clearly impinge upon the guarantees of free communication

---

310. *Id.* at 271. The Supreme Court stated:

They cannot be punished merely for expressing their personal views on the school premises—whether “in the cafeteria, or on the playing field, or on the campus during the authorized hours”—unless school authorities have reason to believe that such expression will “substantially interfere with the work of the school or impinge upon the rights of other students.”

*Id.* at 266 (citation omitted) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 512–13 (1969)).

311. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 160 (2007).

312. *See Daly*, *supra* note 306, at 14.



contained in the First Amendment . . . .<sup>313</sup>

Surely, *Garcetti* was not designed to make teachers puppets of school boards and their whims. When all the discretion is taken out of the teaching obligation, what is there left to do?

This Article is not designed to forge new ground in the matter of academic freedom; it is instead designed to address *Garcetti*'s impact on teachers. As noted in the analysis, many cases applying *Garcetti* to school district retaliation against teachers really do not involve curricular disputes. Rather, they were instances of school administrators who punished teachers when parents got upset over perceived political statements and who lashed out before the parents went to the school board, who would then punish the school administrators as a form of defensive retaliation. They were academic freedom issues, but unrelated to curriculum.<sup>314</sup>

To the extent that courts continue to frame academic freedom cases as curricular issues, there is probably little to fear that teachers' academic freedom will be threatened often by *Garcetti*. Because the reality is that school boards really have no hand in curriculum, are rarely qualified to control curriculum, and, as discussed below, probably do not want that obligation.

Of all the members of the educational hierarchy, school boards are the entity least able to contribute substantively to curriculum formation. The members are elected officials who usually run on one-issue platforms or who are more interested in the fiscal management of the governmental entity. As a consequence, they usually have no training, background, or experience in education and education policy. Although their advocacy groups may have some expertise in the area, school board members do not serve life-time tenures, and the members filter in and out of the political process. Continuity in the teaching process is necessary, and school boards do not and cannot fulfill that role.

Instead, for curriculum purposes, school boards are governed by what their state education departments set out, for any particular grade or for any particular discipline, as the curricular goals.<sup>315</sup> The implementation of those goals is outside the expertise of the school boards so they delegate academic matters like curriculum to those better equipped to

---

313. 393 U.S. 97, 115–16 (1968) (Stewart, J., concurring in the result).

314. Such fear of retaliation is the natural consequence of “elected school boards [that] are tempted to support majority positions about religious or patriotic subjects.” *Mayer*, 474 F.3d at 479.

315. See, e.g., MICHAEL IMBER & TYLL VAN GEEL, *EDUCATION LAW* 62-67 (3d ed. 2004). These days, the federal government, through the No Child Left Behind Act, 20 U.S.C. §§ 6301–7941 (2000 & Supp. V 2005), is playing a greater role in the states' prerogative to control their curricular choices and academic programs.



handle them. And the individuals who are better equipped to formulate curricular affairs and the educational function of the institution are the education professionals: teachers and school administrators. It is to them that school boards delegate the responsibility for curriculum and all things associated with curriculum, such as textbook selection, curriculum guides, and often grading policies. If the school district is large enough, it may have curriculum professionals on administrative staff to assure compliance with state models and to oversee the general academic agenda. In other districts, teachers and administrators (and perhaps parents) serve on committees to formulate academic policy and adopt textbooks. In some jurisdictions, curricular programming and academic programming are, at the very least, mandatory subjects of labor discussion with the teachers, if not mandatory subjects of bargaining. Thus, only the rare state gives the school board full power over the academic program. As a consequence of this delegation of academic programming and derogation of control, only the unique school board can prove it has such control over the curriculum that its teachers and administrators have no academic freedom. As a practical matter, the vast majority of school boards afford academic freedom to their teachers and administrators over curricular and academic programming as both a legal and as a practical matter, regardless of what the courts decide. And it would be the rare school board that would wish to do it all itself.<sup>316</sup>

Confining teachers' classroom speech to only specified curricular matters, without the ability to step outside the lines, defeats the purpose of a democratic education that puts little value on uniformity and orthodoxy. Indeed, students are unimpressed by teachers confined by strictures imposed on academic planning and curricular materials:

---

316. School boards are also ill-equipped to deal with curricular issues because they are a majoritarian representative body:

[W]ithin our constitutional scheme, the representative nature of school boards may actually militate *against* allowing them unrestricted control over curricular decisions. Elected officials likely are highly responsive to the majority that voted for them. Since the majority controls the election, we need not otherwise protect dominant viewpoints of established groups. Similarly, electoral accountability ensures that those who disagree with these dominant views rarely hold public office. This political process, however, scantily protects the community's ideological minorities. These disadvantaged outsiders, lacking political influence, most need the first amendment to protect them from the tyranny and transient passions of the majority.

Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 38. For a contrary view: "[I]f indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers." *Mayer*, 474 F.3d at 479-80.



Students always test their teachers, and teachers too seldom pass those tests. What they are looking for in their teachers are a few basic qualities—honesty, integrity, concern. They generally dislike teachers who merely parrot what their own superiors, or their own lesson plans, tell them to say. They respond to the local, not to the imperial. They respond to the individual, not to the institution. They respond to the act of one man or woman stepping away from the protection of the school system and the textbook, from the collusion of adults and authorities, and taking risks based on faith in individual students. That act of faith, the faith of one teacher in one student, is the center of it all.<sup>317</sup>

As a consequence, academic freedom is willingly ceded to public school teachers by their school boards, a cession with which courts should be loathe to interfere, despite *Garcetti*.

#### IV. BE CAREFUL WHAT YOU WISH FOR

##### A. *Employee Morale*

Now that public employers can punish or even dismiss public employees for communicating to and about their students—in essence, for doing their jobs—*Garcetti* will likely accomplish that which public employers feared would happen if public employees were allowed to speak out under the First Amendment: it will likely “lower morale, disrupt the work force, or otherwise undermine the mission of the office.”<sup>318</sup> The immediate effect of *Garcetti* and the increasing number of teacher retaliation cases being decided in its wake will likely render the labor-management relations in the workplace even more contentious. With the definition of “official duties” unclear at best, and an unattainable moving target at worst, teachers and administrators will not know how to protect themselves from the “fanciful” fears of their employer.

And the tension is not just reserved for school boards and their employees. It also encourages a widening rift between administrators and teachers. It will further “the parking lot syndrome,” where the administration talks at faculty meetings while the faculty talks in the parking lot afterward.<sup>319</sup> Improvements in and critiques of academic and

---

317. PETER S. TEMES, *AGAINST SCHOOL REFORM (AND IN PRAISE OF GREAT TEACHING): GETTING BEYOND ENDLESS TESTING, REGIMENTATION, AND REFORM IN OUR SCHOOLS* 160 (2002).

318. *Rankin v. McPherson*, 483 U.S. 378, 393 (1987) (Powell, J., concurring) (remarking that public employers’ fears were “fanciful”).

319. ROLAND S. BARTH, *IMPROVING SCHOOLS FROM WITHIN: TEACHERS, PARENTS AND PRINCIPALS CAN MAKE THE DIFFERENCE* 20 (1990).



other schoolhouse matters will be suspended for fear that the teachers' speech will not comport with an administrators' orthodoxy.<sup>320</sup> And teachers' classroom instruction will be stunted by the fear that they will be disciplined—even discharged—based on their speech, which only could be protected by some irrational and unknowable standard. Independent thought will be abandoned for concern of potential job loss. Teachers and administrators will become even greater adversaries than before.<sup>321</sup> Gone are the days when

[a]ll the habits of mind and work that go into democratic institutional life [are] practiced in our schools until they truly become habits—so deeply a part of us that in times of stress we fall back on them rather than abandon them in search of a great leader or father figure, or retreat into the private isolation of our private interests, the unfettered marketplace where one need not worry about the repercussions of one's individual decisions.<sup>322</sup>

In their place are the days of fear and anxiety: Teachers and school administrators have specific job skills, and there is rarely more than one educational employer in town. Therefore, losing a teaching or administrative job often means leaving the community.<sup>323</sup>

The only saving grace for teachers—but usually not for administrators—may be an increased union presence to assure that retaliatory acts are ineffective under the state tenure and collective

320. Unfortunately, the situation may simply reflect the status quo as some administrative orthodoxy does not have much respect for teachers anyway:

[T]eaching is largely a feminized occupation. It therefore behaves that way in some situations.

Teachers are highly sensitive about status differentials. They are highly resistant to change. They are suspicious of authority. They are politically conservative. They are not an easy group to lead, govern, congeal, motivate, or cajole. They are, however, easily insulted, provoked, intimidated, or angered. Great teachers are always prima donnas with their principals and sometimes with their students.

It should be remembered that administrators deal with teachers as adults. However, teachers are most used to dealing with students. They often have a terrible time dealing with other adults and especially with persons in authority. Some teachers are just awful adults.

JOHN A. BLACK & FENWICK W. ENGLISH, WHAT THEY DON'T TELL YOU IN SCHOOLS OF EDUCATION ABOUT SCHOOL ADMINISTRATION 75 (1986) (footnote omitted). Unfortunately, administrators have their own personal baggage. See, e.g., Donal M. Sacken, *Sad Stories of the Death of Kings: Demotions and Dismissals of Administrators*, 25 J.L. & EDUC. 419 (1996).

321. See BARTH, *supra* note 319, at 19–22.

322. DEBORAH MEIER, IN SCHOOLS WE TRUST: CREATING COMMUNITIES OF LEARNING IN AN ERA OF TESTING AND STANDARDIZATION 177 (2002).

323. In addition, losing a teaching job may well preclude teaching ever after because of the stigma attached. See generally Jay Worona & Cheryl Randall, *Defamation and Stigma Claims by Terminated Employees*, in TERMINATION OF SCHOOL EMPLOYEES: LEGAL ISSUES & TECHNIQUES 13-1 (1997).



bargaining acts and under the pertinent collective bargaining agreements that govern the discipline and discharge of teachers.<sup>324</sup> So far, the vast majority of teacher cases involved teachers with little experience, usually the least protected and most vulnerable under the statutes. Indeed, in these and administrator cases, the First Amendment may well have been invoked because of the absence of other statutory or contractual protections. However, the new “orthodoxy” of school boards<sup>325</sup>—for the “efficiency of the educational system”<sup>326</sup>—may impel school boards to flex their new-found power over more experienced teachers. Even if they do not, the “pall” may poison the employment relationship at the least, and at the worst, interfere with the “efficiency of the educational system.”

### B. Schools as a Matter of Public Concern

The perspective on this new power given by the Court to school boards may evoke different public reactions. One reaction at the forefront likely will be this power’s potential to squelch public oversight of the educational institution. If the foxes are guarding the henhouse and the hens cannot give warning of legitimate problems, then the public trust in the institution will justifiably be eroded—even further. On such issues, those with eroded trust would run a school board election campaign opposing sitting members. Their election issues would be twofold: the school board is not responsive to the taxpayers, and the school board is hiding something.<sup>327</sup>

This reaction would rest on this premise: Much of what educators do in public schools is a matter of public concern. Educators know better than the school board members what is going on in the schools day to

---

324. FISCHER, SCHIMMEL & STELLMAN, *supra* note 302, at 41.

325. See Brief of Amicus Curiae National School Boards Association in Support of Petitioners, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473), 2005 WL 1284578. See generally Thomas E. Wheeler, II, *Striking a Faustian Bargain: The Boundaries of Public Employee Free Speech Rights*, RES GESTAE, Sept. 2006, at 13. Mr. Wheeler was one of counsel on the NSBA amicus brief in support of the public employer.

326. Brief of Amicus Curiae National School Boards Association in Support of Petitioners, *supra* note 325, at 1.

327. Although one would hope school board elections would take the high road and not engage in bashing the incumbents, the unfortunate fact is that candidates must distinguish themselves from the incumbents. Showing that the current board members do not feel they can be held accountable to the public will resonate with voters. See, e.g., Associated Press, *Dover Voters Oust Intelligent Design Supporters*, MSNBC.COM, Nov. 9, 2005, available at <http://www.msnbc.msn.com/id/9973228>; MSNBC Staff and News Service Reports, *Evolution's Foes Lose Ground in Kansas*, MSNBC.COM, Aug. 2, 2006, <http://www.msnbc.msn.com/id/14137751>; Jessica Blanchard, *Groups Prepare for School Board Election*, SEATTLE POST-INTELLIGENCER, May 18, 2007, available at [http://seattlepi.nwsourc.com/local/316380\\_appleseed19.html](http://seattlepi.nwsourc.com/local/316380_appleseed19.html).



day. In addition, educators are often the sole sources for information that might not otherwise be a matter of public knowledge. But for their jobs, they would not have this information. The best resources for speech about government accountability on the day-to-day operations of school districts, therefore, are those now at risk of being discharged under *Garcetti*.

The impetus for this perspective is that teachers are a special type of citizen. In other words, a teacher's chosen profession is at all times a matter of public concern, and when teachers are at their places of employment, they remain citizens. The unique nature of this public employment makes teachers' personas inseparable from their citizen personas. This may be for no other reason than their self-imposed sense of personal ethics. It may also be the practical continuity that must carry them through any number of school board members who are not education professionals. But it also arises because of the nature of the institution, its structure, and its role in society.

Numerous philosophers have enunciated their constructs of education and how teaching can implement it.<sup>328</sup> For instance, Plato's notion of education posited that the

teacher's task is to effect a kind of intellectual conversion experience in the learner that redirects the person from the sensory world of appearances, images, and opinions to the realm of ideas. Whereas knowing can occur only in the mind of the person, the teacher creates the proper environment and asks the questions that will stimulate the learning process.<sup>329</sup>

In a more contemporary vein, John Dewey stated that the "value of school education is the extent in which it creates a desire for continued growth and supplies means for making the desire effective in fact."<sup>330</sup> He further opined,

Without . . . formal education, it is not possible to transmit all the resources and achievements of a complex society. It also opens a way to a kind of experience which would not be accessible to the young, if they were left to pick up their training in informal association with others, since books and the symbols of knowledge are mastered.<sup>331</sup>

In addition, upon that institution are placed the burdens of universal

328. See generally GERALD L. GUTEK, HISTORICAL AND PHILOSOPHICAL FOUNDATIONS OF EDUCATION: A BIOGRAPHICAL INTRODUCTION (2d ed. 1997).

329. *Id.* at 22.

330. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 53 (1st Free Press Paperback ed., The Free Press 1966) (1916).

331. *Id.* at 8.



education and the instruction of the citizenry. As the Court stated half a century ago,

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>332</sup>

Thus, public schools are the institution to which the

devotion of democracy . . . is a familiar fact. The superficial explanation is that a government resting upon popular suffrage cannot be successful unless those who elect and who obey their governors are educated. . . . But there is a deeper explanation. A democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience.<sup>333</sup>

To the extent a democratic society continues to broaden its participation in government and interaction among its members, the more it is dependent upon that government's "deliberate effort to sustain and extend" the community of interests and to prepare its constituent members to actively participate and adapt.<sup>334</sup> Thus are schools a civic enterprise in which all citizens have an interest, unlike the particular workings of the county highway department, the state bureau of motor vehicles, or the Federal Trade Commission. Indeed, most citizens insist on taking an interest in and having a hand at participating in this institutional enterprise. Consequently, most of what happens in schools is considered a matter of public concern.

Muzzling teachers from speaking out about this institution smacks of an authoritarianism that is contrary to everything the institution stands for. Furthermore, the ordinary citizen would be puzzled to hear that teachers were fired for doing their jobs, and more so to hear that teachers are fired for speaking out on matters that concern the public, not just on teaching obligations but on matters that affect the administration of a

---

332. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

333. DEWEY, *supra* note 330, at 87.

334. *Id.* at 87-88.



school district and the management of taxpayer funds.<sup>335</sup>

But most of all, many citizens are affected by public schools and interested in how they are run as a participatory governmental enterprise, one that is often open to the public for a very public enterprise. This is particularly so simply because school boards are elected. As the Court, in its wisdom, pointed out in *Pickering*, speaking out on matters of public concern in schools informs the “free and open debate . . . vital to informed decision-making by the electorate.”<sup>336</sup> A school board that uses *Garcetti* to stifle that debate runs significant risk of public and political backlash in this era of increasing accountability. A school board that squelches that type of speech runs the justifiable risk of adverse publicity<sup>337</sup> and electioneering that accuses it of hiding something from the public.

### C. *Airing the Dirty Laundry*

Adverse publicity is clearly one way for teachers to feel they are fulfilling their professional responsibilities yet armor themselves from retaliation. They may go public with disclosures through the media or by speaking out at public school board meetings, especially when the press is there. Going to the local media clearly insulated the teachers from retaliation in both *Pickering* and *Mt. Healthy City School District Board of Education v. Doyle*. Marvin Pickering wrote a letter to the editor of the local newspaper<sup>338</sup> while Fred Doyle telephoned a

---

335. This is just one reason why *Pickering* is and should remain the model for teacher speech. *Pickering*'s appositive, “teacher, as a citizen,” did not identify two creatures—teacher or citizen—but one: teacher = citizen. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). As such, teachers were encouraged by the *Pickering* Court to use the information to which they are privy qua teachers for communicating public concerns. “Teachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.” *Id.* at 572.

336. *Id.* at 571–72. In a similar situation, the Court has stated:

Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.

*Bd. of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (footnote omitted).

337. *Parents Expose Corrupt School Board* (Full Disclosure Network Mar. 25, 2006), [http://www.fulldisclosure.net/flash/452-3\\_CUSD\\_preview.php](http://www.fulldisclosure.net/flash/452-3_CUSD_preview.php); Pat Kossan, *School Districts on Notice*, ARIZ. REPUBLIC, Dec. 6, 2005, available at [http://www.aznews.us/school\\_districts\\_on\\_notice.htm](http://www.aznews.us/school_districts_on_notice.htm).

338. *Pickering*, 391 U.S. at 575–78 (appendix to opinion of the court).



Cincinnati radio station.<sup>339</sup> In addition, several post-*Garcetti* cases suggest that, had the “offending” teacher gone public first, the school district would have been in violation of the First Amendment for retaliating. For instance, of all Elihu McMahon’s numerous communications about alleged school district problems, only three were deemed worthy of protection, including a letter to the *New York Times*.<sup>340</sup> At the very least, speaking to the media is rarely—if ever—within a teacher’s “official” duties.

Thus, case law supports the notion that teachers should make their concerns public rather than approach their administrators if they believe that matters of public concern in the school district are being inadequately addressed by the school administration or the school board.<sup>341</sup> If the public has a right to know—perhaps a need to know—of mismanagement problems, then teachers must comply with that need and circumvent the ordinary lines of communication. And there is not much that a school board can do in response as prior restraint of teacher speech is prohibited.<sup>342</sup> Nor can a school board assert that a teacher must go through “proper channels” on matters of public concern.<sup>343</sup> So

---

339. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S.274, 282 (1977).

340. *McMahon v. N.Y. City Bd. of Educ.*, No. CV-01-6205, 2006 WL 3680624, at \*8 (E.D.N.Y. Dec. 12, 2006); *see also* *Rush v. Perryman*, No. 1:07CV00001, 2007 WL 2091745 (E.D. Ark. July 17, 2007) (finding that a college president’s speech to the press was protected whereas his speech to a state legislative committee was not if undertaken pursuant to his official duties). Security specialist Robert B. Posey would have made out a case for retaliation if he had “communicate[d] his concerns regarding school security and safety issues to the ‘newspapers or [his] legislators.’” *Posey v. Lake Pend Oreille Sch. Dist.* No. 84, No. CV05-272, 2007 WL 420256, at \*5 (D. Idaho Feb. 2, 2007) (second alteration in original). And Gail Cole’s complaints about bus discipline might have been better protected if they had been “made . . . in an attempt to inform the public or to further public discourse.” *Cole v. Anne Arundel County Bd. of Educ.*, No. CCB-05-1579, 2006 WL 3626888, at \*7 (D. Md. Nov. 30, 2006); *see also* *Bailey v. Dep’t of Elementary & Secondary Educ.*, 451 F.3d 514, 519 (8th Cir. 2006) (suggesting, in dicta, that a state department of education employee would have made a better case for First Amendment protection if his concerns had been “made public”). Such disclosures, of course, must be constrained by the Family Educational Rights & Privacy Act and state legislation that protects public employee privacy rights.

341. *See also* Krystal LoPilato, Recent Case, *Garcetti v. Ceballos: Public Employees Lose First Amendment Protection for Speech Within Their Job Duties*, 27 BERKELEY J. EMP. & LAB. L. 537, 543 (2006).

342. *See* *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm’n*, 429 U.S. 167, 175 (1976). “Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment . . .” *Id.* at 176 (citing *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972)).

343. *See* *Knapp v. Whitaker*, 757 F.2d 827, 843 (7th Cir. 1985). The Seventh Circuit has determined a school board cannot discipline a teacher who foregoes the chain of command to speak directly to the board on matters of public concern when such communication did not disrupt the district’s provision of education services. *Id.* In like manner, a Texas federal district court stated, “the interest of the [school district] to have these matters [of public concern] channeled through a grievance procedure does not justify the termination of [the teacher’s] teaching contract under these



school boards face the prospect of having their dirty laundry aired in public with little recourse for retaliation unless the speech results in a disruption of educational services, a rather hard standard to meet when the matters are weighty issues of public concern.

Consequently, a more considered approach to the problem would be for school boards to fulfill their public role and act less like an employer and more like an institution in these matters. Such role would go back to the *Pickering-Connick* analysis and respect teachers' First Amendment rights to speak.<sup>344</sup> A cooperative relationship would ultimately be more beneficial than an adversarial one, especially when there is a "common" enemy out there: the federal government and the new accountability measures.

#### D. Accountability

One of the cornerstones of the various education "reform" movements is to make teachers more accountable for their classroom teaching. Indeed, much of the premier legislation designed to achieve these reforms—No Child Left Behind (NCLB)<sup>345</sup>—is dependent upon measuring school districts' accountability for student achievement.<sup>346</sup> Although increasingly the one common enemy of school boards, administrators, and teachers,<sup>347</sup> accountability specifically puts teachers under the gun.<sup>348</sup> they can be rewarded for good scores and they can be disciplined for bad scores because, even if they are the chief delivery

---

circumstances." *Lusk v. Estes*, 361 F. Supp. 653, 662 (N.D. Tex. 1973). Even more blunt was the pronouncement from a federal district court in Oregon: "The channels rules, which require advance notice to the superintendent of any direct message to the board, are an impermissible prior restraint." *Anderson v. Cent. Point Sch. Dist. No. 6*, 554 F. Supp. 600, 608 (D. Ore. 1982), *aff'd*, 746 F.2d 505 (9th Cir. 1984) (citing *Rosen v. Port of Portland*, 641 F.2d 1243, 1247 (9th Cir. 1981)). Most recently, a 2006 federal district court decision from New York determined that a school district failed to articulate any government interests in support of its broad "communication protocol" that required teachers to follow a chain of command before discussing school matters with outside sources. *Price v. Saugerties Cent. Sch. Dist.*, No. 105CV0465, 2006 WL 314458 (N.D.N.Y. Feb. 9, 2006).

344. See, e.g., Richard S. Vacca, *Teacher First Amendment Speech 2006: Policy Implications*, CEPI EDUC. L. NEWSL. (Commonwealth Educ. Policy Inst., Richmond, Va.), Jan. 2006, available at [http://www.cepi.vcu.edu/newsletter/2005-2006/2006\\_Jan\\_Teacher\\_First\\_Amendment.html](http://www.cepi.vcu.edu/newsletter/2005-2006/2006_Jan_Teacher_First_Amendment.html).

345. 20 U.S.C. §§ 6301–7941 (2000 & Supp. V 2005).

346. See, e.g., Wendy Beetlestone & Owen F. Lipsett, *No Child Left Behind's Accountability and Access Provisions: An Inherent Tension Within Supplemental Educational Services Programs*, 216 EDUC. L. REP. 807 (2007); William S. Koski, *Achieving "Adequacy" in the Classroom*, 27 B.C. THIRD WORLD L.J. 13 (2007); Gershon M. Ratner, *Why the No Child Left Behind Act Needs to Be Restructured to Accomplish Its Goals and How to Do It*, 9 UDC/DCSL L. REV. 1 (2007).

347. See, e.g., Philip T.K. Daniel, *No Child Left Behind: The Balm of Gilead Has Arrived in American Education*, 206 EDUC. L. REP. 791 (2006).

348. Leah A. Rinfret, *No Child Left Behind for the Teachers Left Behind: Returning Education to the Educators*, 35 CAP. U. L. REV. 281 (2006).



system of instruction, they remain mere public employees.<sup>349</sup> But *Garcetti's* progeny may have put paid to the notion that teachers can be held accountable for their teaching anymore if school boards are allowed to retaliate against teachers for classroom speech.

If one follows through with the notions set forth in the Seventh Circuit's reasoning in *Mayer v. Monroe County Community School Corp.*<sup>350</sup> and in the Fourth Circuit's reasoning in *Boring v. Buncombe County Board of Education*,<sup>351</sup> rightly or wrongly decided, school boards are the sole deciders and therefore the sole defenders of curriculum now. Teachers in the public schools in at least the Fourth and Seventh Circuits no longer have any academic freedom to teach. Rather, teachers' curriculum delivery has become a function of employment not a function of education. Instead, the teachers are now just government speakers, and the rigor required of the curriculum lies entirely with the school board. As a consequence, teachers are no longer delegated the professional responsibilities they once held to "have at least some input into the school curriculum and . . . to exercise their professional discretion in translating that curriculum into classroom lessons."<sup>352</sup> NCLB and decisions like those in *Mayer* and *Boring* tip the balance of professional power and teaching discretion into the hands of those least equipped to handle it but nevertheless eager to wield control over the modus of instruction.<sup>353</sup> With such direct control over the instructional function, teachers are reduced to the puppets of school boards. Without the discretion to use their professional judgment, teachers are reduced to ministerial functionaries with no other academic function than to parrot the school board liturgy.

Under those circumstances, there seems no foothold for holding teachers accountable for results. If teachers deliver the curriculum they are given by their employers, then they must be rewarded for doing their jobs, not punished if the appropriate results are not achieved. Because teachers will no longer have any control or discretion on student achievement, school boards cannot make them accountable for the results. Consequently, teachers in at least the Fourth and Seventh Circuits seem to have escaped the accountability hammer because, without academic freedom, they have no discretion with which to be held accountable. Only the school boards can be held accountable when

---

349. Daly, *supra* note 306, at 45 (positing that, in a rigidly hierarchical school district, teachers are unfairly made accountable for the curricular and educational decisions made by the school board).

350. 474 F.3d 477 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 160 (2007).

351. 136 F.3d 364 (4th Cir. 1998).

352. Daly, *supra* note 306, at 48–49.

353. *Id.* at 49.



academic freedom is absent.<sup>354</sup>

In conjunction with this new-found power of the school boards, however, is the courts' increased power to second-guess curricular decisions and the delivery of instruction. Right now, one of the few judicial bulwarks from claims of educational malpractice that school boards have enjoyed is that, among other things, there is no readily articulated standard of care for teaching:

Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject. The “injury” claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are [sic] influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.<sup>355</sup>

Now that the courts have removed pedagogy from the equation and teachers are simply the mouthpieces for whatever the school board directs them to say, the policies behind dismissing educational malpractice cases out of hand have much less substance and support. The loss of academic freedom renders the failure of the academic function a matter of mere negligence, easily decided by the courts.<sup>356</sup>

---

354. To take advantage of this loss of academic freedom, school boards can now wrest curriculum construction from the professional educators and do it all themselves. On the one hand, any delegation of those duties would cloak the teachers and administrators with ipso facto academic freedom and would act as a waiver or estoppel of a school board's arguments against academic freedom. On the other hand, such derogation of academic freedom may increase court interference in the affairs of school districts. To the extent that instructional choices become ministerial rather than discretionary (and therefore outside the expertise of courts), then courts will begin to believe themselves as well equipped to make instructional decisions as school boards. To the extent that the Court has not embraced fully embraced the school-board delegation model, the onus may well be on school boards rather than teachers:

School boards are generally quite content to delegate authority to teachers, for reasons of managerial efficiency and recognition of teachers' superior professional expertise. The courts are required to intervene and enforce this division of labor only in rare cases where the structure breaks down. Various lower courts have done so; however, despite supportive language, the Supreme Court has never explicitly endorsed the delegation model.

*Id.* at 47–48 (footnotes omitted).

355. *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854, 860–61 (Ct. App. 1976), *quoted in Hunter v. Bd. of Educ.*, 439 A.2d 582, 584 (Md. 1982).

356. *See, e.g., Hyman v. Green*, 403 N.W.2d 597 (Mich. Ct. App. 1987); *Webber v. Yeo*, 383



An additional effect of removing academic freedom from public school teachers is the legal characterization of the teaching function itself. The school boards within the jurisdictions of the Seventh and Fourth Circuits now have on their hands teaching employees with only ministerial functions. As any public employer should know, ministerial functions are usually not immune from tort liability because the qualified privilege from attack often only exists when a public employee is acting in a discretionary capacity.<sup>357</sup> Indeed, state tort claims acts often except only discretionary but not ministerial acts from tort liability.<sup>358</sup> Thus, the school boards have laid themselves open to “permitting damages suits [that] can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit [them] in the discharge of their duties.”<sup>359</sup>

Heaven forbid that educational malpractice cases ever gain traction. However, the school boards are flirting with disaster in denying to their most qualified employees the liberty to exercise their educational function. With the increased attention to accountability and the reduction of student learning and teacher instruction to a numbers game, the current education reform measures have sowed fertile ground for easily provable acts of negligence.<sup>360</sup> Indeed, the strictures of NCLB have made the failure to achieve those numbers virtually a matter of negligence per se. In removing the cushion of the discretionary function of academic freedom, the school boards are going to find themselves answerable not just to the federal government and their state departments of education, but also to their student constituents. Surely that is not what school boards intended in litigating to appeal those academic freedom cases that were essentially political controversies easily mediated with the parents and teachers. Retaliation clearly has its costs.

Perhaps the most effective remedy to that problem is to create a written policy of the school board’s fundamental belief in academic freedom, within the *Pickering* limits. Indeed, collective bargaining agreements containing academic freedom language would reinstate the equilibrium between the school board’s fiscal tasks and teachers’ instructional tasks.<sup>361</sup> One such comprehensive provision states:

---

N.W.2d 230 (Mich. Ct. App. 1985).

357. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

358. See, e.g., MICHAEL J. KAUFMAN, *EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS* 670-71 (2005).

359. *Anderson*, 483 U.S. at 638 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

360. See Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU EDUC. & L.J. 485.

361. See, e.g., *Cary v. Bd. of Educ.*, 598 F.2d 535, 538 (10th Cir. 1979) (limited academic



## Academic Freedom

(1) It is mutually recognized that freedom carries with it responsibility; academic freedom also carries with it academic responsibility which is determined by the basic ideals, goals, and institutions of the local community. Discussion and analysis of controversial issues should be conducted within the framework of the fundamental values of the community as they are expressed in the educational philosophy and objectives of the Board.

(2) Within the preceding frame of reference and as it pertains to the course to which a teacher is assigned, academic freedom in the Fort Wayne Community Schools is defined as:

(a) The right to teach and learn about controversial issues which have economic, political, scientific, or social significance.

(b) The right to use materials which are relevant to the levels of ability and maturity of the students and to the purposes of the school system.

(c) The right to maintain a classroom environment which is conducive to the free exchange and examination of ideas which have economic, political, scientific, or social significance.

(d) The right of teachers to participate fully in the public affairs of the community.

(e) The right of students to hold divergent ideas as long as the expression of their dissent is done within the guidelines of debate and discussion which are generally accepted by teachers in a normal classroom environment.

(f) The right of teachers to free expression of conscience as private citizens with the correlative responsibility of a professional presentation of balanced views relating to controversial issues as they are studied in the classroom.<sup>362</sup>

The converse of such agreement—even if only in principle—is the pall of orthodoxy decried by the Court and its inherent threat to the institution:

Teachers, if forced to act as a mouth-piece for the school board, are the most efficient tools of indoctrination imaginable. A system that permits teachers to act as opposing voices within curricular parameters established by a popularly elected school board minimizes the potential of either actor to distort their educational function into brainwashing.<sup>363</sup>

---

freedom provision in collective bargaining agreement).

362. 2004–07 Master Contract Between the Board of School Trustees of Fort Wayne Community Schools and Fort Wayne Education Association, Inc. 30 (on file with author).

363. Daly, *supra* note 306, at 46.



## V. CONCLUSION

The history of First Amendment protection for public employees is dependent upon the history of First Amendment protections for teachers. For good or ill, teachers have found themselves as the forward unit in setting out the stakes governing the free speech relationship between the public employer and the public employee. Perhaps teachers' unique characteristics make their speech the natural target for employment retaliation—they are, after all, hired for their communication skills. However, perhaps teachers' unique characteristics also make *Garcetti* ill-suited for any long-term application.

Teachers have so many obligations to their students, their schools, their administrators and their colleagues that are peripheral to the actual instruction that they have a hard time enunciating what is *not* professional speech in any particular teaching assignment.<sup>364</sup> Professionalism on the job for teachers digs more deeply and sweeps more broadly than any enumeration of specific duties to a special, expansive citizenship responsibility. Teachers are considered to be the schools—they do not just do a job; rather, they *are* the institution. Identified as being the bulwark of the institution means to bear the responsibilities the institution itself is expected to carry in the life of this country. Thus, teachers are never really off the job of an institution that is ubiquitous and essential to this county. Now, they are being told that they have to be careful of what they say in all aspects of their jobs and to be able to bifurcate that which is official-duty-speech from that which is citizen-speech.

The constraints on teachers are immediately apparent; the impact on the institution will become more evident with the passage of time and an

---

364. David Moss explains:

Although there is no typical day that is representative of the full range of what it is to teach, . . . these notions offer insight into the dedication, emotional toll, and knowledge base required of today's teachers.

Perhaps most significant is the effort expended by each of these educators with respect to the desire to meet the needs of each student in class. Whether it is scheduling meetings to coordinate student support, revising lessons over the course of a single school day in response to the learning styles of students, or developing curriculum materials to capture student interest and sustain motivation, there is an underlying element of respect and personal attention for students expressed by each teacher. Differentiating instruction, attending to students' needs and interests, and providing support beyond the confines of traditional classroom time are all measures designed to meet the needs of *each and every learner*.

David M. Moss with Shirley Reilly, Christopher Burdman & Sayward Parsons, *Walk a Mile in Their Shoes: A Day in the Life of Professional Educators*, in PORTRAIT OF A PROFESSION: TEACHING AND TEACHERS IN THE 21ST CENTURY 85, 106 (David M. Moss et al. eds., 2005).



increasing number of retaliation cases. In addition to the obvious harms—blow to morale, loss of public confidence, and potential spike in litigation—other tertiary concerns will begin to emerge. For instance, school districts that retaliate for reporting child abuse and neglect will become targets of lawsuits by parents for failing to prevent subsequent abuse;<sup>365</sup> as often as possible, teachers will learn to entwine controversial speech with federal legislation that affords a cause of action for retaliation<sup>366</sup> or with applicable state whistleblower laws;<sup>367</sup> teachers will find alternative causes of action against school boards who retaliate, asserting intentional torts such as intentional infliction of emotional distress,<sup>368</sup> defamation, and stigma,<sup>369</sup> which entail punitive damages awards; and school administrators will find themselves investigated on criminal charges of intimidation.<sup>370</sup> In any case, no public employee should be put into the position of having to choose her job over her duty as *Garcetti* requires. This is only a lose-lose situation for both children and the institution itself.

Surely there are better ways for school boards to govern their labor relationships. A return to *Pickering*, which better suits teachers and the employment relationship, would still accomplish what school boards intend—a moderate grasp on their employees' behavior. *Garcetti* is a bazooka in a knife fight—and with the same incipient risks of blowing up in one's face.

---

365. See, e.g., *Marquay v. Eno*, 662 A.2d 272 (N.H. 1995). Worse yet will be the criminal investigations for failure to report.

366. Titles VI, VII, and IX and the Rehabilitation Act currently protect individuals from retaliation for speech arising from their rights. See *supra* notes 200–206 and accompanying text.

367. See generally FISCHER, SCHIMMEL & STELLMAN, *supra* note 302, at 134.

368. See, e.g., *Radvany v. Jones*, 585 N.Y.S.2d 343 (App. Div. 1992) (holding that principal could be sued for intentional infliction of emotional distress for intimidating his assistant principal after he retaliated against her for reporting a teacher had altered students' answers for the Regents examination).

369. See, e.g., *Worona & Randall*, *supra* note 323, at 13-1, 13-8.

370. In line with efforts at prior restraint will be the temptation for school administrators and school boards to use *Garcetti* as a weapon, to threaten teachers with retaliation for doing their jobs. Criminal statutes concerning intimidation would forestall that sort of persistent behavior, especially when one threatens the victim with harm if the victim does a lawful act. See, e.g., IND. CODE § 35-45-2-1 (2007) (a Class D felony if against an employee of a school corporation); MASS. GEN. LAWS ch. 265, § 25 (2007). Other statutes specifically criminalize acts of intimidation against public employees who are doing their jobs. See, e.g., ALA. CODE § 13A-10-2 (2007) (obstructing governmental operations); 720 ILL. COMP. STAT. 5/12-6 (2007) (public official); KY. REV. STAT. ANN. § 509.080 (West 2007) (an official); NEV. REV. STAT. § 199.300 (2007) (public employee). It would be nice if one could say that school administrators will not intimidate teachers, but they do. See, e.g., *Rabon v. Bryan County Bd. of Educ.*, 326 S.E.2d 577 (Ga. Ct. App. 1985) (upholding termination of principal for, among other things, intimidating teachers).