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Margaret Tarkington

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## Government Speech and the Publicly Employed Attorney

*Margaret Tarkington\**

### I. INTRODUCTION

In its recent cases, the U.S. Supreme Court has expanded its theory of government speech in such a way that constitutional free speech rights are nullified merely by categorizing the speech as “government speech.”<sup>1</sup> In *Garcetti v. Ceballos*, the U.S. Supreme Court nullified the free speech rights of public employees vis-à-vis their employers by applying the government speech doctrine to the speech of public employees whenever they speak pursuant to their official duties. The Court held that “when public employees make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline.”<sup>2</sup>

The incorporation of the government speech idea into the realm of public employee speech was a new development. Before *Garcetti*, the test created in *Pickering v. Board of Education*<sup>3</sup> was used to

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\* Associate Professor of Law, J. Reuben Clark Law School; Visiting Associate Professor of Law, University of Cincinnati College of Law. © 2011 Margaret Tarkington. I would like to thank Helen L. Norton for her helpful comments and Carla Crandall for her exceptional research assistance.

1. *See, e.g.*, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009) (explaining that if the speech at issue is “a form of government speech,” it “is therefore *not subject to scrutiny under the Free Speech Clause*” (emphasis added)); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (noting that government speech is completely “*exempt* from First Amendment scrutiny” (emphasis added)).

Notably, prior cases indicated that the Free Speech Clause prohibited viewpoint-based restrictions even where government speech was at issue. *See, e.g.*, *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (“[A] more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive ‘certain ideas or viewpoints from the marketplace.’” (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Bd.*, 502 U.S. 105, 116 (1991))); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (“The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ‘ai[m] at the suppression of dangerous ideas.’ . . . We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect.” (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959))).

2. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

3. 391 U.S. 563 (1968).

determine if a public employee could be punished by an employer for her speech. The *Pickering* test balanced the free speech interests of the speaker and recipients with the government employer's interest in an efficient and effective work environment.<sup>4</sup> The *Garcetti* rule is in stark contrast: There is no balancing of the interests—courts examine neither the importance of the speech nor the lack of disruption to the workplace. Rather, if the speech is made pursuant to the public employee's official duties, the Free Speech Clause is inapplicable and provides no protection to the employee.

The rule in *Garcetti* and the government speech doctrine in general have been examined and criticized as problematic from a number of viewpoints.<sup>5</sup> One aspect that has not received sufficient

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4. See *id.* at 568 (“The problem in any case is to arrive at a 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.”).

5. See, e.g., Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463 (2007) (arguing that *Garcetti* was incorrectly decided, but also arguing that Due Process may provide a solution); Ruben J. Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMENDMENT L. REV. 22 (2008) (arguing that statutes are insufficient to protect whistleblowers and arguing, despite *Garcetti*, for a move to greater constitutional protection for such speech); Risa L. Lieberwitz, *Linking Professional Academic Freedom, Free Speech, and Racial and Gender Equality*, 53 LOY. L. REV. 165, 165 (2007) (“address[ing] the potential impact of *Garcetti* on constitutional rights of public sector faculty”); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 210 (2008) (arguing that *Garcetti* “was not in the public’s best interest and refut[ing] arguments that federal and state whistleblower laws and civil rights laws provide adequate protections for public educators who expose questionable school practices”); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 563 (2008) (arguing that *Garcetti* is “unsound as a matter of First Amendment policy” for multiple reasons, including “because it under-protects public employee speech that is vital to self-government,” and because “it creates perverse incentives for public employees to go public and for their employers to broaden job descriptions to capture as much employee speech as possible”); Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4, 34 (2009) (noting that “[l]ower courts routinely apply [*Garcetti*] to dispose of the First Amendment claims of a wide range of public employees punished for their on-the-job reports of safety hazards, ethical improprieties, and other government misconduct,” and arguing that the *Garcetti* rule should apply only to “the speech of public employees that [the government] has specifically hired to deliver a particular viewpoint that is transparently governmental in origin and thus open to meaningful credibility and accountability checks by the public”); Charles W. “Rocky” Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1202 (2006) (“*Garcetti* adopted a prophylactic rule in a situation in which the individualized circumstances supporting rule-based adjudication were missing.”); Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMENDMENT L. REV. 117, 118 (2008) (“In the

discussion, however, arises from the facts of *Garcetti* itself—namely, the special problem of using the government speech doctrine where the public employee is also an attorney.<sup>6</sup>

The facts of *Garcetti* itself demonstrate the problem with applying the government speech doctrine to attorney speech. Richard Ceballos was a deputy district attorney in Los Angeles County.<sup>7</sup> Ceballos was contacted by the defense about a potential problem with a search warrant that was critical in a certain prosecution. Ceballos made his own inquiry into the matter, including talking with the affiant of the warrant, and concluded that the warrant contained serious misrepresentations.<sup>8</sup> He wrote a memo to his superiors and recommended dismissal of the case, but his superiors refused to dismiss it.<sup>9</sup> He then gave the memorandum to the defense (after redacting his conclusions as work product) and testified at the suppression hearing.<sup>10</sup> As a consequence of these actions, Ceballos suffered adverse employment actions, including reassignment, transfer, and denial of a promotion.<sup>11</sup> As explained in Justice Breyer's dissent, Ceballos believed that the speech contained in the memo "fell within the scope of his obligations under *Brady v. Maryland*" and progeny "to learn of, to preserve, and to

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name of managerial prerogative, federalism, and separation of powers, *Garcetti* has the effect of making government less transparent, accountable, and responsive."); Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. CIN. L. REV. 1281, 1282 (2008) (calling *Garcetti* "perhaps one of the most extraordinarily ill-considered—and short-sighted—opinions penned by the United States Supreme Court in recent years" and discussing the "adverse impact" that *Garcetti* is having on teachers and school administrators). *But see* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 38 (2008) (arguing that *Garcetti* properly "recognized a prerogative of public employers to regulate duty-related speech of public employees in order to ensure that these officials are accountable for the manner in which the offices that they hold discharge their public duties").

6. In its Summer 2007 issue, the ABA's *Criminal Justice Magazine* included two pieces briefly discussing *Garcetti* as applied to defense attorneys and prosecutors. *See* J. Vincent Aprile II, *Public Defenders, Official Duties, and the First Amendment*, ABA CRIM. JUST. MAG., Summer 2007, at 5 (arguing that *Garcetti* should not be applied to public defenders because of their unique role in the government employment structure and because they must be independent of state control); Bruce A. Green, *Prosecutors' Professional Independence*, ABA CRIM. JUST. MAG., Summer 2007, at 4 (arguing that *Garcetti* highlights the inadequacy of rules and standards of prosecutorial conduct and the need for prosecutors' offices to encourage conduct like that of Ceballos).

7. *See Garcetti*, 547 U.S. at 413.

8. *See id.* at 413–14.

9. *See id.* at 414.

10. *See id.* at 442 (Souter, J., dissenting).

11. *See id.* at 415 (majority opinion).

communicate with the defense about exculpatory and impeachment evidence.”<sup>12</sup>

Despite the fact that Ceballos’s speech may have been required by the Constitution and rules of professional conduct to protect the constitutional rights of a criminal defendant (the Court did not actually examine whether or not it was so required),<sup>13</sup> and despite his disclosure of potential government misconduct, the Supreme Court held that his speech enjoyed no First Amendment protection whatsoever.<sup>14</sup> His employer could freely discipline him for his speech.<sup>15</sup> In so holding, the Court incorporated the rule from its government speech cases—namely, that speech made by public employees in the scope of their official duties is treated as the government’s own speech and the First Amendment is inapplicable.

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12. *Id.* at 446–47 (Breyer, J., dissenting).

13. The dissent noted that Ceballos had argued that the memo “fell within the scope of his obligations under *Brady v. Maryland*” and its progeny “to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence.” *Id.* However, the majority never even discussed the possible characterization of the memo as *Brady* material. Such an omission is problematic because it creates an interpretation of the *Garcetti* majority that, regardless of whether the memo was *Brady* material, there is no First Amendment protection for it.

Lawrence Rosenthal argues that Ceballos’s speech did not qualify technically as exculpatory evidence under *Brady v. Maryland*. Rosenthal argues that “Ceballos learned of the circumstantial evidence suggesting police perjury from the defense counsel and his inspection of the area described in the warrant application, not as the result of any information *in the exclusive possession of the District Attorney or Sheriff’s office*. Ceballos’s opinion about the affiant’s veracity similarly was not exculpatory information; he had no special ability to evaluate the evidence.” *See* Rosenthal, *supra* note 5, at 56–57 (emphasis added).

Rosenthal may ultimately be “right” that a court could determine that the memo was not *Brady* material; yet, as noted, the Supreme Court’s decision does not appear to turn on such a distinction. Indeed, the Court did not decide whether or not Ceballos’s memo was within or outside the confines of *Brady*. The possible *Brady* characterization of the material is raised by the *Garcetti* dissent, *see Garcetti*, 547 U.S. at 446–47 (Breyer, J., dissenting), but never even mentioned by the majority. The *Garcetti* Court’s conclusion that Ceballos’s speech was denied constitutional protection appears to be based entirely on the fact that the speech was made within the scope of his official prosecutorial duties, and not because it fell outside the requirements of *Brady*. Moreover, the *Garcetti* case was decided on a motion for summary judgment, which means that all evidence and inferences had to be viewed in the light most favorable to the losing party—namely, Ceballos. *Id.* at 442 n.13 (Souter, J., dissenting). Finally, in addition to viewing the premises and the circumstantial evidence raised by the defense, Ceballos, as a member of the prosecution, talked twice with the police affiant for the warrant about the contents of the affidavit to determine if there was any satisfactory explanation for the discrepancies. *See id.* at 414 (majority opinion). Such information perhaps was “in the exclusive possession of the District Attorney or Sheriff’s office.” Rosenthal, *supra* note 5, at 57.

14. *See Garcetti*, 547 U.S. at 421–22.

15. *See id.*

As Helen Norton has summarized, in *Garcetti*, “the majority created a bright-line rule that treats public employees’ speech delivered pursuant to their official duties as the government’s own speech—that is, speech that the government has bought with a salary and thus may control free from First Amendment scrutiny.”<sup>16</sup>

While the *Garcetti* rule may be problematic for a number of reasons, it is particularly troubling as applied to publicly employed *attorney* speech. Attorney speech (including the speech of publicly employed attorneys) is not government speech and should not be treated as government speech. In examining this problem, it is important to note that a primary contingent of publicly employed attorneys is employed in the criminal justice system as either prosecutors or criminal defense attorneys. It is within this criminal setting that I will examine the *Garcetti* rule.

As discussed in Part II, a major premise of the government speech doctrine—allowing the government to make expressive choices—does not apply to criminal process. Compliance with the Constitution (or not) upon prosecution of an individual is not an “expressive choice” left to government discretion. Moreover, as shown in Part III, the primary justification underlying the government speech doctrine—the idea of political accountability—does not exist for discipline imposed on the publicly employed attorney. Importantly, political accountability is both insufficient and inadequate to protect the constitutional interests at stake.

Indeed, the content of the “government message” is dictated by the Constitution and the role of attorneys in our system of justice, which will be explored in Part IV. Finally, as discussed in Part V, the scope of government control inherent in the theory and practice of the government speech doctrine is at odds and interferes with the core function of the publicly employed attorney.

## II. PROVIDING CONSTITUTIONAL PROCESS IS NOT AN EXPRESSIVE CHOICE

It is hard to even wrap one’s head around the idea of attorney speech in the criminal process being “government speech”—meaning a message that the government has decided as a matter of policy to promote. On a very simplistic level such speech might be categorized as government speech because (1) the government pays

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16. Norton, *supra* note 5, at 12.

the salaries of the prosecution and often the defense as well, and consequently, (2) what is said by them is funded and thus owned by the government and can be (and, within certain boundaries, is) shaped by government policies. Unfortunately, this simplistic view does not withstand scrutiny. Indeed, a review of the government speech cases illustrates how tortuous it is to fit publicly-employed attorney speech into the government speech doctrine.

*Rust v. Sullivan* is one of the defining opinions for the government speech doctrine. In *Rust*, the Secretary of Health and Human Services implemented regulations that forbade recipients of Title X funding from any activities that “encourage, promote or advocate abortion as a method of family planning.”<sup>17</sup> Indeed, the regulations prohibited doctors receiving Title X funding from counseling regarding abortion or referring a woman to an abortion provider.<sup>18</sup> The Supreme Court upheld the regulations, explaining:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>19</sup>

Because the government has the option of not funding the program at all, it can choose how to shape it. As the Court elaborated, “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”<sup>20</sup> Similarly, in *Johanns v. Livestock Marketing Ass’n*, the government chose to promote beef through an assessment on cattle sales, including creating the ads, “Beef. It’s What’s for Dinner.”<sup>21</sup> As with *Rust*, the theory underlying the *Johanns* decision is that the government has the option to fund a program (or not), and thus can define the content thereof.<sup>22</sup> In *Pleasant Grove City v. Summum*,<sup>23</sup> the Court

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17. *Rust v. Sullivan*, 500 U.S. 173, 180 (1991) (quoting 42 C.F.R. § 59.10(a) (1989)).

18. *Id.*

19. *Id.* at 193.

20. *Id.* at 194.

21. 544 U.S. 550, 554 (2005).

22. *See id.* at 559 (“We have generally assumed . . . that compelled funding of government speech does not alone raise First Amendment concerns.”).

23. 129 S. Ct. 1125, 1129 (2009).

examined governmental placement of privately donated monuments in public parks, and determined that such constituted government speech. The Court explained: “The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to ‘speak for itself.’ ‘[I]t is *entitled to say what it wishes,*’ and to *select the views that it wants to express.*”<sup>24</sup> Thus the government speech cases generally involve areas where the government seems to have expressive choice in using public funds—indeed, it need not fund the item or program at all. The government can decide either to put monuments in parks or to not have monuments in parks. The government can fund women’s healthcare through Title X or not. It can promote beef—or chicken or bacon or veganism. And if taxpayers disagree with any of these expressive choices, they don’t have a First Amendment right to receive a different message; rather, as discussed more fully below, citizens can employ political accountability by voting those public officials out of office.<sup>25</sup>

In stark contrast, the criminal justice system is not an “expressive choice” belonging to the government. Theoretically, state and federal governments could choose not to prosecute anyone, but once they choose to prosecute someone, they lose in large part the ability to choose what “message” to promote. The government is exerting power to deprive people of life, liberty, and/or property. The Constitution requires that such deprivations be handled with specific guarantees in place; indeed, the Constitution makes several express guarantees specific to criminal prosecutions.<sup>26</sup> The Constitution does not give the government an “expressive choice” of whether or not to comply with constitutionally required criminal processes.

Granted, prosecutors have some expressive choice, generally referred to as prosecutorial discretion, as to whether or not to prosecute certain crimes. What prosecutorial discretion does not include, however, is discretion to disregard the Constitution once a decision to prosecute is made. Using *Garcetti* as an example, the Constitution precludes the government from having the expressive choice of failing to provide exculpatory evidence to the defense.<sup>27</sup>

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24. *Id.* at 1131 (emphasis added) (citations omitted); *see also* Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view . . .”).

25. *See infra* Part III.

26. *See* U.S. CONST. amends. V, VI, XIV, § 1.

27. *See, e.g.,* Brady v. Maryland, 373 U.S. 83, 87 (1963) (“[S]uppression by the



Government has even less “expressive choice” for the publicly employed defense attorney. The Constitution requires that the government provide adequate representation for defense, which includes providing to the criminal defendant an independent attorney.<sup>28</sup> Government does not have the expressive choice to fail to provide counsel to criminal defendants where the Constitution requires it.<sup>29</sup>

Moreover, in a number of the government speech cases, the Supreme Court has emphasized the option of an alternative forum for citizens to express a contrary message.<sup>30</sup> *Rust v. Sullivan* is illustrative. The doctors in *Rust* were not prohibited from promoting and recommending abortions outside of their work at a Title X project<sup>31</sup> and were not required to work in clinics funded by Title X.<sup>32</sup> The Court emphasized that doctors could fund their own clinics that recommended abortion if they disagreed with the government’s message. By extension, as related to *National Endowment for the Arts v. Finley*,<sup>33</sup> private individuals can fund art that the national government fails to fund; and, as to *Summum*, individuals can fund and promote their own private monuments and parks.

The criminal justice system is not even in this realm; there simply is no private speech or non-government alternative. The subordinate prosecutor who wants to comply with the Constitution against his supervisor’s wishes cannot prosecute an individual in a different forum, and the criminal defendant cannot choose to be prosecuted in another forum where constitutional processes are closely attended. To talk of an alternate forum separate from government funding where the citizens involved (here the attorneys and the defendant)

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prosecution of evidence favorable to an accused upon request violates due process . . .”).

28. See, e.g., *Polk Cnty. v. Dodson*, 454 U.S. 312, 318–24 (1981).

29. See *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963).

30. See *Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 400 (1984) (explaining that “a statutory mechanism” that would allow broadcasters to engage in the prohibited speech when using non-federal funds “would plainly be valid”); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545–48 (1983).

31. See *Rust*, 500 U.S. at 196 (explaining that doctors working in a Title X project “can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy,” but they must “conduct those activities through programs that are separate and independent from the project that receives Title X funds”).

32. See *id.* at 199 n.5 (explaining that recipients are “in no way compelled to operate a Title X project; to avoid the force of the regulations, [they] can decline the subsidy” and can “financ[e] their own unsubsidized program”).

33. 524 U.S. 569 (1997).

can promote their desired message doesn't even make sense. The only available forum for expression is the underlying prosecution, with constitutional process as the government's only option. The government employs the judge, the prosecution, and often the defense counsel. There simply is *not* a non-government-funded forum where alternate speech can serve a meaningful role or can adequately affect the government's assertion of power over the defendant.

While the government can fund art or beef or monuments as it pleases, the criminal justice system is not a case of government "say[ing] what it wishes."<sup>34</sup> Rather, it is coercive government power being exerted against specific individuals, which brings into play constitutional limits. Such use of government power is not an "expressive choice": It is the deprivation of life, liberty, and/or property and must include the appropriate protections thereof.

### III. POLITICAL ACCOUNTABILITY

The major justification underlying the Supreme Court's theory of government speech is the idea of political accountability. As the Court explained: "When the government speaks, for instance to *promote its own policies* or to advance a particular idea, it is, in the end, *accountable to the electorate and the political process* for its advocacy."<sup>35</sup> Consequently, "[i]f the citizenry objects, newly elected officials later could espouse some different or contrary position."<sup>36</sup> If people don't like the government's message or funding choices, they can fix this problem via democratic correctives—primarily by voting

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34. *Garcetti v. Ceballos*, 547 U.S. 410, 437 (2006) (Souter, J., dissenting) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)) (internal quotation marks omitted).

35. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (emphasis added) (citations omitted) (quoting Bd. of Regents of Univ. of Wis. Sys. v. *Southworth*, 529 U.S. 217, 235 (2000)); *see also* *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring) ("Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, *that the government will be able to avoid political accountability for the views that it endorses or expresses through this means.*" (emphasis added)); *Johanns*, 544 U.S. at 563 (majority opinion) (explaining that "[s]ome of our cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability," and finding that sufficient accountability existed).

36. *Southworth*, 529 U.S. at 235 (noting that "[i]f the citizenry objects [to the manner in which the government promotes its own policies], newly elected officials later could espouse some different or contrary position").

their government speakers out of office. As summarized by Helen Norton: “Political accountability, rather than the Free Speech Clause, provides the recourse for those unhappy with their government’s expressive choices.”<sup>37</sup>

As Norton persuasively argues, in order for political accountability to work, there must be transparency and the government must actually articulate its message.<sup>38</sup> Indeed, as is apparent from cases such as *Johanns* and *Summum*, the Supreme Court has failed to ensure either transparency or articulation. The majority in *Johanns* insisted that there would be political accountability for the beef promotion ads because citizens who objected to governmental promotion of beef could employ democratic correctives and remove the beef promoters from office.<sup>39</sup> Yet, as countered by the dissent, in upholding the Beef Act, the majority “fail[ed] to require the government to show its hand.”<sup>40</sup> The dissent noted that when the ad says “funded by America’s beef producers” that “all but ensures that no one reading them will suspect that the message comes from the National Government.”<sup>41</sup> Political accountability is thus completely lacking. Since the public will think the speech comes from independent beef sellers, it lacks the knowledge to lay blame at the government’s door if it objects to the message or to the use of public funds. The public will not employ democratic correctives, not because the democratic correctives don’t exist or because the public approves the message, but because the public doesn’t realize that it is the government that is providing the speech at issue.

Notably, in *Summum*, both majority and concurring opinions seem to agree that there is political accountability for a statue placed in a public park.<sup>42</sup> If people don’t like it, they will know that the message comes from the government and will elect different representatives. However, the problem in *Summum* is that the Court does not require that the government articulate its message. Instead

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37. Norton, *supra* note 5, at 22.

38. *See id.* at 27–32.

39. *Johanns*, 544 U.S. at 563–64.

40. *Id.* at 572 (Souter, J., dissenting); *see also id.* at 577.

41. *Id.* at 577.

42. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009); *see also id.* at 1139 (Stevens, J., concurring) (“Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views that it endorses or expresses through this means.”).

the Court says that a statue could mean one thing to one group and something different to someone else.<sup>43</sup> The *Summum* Court illustrates this by discussing the “message” of a mosaic in Central Park featuring the word “Imagine” in memory of John Lennon.<sup>44</sup> Indeed, the Court presumes that the government is promoting a constitutionally permissible message without any real examination of the content of that message and without requiring the government to articulate its message.<sup>45</sup> Perhaps it could be argued that articulation is a superfluous step because the government could likely come up with a permissible message. Yet, failing to require government to take that step means that government does not even have to examine or be cautious regarding its messages. Consequently, the Court allows government to avoid accountability by permitting it to conceal (and not even undertake self-examination regarding) the content of the message it promotes.

The problems with political accountability justifying the lack of recourse to the Free Speech Clause exist in several government speech cases (as *Johanns* and *Summum* illustrate), yet they are particularly acute in the area of speech by publicly employed attorneys.

First, while transparency may not be an issue in the criminal process context (perhaps there is no clearer instance of government providing a person with a message than by prosecution), articulation is certainly a problem. Notably, as in *Summum*, the *Garcetti* Court did not require the prosecutor’s office to articulate its message nor did the Court examine the government’s message closely. What is the message the prosecutor’s office was promoting by punishing Ceballos for writing a memo exposing potential police perjury and attempting to provide a criminal defendant with exculpatory evidence? They certainly were not promoting a message of careful compliance with constitutional processes and ethical obligations.<sup>46</sup>

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43. *Id.* at 1135–36.

44. *Id.* at 1135 & n.2 (“What, for example, is ‘the message’ of the Greco-Roman mosaic of the word ‘Imagine’ that was donated to New York City’s Central Park in memory of John Lennon. Some observers may ‘imagine’ the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that obviously inspired the mosaic and may ‘imagine’ a world without religion, countries, possessions, greed, or hunger.”).

45. *See id.* at 1135–37.

46. Rosenthal argues that the Constitution does not guarantee to “an accused . . . an advocate inside of the prosecutor’s office who will protect the accused’s rights.” Rosenthal, *supra* note 5, at 45. However, Rosenthal contends that professional ethics rules place a broader

But as in *Summum*,<sup>47</sup> the *Garcetti* Court just assumed that whatever message was being promoted was acceptable because, under the government speech doctrine, the government “is entitled to say *what it wishes*.”<sup>48</sup> But, again, even assuming that government can say whatever it wishes, that does not undermine the importance of articulation. If government were required to articulate the message it was promoting (in order to protect itself from a Free Speech Clause challenge), then it should also be required to show how the speech or conduct at issue fits within that message. A prosecutor’s office has the constitutionally and ethically dictated message of ensuring that justice is done and that constitutional process is provided. If the office cannot fit the challenged conduct (such as punishing a subordinate for investigating and writing a memo about potential exculpatory evidence) into its purported message, there is a problem. Moreover, allowing the government to sidestep articulation undercuts political accountability. Government can avoid democratic correctives if government can promote a message without owning up to it through articulation.

In addition to the articulation problem, political accountability is wholly unworkable in the realm of criminal process, a primary context for publicly employed attorneys. Political accountability is both *insufficient* and *inadequate* to secure the constitutional rights of criminal defendants whose life, liberty, and property are put into the hands of publicly employed attorneys.

#### *A. Political Accountability Is Insufficient to Secure Constitutional Rights*

With other types of government speech, it is at least plausible that if there is transparency and articulation of the government

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restriction on prosecutorial action and may require a prosecutor to actively protect the accused. *See id.* Rosenthal’s theory of managerial prerogative would prohibit prosecutor offices from punishing an employee “for honoring a constitutional obligation,” *id.* at 69, but would allow (by denying First Amendment protection for) managerial policy and discipline that “violate some state-law rule of professional ethics, but . . . no principle of constitutional law,” *id.* at 45.

Monroe Freedman and Abbe Smith assert that “prosecutors are ethically obligated to assure that the rights of their adversaries are protected.” *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 306 (3d ed. 2004).

47. 129 S. Ct. at 1134.

48. *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2005) (emphasis added) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see also Summum*, 129 S. Ct. at 1131.

message then political accountability may work. If a person does not like the government's expressive choices, she can push for the speakers' removal from office. Not so in the area of publicly employed attorneys.

For example, what happens if a prosecutor's office punishes an attorney for trying to provide a criminal defendant with her constitutionally guaranteed exculpatory evidence? It is near fanciful that criminal defendants, demoted prosecutors, or even defense attorneys will be able to successfully amass democratic correctives to fix such constitutional deficiencies. Providing criminal defendants constitutional process garners little public sympathy. In the words of Erwin Chemerinsky: "Unpopular minorities—criminal defendants, prisoners, undocumented immigrants—must have judicial protection; there is no realistic chance that such individuals will succeed in the majoritarian political process."<sup>49</sup> The lack of funding for criminal defense is indicative of the lack of public sympathy and concern for criminal defendants and for providing them with constitutionally sufficient process.<sup>50</sup> In fact, many criminal defendants are disenfranchised and cannot even vote<sup>51</sup>—how they are to bring about political accountability is a quandary.

Indeed, there is not only a lack of political accountability for failing to comply with the Constitution in criminal processes, but also a tendency to reward government employees engaging in such constitutionally unacceptable behavior. Studies indicate that

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49. Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67 *LAW & CONTEMP. PROBS.* 53, 61–62 (2004).

50. See, e.g., DAVID COLE, *NO EQUAL JUSTICE* 92 (1999) ("Providing genuinely adequate counsel for poor defendants would require a substantial infusion of money, and indigent defense is the last thing the populace will voluntarily direct its tax dollars to fund."); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 *N.Y.U. REV. L. & SOC. CHANGE* 427, 430 (2009) (noting that "state legislatures have been on notice, sometimes for decades, regarding their state's own indigent defense crises without taking action" and noting that the people in "the general electorate often demand that politicians take a 'tough on crime' stance," which results in legislatures being "unresponsive to the unpopular and largely silent constituency of criminal defendants"); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 *CORNELL L. REV.* 679, 699 (2007) (noting that despite the problems with indigent defense funding "there is little reason to believe that local, state, or federal legislatures will choose to contribute sufficient funds to solve the problem *ex ante*").

51. Drinan, *supra* note 50, at 430 ("People accused of crimes are often excluded from the electorate because they tend to hail from poor and alienated groups, or have even been barred from voting if convicted of a felony."); Primus, *supra* note 50, at 698–99 ("[S]ociety disenfranchises most convicts, and the public is not exactly clamoring for greater safeguards for criminal defendants").

prosecutors are promoted and obtain office based on their conviction rate—not by complying with the Constitution or professional responsibility obligations, or by uncovering police or other governmental misconduct. As summarized by Erik Luna, “front-line prosecutors are evaluated for promotion (and thus higher salary and prestige) by their win-loss record, while chief prosecutors will be reelected or retained based on, inter alia, the rate and number of convictions obtained by their office.”<sup>52</sup> Luna notes that dismissals and acquittals “*may affirmatively damage* their careers regardless of whether justice was done in the respective cases, including those involving credible claims of actual innocence.”<sup>53</sup> Erwin Chemerinsky interviewed prosecutors across the country, including in Los Angeles, and summarized:

Repeatedly, I heard from Assistant District Attorneys that they felt that they were evaluated based on their effectiveness in processing cases and gaining convictions. There were no incentives for uncovering police misconduct or for dismissing cases because of their suspicions about the police officers’ actions. . . . Such a promotion and award structure maximizes the incentive for prosecutors to disregard problems with police credibility that may undercut the strength of the prosecutor’s case.<sup>54</sup>

The facts of *Garcetti* itself supply a ready example of actual dynamics in a prosecutor’s office. Ceballos attempted to fulfill his constitutionally required duties to a criminal defendant and suffered adverse employment actions as a consequence. He was punished, not rewarded.

Public support tends to clamor around “tough on crime” candidates. Indeed, studies regarding judicial elections are shocking on this score. One study examining hundreds of decisions from elected judges in Pennsylvania found that “all judges, even the most punitive, increase their sentences as reelection nears.”<sup>55</sup> Another

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52. Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201, 1213 (2005).

53. *Id.* (emphasis added); see also Catherine Ferguson-Gilbert, Comment, *It is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 293 (2001) (“Promotions for subordinate prosecutors depend on their ‘scores’ for convictions. Winning gets rewarded while misconduct [such as failing to comply with the Constitution] goes unpunished.”).

54. Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL’Y & L. 305, 320–21 (2001).

55. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 258 (2004), quoted in Amanda Frost

recent empirical piece found “a strong relationship between election years for judges and the likelihood that a defendant will receive a death sentence. That is, conditional on being found guilty of murder, criminal defendants were approximately 15% more likely to be sentenced to death when the sentence was issued during the judge’s election year.”<sup>56</sup>

Political accountability is also insufficient because criminal defendants (even with the unlikely assumption that they could amass majoritarian support) are unlikely to know about constitutional violations absent protection of speech. That is, if the prosecution is allowed to punish its employees for providing *Brady* material to a defendant, this will deter subordinate prosecutors from undertaking the speech in the first place or from suing when they are punished for speech made to protect the rights of criminal defendants. Absent protected speech from the subordinate prosecutor, the criminal defendant will have no ready means to know of the violation. Moreover, when the subordinate prosecutor can be punished for conveying such information to the defense against the recommendation of his supervisors (as that would fall within the scope of his official duties and thus the *Garcetti* rule<sup>57</sup>), the subordinate is chilled from informing the defendant at all.

*B. Political Accountability Is Inadequate to Protect Constitutional Process*

Political accountability is particularly problematic because constitutional guarantees for criminal defendants exist regardless of the political makeup. Constitutional process for criminal defendants should not depend on political accountability for implementation. Indeed, that is why it is in the Constitution. Fair criminal process was not left to the vagaries of political winds and majoritarian

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& Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 737 (2010).

56. Richard R. W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 610 (2002).

57. Rosenthal argues against “a reading of *Garcetti* that would deny prosecutors protection even when they speak pursuant to a constitutional obligation.” Rosenthal, *supra* note 5, at 67. Although he notes that such a reading is possible, *see id.* at 68 n.120, he argues that the “conception of employer prerogative does not deny protection for an employee who is disciplined for honoring a constitutional obligation because an employer’s desire to suppress such information is not within the scope of a public employer’s constitutionally legitimate prerogatives,” *see id.* at 68.



sympathies. As Amanda Frost and Stefanie Lindquist explained: “Constitutionalism may be viewed as the antithesis of democracy because the very existence of a constitution presumes that some choices are to be withheld from the majority.”<sup>58</sup> Thus there is an inherent incongruence with incorporating the government speech doctrine into speech protecting the constitutional rights of criminal defendants: Political accountability—the cure for problematic government speech—*depends* on the political climate, while constitutional rights are supposed to exist *regardless of* the political climate.

Further, for the criminal defendant who is deprived of constitutional process and protections, ultimate political accountability (removal from office) of the prosecutor does not cure the deprivation. The remedy is inadequate. As noted above, it is important to recognize that in the area of criminal prosecution and defense, there is no alternate forum where the defendant or prosecutor can vindicate constitutional rights or receive/provide different treatment. If subordinate prosecutors are chilled or punished for providing information to the defense, then the criminal defendant will not even know about the deprivation and will be unable to vindicate her constitutional rights at the time and place where it matters to her as a defendant. The defendant is not going to care if a prosecutor loses a subsequent election. Rather, the defendant will care that she receives constitutional process, including exculpatory evidence from the prosecution or dismissal of a case that should not be prosecuted. The defendant will want the subordinate prosecutor, like Ceballos, to be protected in providing speech that fulfills that constitutional requirement. The defendant may be able to avoid imprisonment or obtain a lesser sentence with such evidence. That remedy is what matters to the defendant, and that remedy is what the Constitution is intended to provide: justice.

#### IV. CONTENT OF THE GOVERNMENT’S MESSAGE

Another problem with the *Garcetti* rule and the treatment of public employee speech as government speech is the consequent content of the government’s message. Under the government speech theory, when the government is giving and/or funding its “*own*

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58. Frost & Lindquist, *supra* note 55, at 729.

expressive conduct”<sup>59</sup> or “*its own policies*,”<sup>60</sup> then “it is entitled to say *what it wishes*.”<sup>61</sup> For example, in *Rust*, the government had created the optional Title X funding.<sup>62</sup> In so doing it could promote pro-life policies, pro-choice policies, or neither. Indeed, it need not provide any funding at all. In *Johanns* the government promoted beef—its message: “Beef. It’s what’s for Dinner.”<sup>63</sup> But it could have promoted apple pie for dessert or yogurt for breakfast. Or government could just stay out of the food-promotion business altogether and promote none of it.

But the overall content of the message delivered by publicly employed attorneys, again, in large part is *not* a policy choice. The government’s message must be to do justice and comply with the Constitution. The ABA Prosecution Function Standards state that “[t]he duty of the prosecutor is to seek justice.”<sup>64</sup> The comment elaborates:

Although the prosecutor operates within the adversary system it is fundamental that the prosecutor’s obligation is to *protect the innocent* as well as to convict the guilty, to *guard the rights of the accused* as well as to enforce the rights of the public. Thus, the prosecutor has sometimes been described as a “*minister of justice*” . . . .<sup>65</sup>

Although summarized here by the ABA, the content of the message is not created by the ABA, but is dictated by the Constitution and its promise of due process and special protections for criminal defendants to ensure fairness and that justice be done.<sup>66</sup> Thus, the *Garcetti* Court mischaracterized the situation when it held that it “simply” was allowing “the exercise of employer control over what the employer itself has commissioned or created.”<sup>67</sup> The Los Angeles

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59. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) (emphasis added).

60. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 575 (2005) (emphasis added) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

61. *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (emphasis added) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see also Summum*, 129 S. Ct. at 1131.

62. *Rust v. Sullivan*, 500 U.S. 173 (1991).

63. *Johanns*, 544 U.S. at 554.

64. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2 (1993).

65. *Id.* § 3-1.2 cmt.

66. *See* U.S. CONST. amends. V, VI, XIV.

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

prosecutor's office didn't "commission" Ceballos's memo, and more importantly, the office did not "create" his obligation to write it or to provide the materials to the defense. If Ceballos's memo fell within his obligations under the Constitution, then the Constitution created Ceballos's obligation to write the memo, an obligation that was also required by the applicable rules of professional conduct. Publicly employed attorneys should be protected in making such speech. It is not speech commissioned or created by their employers, but is speech that is required by the Constitution and the rules of professional conduct.

The fact that publicly employed attorneys represent both the prosecution and defense underscores the deficiencies in the idea that the government commissions or creates the message and should be able to choose a side. As explained in the ABA Defense Function Standards, "A Court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused."<sup>68</sup> Each of these three parties operates independently from each other and is "essential to the fulfillment of the court's responsibility in the administration of criminal justice."<sup>69</sup>

In contrast, the theory of government speech as articulated in *Rust* is that by promoting one point of view (pro-life), "Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."<sup>70</sup> But, in the case of the criminal justice system, the government is constitutionally required to follow certain procedures and to create fair proceedings that allow both sides to fully and fairly present their cases. Funding the criminal justice system is not government's "own expressive conduct" that would allow government to employ what would otherwise be a viewpoint discriminatorily favoring of one side "to the exclusion of the other" side.<sup>71</sup> The whole idea of the constitutional constraints and requirements regarding criminal processes is that the only message that government can promote is fair proceedings where justice is done.

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68. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-1.2 (1993).

69. *Id.* § 4-1.2 cmt.

70. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

71. *See id.*

Because government always employs the prosecution, and often employs the defense, it is helpful to examine the requisite content that each side can constitutionally promote. For the prosecuting attorney, the only message the government can promote is that justice be done.<sup>72</sup> A prosecutor represents a sovereign's brute power being brought to bear against an individual, and in so doing, the prosecutor's only interest "is *not* that it shall win a case, but that *justice shall be done*."<sup>73</sup> As explained in the ABA Criminal Justice Prosecution Function Standards, "this responsibility," as exercised by a minister of justice, "carries with it specific obligations to see that *the accused is accorded procedural justice* and that guilt is decided upon the basis of sufficient evidence, including consideration of exculpatory evidence known to the prosecution."<sup>74</sup> The message of justice includes that the prosecution complies with the criminal defendant's constitutional rights. Importantly, contrary to *Garcetti*, the government cannot "buy" employee speech<sup>75</sup> and promote a message of injustice in violation of the constitutional rights of criminal defendants. The government simply lacks this "expressive choice."

Moreover, all prosecutors (subordinate or senior)<sup>76</sup> have an independent and personal obligation to promote justice, uphold the Constitution, and abide by rules of professional conduct. When the

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72. As noted in the Model Rules of Professional Conduct, "A prosecutor has the responsibility of a minister of justice . . ." See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2006).

73. *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added); see also FREEDMAN & SMITH, *supra* note 46, at 307 (quoting *Berger*); *id.* at 330 (discussing the "prosecutor's duty to ensure [a] fair trial for the accused," which "reflects the prosecutor's duty to 'seek justice' rather than convictions").

74. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.11 cmt. (1993) (emphasis added).

75. Norton, *supra* note 5, at 12 (noting that *Garcetti* "treats public employees' speech delivered pursuant to their official duties as the government's own speech—that is, speech that the government has bought with a salary and thus may control free from First Amendment scrutiny").

76. The Rules of Professional Conduct specifically make the performance of ethical duties an individual responsibility that cannot be avoided by claiming that a supervisor directed the conduct. See MODEL RULES OF PROF'L CONDUCT R. 5.2 (a) (2006) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person."). A subordinate lawyer, however, will not be found in violation of the rules if she "acts in accordance with a supervisory lawyer's *reasonable* resolution of an *arguable* question of professional duty." See *id.* at R. 5.2(b) (emphasis added). Notably, there is no exception for violations of clear professional duties—both the subordinate and supervisory lawyer will be in violation of the rule and subject to discipline.

prosecutor was admitted to the bar, she took an oath to uphold the Constitution and abide by the applicable rules of professional conduct. Publicly employed attorneys should be granted speech rights commensurate to such duties.

The constitutional role of the publicly employed defense attorney is to provide a criminal defendant with effective and loyal assistance. Such assistance cannot be controlled by the prosecuting government, but must be independent therefrom.<sup>77</sup> As the Supreme Court has recognized: “[The defense attorney’s] principal responsibility is to *serve the undivided interests of his client*. Indeed an indispensable element of the effective performance of his responsibilities is the ability to *act independently of the Government and to oppose it* in adversary litigation.”<sup>78</sup>

Further, as explained by Freedman and Smith, the criminal defendant’s right to counsel is “‘the most precious’ of [her] rights, because it affects one’s ability to assert any other right.”<sup>79</sup> Thus, “[t]he right to competent counsel is *central to every other right of the criminally accused*, and the denial of this right destroys the foundation of adversarial justice.”<sup>80</sup>

It is hard to conceive of a way in which the speech of the defense attorney on behalf of his criminal defendant client and in opposition to the government could somehow be the government’s “own expressive conduct”<sup>81</sup> that entitles the government to control that speech and “say what it wishes.”<sup>82</sup> Even more so than with the prosecution, the state cannot “buy” the public defender’s speech to promote a message different from providing criminal defendants constitutionally sufficient—meaning loyal, effective, and

77. *See, e.g.*, *Polk Cnty. v. Dodson*, 454 U.S. 312, 318–22 (1981).

78. *Id.* at 319 n.8 (emphasis added) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)); *see also* FREEDMAN & SMITH, *supra* note 46, at 16 (explaining that the defense “lawyer is not the agent or servant of the state,” but instead is “the client’s champion against a hostile world” (internal citations omitted)).

79. *See* FREEDMAN & SMITH, *supra* note 46, at 13 (quoting *United States v. Cronin*, 466 U.S. 648, 654 (1984)).

80. *See id.* at 332 (emphasis added). Freedman and Smith explain that the American “adversary system represents far more than a simple model for resolving disputes,” but has been “constitutionalized by the framers” and “consists of a core of basic rights that recognize, and protect, the dignity of the individual in a free society.” *See id.* at 13. Thus, “[a]n essential function of the adversary system [] is to maintain a free society in which individual human rights are central.” *See id.*

81. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009).

82. *See Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see also Summum*, 129 S. Ct. at 1131.

independent—representation.<sup>83</sup> The theory of the government speech cases is entirely at odds with the idea of loyal and independent representation of the criminal defendant.

Finally, and importantly, the publicly employed defense attorney must be able to exercise independent professional judgment.<sup>84</sup> In *Polk County v. Dodson*, the Court noted the importance of the independence of public defenders.<sup>85</sup> The Court explained two ways in which the public defender must be independent.<sup>86</sup> First, public defenders must be independent from superiors in their own office.<sup>87</sup> The Court explained, “a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior,” in part because the “public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.”<sup>88</sup> Indeed, Model Rule of Professional Conduct 1.8(f)(2) forbids a third party from paying an attorney for a representation unless “there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.”<sup>89</sup> Thus, although public defenders are paid by a third party for their representation—namely, their employer—to provide representation to criminal defendants, the employer cannot interfere with the attorney’s independence or the attorney-client relationship. The public defender’s superiors cannot direct her actions in the representation. The client *is* the criminal defendant (even though the attorney is paid by someone else).

The *Dodson* Court additionally recognized “the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages,” noting that an implicit

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83. See *Dodson*, 454 U.S. at 322 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)) (explaining that “[t]here can be no fair trial unless the accused receives the services of an effective and independent advocate”) (emphasis added).

84. J. Vincent Aprile II emphasizes the importance of this independence from the state and loyalty to the criminal defendant in arguing that *Garcetti* should not apply to public defenders. See Aprile, *supra* note 6, at 14. However, Aprile concludes by saying that *Garcetti* does not apply to public defenders in that role because their speech is more akin to speech of a citizen. See *id.* at 14–15. Nevertheless, while public defender speech is made on behalf of private citizen criminal defendants, the public defender does not speak as a lay citizen. Indeed, public defenders serve an essential role in the administration of justice, which is why their speech must be protected.

85. *Dodson*, 454 U.S. at 320–22.

86. *Id.* at 321–22.

87. *Id.* at 321.

88. *Id.*

89. MODEL RULES OF PROF’L CONDUCT R. 1.8(f)(2) (2006).

aspect of constitutionally sufficient defense counsel is “the assumption that counsel will be free of state control.”<sup>90</sup> Again, it is impossible to square the idea of constitutionally sufficient, publicly employed defense attorneys with the theory that the speech of such public defenders should be treated as the government’s own speech that can be dictated and shaped by the government.

#### V. SCOPE OF GOVERNMENT EMPLOYER CONTROL

A final problem with fitting publicly employed attorney speech into the theory of government speech is the scope of government employer control shown in *Garcetti*. In *Garcetti*, the Court held that “when public employees make statements *pursuant to their official duties* . . . the Constitution does not insulate their communications from employer discipline.”<sup>91</sup> The Court went on to define “official duties” broadly, appearing to include employer control over all responsibilities of the attorney.<sup>92</sup> In applying the rule to Ceballos’s speech, the Court opined that official duties (and the concomitant lack of Free Speech Clause protection) included whenever the attorney goes “about conducting his daily professional activities, such as supervising attorneys, investigating charges, . . . preparing filings[, and] . . . writing a memo that addressed the proper disposition of a pending criminal case.”<sup>93</sup> Essentially, the Court indicates that anything that is done within the scope of an attorney’s responsibilities is government speech. “When he went to work and *performed the tasks he was paid to perform*, Ceballos acted as a government employee.”<sup>94</sup> Unfortunately, the Court did not limit the “tasks that [Ceballos] was paid to perform” to tasks that he was specifically assigned to perform by his government supervisor. The memo in question was written on Ceballos’s *own initiative* in an attempt to preserve the constitutional rights of a criminal defendant. No one in the prosecutor’s office asked him to write it. Yet because such speech was part of “conducting his daily professional activities,”<sup>95</sup> it was interpreted to be speech belonging to the government and thus subject to government control and discipline.

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90. *Dodson*, 454 U.S. at 321–22.

91. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (emphasis added).

92. *Id.* at 422.

93. *Id.*

94. *Id.* (emphasis added).

95. *Id.*

The broad scope of speech pulled into the government speech doctrine interferes with the professional independence of publicly employed lawyers. *Rust* again provides a contrasting example. In *Rust*, the majority concluded that the regulations were permissible because the doctors could additionally work in a clinic that was not funded by Title X and provide abortion counseling in that setting<sup>96</sup> or could opt out of Title X funding altogether and fund their own clinic.<sup>97</sup> Moreover, patients could be told that Title X simply did not cover post-conception healthcare or counseling.<sup>98</sup> Unlike the doctors in *Rust*, prosecutors and public defenders cannot opt out of the criminal justice system to provide a different “message” free from their government employer’s control.

The broad scope of employer control is particularly problematic for the criminal defense attorney. Again, as the Supreme Court recognized in *Polk County v. Dodson*, “[A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior.”<sup>99</sup> As noted above, the Court recognized that both the constitutionally dictated function and professional responsibilities of the public defender do not allow for employer control over public defenders.<sup>100</sup> Rather, implicit in the criminal defendant’s constitutional right to counsel is “the assumption that counsel will be free of state control” and “[t]here can be no fair trial unless the accused receives the services of an effective and *independent* advocate.”<sup>101</sup> Under our criminal justice system, the defense attorney’s role is not to “act[] on behalf of the State or in concert with it, but rather by advancing ‘the undivided interests of his client.’”<sup>102</sup> Thus, “a public defender is not acting on behalf of the State; he is the State’s adversary.”<sup>103</sup> The publicly employed defense

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96. *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (“The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.”).

97. *Id.* at 199 & n.5.

98. *See id.* at 200.

99. *Polk Cnty. v. Dodson*, 454 U.S. 312, 321 (1981).

100. *See id.* at 321–22 (explaining that public defenders themselves “work[] under canons of professional responsibility that mandate [their] exercise of independent judgment on behalf of the client” and that the State has a “constitutional obligation . . . to respect the professional independence of the public defenders whom it engages”).

101. *Id.* at 322 (emphasis added).

102. *Id.* at 318–19 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)).

103. *Id.* at 322 n.13.



attorney's speech thus cannot be treated as government speech. Not only is the government *not* "say[ing] what it wishes"<sup>104</sup> when the public employee speaks, but instead, the government is being opposed and challenged by the public employee.

Even inside the public defender's office, subordinate attorneys have independent obligations to their clients that cannot be controlled by their employer. Again, the *Dodson* Court explained:

The personal attorney-client relationship established between a deputy [subordinate public defender] and a defendant is *not one that the [supervisor] public defender can control*. The canons of professional ethics require that the deputy be "his own man" *irrespective of advice or pressures from others*. A deputy [subordinate] public defender *cannot* in any realistic sense, in fulfillment of his professional responsibilities, *be a servant of the [supervisor] public defender*. He is, himself an independent officer.<sup>105</sup>

The Supreme Court has recognized the need for this independence for lawyers even outside the criminal defense context. In *Legal Services Corp. v. Velazquez*, the Court held that the Free Speech Clause prohibited Congress from restricting attorneys who received federal funding from raising constitutional and validity challenges to existing welfare laws.<sup>106</sup> The Court recognized that even though attorneys received congressional money, "[t]he lawyer is not the government's speaker," but instead represents the interests of her clients.<sup>107</sup> Indeed, the Court recognized that "[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."<sup>108</sup> Admittedly, the attorneys in *Velazquez* were not government employees, but instead, recipients of federal funds that allowed them to provide representation to the poor. But the Court in *Velazquez* recognized, as it failed to do in *Garcetti*, the importance of the independence of attorneys: "An informed, independent judiciary presumes an

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104. *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see also Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009).

105. *Dodson*, 454 U.S. at 321 n.11 (quoting *Sanchez v. Murphy*, 385 F. Supp. 1362, 1365 (D. Nev. 1974)).

106. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548–49 (2001).

107. *Id.* at 542.

108. *Id.* at 542–43.

informed, independent bar.”<sup>109</sup> Thus the Court held that Congress’s attempt to limit the kinds of issues an attorney could raise with federal funding was unconstitutional because it “prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source.”<sup>110</sup> In like manner, the Court in *Garcetti* should have clearly prohibited government employers from punishing attorneys for complying with constitutional requirements for criminal prosecution.<sup>111</sup>

Finally, both prosecutors and public defenders have individual professional obligations to uphold the Constitution and to comply with the rules of professional conduct. Indeed, they have sworn an oath to do so. Regardless of what their employer decides should or should not be done, where Constitutional rights and professional obligations require that speech be made, the attorney’s speech fulfilling that obligation should be protected from employer discipline.<sup>112</sup> Such protection is necessary to protect the underlying constitutional rights of criminal defendants. As I have argued in another context, if attorneys can be punished for speech made to ensure or preserve the constitutional rights of criminal defendants, then those rights are severely undercut and perhaps entirely lost.<sup>113</sup>

Part of the theory underlying the *Garcetti* rule and the government speech doctrine is that the employee has no personal interest in undertaking the speech when speech is made as an employee (rather than “as a citizen”).<sup>114</sup> The *Garcetti* Court found it

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109. *Id.* at 545.

110. *Id.*

111. Although Rosenthal argues for an interpretation of *Garcetti* that would still prohibit discipline for honoring a clear violation of *Brady*, he recognizes that the case can be read to condone such discipline. See Rosenthal, *supra* note 5, at 68 n.120; see also *supra* note 13 and accompanying text.

112. Rosenthal argues that the First Amendment should protect “an employee who is disciplined for honoring a constitutional obligation,” but should not protect speech violating “state-law rule of professional ethics.” See *id.* at 45, 68. Rosenthal contends that violation of constitutional obligations is outside of employer prerogatives and thus should be outside of the *Garcetti* rule, but that violation of state-law rules of professional ethics is within employer prerogatives.

113. See Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 371–73 (2010).

114. Indeed, this was how the *Garcetti* majority interpreted *Pickering v. Board of Education*. In *Pickering*, the Court had required a “balanc[ing] 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.” 391 U.S. 563, 568 (1968) (emphasis added). The *Garcetti* Court,

dispositive that Ceballos had written his memo “pursuant to his duties as a calendar deputy.”<sup>115</sup> The Court determined, consequently, that:

Ceballos wrote his disposition memo because that is part of what he . . . was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo . . . . The significant point is that the memo was written pursuant to Ceballos’ [sic] official duties. Restricting speech that *owes its existence to a public employee’s professional responsibilities* does not infringe any liberties *the employee might have enjoyed as a private citizen*. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.<sup>116</sup>

In other words, because Ceballos would not have written the memo if he had merely been a private citizen and had not been employed as a prosecutor (that is, the memo “owes its existence” to his work duties), then he has not lost any First Amendment rights that he would have enjoyed as a private citizen. The theory is that the public employee has not “lost” anything by virtue of his public employment when the speech that lacks protection is speech that the employee would never have undertaken absent the employment.<sup>117</sup> In a similar vein, a concurrence of the Ninth Circuit opinion affirmed by *Garcetti* had theorized: “[W]hen public employees speak in the course of carrying out their routine, required employment

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emphasizing “as a citizen,” determined 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.” *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (emphasis added). However, prior Supreme Court cases had applied the *Pickering* balancing approach even where speech was made by an employee as an employee. *See, e.g.*, *Connick v. Meyers*, 461 U.S. 138 (1983) (finding *Pickering’s* balancing test applicable for speech made by Meyers “as an employee” for the one portion of speech that regarded matters of public concern); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (finding protection for public employee work-related discussion with supervisor).

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

116. *Id.* at 421–22.

117. *Id.*; *see also id.* at 423–24 (“Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. . . . When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.”).

obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right.”<sup>118</sup>

The theory, however, is flawed, particularly in the context of the government-employed attorney and the public employee providing constitutionally required speech. First, in the context of a prosecuting attorney fulfilling her duties under *Brady v. Maryland*,<sup>119</sup> the government employer does not “commission or create” the speech obligation. Rather, that obligation is created by the Constitution itself. Second, a prosecuting attorney is not fulfilling mere job duties imposed by her employer in so speaking. She not only has a “personal *interest*” in undertaking the speech, but she has *personally sworn an oath* to uphold the Constitution upon admission to the bar. Whether or not her “employer” considers it a part of her duties to investigate and provide the defense with *Brady* materials, the attorney has sworn an oath that personally (as a citizen and a lawyer) obligates her to speak. This personal obligation is not, as mischaracterized by the *Garcetti* Court, merely a matter of “experienc[ing] some personal gratification” in one’s speech.<sup>120</sup> Rather, it is a serious and weighty personal obligation. Both the Model Rules of Professional Conduct and the Constitution require investigation and provision of exculpatory evidence to the defense, with a threat of professional discipline for failing to so do.<sup>121</sup> Moreover, the Model Rules of Professional Conduct do not allow a subordinate lawyer to avoid discipline for a clear violation of the Rules by arguing that a supervising lawyer told him to act in that manner.<sup>122</sup> The obligation is personal, and attorneys need the requisite speech rights to fulfill speech obligations imposed by the Constitution and Model Rules of Professional Conduct.

## VI. CONCLUSION

Publicly employed attorneys play vital roles in our criminal justice systems. Many aspects of those roles are dictated by the

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118. *See id.* at 416 (internal quotations omitted) (quoting *Ceballos v. Garcetti*, 361 F.3d 1168, 1189 (2004) (O’Scannlain, J., concurring)).

119. 373 U.S. 83 (1963).

120. “It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction.” *Garcetti*, 547 U.S. at 421.

121. *See Brady*, 373 U.S. 83 (1963); MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2006); *see also* ABA PROSECUTION FUNCTION STANDARDS, 3-3.11 & cmt.

122. MODEL RULES OF PROF’L CONDUCT R. 5.2 (2006).

Constitution, and some are additionally required by rules of professional conduct. To categorize attorney speech as government speech, which can be shaped and controlled as government employers please, frustrates the constitutional role that these attorneys play in our system of justice.

Commentators have condemned *Garcetti* and argued for a return to the *Pickering* standard for public employees.<sup>123</sup> *Pickering* certainly would be a vast improvement over *Garcetti* because the free speech rights of the publicly employed attorney would have to be weighed and thus recognized to some degree. But *Garcetti* highlights the particular problems associated with protection and lack of protection for attorney speech—an area that certainly has been insufficiently explored and developed. Where the public employee is also an attorney, rather than applying the governing case law covering free speech for all public employee speech, special considerations should be taken into account and perhaps a new methodology should be employed. Attorney speech serves very specific functions essential to our entire system of justice. These functions include the protection of the constitutional rights of criminal and civil litigants and assisting individuals in invoking and avoiding the power of government when government seeks to deprive them of life, liberty, or property. In light of the particular role that attorneys play in our constitutional structure, attorney speech should enjoy special protection when it is essential to the role of the attorney in the administration of justice and in the protection of constitutional rights of litigants—especially of criminal defendants.<sup>124</sup>

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123. See, e.g., Nahmod, *supra* note 5.

124. I am currently working on a paper, *A First Amendment Theory for Protecting Attorney Speech*, that proposes a theory and methodology for protecting such speech.