

ORDINANCES

As a Matter of Fact

by Devala Janardan, Associate Counsel

It should come as no surprise that many legal commentators, from academics to judges, have criticized the Supreme Court's decision in *Garcetti v. Ceballos*.[1] Criticizing Supreme Court opinions in scholarly journals and roundtables is one thing, but it is more serious when a judge specifically requests exceptions be made to the rule of law under the Supreme Court. Yet, a federal district court judge in New York did just that in a recent case.[2]

The facts around the case follow a "typical" *Garcetti* pattern. Jackler, a probationary police officer, was called to assist a commissioned officer on an arrest. Jackler claimed that the commissioned officer used excessive force by punching the arrestee in the face, after the arrestee was subdued. Jackler filed an official report with his supervisor about the incident and eventually filed a First Amendment lawsuit claiming that he was retaliated against for filing the report. The district court ruled that *Garcetti* applied, that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.[3] However, the district court judge took the opportunity recently to suggest an exception to *Garcetti* in the following footnote:

> I would encourage higher courts to consider whether *Garcetti* should apply at all when the employee speech concerns a matter of fact, rather than a matter of judgment, opinion, or policy, as in *Garcetti*.[4]

Let's analyze this suggestion by the district court judge more closely. The closest analogue where discussion by the judiciary exists analyzing the legal difference between fact and opinion, while remaining within the confines of the First Amendment, is defamation law. To be clear, fact/opinion tests instituted by a court, while difficult to administer, still make sense in the defamation context. Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements.[5] As defamation law evolved, "[t]he principle of 'fair comment' afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact."[6] Fair comment "was generally privileged when *it concerned a matter of public concern*, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm."[7]

No court at any level of the judiciary (federal, state, local) has carved out from the *Garcetti* rule statements of fact and narrowed its holding to mere statements of opinion. Creating a legal distinction by the type of speech uttered by a plaintiff in a First Amendment retaliation case will cause federal courts to be flooded with additional cases that are more appropriate to be resolved under existing state law and other constitutional protections.

A quick review shows the difficulty in distinguishing between fact and opinion:

> It is rather hard to imagine a context in which the statement, "Mr. Jones had ten drinks at his office party and sideswiped two vehicles on his way home," could be deemed to be a statement of opinion. At the other extreme are evaluative statements reflecting the author's political, moral, or aesthetic views, not the author's sense perceptions. A statement such as, "Mr. Jones is a despicable politician," is a paradigm of opinion. It is a *fitting illustration of the complexity of language and communication that many statements from which actions for defamation arise do not clearly fit into either category*. These statements pose more subtle problems and are the stuff of which litigation is made. An example of such a statement.... is "Mr. Jones is an alcoholic."[8]

The English language is full of words that are dependent on context in order to convey meaning. It will be very difficult for a court to create a mechanical test to determine whether a statement is fact or non-fact. Indeed, a court that "lay[s] down rules of excessive complexity may deter publication of the very opinions which [a] distinction is designed to protect, inasmuch as potential speakers or writers would, under such regimes, be at a loss to predict what courts will ultimately deem to be opinion."[9] The Second Circuit has addressed this tension as well, noting that "the determination of whether a specific statement is one of opinion or fact is difficult. ... [T]he law in this area is murky."[10]

Finally, requiring a municipality to expend more on legal costs on issues whether a certain type of speech is fact or opinion will result in less resources being allocated to other municipal services. Faced with one of the most severe economic challenges since the Great Depression, state and local governments are faced with daunting challenges, including challenges in the public employer realm. The average American municipality with a population of under 10,000 expends around $7.59 per capita on judicial and legal expenses.[11]

The net effect of instituting an exception to *Garcetti* would be to increase the legal costs associated with litigating the "he said, she said" garden variety of employment disputes by making them federal cases and that would not be easily resolved on motion. Should the court find First Amendment protections in the day to day official speech of every public employee, the resulting litigation will result in less resources being allocated to other municipal services, such as education, and fire and police protections that are more properly the intent and function of government than defending First Amendment actions filed by disgruntled employees who find in

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philosophy." **Morals:** "Derived from the Latin term *moralis* which refers to manners or customs; making or being capable of making, distinctions between right and wrong conduct at the individual level." **Legality:** "derived from the Greek term, *legein*, which means to collect, and the Old English term *lag*, which refers to something laid down and settled." It has an emphasis on authority and preciseness, its strongest roots are with politics/rule-making and jurisprudence. **Codes of Ethics:** "[G]enerally articulates aspirational principles, such as forthrightness." Codes of Conduct: "[G]enerally asserts aspiration values or sets minimum expectation values." Van Wart, Montgomery, Codes of Ethics as Living Documents, Public Integrity 5, no. 4:331-346 (2003) (hereinafter "Van Wart").

4. Davies, Mark, *A Practical Approach to Establishing and Maintaining a Values Based Conflicts of Interest Compliance System*, Remarks for a session entitled *Rules and Tools for Managing Conflicts of Interest Issues*, The Global Forum on Fighting Corruption, Brasilia, June 7-10, 2005.

5. Tampa, FL, Ethics Code, art. VIII (2003) at http://www.tampagov.net/dept_human_resources/files/City_of_Tampa_Ethics_Code.pdf (last accessed Aug. 13, 2010).

6. CityEthics.Org, *Draft Model Municipal Ethics Code* (2006) at http://www.cityethics.org/content/model-code-introduction (last accessed Aug. 13, 2010).

7. Van Wart, *supra* note 3 at 334.

8. Swain, John W. and Duke, Matthew L., *Recommendations for Research on Ethics in Public Policy from a Public Administration Perspective: Barking Dogs and More*, Int'l J. Pub. Admin. 24, no.1:125-136 (2001).

9. Menzel, Donald C., Ethics Management for Public Administrators (New York, M.E. Sharpe, 2007); Lewis, C.W. & S.C. Gilman, The Ethics Challenge in Public Service: A Problem Solving Guide (2d ed. San Francisco 2005 Jossey-Bass).

10. City of Philadelphia, *IntegrityWorks*, *The place to learn why and how the City operates ethically*, at http://www.phila.gov/integrityworks/index.html (last accessed Nov. 10, 2010).

11. Jacksonville, FL, Ethics Code, ch. 602, § 602.1101 to 1104 (1999).

12. City of Atlanta, *Ethics Office Website* at http://www.atlantaga.gov/government/boards/ethics_ethicsofficer.aspx (last accessed Nov. 10, 2010).

13. *See, e.g.*, Miami-Dade, Miami-Dade Inspector General website at http://www.miamidadeig.org (last accessed Aug. 13, 2010).

14. *Id.*

15. The Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), set standards for all U.S. public companies and accounting firms. It includes penalties for interfering with whistleblowers.

16. United States Sentencing Commission, Federal Sentencing Guidelines, Guidelines Manual, §3E1.1 (Nov. 2005), at http://www.ussc.gov/orgguide.htm (last accessed Aug. 13, 2010). Section 8B2.1, Guide to Effective Compliance and Ethics Programs, requires an organization under section 5C: "to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance...without fear of retaliation." *Id.* at 479.

17. Miami-Dade Commission on Ethics and Public Trust, *2009 Annual Report*, at 6 (staff and budget). *See* http://www.miamidadeethics.com/Publications/annual2009.pdf (last accessed Aug. 13, 2010).

18. Bradbury, Mark D., *Toward a Cost-Effectiveness Assessment of State Ethics Commission: An Analysis of Enforcement Outputs*, Pub. Integrity 9, no.4:333-347 (2007).

19. For more information about the City of New York's Conflict of Interest Board, see http://www.nyc.gov/html/conflicts/html/home/home.shtml (last accessed August 13, 2010).

20. For more information about the City of New Orleans' Ethics Review Board, see http://nolaethics.org/main/inside.php?page=mission (last accessed Aug. 13, 2010).

21. Ethics Review Board, *New Orleans: History of the Ethics Review Board*, at http://nolaethics.org/main/inside.php?page=mission (last accessed Nov. 10, 2010).

22. For more information about the City of Boise's Ethics Commission, see http://www.cityofboise.org/CityGovernment/EthicsCommission (last accessed Aug. 13, 2010). **ML**

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2(b) and 7 *Charter* challenges to what are now s. 210 and s. 213(1)(c)) of the *Criminal Code*. There, the Court found that the communicating offence represented a prima facie infringement of s. 2(b), but upheld the provision as a reasonable limit on expression under s. 1; further, both provisions clearly infringed the right to liberty under s. 7, but found that the infringement was in accordance with the principles of fundamental justice.

Counsel for the applicants in *Bedford*, York University professor Alan Young, noted that several municipalities collect business license fees from massage and escort businesses despite the "general understanding" that the businesses sell sexual services. The ruling eliminates the possibility that the localities are themselves "living off the avails." Asked for comment, Valerie Scott pointed to a future of sex workers as positive municipal citizens: "We would like to tell residents and business owners: Don't be afraid. We are not aliens. Sex workers across the country ... want to work with municipalities and to be good citizens running good businesses." **ML**

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every grievance its source in their spoken word.

IMLA took the opportunity to submit an *amicus* brief in response to the district court's language, and we urge you to do the same if you notice similar actions by judges in your jurisdiction.

Notes

1. 547 U.S. 410 (2006)
2. *Jackler v. Byrne*, 708 F.Supp.2d 319 (S.D.N.Y. 2010).
3. *Garcetti* at 421.
4. *Jackler* at 324 n.5 (S.D.N.Y. 2010).
5. Milkovich v. Lorain Journal Co., 497 U.S. 1 11 (1990) (citing L. Eldredge, Law of Defamation 5 (1978).
6. *Id.* at 13 (citing 1 F. Harper & F. James, Law of Torts § 5.28, p. 456 (1956).
7. *Milkovich* at 13-14 (emphasis added).

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8. *Ollman v. Evans*, 750 F.2d 970, 978-979 (D.C. Cir. 1984) (emphasis added).
9. *Id.* at 979 (alteration in original).
10. *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2nd Cir. 1985).
11. *See* 2002 Census of Governments, Vol. 4, No. 4, "Government Finances," U.S. Census Bureau, Table 13, available at http://www.census.gov/prod/2005pubs/gc024x4.pdf. **ML**

Cases

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a First Amendment right to select the books and methods of instruction for use in the classroom, without interference from public officials? Evans-Marshall taught high school classes in English and creative writing. She assigned Ray Bradbury's *Fahrenheit 451* to her English class. As part of the assignment, she distributed a list compiled by the American Library Association of the "100 Most Frequently Challenged Books." Students were divided into groups, told to select books from the list, and debate why a particular book had been challenged. A parent complained about that assignment and a book called *Heather Has Two Mommies*. After the school principal, Wray, asked Evans-Marshall to tell her students to pick another book, Evans-Marshall complied. After the *Fahrenheit 451* assignment, Evans-Marshall assigned *Siddhartha* by Herman Hesse. At a later meeting of the school board, 25 or so parents complained about Evans-Marshall's assignments, including *Siddhartha* and the debate assignment. Evans-Marshall also maintained a folder containing writing samples from former students. She shared this with students who asked for additional guidance on assignments. One of the writing samples was a first-hand account of rape; another was a story about a young boy who murdered a priest. Over the next few months, Wray and Evans-Marshall talked about the perceived problems with her curriculum, but without reaching a resolution. Wray's evaluation, however, criticized Evans-Marshall's attitude and demeanor, as well as her "[u]se of material that [was] pushing community standards." At the next school board meeting, the board voted unanimously not to renew Evans-Marshall's contract due to "problems with communication and teamwork."

Evans-Marshall filed a 42 U.S.C. §1983 action against the school board and Wray, alleging that these defendants had retaliated against her "curricular and pedagogical choices" and infringed her First Amendment right to "select books and methods of instruction for use in the classroom without interference from public officials." The district court denied the defendants' motion to dismiss. After discovery by both sides, the defendants moved for summary judgment, arguing that the U.S. Supreme Court's intervening decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), foreclosed Evans-Marshall's claim. The district court granted the defendants' motion for summary judgment.

The U.S. Court of Appeals for the Sixth Circuit affirmed. In free speech retaliation cases arising in the public employment context, the court had indentified three questions: (1) was the individual involved in constitutionally protected activity; (2) would the employer's conduct discourage individuals of ordinary firmness from continuing to do what they were doing; and (3) was the employee's exercise of constitutionally protected rights a motivating factor behind employer's conduct? Under *Garcetti*, to have engaged in protected speech, a claimant was required to have been speaking as a citizen on a matter of public concern. A balancing test was applied, which weighed the interests of the teacher (as a citizen) in commenting upon matters of public concern against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Using this framework, the Sixth Circuit ruled that Evans-Marshall met the "public concern" requirement. A teacher's curricular speech ordinarily covered matters of public concern, based in *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1052 (6th Cir. 2001). Evans-Marshall also satisfied the balancing test: while her interest in selecting "materials to supplement the Board-chosen textbooks and the methods for teaching" was not compelling, that interest still "outweighed the school's near-zero interest in disciplining her for teaching a book [the school itself] had purchased." Evans-Marshall, however, could not overcome *Garcetti* because she had made her curricular and pedagogical choices in connection with her official duties as a teacher. "When a teacher teaches, the school system does not regulate that speech as much as it hires that speech." *Mayer v. Montro County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). If it was the school board that hired that speech, it could surely regulate the content of what is or was not expressed, and what was expressed on its behalf. *Rosenburger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). Lastly, the Sixth Circuit questioned how a school system could operate if all teachers had First Amendment rights in their own curricular decisions. The decision by the district court granting summary judgment in favor of defendants was affirmed. *Evans-Marshall v. Bd. of Ed. of Tipp City Exempted Village School Dist*, 624 F. 3d 332 (6th Cir. 2010).

Search and Seizure

Excessive Force and Use of Force Continuum

The U.S. Court of Appeals for the First Circuit has ruled that a police officer who physically removed a motorcyclist from a parked motorcycle and slammed him into the pavement during a traffic stop in order to arrest him for "ironically, failure to stop," violated the motorcyclist's right to be free from an unreasonable seizure. The police officers saw Raiche, on a motorcycle, go by without wearing the helmet mandated by state law. Pietroski and other officers gave chase after Raiche allegedly failed to stop. Raiche testified that no pursuit occurred as far as he could tell, and that he pulled over as soon as he could do so safely. In a few seconds, Pietroski came up to Raiche, grabbed him, physically lifted him off his bike and tried to pull him as far away from the bike as possible (Pietroski's version), or launched himself at Raiche and knocked him to the ground causing Raiche's forehead to hit the pavement (Raiche's version). Pietroski pulled up on Raiche's arm to apply handcuffs, twisting Raiche, who was still tangled up with the motorcycle. Pietroski allegedly