VULNERABLE INTEGRITY: TWO WHISTLEBLOWER CASES IN PUBLIC UNIVERSITIES

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Abstract

This note analyzes two state higher education whistleblowers' freedom of speech cases under state and federal laws: the 2018 case Bradley v. West Chester University *and the ongoing case of* Khatri v. Ohio State University. *These cases serve as windows into the post-*Garcetti v. Ceballos *era, characterized by a lack of constitutional protection for whistleblowers in the public sphere, especially in public universities. My analyses of* Bradley *and* Khatri *raises questions about public trust in state institutions and the integrity of public officials, competing organizational and public values, and the problematic federal jurisprudence when it comes to First Amendment protections for higher education employees. The distinction between the roles of administrative staff like Bradley, and contingent research faculty like Khatri also raises important questions about whether staff and contingent faculty ought to have the same or different speech protections. This article argues that both cases have instructive value to not only higher education attorneys, but also educational researchers, and organizational stakeholders. The author also argues that the protections available to employees of public higher education institutions ought to depend on their roles in fulfilling the educational mission (like Khatri as a research scientist) versus the business operations (like Bradley as budget director).*

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TABLE OF CONTENTS

INTRODUCTION **362**

I. BACKGROUND AND FRAMEWORK **363**

II. CONTEXT **363**

A. First Amendment Protections for Public Servants 364

1. Garcetti v. Ceballos 364

2. Since Garcetti 365

3. Whistleblower Protections 367

B. Bradley v. West Chester University 368

C. Khatri v. Ohio State University 368

III. ANALYSIS **370**

A. Competing Values 370

1. Integrity and Professional Ethics 372

B. Public Trust 374

C. First Amendment Jurisprudence 375

1. How have the courts understood intramural/chain of command speech in faculty cases? 376

2. What ought public employees and attorneys know about whistleblower protections? 378

D. Why Khatri and Contingent Faculty Should Have More Protections Than Bradley 379

IV. CONCLUSION AND SIGNIFICANCE **384**

INTRODUCTION

In the last fifty years, federal regulation of higher education institutions has shifted the allocation of power significantly toward the administration and away from the faculty when it comes to laboratory health and safety, research misconduct, and overall budgeting.[1] While the purpose of this regulation may have been to increase accountability and transparency, recent court cases involving university whistleblowers reveal that the shared governance consequences of such administrative power leave a lot to be desired. Laboratory norms and procedures once governed by laboratory safety committees are now enforced by whole compliance offices. While the administrative authority to ameliorate lab safety concerns may lie with the environmental health and safety office, the authority to discipline routine perpetrators of unsafe conduct or exploitative practices still lies solely with academic administration in most universities. While these cases *may* go before a faculty panel, this is often only the case when a tenured faculty member is disciplined. By examining the recent case of *Khatri v. Ohio State University*,[2] this Note considers what should happen when the person disciplined is a contingent worker (post-doc, graduate student worker, or non-tenure-track researcher) and the reason for that discipline is whistleblowing activity.

This article also explores how whistleblowers who work as administrative staff (like Colleen Bradley in *Bradley v. West Chester University of Pennsylvania State System*[3]) are and are not protected from retaliation for their whistleblowing activities and to what degree there ought to be shared governance protections for them as well. This case provides an important window into the post-*Garcetti v. Ceballos*[4] era constitutional failure to protect whistleblowers in the public sphere. More specifically, an analysis of *Bradley* raises questions about public trust in state institutions and the integrity of public officials, competing organizational and public values, and fundamental misunderstandings of First Amendment protections for public employees. The author argues that since there are such limited protections for whistleblowers in public colleges and universities available under federal law, and state whistleblower statutes vary significantly in this regard, this is an area ripe for collective bargaining protections and inclusion in collective bargaining agreements and even non-union contracts. The author argues for a contractual protection for intra-institutional speech made in support of the educational mission[5] and according to institutional policy outside of one's chain of command, for faculty and for staff.

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1 For a more thorough coverage of the changes in federal regulation of higher education institutions over time, see Barbara A. Lee, *Fifty Years of Higher Education Law: Turning the Kaleidoscope*, 36 J.C. & U.L. 649, 679–81 (2009–2010).

2 Khatri v. Ohio State Univ., 2021 WL 534904 (N.D. Ohio).

3 Bradley v. W. Chester Univ. of Pa State Sys., 880 F. 3d 643 (3d Cir. 2018).

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

5 This argument builds on the arguments put forth by David M. Rabban, *Academic Freedom, Professionalism, and Intramural Speech*, 1994 New Directions for Higher Edu. 77 (1994); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and*

I. Background and Framework

My argument for increased protections for whistleblowers relies on the scholarship of legal scholars David Rabban, Judith Areen, and Robert Post, who argue that faculty speech that supports the institution's educational mission to create and disseminate expert knowledge ought to be given special protections from retaliatory discipline.[6] The additional literature that frames the discussion comes from the fields of public administration, higher education, law, and organizational theory. For example, what "public good" means is central to the framing of these cases, yet the Supreme Court's decision in *Garcetti v. Ceballos* has restricted the legal understandings of the public good in public sector whistleblower cases.[7]

In free speech cases, there is often a tension between the intramural/extramural speech dichotomy (speech made to someone else within the organization vs. to someone outside the organization).[8] In the federal case law, judges sometimes conflate internal speech (expressions made to other members of the organization) with "chain of command" speech — speech made up the reporting structure of the organization to one's supervisor, or one's supervisor's supervisor, etc.[9] While the First Amendment retaliation caselaw often does not recognize "chain of command" speech as protected speech, the same is not true for all intramural speech. For instance, it is important to distinguish chain of command speech from internal reporting made outside one's chain of command (e.g., to the Equal Employment Office, Title IX office, campus police, or the like).

II. Context

To set the context for the analysis of *Bradley,* it is instructive to look first at the landscape of the protections available for public employees who have been disciplined for their speech made pursuant to their official duties. The First Amendment caselaw changed drastically in 2006 with the Supreme Court decision in *Garcetti v. Ceballos* which is discussed in Part II.A.1.[10] Issues with the *Garcetti* ruling are described, as well as how *Garcetti* and a case from 2014 (*Lane v. Franks*)[11] shape the current protections for public employees. Finally, the protections for whistleblowers in public employment contexts, which vary by state and differ for state and federal employees, are discussed.

Governance, 97 Geo. L.J. 945 (2009); Robert C. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State (2013).Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State} (Yale University Press Reprint edition ed. Apr. 2013 This argument comes out of my dissertation research on faculty free speech cases.

6 Rabban, *supra* note 5, at 77; Areen, *supra* note 5, at 994; Post, *supra* note 5, at 77–78.

7 *Garcetti v. Ceballos*, 547 U.S. 410 410. Full description of the case is included in the following section.

8 See especially, Rabban, *supra* note 5.

9 See *Khatri v. Ohio State University*, 2021 WL 534904 at *9 (N.D. Ohio Feb 9, 2021, overruling plaintiff's objections because he "failed to plausibly plead that his speech was uttered as a private citizen, unrelated to his job duties and to entities outside the chain of command of his employer.").

10 For a short primer on First Amendment caselaw prior to 2006, see Julian W. Kleinbrodt, *Pro-Whistleblower Reform in the Post-Garcetti Era*, 112 Mich. L. Rev. 111, 114 (Oct. 2013).

11 Lane v. Franks, 573 U.S. 228 (2014).

A. First Amendment Protections for Public Servants

Prior to 2006, all cases in which public employees sued their employers for violating their First Amendment right to free speech were decided using a balancing test developed by the Supreme Court in a series of cases starting with *Pickering v. Board of Education*.[12] Under the *Pickering* balance test, the Supreme Court did not distinguish between public employees in or outside of academia.[13] Thus, the First Amendment protections available for a faculty member or a staff member at the same university were the same as those for a municipal sanitation worker— at least in principle.[14] Protections for faculty were especially well established, since the McCarthy era brought several important cases to the Supreme Court.[15] Peter Byrne's foundational treatise on academic freedom and the First Amendment serves as an excellent introduction to the line of caselaw dealing with faculty speech through the 1980's.[16] While this jurisprudence has been revised by the addition of *Garcetti*, the research on these earlier cases shows that what started as fairly robust protections, over time came to protect employee speech—and especially faculty speech—less and less.[17]

1. Garcetti v. Ceballos

In 2006 the U.S. Supreme Court decided a case—*Garcetti v. Ceballos*—that drastically restricted the free-speech protections of public employees.[18] In this case, Ceballos, a calendar deputy in the Los Angeles County District Attorney's Office (DA), was informed by a defense attorney that there were concerns about an affidavit (written by a deputy sheriff) used to obtain a search warrant.[19] Ceballos investigated these claims and found them credible. He wrote a memo to his supervisor to summarize his findings. After the first memo, there was a second, and subsequently a meeting with members of the sheriff's office, Ceballos, and his supervisors that "allegedly became heated."[20] Nevertheless, the DA continued unhindered with the prosecution and Ceballos was called to testify for the defense. Thereafter, Ceballos was reassigned to a different title, a different location, and denied a promotion. In his lawsuit he alleged that the DA's office violated his First Amendment rights by retaliating against him for his first memorandum which he claimed was protected speech. The trial court dismissed the case, which Ceballos

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12 Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563 (1968).

13 J. Peter Byrne, *Academic Freedom: A" Special Concern of the First Amendment"*, 99 YALE L.J. 251, 264 (1989).

14 *Id.*

15 Sweezy v. New Hampshire, 354 U.S. 234 (1957); Keyishian v. Board of Regents of Univ. of State of NY, 385 U.S. 589 (1967).

16 Byrne, *supra* note 13; see also, WILLIAM A. KAPLIN ET AL., LAW OF HIGHER EDUCATION, ch. 7 (6th ed. 2019).

17 KAPLIN ET AL., *supra* note 16, at 760.

18 547 U.S. 410 (2006).

19 *Id.* at 414.

20 *Id.*

appealed to the Ninth Circuit. The circuit court reversed, asserting that Ceballos' speech was protected. Garcetti, the district attorney, appealed to the U.S. Supreme Court and in 2006 a 5-4 decision was published in favor of the DA.

The U.S. Supreme Court reasoned, in accordance with the appellants' oral arguments, that it would be a great risk to "constitutionalize the employee grievance" process; thus they ruled that speech made pursuant to official duties of a public employee is not protected by the First Amendment.[21] In other words, the concern for the majority was how employment ramifications for on-the-job speech of public employees might become a constitutional issue (and flood the courts with employment disputes), rather than remaining an internal employment issue. While this is a reasonable concern, there are multiple problematic aspects of this precedent that are well-argued in the dissents of Justices Stevens and Souter (joined by Ginsburg and Stevens). One concern raised in the dissents was that this precedent would be applied unjustly to public college and university faculty.[22] The majority opinion thus included a three-sentence paragraph explaining that the Court would defer deciding the question of constitutional protection for faculty speech related to scholarship and teaching in public colleges and universities for a future case.[23] While *Garcetti*'s effect on staff or administrator speech cases is fairly uniform across the federal circuits, the Supreme Court's decision leaves open the question of how *Garcetti* should be applied to faculty speech cases, if at all. The Part II.A.2 discusses additional concerns with *Garcetti*'s effects on public employee speech doctrine.

2. Since Garcetti

In this subsection two issues with *Garcetti* related to *Bradley* and *Khatri* are analyzed. The first issue is the failure to protect whistleblower speech under *Garcetti*, thus making public-employee whistleblowing even more precarious. The second issue is that under *Garcetti* there are social, organizational, and cultural ramifications that result in a convoluted logic to organizational functioning that is not in anyone's—least of all, the public's—best interest.

First, Justice Stevens sums up the most problematic aspect of the precedent in his dissent, writing, "The proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties,' is 'Sometimes,' not 'Never.'"[24] The majority claimed that it should not fall on the Constitution to protect this speech, arguing that instead there are whistleblower statutes that protect the speech that Stevens would say falls in the "sometimes" category.[25] Yet, Justice Souter, joined by Justices Stevens and Ginsburg, argues, "the combined variants of statutory

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21 *Id.* at 420, internal citations omitted.

22 *Id.* at 438.

23 *Id.* at 425.

24 *Id.* at 426, internal citations omitted.

25 For a complete list of whistleblower statutes by state, updated in 2019, see *Whistleblower Statutes Section 25*, in 8th NATIONAL SURVEY OF STATE LAWS 461 (Richard A. Leiter ed., 2019).

whistle-blower definitions and protections add up to a patchwork," which they describe in detail as failing to comprise any semblance of the necessary protections for local, municipal, state, or federal whistleblowers.[26] The dissenters conclude that the assertion that whistleblower statutes will protect those employees in need of protection is fundamentally unfair: "individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them."[27] Thus, in denying all government employees the protection of the constitution for their speech made pursuant to their official duties, the court knowingly expects the populace to rely on a "patchwork" of statutes to unequally protect whistleblowers speaking out against what they believe to be governmental corruption, deception, or other wrongdoing.

The organizational, cultural, and legal ramifications of this precedent do not appear to have been considered by the majority. In terms of organizational ramifications, by ruling that citizen speech is protected but employee speech is not, the law thus pushes employees with concerns about wrongdoing to speak publicly as citizens before ever speaking with their superiors or other employees. Justice Stevens points out how "perverse" it is "to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors."[28] This creates a culture of not only distrust of one's colleagues, which does plenty of damage on its own, but due to distrust, it can mean people have not felt that they could ask around to investigate or gather more information about the potential wrongdoing without outing themselves as a snitch. Thus, *Garcetti* creates a culture of compulsory ignorance and therefore secrecy. Rather than creating a public record of the investigation into potential wrongdoing, this rule encourages secrecy to prevent anything questionable from being seen by the wrong eyes who might go straight to the press. In giving the employers more control over employee speech, this rule essentially has assumed that it is more desirable for the federal courts not to get involved in employment disputes, than it is to ensure the transparent and ethical conduct of public administrators.

In 2014 the U.S. Supreme Court decided in *Lane v. Franks*[29] that public employees who speak out against wrongdoing in the workplace within their trial testimony are protected by the First Amendment. In this case, a program director for an outreach program at a community college was called to testify against a legislator indicted for fraud whose name was on the program's payroll for no reason. While the decision was made after *Garcetti*, it did not limit the scope of the *Garcetti* ruling as much as it clarified that subpoenaed sworn testimony "outside the course of [one's] ordinary job responsibilities" is protected by the First Amendment.[30] Two

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

27 *Id.* at 441.

28 *Id.* at 427.

29 Lane v. Franks, 573 U.S. 228 (2014).

30 *Id.* at 231. Note: to a keen observer this may appear to contradict the *Garcetti* ruling, since Ceballos also testified under oath and was penalized; however, Ceballos's legal team did not argue that the speech in question was his court testimony, only the memoranda written pursuant to his

aspects of this decision are important. As noted by Kleinbrodt,[31] since *Garcetti*, the first question asked by the court in an employee's First Amendment case is whether the speech was made as an employee or as a citizen. Thus, the content of the speech is of secondary interest to the court, and this is affirmed by *Lane*. Second, *Lane* holds that any public employee's testimony in court must still be balanced with the employer's interest in suppressing that speech.

3. Whistleblower Protections

Whistleblowers are employees who report misconduct or wrongdoing in an organization to which they belong, as in *Garcetti* and *Lane*.[32] Protections from retaliation by supervisors or powerful administrators are available to some employees as outlined in whistleblower statutes.[33] These statutes vary greatly in terms of who is protected and from what based on the jurisdiction or locale of the employer.[34] Bradley's case took place in Pennsylvania and Khatri's in Ohio, both states where there are statutory whistleblower protections for both public and private employees.[35] While there is also a federal whistleblower statute, it applies only to employees of the federal government, not to state or municipal employees.[36] As stated by the dissenters in *Garcetti*, the statutory landscape for whistleblower protections is a "patchwork" at best.[37] While every state appears to have a whistleblower statute, the statutes vary widely in terms of who is protected, what remedies are available, and whether there are any penalties for wrongdoing.[38]

Under *Garcetti*, the first question to determine if an employee's speech is protected under the First Amendment is whether it was spoken pursuant to official duties; this has nothing to do with the content of the speech. There are surely times when the content of the speech would merit protection (i.e., if it is a matter of public concern) but is not protected because the speech was made pursuant to official duties.[39] *Garcetti*'s limitations on employees' First Amendment rights

official duties. Likewise, the court in Lane places the caveat that truthful testimony under oath by a public employee must be "outside of the scope of his [*sic*] ordinary job duties" for it to be considered "speech as a citizen for First Amendment purposes." *Id.* at 238.

31 Kleinbrodt, *supra* note 10.

32 For a more thorough exploration of the definition of whistleblowers, see Milton Heumann et al., *The World of Whistleblowing*, 16 PUB. INTEGRITY 25 (2013).

33 *Whistleblower Statutes Section 25*, *supra* note 25.

34 *Id.*

35 *Id.*

36 Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (5 U.S.C.).

37 Garcetti v. Ceballos, 547 U.S. 410, 440 (2006).

38 *Whistleblower Statutes Section 25*, *supra* note 25.

39 *See* Nuovo v. The Ohio State University, 726 F. Supp. 2d 829 (S.D. Ohio 2010) (finding that a professor of obstetrics who spoke out against an extremely high rate of misdiagnoses of HPV in female patients was made pursuant to his official duties as a physician and employee, and not as a citizen); Alberti v. Univ. of P.R., 818 F. Supp. 2d 452 (D.P.R. 2011), (finding that plaintiff's allegation that a student violated HIPPA was made pursuant to official duties as a nursing instructor); Ezuma v. City Univ. of New York, 367 F. App'x 178 (2d Cir. 2010) (finding that plaintiff's speech in support

means that in the cases where whistleblowing overlaps with employee on-the-job speech, the causes of action available to public employees are limited to the applicable whistleblower statutes. As we will see, in *Bradley* and in *Khatri* there may have been whistleblower violations, but under *Garcetti,* the courts have found no violation of First Amendment rights.[40]

B. Bradley v. West Chester University

From fall 2011 to summer 2015, Colleen Bradley worked at West Chester University (WCU) as the budget director.[41] Part of her work was creating a budget document to submit to the Pennsylvania State System of Higher Education (PASSHE).[42] At a meeting in her first year at WCU, PASSHE administrators told Bradley she needed to remake the budget document showing a multi-million dollar deficit rather than the multi-million dollar surplus the budget reflected.[43] One administrator explained to Bradley that this was a political document—reporting a surplus would jeopardize the state appropriations for the university (and potentially all PASSHE schools).[44] Bradley told her supervisor, Mixner, of this demand, who agreed with the characterization of the document as "political" and subsequently required her to cooperate with the PASSHE request.[45] In September of her first year at WCU, Bradley shared the PASSHE request with the Administrative Budget Committee (ABC). She described the request as "unethical and quite frankly, [possibly] illegal," seemingly unconvinced that there ought to be a difference between a political and financial document.[46] Mixner confronted Bradley about this a few days later and said her actions threatened "her credibility as well as [her] future."[47] The next week she shared with the ABC a memo that stated that she could neither explain nor defend the budgeting technique requested of her and was therefore uncomfortable with the request.[48] She was unable to persuade them to change their practice, and her name was left on the documents that were submitted to the state.[49]

In fall 2014, two years later, Bradley presented Mixner's deficit budget at a meeting with the university enrollment management committee.[50] An attendee had

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of one colleague and calling out two others was made pursuant to his official duties).

40 Nevertheless, *Khatri* is currently on appeal to the Sixth Circuit, and the district court's findings could be reversed.

41 Bradley v. W. Chester Univ. of Pa, 226 F. Supp. 3d 435, 437 (E.D. Pa. 2017). The district court and circuit court decisions present the facts differently (stylistically, not substantively).

42 Bradley v. W. Chester Univ. of Pa State Sys., 880 F. 3d 643, 647 (3d Cir. 2018). *Id.*

43 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d at 647.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* at 648. At 648.

48 *Id.*

49 *Youtube Video by Raging Chicken Press, Colleen Bradley | Whistleblower | Part 1*. http://bit.ly/2Eyb0k3; *Id.*

50 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d at 648.

believed the university had a surplus and asked Bradley why the presented budget instead showed a deficit. Bradley then presented her own budget, which angered Mixner as he had specifically told her to present his. Afterwards, Bradley asked that she be allowed to present her budget at a meeting the next day, but Mixner refused, stating the president requested he present Mixner's budget instead while she sat silently.[51] After a few weeks, in November 2014, Mixner told Bradley her contract would not be renewed after the 2014-15 academic year.[52]

Bradley is an interesting case for education scholars and organizational stakeholders, since it exemplifies how legal precedent shapes and fails to shape how the public views public educational institutions, competing values in workplace culture, and the (lack of) protections available for educational whistleblowers. This section of the note analyzes three important themes of the case: public trust, competing values, and First Amendment protections.

C. Khatri v. Ohio State University

In *Khatri v. Ohio State University*, decided by the U.S. District Court for the Northern District of Ohio, a research scientist sued his former university employer, his principal investigator, his former supervisors, and other colleagues claiming that his First Amendment rights were violated when he was fired because of his whistleblowing activity.[53] A research scientist is a non–tenure-track faculty member who is assigned solely to research duties (they have no teaching or service expectations, therefore they do not normally participate in shared governance). In this case, the plaintiff worked in a lab with dangerous infectious substances (strictly regulated under federal law) and found that lab personnel had not been properly trained on how to work with these pathogens. Fearing the very real possibility of a "major disaster that may have resulted in loss of human lives and livestock," the plaintiff attempted to report the misuse and mishandling of the substances to a federal agency but did not know how.[54] He contacted local law enforcement who told him to contact the campus police; so he did.[55] He also reported the issues in the lab to the campus biosafety manager and the director of the agricultural research center in which his program was housed.[56] He reported additional issues with the hostile work environment, harassment, and abuse he endured to the campus human resources director.[57] Over the course of years, these reports were dismissed or ignored.

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51 Bradley v. W. Chester Univ. of Pa, 226 F. Supp. 3d 435, 438 (E.D. Pa. 2017); *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d at 648.

52 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d at 649.

53 2021 WL 534904 (N.D. Ohio); 2020 WL 5340233 (N.D. Ohio); 2020 WL 533040 (N.D. Ohio).

54 *Khatri v. Ohio State Univ.*, 2021 WL 534904, at *1; 2020 WL 5340233, at *9.

55 *Khatri v. Ohio State Univ.*, 2020 WL 5340233, at* 10.

56 *Khatri v. Ohio State Univ.*, 2021 WL 534904, at *1–2.

57 *Khatri v. Ohio State Univ.*, 2020 WL 5340233, at *10.

After filing a complaint against the acting head of the program, Khatri was placed on an employee improvement plan which eventually led to his termination.[58] The court acknowledged that the plaintiff "was valued for bringing in [over $1 million in] grant money, which his department heads sought to retain" and which they allegedly continued to use for their own purposes without his approval.[59] The court did not address whether or not the plaintiff's whistleblowing activity was a motivating factor in his termination, as the court found that none of the plaintiff's complaints constituted protected speech under the First Amendment.[60] The court stated that the plaintiff's complaints were not protected because they were internal communications—meaning speech made to other units within the same university employer—made pursuant to his job duties, even though HR directors, biosafety officers, and campus police are clearly not within the chain of command of a research scientist.[61]

III. Analysis

Bradley and *Khatri* are interesting cases for attorneys, scholars, and other organizational stakeholders for three reasons. First, they help us understand what is at stake when judges fail to recognize the competing values inherent to a public institution operating under a shared governance structure. Second, they exemplify how legal precedent can chip away at protections available for educational whistleblowers, thus further eroding the public trust in public institutions. Finally, they highlight the differences between the roles staff and faculty play in the educational mission of universities, thus raising questions about an academic exception for speech made in support of the educational mission.[62]

A. Competing Values

This subsection of the article analyzes how competing values inherent to the university governance structure can lead to incentivizing the misuse or misallocation of public funds, despite such arrangements being antithetical to the public good.

In the *Bradley* case, we see the value of accounting professional ethics come into conflict with politics. In the *Khatri* case, we see the value of grant funding in conflict with public safety. Competing values are inherent to what Newfield calls a divided governance model in higher education, wherein the administration is responsible for the business operations, and the faculty is responsible for the

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58 *Khatri v. Ohio State Univ.*, 2021 WL 534904, at *2.

59 *Khatri v. Ohio State Univ.*, 2020 WL 5340233, at *15.

60 *Khatri v. Ohio State Univ.*, 2021 WL 534904, at *9.

61 *Id.* at *8.

62 The Fourth and Ninth Circuits have adopted academic exceptions to *Garcetti*. *See, e.g.*, Adams v. Trustees of the Univ. of NC-Wilmington, 640 F. 3d 550 (4th Cir. 2011); Demers v. Austin, 746 F. 3d 402 (9th Cir. 2014). The Sixth Circuit also recently adopted an academic exception to *Garcetti* in *Meriwether v. Hartop*, 2021 WL 1149377 (6th Cir. Mar. 26, 2021).

educational mission.[63] This governance structure is essentially adversarial, and we see this play out in Khatri's case—he was repeatedly used and retained for his grant funds, while his academic supervisors blocked his applications to other labs and universities.[64] Khatri's speech was made as a whistleblower, raising concerns related to public safety from dangerous viruses. As an immunologist, he was expertly trained to identify pathogenic threats, and he did so in furtherance of the educational mission. Nevertheless, such speech can be easily seen as a threat to public safety in itself, since widespread reporting of such danger might cause a community panic, not to mention a public relations nightmare. The district court in Khatri's case sided with the administration without recognizing the underlying governance structure that, at times, pits the faculty who fulfill educational mission against the administration who prioritize business concerns.

In *Khatri*, the district court found that while the plaintiff's reporting of misuse/mishandling of dangerous infectious agents within a departmental lab to campus police was certainly a matter of public concern, it was not, in the court's view, citizen speech under *Garcetti*. The court ruled that since the plaintiff reported the potential harms to the *campus* police and to "superiors" (though not his direct superior, but rather to campus administration and human resources administrators), his was speech "directly relate[d] to his job duties as a research scientist"[65] and made to entities within "the chain of command of his employer."[66] Because the plaintiff had failed to establish a prima facie case of First Amendment retaliation, the court found that the individual defendants were entitled to qualified immunity. The university defendant was entitled to Eleventh Amendment immunity.

In Bradley's case, the same issue of competing values comes through, but this time it is not due to the often-opposing roles of faculty and administration. Instead, the values at odds in *Bradley* were the plaintiff's professional ethics and the university's role in a political funding process that not only affected their institution, but other sister schools in the state system as well. Kleinbrodt points to the flawed logic of *Garcetti* specifically when it comes to professional codes of conduct, stating that government employees bound by professional ethics can be placed in an impossible situation when they believe their official duties may violate those ethical standards.[67] In this instance, Bradley felt her integrity as an accounting professional and finance officer was at stake. Bradley believed she was being asked to endorse a budget document that made false representations of the state of the institution's accounts—a document that was headed straight to a governing body that determined funds allocation for all of the schools in the state system of higher education.[68] She believed this request to not only be unethical,

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63 Christopher Newfield, Ivy and Industry: Business and the Making of the American University, 1880–1980 80–81 (Duke University Press 2003).

64 *Khatri v. Ohio State Univ.*, 2021 WL 534904, 1–2.

65 *Id.* at 10.

66 *Id.* at 9.

67 Kleinbrodt, *supra* note 10, at 125.

68 Bradley v. W. Chester Univ. of Pa State Sys., 880 F. 3d 643, 647 (3d Cir. 2018).

but possibly illegal.[69] For Bradley, the highest priority was to maintain her integrity and abide by her ethical standards, which would not permit her to entertain any rationale for such a false statement of accounts. In contrast, for her supervisor, Mixner, the role of this document was not budgetary—but political.[70] But how could PASSHE make informed budgeting decisions based on demonstrated need at its individual schools, if the budget documents they receive do not represent the state of accounts? Likewise, Mixner's insistence that such documentation was par for the course concerned Bradley, not just because she believed that her integrity was on the line, but because if true, in her view, the entire state system of higher education may be participating in a practice of failing to provide accurate information to the state and thus taxpayers.

1. *Integrity and Professional Ethics*

One issue with *Bradley* is that the court apparently viewed personal/professional integrity as an individual quality or personality trait, rather than an expectation of all professionals. Instead of viewing Mixner's behavior as a deviation from the ethics of the accounting profession, the court focuses on the institution's right to discipline its employees for contradicting the employer's sanctioned message.[71] Post discusses the importance of self-governing professions as central to the tenet of democratic competence—the constitutional value ensuring the ability of the people in a democracy to control their own (disciplinary) knowledge production and (through education) thus cognitively empower the people.[72] In this instance, according to the court's discussion, we see Bradley's supervisor requesting that she violate what she believed to be the ethics and practices of the discipline of accounting for what her supervisor seemed to believe to be the greater good. When she refuses to do so, thus adhering to the rules of the profession, rather than acquiescing to the authority of her supervisor, she is treated as insubordinate and disciplined accordingly. When professional and employer authorities come into conflict, other values such as loyalty to the institution, obedience, etc. are prioritized over the profession's standards for ethics and integrity and democratic competence is thus put at risk.

Administrative integrity, in Newswander's view, is at risk also because the many constituents holding the institution accountable hold competing values themselves.[73] In other words, there is a debate about what "public good" means. Mark Rutgers avers that the public administrator must always balance the general public's views with organizational values.[74] Nevertheless, the public good may have different and competing meanings when defined by various constituents;

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69 *Id.*

70 *Id.*

71 *Id.* at 651 citing Garcetti v. Ceballos, 547 US 410 (2006).

72 Post, *supra* note 5, at 35–36.

73 Chad B. Newswander, *Guerrilla Statesmanship: Constitutionalizing an Ethic of Dissent*, 75 Pub. Admin. Rev. 126, 128–29 (Jan.–Feb. 2015).

74 Mark R. Rutgers, *The Oath of Office as Public Value Guardian*, 40 Am. Rev. Pub. Admin. 428 (2010).

the organizational culture—shaped by the state system, trustees, employees, traditions or customs, and especially senior leaders—may be in conflict with the state and local citizenry's values, and these may all be in conflict with the state lawmakers' priorities.

The particulars of *Bradley* illuminate the intersection of the more personal values of professional integrity and that which is valued within the organizational culture—in this case, the politics of the state system. Think of Bradley's and Mixner's differing understanding of the process of requesting state appropriations. As an accountant and budgeting expert, she looks at the process as one of accounting and budgeting, throughout which she expects to be held accountable to professional ethics, like, as she offered, being able to "explain or justify" the budget.[75] Mixner, on the other hand, believed that the PASSHE report was a political document, and recognizing the power it had to sway legislators to appropriate more or less funding to all PASSHE colleges, likely also believed he was acting in the public's and students' best interest.

Not only do different people understand public values to mean different things, but what these values are may differ according to their roles; thus as a citizen, or as a member of a profession and as a subordinate employee one may confront a conflict of interest.[76] Ellis [77] states that the Court's ruling in *Garcetti* essentially constitutes "the removal of citizen status from public employees speaking pursuant to official job duties."[78] In their dissent to *Garcetti v. Ceballos*[79] Justices Souter, Stevens, and Ginsburg point to a flaw in the majority's reasoning that lies at the heart of public administration: the public servant is at once a citizen and employee—"citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract." Empirically, employees with high public-service motivation (PSM) have been found more likely to be whistleblowers than employees with lower PSM.[80] Moreover, public administrators often see themselves as "professional citizens" who "first honor their relationship and responsibility to citizenry and, secondarily, organizational missives." Thus, to be required to divorce one's citizenship status

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75 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d at 648.

76 For a more thorough discussion of public values see Gjalt de Graaf & Zeger van der Wal, *Managing Conflicting Public Values: Governing with Integrity and Effectiveness*, 40 Am. Rev. Pub. Admin. 623 (2010).

77 Elizabeth M. Ellis, Note: *Garcetti v. Ceballos: Public Employees Left to Decide Your Conscience or Your Job*, 41 Ind. L. Rev. 187, 208 (2008).

78 The author would argue that the Third Circuit's interpretation of *Garcetti* also effectively removes one's professional status as well by subsuming it wholly under one's employee status. For more on professional speech, see Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151 (1996).

79 547 U.S. 410, 432 (2006).

80 James Gerard Caillier, *Public Service Motivation and Decisions to Report Wrongdoing in U.S. Federal Agencies: Is This Relationship Mediated by the Seriousness of the Wrongdoing*, 47 Am. Rev. Pub. Admin. 810 (Oct. 2017); James Gerard Caillier, *Transformational Leadership and Whistle-Blowing Attitudes: Is This Relationship Mediated by Organizational Commitment and Public Service Motivation?*, 45 Am. Rev. Pub. Admin. 458 (Jul. 2015).

from one's public servant role is an affront to democracy.[81] What is perhaps more worrisome, however, is how the logic of *Garcetti* could be used to enable wrongful conduct and further erode the public trust in institutions of higher education.[82]

B. Public Trust

Public trust in higher education has been on a steady decline in the United States since Gallup began collecting this data in 2015.[83] Gallup polls attribute the lack of public trust in higher education to a variety of reasons that differ along political party lines,[84] but both democrats (14%) and republicans (9%) who stated they had "some" or "very little" confidence in higher education said this was due to "[p]oor leadership; not well-run; too much corporate interest; bad policies." This suggests that actions or lack of integrity of specific officials or administrators within higher education institutions may be contributing to the degradation of public trust in these institutions.

In his book *Trust and the Public Good: Examining the Cultural Conditions of Academic Work,* higher education scholar William Tierney explains that within an organization, organizational culture shapes and defines the characteristics of trust, such as "perceived individual integrity." [85] Likewise, integrity, the perception of what one says and does,[86] can be attributed to persons acting in administrative capacities as well. When whistleblowers call attention to what they perceive as wrongdoing within the organization, as the plaintiffs did in *Bradley* and *Khatri*, the legitimization of "such a discretionary act poses a risk to administrative integrity" or what Bradley's supervisor called her "credibility."[87] Bradley felt her individual integrity was at risk if she did not speak up about her discomfort with submitting figures she could not defend. In maintaining her individual integrity, however, she was calling into question the administrative integrity of WCU—not just Mixner's integrity, but also the integrity of the leadership of the entire PASSHE system as well.[88] If this kind of "political" budgeting was widespread among PASSHE

81 Jennifer Alexander & Samuel A. Richmond, *Administrative Discretion: Can We Move Beyond Cider House Rules?*, 37 Am. Rev. Pub. Admin. 51, 53 (2007).

82 The author does not, by any means, mean to imply that this was the motivation of any of the parties involved in the lawsuits discussed herein. Simply put, the extension of the logic of the *Garcetti* ruling could be used to keep misconduct from reaching the public by retaliating against potential whistleblowers.

83 Zac Auter, *What Gallup Learned About Higher Education in 2017*, Gallup News (Dec. 27, 2017), https://news.gallup.com/opinion/gallup/224444/gallup-learned-higher-education-2017.aspx; Jeffrey M. Jones, *Confidence in Higher Education Down Since 2015*, Gallup News (Oct. 9, 2018), https://news.gallup.com/opinion/gallup/242441/confidence-higher-education-down-2015.aspx.

84 Frank Newport & Brandon Busteed, *Why Are Republicans Down on Higher Ed?*, Gallup News (Aug. 16, 2017), https://news.gallup.com/poll/216278/why-republicans-down-higher.aspx.

85 William G. Tierney, Trust and the Public Good: Examining the Cultural Conditions of Academic Work 75, 78 (Peter Lang 2006).

86 *Id.* at 78. This definition encompasses both self-perception and the perception of others.

87 Newswander, *supra* note 73, at 127; Bradley v. W. Chester Univ. of Pa State Sys., 880 F. 3d 643, 648 (3d Cir. 2018).

88 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d at 647.

schools, Bradley questioned, what does true public accountability look like?[89]

Likewise, Khatri had also shared his complaints with high-level administrators multiple times to request support, a transfer to another lab/department, or some sort of intervention to prevent potential public health crises due to his fear of the potential misuse/mishandling of highly infectious substances that cause sickness or death in livestock and humans.[90] By failing to take action, Khatri also called into question the administrators' integrity.

Thus, whistleblowers in Bradley's or Khatri's positions must consider whether it is better to maintain the public's trust in the organization as is or call for accountability and improvement by attempting to call out the organization for what they believe is contrary to the institutional mission. The two choices are essentially to continue to follow orders or to see oneself as a public employee whose duty is to the citizens before the institution. Bradley believed that at least $26 million was being essentially hidden from the public.[91] She herself lost trust in public institutions when she realized this and did not want any part of "business as usual" when she no longer believed it was in the public's best interest. As Tierney explains, "How the public learns to trust academe turns on the meaning of 'public good,'" and Bradley clearly felt it was obvious that more financial aid and/or more budget transparency constituted the "public good?" [92]

C. First Amendment Jurisprudence

In the months following the Third Circuit's decision in *Bradley*, Kevin Mahoney, an independent journalist, interviewed Bradley and her legal team about the case which they had appealed to the U.S. Supreme Court.[93] In the course of the nearly fifteen-minute-long video with Bradley's legal counsel, it is clear that the attorneys did not fully grasp the impact of *Garcetti* on whistleblower cases like Bradley's.[94] Khatri, on the other hand represented himself *pro se* throughout his entire federal suit, including his pending appeal. The district court's ruling in *Khatri* that his

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89 The court writes, "specifically, Plaintiff alleges that she was told by two individuals at the Pennsylvania State System of Higher Education (PASSHE), the administrative body to whom West Chester's annual budget report is submitted, to change a line item in the report such that 'a multimillion dollar surplus [would be converted] into a multimillion dollar deficit.' She believes that this method was used as a way for West Chester to gain more taxpayer dollars than its true financial status merited." Bradley v. W. Chester Univ. of Pa, 226 F. Supp. 3d 435, 438 (E.D. Pa. 2017).

90 Khatri v. Ohio State Univ., 2020 WL 533040, at *7 (N.D. Ohio February 3, 2020).

91 *Bradley v. W. Chester Univ. of Pa. State Sys.*, 880 F. 3d at 648. If true, the money would importantly have been hidden not just from the legislature, but from the students whose educations and lives would obviously benefit from more spending on faculty, resources, and student financial aid.

92 Tierney, *supra* note 85, at 174.

93 *Colleen Bradley | Whistleblower | Part 1*, *supra* note 49; *Youtube Video by Raging Chicken Press, Colleen Bradley | Whistleblower | Part 2 - Legal Team Explains Her Case*, http://bit.ly/2R5rd7a; Kevin Mahoney, *Exposing Budget Fraud at PASSHE Universities | Colleen Bradley Tells Her Story*, Raging Chicken Press, https://ragingchickenpress.org/2018/04/11/exposing-budget-fraud-passhe-universities-colleen-bradley-tells-story/. Note: the SCOTUS denied certiorari in October 2018.

94 *Youtube Video by Raging Chicken Press, Colleen Bradley | Whistleblower | Part 2 Legal Team Explains Her Case*, *supra* note 93.

speech was not outside of the chain command, and the Third Circuit's ruling in *Bradley* that her speech was made pursuant to her official duties, raise important questions for employees of public universities and their counsel. For instance,

> 1) How have the courts understood intramural/chain of command speech in higher education cases?
>
> 2) What ought public employees and attorneys know about whistleblower protections?
>
> This section addresses these two questions.

1. *How Have the Courts Understood Intramural/Chain of Command Speech in Faculty Cases?*

Scholars disagree about every aspect of intramural speech, down to the definition and up to the application of the term in the First Amendment jurisprudence. Scholars like Rabban, Post, Fish, and Finkin have taken stances on what faculty or employee speech should be protected under the First Amendment, and their opinions vary as wildly as desert temperatures.[95] The courts tend to define intramural speech as speech made within the spaces governed by the university (whether virtual or physical)—in other words, they tend to take a very literal interpretation, understanding intramural as literally "within the walls." Scholars tend to see the concept as less literal and more abstract; some scholars argue that intramural speech also encompasses any discussion of the employer/institution even if it is made by a public employee in a public forum (e.g., Twitter).[96] Rabban, in contrast, argues that intramural speech dealing with the business operations, rather than the educational mission, should not be protected because it falls outside of the professional expertise of the faculty.[97] Finally, Judith Areen argues for a "government as educator" jurisprudence that would protect faculty speech made in teaching, research, or shared governance capacities.[98] The one thing that's agreed upon by all scholars is that the courts have found many instances of intramural speech to lack protection under the First Amendment that these scholars would want protected.

The courts have repeatedly returned to the concept of "chain of command" speech as well, which the scholars have not relied on at all in their recommendations for First Amendment academic freedom. What courts identify as chain of command speech depends on the court and probably also on many other factors.

In Khatri's case, the court determined that chain of command speech included any and all instances of speech wherein the speaker spoke with anyone else who

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95 Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 Tex. L. Rev. 1323 (1987–88); Rabban, *supra* note 5; Stanley Fish, Versions of Academic Freedom: From Professionalism to Revolution (2014); Matthew W. Finkin & Robert C. Post, For the Common Good: Principles of American Academic Freedom (2009).

96 Finkin & Post, *supra* note 95, at 113–26.

97 Rabban, *supra* note 5, at 77, 86.

98 Areen, *supra* note 5.

had the same employer. No other faculty speech cases in the Sixth Circuit since 2006 support this understanding of the term. Indeed, such an understanding contradicts the common sense meaning of "chain of command" which connotes speech made up the ladder to one's supervisor, or to a supervisor's supervisor and so on. The author has not heard of any university in which the chain of supervisors starting at a faculty member could reach a police officer or HR officer, two of the people to whom Khatri reported his concerns in his lab.[99] Indeed, this definition seems to connote more of a broader "intramural" speech category, rather than the narrow category of "chain of command." The court's conflation of these terms is dangerous precedent, as it indicates that future courts may not view speech made about public safety to campus police to be made by employees in their role as citizens rather than employees. This disincentivizes employees from reporting unsafe conditions or potential threats to public safety to campus police for fear of retaliation.

Likewise, in *Bradley*, the Third Circuit determined that because Bradley's role as a budget officer included "scrutinizing and analyzing the numbers appearing in the budget" she was responding in her official capacity to a question from the Enrollment Management Committee (EMC) when she presented her own budget at their request.[100] Despite the fact that none of these committee members were in her chain of command, the Third Circuit Court of Appeals wrote, "The undisputed evidence shows that Ms. Bradley was not speaking 'outside her chain of command' when she was reporting to the EMC on October 29, 2014; rather she was responding in her official capacity to a direct question by a member of that committee."[101] This precedent, like that set in *Khatri*, is problematic for whistleblowers who bring their concerns of malfeasance or misconduct to other leaders within the institution but outside of their own chain of command. Unlike *Khatri,* however, a similar precedent had already been set within the Third Circuit, in *Meyers v. California University of Pennsylvania,* even though the court did not cite such a precedent in *Bradley*.[102] Nevertheless, in *Meyers,* the District Court for the Western District of Pennsylvania determined that when the plaintiff reported potential misconduct to the office of social equity and other administrators, he was making reports "up the chain of command."[103] Meyers reported what he believed to be misconduct by his department chair related to the search committee on which plaintiff was serving, to the office of social equity, the assistant provost (faculty search coordinator), and the president of the university. While the report to the president is within the plaintiff's chain of command, the other two reports were not. Once again, the conflation of any and all internal speech made to "members of the administration" with "chain of command" speech makes it nearly impossible for a whistleblower to be protected against retaliation.[104]

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99 The author invites readers to make the author aware of any institutions with such a reporting structure.

100 Bradley v. W. Chester Univ. of Pa State Sys., 880 F. 3d 643, 653 (3d Cir. 2018).

101 *Id.*

102 2014 WL 3890357, at *1 (W.D. Pa.).

103 *Id.* at *14.

104 *Id.*

Whistleblower protection is of the utmost importance to colleges and universities, and especially to these institutions' attorneys. College and university whistleblowers, when granted protections, can bring great press, recognition, and even esteem to their institutions by shining sanitizing light in dark corners—but their protection must be prioritized by the legal office from the start, or the pressure to maintain confidentiality at the public's expense may become too great. We also know that the kinds of decisions not to disclose allegations of misconduct can create a huge amount of tumult in the upper-level administration of a university; indeed, presidents at Michigan State University and Penn State University have faced criminal charges for their active participation in scandals involving sexual abuse of minors.[105] It would be disingenuous not to acknowledge that these are the recent events that jump to mind for whistleblowers in higher education institutions, which can, rightly or wrongly, up the stakes significantly in the minds of those who believe they must call out wrongdoing.

2. *What Ought Public Employees and Attorneys Know About Whistleblower Protections?*

Garcetti is settled law. Part of the majority's reasoning for denying First Amendment protections for public employees was because there are already whistleblower statutes in place to protect these employees. Thus, the central question of Bradley's case was not whether her First Amendment rights had been violated, but rather whether WCU violated the Pennsylvania whistleblower statute by dismissing her. The answer, given the facts presented in her federal case appears to be yes—Bradley was fired for speaking out against practices she believed to be unethical or even illegal, and the record appears to support this. Given her positive performance reviews[106] and the ample documentation of her conflicts with Mixner over WCU's and PASSHE's allegedly unethical practices,[107] the university would be hard-pressed to defend her dismissal in light of the federal court record. Rather than filing a lawsuit under the state whistleblower law, her attorneys filed in federal court, which cost even more thousands of taxpayer dollars by appealing twice. The district court decided in April 2016 that the original filing under the Pennsylvania whistleblower statute would not fall under federal jurisdiction,[108] and after the 2018 Third Circuit decision, plaintiff's counsel resurrected their statutory claim in Commonwealth Court where the case is still active.[109] It would seem that the state whistleblower case was the one to focus on rather than the federal case, as *Garcetti* settled the First Amendment question in Bradley's case back in 2006. Instead, counsel for the plaintiff appealed the federal court decisions twice before turning back to their state whistleblower claim.

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105 Mitch Smith & Monica Davey, *Ex-President of Michigan State Charged with Lying About Nassar Case*, The New York Times (Nov. 21, 2018), https://www.nytimes.com/2018/11/20/us/lou-anna-simon-michigan-state-nassar.html; Michael Levenson, *Former Penn State President Will Serve 2 Months in Jail in Child Abuse Scandal*, The New York Times (May 26, 2021), https://www.nytimes.com/2021/05/26/sports/football/Graham-Spanier-Sentenced-Penn-State-Scandal.html.

106 Bradley v. W. Chester Univ. of Pa, 226 F. Supp. 3d 435, 438 (E.D. Pa. 2017).

107 *Id.* at 446–47.

108 Bradley v. W. Chester Univ. of Pa., 182 F. Supp. 3d 195 (E.D. Pa. 2016).

109 Bradley v. W. Chester Univ., 2020 WL 118614 1 (Pa. Commw. Ct. Jan. 10, 2020) (No. 118614).

Given this reality, public employees must be educated about the law, especially those with the managerial authority to discipline whistleblowers without first speaking with someone in the general counsel's office. They need to know that there is no protection under the First Amendment anymore for almost any on-the-job speech, but they also need to know what kinds of protections their employees have under whistleblower statutes. To that end, public service announcements for public employees about how to report wrongdoing and what protections they have for doing so under state or federal whistleblower statutes would be helpful. One way to go about this might be to create an ombuds office for whistleblower complaints that can work closely with the university counsel to handle alleged misconduct before any whistleblowers can be wrongly disciplined. We need to take government misconduct seriously and create systems that are more successful at punishing deception and negligence that threatens the educational missions of our public colleges and universities. To do that, we will need to incentivize government employees to speak out against unethical or unlawful practices in their workplaces.

Attorneys in whistleblower cases like Bradley's need to be careful not to put their clients through years of added stress and additional expense by appealing decisions based on settled law, especially since the cost of defending such claims is on the taxpayers' dime. A close reading of *Garcetti* clarifies that the state whistleblower statute is all that is left for plaintiffs like Bradley.

If a public employee comes to an attorney to ask for advice before blowing the whistle, the attorney ought to be aware of the protections available under the First Amendment as well as applicable whistleblower laws. In this case, Bradley likely would have been protected under the First Amendment if she had written to the *Philadelphia Inquirer* about the PASSHE practice, rather than speaking about it in closed-door meetings on campus. Likewise, college and university counsel ought to consider how they would respond if a whistleblower came to them directly to ask for advice on how to handle a situation of what they perceive to be unethical or reckless conduct on the job. Developing a specific procedure for the office that will protect the whistleblower as well as the institution, is essential for preventing scandals or corruption. Similarly, institutional leaders should be aware that attorneys in the general counsel's office are not themselves immune from the responsibility to blow the whistle.

D. Why Khatri and Contingent Faculty Should Have More Protections Than Bradley

One important aspect of Areen's conceptualization of the university is that the academy is made up of faculty who participate in the governance of the institution,[110] as asserted in the American Association of University Professors' original 1915 Declaration of Principles.[111] By defining the institution by the faculty it houses, Areen's understanding of the academy bridges the gap between Post's professional right

110 Areen, *supra* note 5, at 957–67.

111 Am. Ass'n of Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, VII Bull. Am. Ass'n. Univ. Professors 487 (1922).

to academic freedom and Byrne and Horwitz's institutional right.[112] The shared governance structure common to higher education is such that the faculty carry out the educational mission while the administration and board members handle the business operations.[113] The work of the president is to fund the institution through charisma and delegate to capable administrators.[114] The work of the provost is to ensure the academic mission is and can be fulfilled through the work of the faculty by creating a culture that maintains a healthy and satisfying workplace.

For Areen, expressions related to all academic matters deserve academic freedom protections as a special concern of the First Amendment.[115] In any case where faculty members sue their public colleges or universities for infringing on their freedom of speech, the case would fall under a category of managerial authority that Areen calls "government as educator" where the government acts in its capacity as an educational institution rather than governing the general public.[116] Areen's theory calls for two important changes to the First Amendment employee speech jurisprudence. First, Areen's theory calls on courts to recognize that in addition to research and teaching, faculty "have a professional obligation to oversee core academic matters in their institutions."[117] Second, the theory demands that academic speech expressed during teaching, research, or shared governance duties be protected from retaliation by government actors (administrators, trustees, politicians, etc.). Connecting to Post's authorities, the institutional function for which the government is granted managerial authority within colleges and universities is the educational mission—the work of which is carried out primarily by the faculty.[118]

Within the case law to date, the courts' deference toward universities has generally inhered with the administration rather than the faculty;[119] however, the author argues that based on the bifurcation of responsibilities between administrators and faculty which bestows faculty with the work of carrying out the educational mission of the institution, the deference of the courts ought to be awarded to the faculty rather than the administration. This aligns with Areen's understanding as government as educator, as she states "the doctrine of government-as-educator, in contrast to the public-employee speech doctrine of government-as-employer, would provide First Amendment protection for the speech of individual faculty members as long as the speech concerned research, teaching, or faculty governance

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112 Byrne, *supra* note 13; Paul Horwitz, First Amendment Institutions (2013).

113 Newfield, *supra* note 63, at 80–81.

114 James J. Duderstadt, The View from the Helm: Leading the American University During an Era of Change 27–28, 285–86, 306 (2007).

115 Areen, *supra* note 5, at 990–91.

116 Areen, *supra* note 5.

117 *Id.* at 999.

118 Newfield, *supra* note 63, at 80.

119 See, for instance, James D. Jorgensen & Lelia B. Helms, *Academic Freedom, the First Amendment and Competing Stakeholders: The Dynamics of a Changing Balance*, 32 The Review of Higher Education 1, 8–9 (Johns Hopkins University Press Aug. 2008); Michael H. LeRoy, *How Courts View Academic Freedom*, 42 J.C. & U.L. 1 (2016).

matters."[120] Furthermore, Areen's government-as-educator doctrine would grant deference to academic decisions made or authorized by the faculty (or a faculty committee); this contrasts with certain high-profile cases since *Garcetti* in which courts overturned academic decisions made by faculty (e.g., *Adams v. Trustees of UNC-Wilmington*).[121] Likewise, Post's assertion (that institutions ought to be primarily afforded deference in accordance with their need to carry out their missions) logically extends to my argument that judicial deference ought to be awarded to the party who is most responsible for the institutional mission, which in higher education is the faculty.

Tying the argument for faculty as carriers out of the institutional mission back to the two cases discussed in this article, there is no aspect of Bradley's work that involves creating or disseminating (disciplinary) knowledge; rather, her work was simply to apply her knowledge of budgets and budgeting systems and share information on behalf of the university office she ran. In other words, she spoke *as the university* when she spoke as an employee. Under the precedent in *Garcetti* it is very clear that Bradley's speech would not be protected under the First Amendment.[122] This does not mean Bradley's speech should not be granted protection under whistleblower statutes or that administrators should not advocate for contractual whistleblower protections for themselves when their work requires them to handle important financial information that is of public importance. Rather, the value of democratic competence inherent to the First Amendment is applicable to the creation and dissemination of knowledge and not the business operations; thus *First Amendment protection* ought to be granted only to speech concerning the educational mission.

Unlike Bradley's speech, Khatri's speech was made due to his expertise as an animal pathologist who had years of experience working in labs with dangerous infectious substances. His work directly carried out the educational mission of his institution every day. Yet, Khatri also faced pushback from government actors who allegedly took his research funds without permission, impeded his ability to apply to other jobs, threatened him with termination, and otherwise mistreated him. If Khatri had been given an opportunity to relay his concerns about research misconduct, mistreatment, or misuse of his grant funding—not to mention the mishandling of infectious substances—to a faculty committee from other departments, we may have seen the university take a very different approach to his case. Khatri and other contingent faculty members are responsible for a great deal of the work done each day to carry out a college or university's educational mission. These workers speak as professionals and experts within their disciplines, and thus play an essential role in preserving democracy. For this reason, it is extremely important when determining the level of protection available for employee speech to consider how that speech relates to the educational mission of the institution. When other influences aside from the educational mission enter into consideration, the focus can become blurred, and other concerns can distract leaders from the purpose and reason for the institution to begin with.

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120 Areen, *supra* note 5, at 994.

121 Adams v. Trustees of the Univ. of NC-Wilmington, 640 F. 3d 550 (4th Cir. 2011).

122 Although it almost surely would have been protected under the Pennsylvania whistleblower statute, though her state court claim appears to be still pending.

Looking at the Bradley case, we see that public universities and their employees are influenced by state systems (PASSHE), state legislators (appropriations), individual administrators (president of the university), organizational culture (valuing obedience over integrity), and professional ethics and standards (accepted accounting practices). This aligns with the theoretical understanding of public organizations as "open systems" or the idea that "organizations are in constant interaction with their environments, [and] that organization boundaries are permeable."[123] While all of these influences were clear throughout the case, what was not clear to the plaintiff's attorneys and therefore the plaintiff, was the role of common law in shaping the systems in place. The precedent set by *Garcetti* was upheld in this case because it is settled law. According to that settled law, if Bradley had sought First Amendment protection, she would have been better off posting her concerns on a blog or in a newspaper rather than sharing them with her supervisor or an administrative committee.

We know from O'Leary's study of public administrators who have dealt with "guerrilla government"—government employees achieving their goals against the policies, practices, or commands of their supervisors—that the best practices for preventing employees from "going rogue" include being "accessible," having "an open-door policy," and insisting "that employees come to you first."[124] Yet this directly contradicts *Garcetti,* which requires that employees speak as private citizens for the First Amendment to protect them from retaliation: speech made on the job is often speech for which you can be fired. Imagine how widespread knowledge of this precedent among public employees would shape the culture of their workplaces. How might it challenge the integrity of the public servants? How might it further erode the public's trust in higher education? To prevent the erosion of public trust and protect integrity of public servants, colleges and universities should clarify policies and procedures that will provide whistleblowers with safe and effective ways to report and resolve allegations of misconduct or malfeasance. A contractual protection for all employee whistleblowers would have not only kept *Khatri*'s job secure, but it likely also would have meant that more would have been done to investigate and eradicate the alleged corruption in his department. And had West Chester's leaders considered how Bradley's speech related to the public perception of the university and intervened before condoning her supervisor's decision not to renew her contract, perhaps she never would have lost her job.

This analysis of *Bradley* and *Khatri* demonstrates the need for legal and policy researchers to educate public employees and attorneys on the protections available to whistleblowers in public educational institutions. These cases have provided evidence to support Rainey's claim that "most public managers and employees need a sound knowledge of the judicial environment."[125] Similarly, the questions raised by *Bradley* are essential to the work of collaborating with organizational stakeholders. For example, can WCU really fulfill its mission as a public institution of higher education when the public cannot be sure of its financial stability? We do

123 Rosemary O'Leary, *The 2016 John Gaus Lecture: The New Guerrilla Government: Are Big Data, Hyper Social Media and Contracting Out Changing the Ethics of Dissent?*, 50 Pol. Sci. & Pols. 12, 13 (2017).

124 *Id.* at 20.

125 Hal G. Rainey, Understanding and Managing Public Organizations 130 (5th ed. 2014).

not know what the president's plans were for the funds that were allegedly hidden from the legislature, and it is for the trustees to decide if funds should be saved for a rainy day or new buildings or scholarships. What is so problematic about the facts of this case is that when Bradley shared her concern with the administrative budget committee she was reprimanded.[126] While the administration argued over how to get more appropriations from the state, 77% of WCU students, on average, owed over $36,000 in student loans[127]—ranking WCU fortieth among U.S. public colleges for highest average student debt.[128] Perhaps, the administration was motivated by this very fact, and wanted more appropriations for student assistance, a noble pursuit indeed. The problem is, without accountability and transparency, the public just does not know.

These cases also reveal the tension that general counsel's offices must confront when presented with the kinds of issues faced by Khatri and Bradley. On the one hand, clearly it is not in the best interest of the institution to facilitate misconduct, whether inadvertently or knowingly. On the other hand, the threat to the institution may be greater if those individuals were to be removed from their positions. In Khatri's case, the removal of the most senior research faculty on their campus could cost the university millions of dollars in research grants. In Bradley's case, calling out the budgeting practices of (potentially) the entire PASSHE system could mean saying goodbye to state appropriations in the billions of dollars, and not just for WCU, but for the entire state system. Facing these dilemmas is in no way easy. Nevertheless, there is something of more fundamental importance to colleges and universities than money that should trump all other concerns: the educational mission. The educational mission demands that a university practice what it preaches; accounting majors learn not to hide funds from the government, so the university should be held to the same ethical principle it teaches. Likewise, the university teaches proper lab safety, academic integrity, and the value of excellent research, thus the alleged mistreatment faced by Khatri during his time at Ohio State was unacceptable. When considering settlement, the author recommends that attorneys for higher education institutions pause to imagine whether fighting whistleblower cases like *Khatri* and *Bradley* in court is truly serving the educational mission of the university, or if by defending retaliation against whistleblowers, that defense in fact erodes that mission, along with the community's trust in public institutions.[129]

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126 Bradley v. W. Chester Univ. of Pa State Sys., 880 F. 3d 643, 648 (3d Cir. 2018).

127 *Here's How Much You'll Pay to Attend West Chester University of Pennsylvania*, https://www.usnews.com/best-colleges/west-chester-3328/paying (last visited July 30, 2021).

128 lendedu, *Average Student Loan Debt Statistics by School by State 2019*, LendEDU (Aug. 8, 2019), https://lendedu.com/wp-content/uploads/2021/04/Student-Loan-Debt-by-School-by-State-Report-2019-_-LendEDU.pdf.

129 Undoubtedly, many cases of alleged whistleblowing ought to be fervently defended in court. The author wants to make it abundantly clear that sometimes plaintiffs think they are whistleblowers but the facts objectively demonstrate that they themselves are lawbreakers or otherwise in the wrong. See, for instance, Shub v. Westchester Cmty. Coll., 556 F. Supp. 2d 227 (S.D.N.Y. 2008).

IV. Conclusion and Significance

These two cases demonstrate how First Amendment jurisprudence fails to protect public higher education whistleblowers from retaliatory termination. Yet whistleblowers play an essential role in holding public institutions accountable to their missions, and especially in holding colleges and universities to their specifically educational missions. Without whistleblowers raising the alarm when employees operate without regard for the educational mission or contrary to standards of professional ethics, our higher educational institutions can fall prey to leadership that diverts the institutional trajectory away from its mission, as we saw in the Michigan State[130] and Penn State[131] scandals.[132] Thus, adequate protections for whistleblowers must be adopted at the level of the states, institutions, or collective bargaining agreements, in light of the federal courts' treatment of these cases. Despite Bradley's speech addressing matters of public concern, the current *Garcetti* case law leaves little room for First Amendment protection for Bradley's speech up the chain of command. Instead, Bradley may have a state whistleblower case, but it is still pending in courts more than five years later. There is still room for Khatri's speech to qualify for First Amendment protection under an academic exception to *Garcetti*. The academic exception jurisprudence has been adopted in multiple federal circuits so far,[133] and just this year was adopted by the Sixth Circuit Court of Appeals where Khatri's case is currently pending.[134]

In addition to advocating for additional contractual protections for whistleblowers like *Bradley*, this article extends Areen, Post, and Rabban's arguments that the educational mission of postsecondary institutions requires further protection than is currently offered by the Supreme Court's reading of the First Amendment.[135] Building on these legal scholars, speech furthering the educational mission of the institution ought to be protected under the First Amendment. Since the Supreme Court has yet to cite this line of reasoning, one might hope that this research will be used to inform the development and implementation of institutional policies to protect all public university whistleblowers.

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130 Smith & Davey, *supra* note 105.

131 Levenson, *supra* note 105.

132 For an apt example at a private institution, consider Liberty University's documented divergence from their educational mission due to the leadership of its former President Jerry Falwell Jr. and subsequent lawsuit, Eric Kelderman & Jack Stripling, *Liberty U. Sues Disgraced Former President Jerry Falwell Jr. for $10 Million*, Chron. Higher Educ. (Apr. 16, 2021), https://www.chronicle.com/article/liberty-u-sues-disgraced-former-president-jerry-falwell-jr-for-10-million. The whistleblowers at Liberty University were there, but their voices seemed to have been ignored, if not silenced according to recent reporting for the podcast "In God We Lust." Aricia Skidmore-Williams & Brooke Siffrinn, *Survivors of Liberty (Episode 8)* (Wondery Aug. 2021).

133 *See, e.g.*, Adams v. Trs. of the Univ. of NC-Wilmington, 640 F. 3d 550, 562 (4th Cir. 2011), concluding that *Garcetti* does not apply to the "academic context of a public university"; Demers v. Austin, 746 F.3d 402 (9th Cir. 2014); Buchanan v. Alexander, 919 F.3d 847 (5th Cir. 2019).

134 Meriwether v. Hartop, 2021 WL 1149377, at *7 (6th Cir. Mar. 26, 2021).

135 Areen, *supra* note 5; Post, *supra* note 5; Rabban, *supra* note 5.