

**SILENCING MATTERS OF PUBLIC CONCERN:  
AN ANALYSIS OF STATE LEGISLATIVE PROTECTION OF  
WHISTLEBLOWERS  
IN LIGHT OF THE SUPREME COURT’S RULING IN *GARCETTI V.  
CEBALLOS***

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*Abstract*

With its decision in *Garcetti v. Ceballos* in 2006, the Supreme Court significantly limited First Amendment protections for public employee free speech. The Court concluded that constitutional protections were not necessary given the “powerful network” of legislation designed to protect whistleblowers from unlawful retaliation. Opinions are mixed, however, as to whether whistleblower laws adequately protect those seeking to expose government wrongdoing. This article analyzes state statutes to assess the nature and extent of legislative protections, and it compares the state laws to those in the Organization of American State’s (OAS) model statute. Results indicate that legislative protection for whistleblowers varies widely, and many state laws lack key protections found in the OAS model statute. The article concludes that the majority’s invocation of a “powerful network” of

state laws that will protect whistleblowers is far from certain. In light of *Garcetti*, states need to adopt stronger statutes to both encourage reporting of government wrongdoing and to adequately protect those who make these reports.

## I. INTRODUCTION

A cursory review of recent media headlines indicates that corruption and misconduct by public officials at the local, state, and federal levels is fairly commonplace in the United States.<sup>1</sup> Research shows that wrongdoing by public officials causes significant economic, political, and social problems, and ultimately undermines the public's trust in government.<sup>2</sup>

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1. See e.g., *City of Austin Employee Arrested for Alleged Theft*, KVUE NEWS, (Aug. 28, 2015, 11:23 am), <http://legacy.kvue.com/story/news/crime/2015/08/28/city-austin-employee-arrested-alleged-theft/71308450/> (reporting that a City of Austin employee was arrested for allegedly stealing more than \$175,000 in property from city facilities); Paul Grondahl, *State Tax Worker Allegedly Netted \$50,000 through Identity Theft*, ALBANY TIMES UNION (Oct. 3, 2015, 4:14 pm), <http://www.timesunion.com/local/article/State-tax-worker-allegedly-netted-50-000-through-6546863.php> (reporting that a New York state Department of Taxation and Finance employee was arrested for stealing more than \$50,000 in a 63-count identity theft case involving a dozen state taxpayer accounts compromised between 2013 and 2015); Sara Kaplan, *FBI Arrests Nearly All of the Top Officials of Crystal City, Tex.*, WASHINGTON POST (Feb. 8, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/02/08/theres-only-one-person-left-on-this-texas-city-council-after-fbi-arrests-top-officials-on-corruption-charges/> (reporting that “five top officials in the Texas city were arrested...under a federal indictment accusing them of taking tens of thousands of dollars in bribes and helping the operator of an illegal gambling operation”); Don Lehman, *Four Arrested for Sale of Dozens of Stolen State Computers*, GLEN FALLS POST STAR (Jan. 4, 2016), [http://poststar.com/news/blotter/four-arrested-for-sale-of-dozens-of-stolen-state-computers/article\\_783861d2-fc6b-509c-b00e-9f235545f745.html](http://poststar.com/news/blotter/four-arrested-for-sale-of-dozens-of-stolen-state-computers/article_783861d2-fc6b-509c-b00e-9f235545f745.html) (reporting that four New York state employees were arrested on felony charges for the theft and sale of dozens of laptop computers from state agencies); Catherine Mejia, *Corrections Officer Accused of Smuggling Contraband*, WESH.COM (July 17, 2015, 10:30 AM EDT), <http://www.wesh.com/news/former-corrections-officer-charged-with-taking-bribes-from-inmates/34197250> (reporting that a federal correctional officer working in Sumter County, Florida was indicted for accepting bribes from inmates to smuggle contraband including drugs, cellphones, pills and tobacco into the Coleman Federal Correctional Complex).

2. *Lack of Trust—Caused by Institutional Corruption—Is Killing the Economy*, WASHINGTONBLOG, (May 4, 2012), <http://www.washingtonsblog.com/2012/05/trust.html>.

Governments as well as the citizens they serve, therefore, have an interest in detecting, addressing, and reducing misconduct and corruption. The role of government employees in helping achieve these lofty goals cannot be understated because these employees are arguably the people most likely to witness government wrongdoing. However, all too often public employee-reporting of wrongdoing or “whistleblowing” is met with resistance and retaliatory reactions by employers.

State legislatures have enacted whistleblower protection laws to encourage reporting of government wrongdoing and discourage employer retaliation.<sup>3</sup> In addition, the filing of First Amendment violation claims under Title 42 of the United States Code, Section 1983 has also served as an avenue of relief for whistleblowers.<sup>4</sup> In *Garcetti v. Ceballos*, however, the Supreme Court denied First Amendment protection to government whistleblowers who engage in speech, including that regarding government wrongdoing, “pursuant to their official duties.”<sup>5</sup> In doing so, the Court reasoned, in part, that such protection was unnecessary because the nation’s “powerful network” of whistleblower protection legislation provided sufficient protection.<sup>6</sup> However, opinions—including those of the majority and the dissent in *Garcetti*—are mixed as to whether these laws adequately protect public employees seeking to report government wrongdoing.<sup>7</sup>

The purpose of this article is to identify and analyze the whistleblower protection statutes of the 50 states to determine the extent to which they offer protection to those who seek to expose public wrongdoing. In doing so, the article compares the protections offered by state statutes to

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3. See *State Whistleblower Laws*, NATIONAL COUNCIL OF STATE LEGISLATURES, (Nov. 19, 2010), <http://www.ncsl.org/research/labor-and-employment/state-whistleblower-laws.aspx> (listing dozens of state whistleblower protection laws).

4. See e.g., Michael S. Vaughn, *Political Patronage in Law Enforcement: Civil Liability Against Police Supervisors for Violating their Subordinates' First Amendment Rights*, 25 J. OF CRIM. JUST. 347 (1997) (citing cases finding liability under 42 U.S.C. § 1983 for First Amendment violations by state and local law enforcement authorities).

5. 547 U.S. 410 (2006).

6. *Garcetti*, 547 U.S. at 425.

7. See *id.* (“[E]xposing governmental inefficiency and misconduct is a matter of considerable significance” and “[t]he dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing”). *But see id.* at 440-441 (Souter, J. dissenting) (citing cases in which government employees that exposed wrongdoing or mismanagement were differentially protected “depending on the local, state, or federal jurisdictions that happened to employ them”).

those contained in the model whistleblower protection statute drafted by the internationally-based Organization of American States. This article reports that while all states have whistleblower protection statutes, the strength of the statutes, as measured by the scope of the protections they offer, varies widely. None of the state statutes is as strong as the model statute, which contains broad-scoped protections for a wide range of disclosures of suspected wrongdoing. While some of the states' statutes provide comprehensive protections, many are very weak and do little to encourage reports of wrongdoing or discourage retaliatory actions. The article concludes that these results are troubling, particularly in light of the Supreme Court's decision in *Garcetti*. The lack of comprehensive protections for whistleblowers could serve to discourage reports of government wrongdoing and could invite retaliatory actions by those who stand to lose when reports are made.

## II. CONSTITUTIONAL LIMITS TO PUBLIC EMPLOYEE SPEECH

Prior to the Supreme Court's ruling in *Pickering v. Board of Education*,<sup>8</sup> public employees all but checked their First Amendment rights at the door upon accepting government employment.<sup>9</sup> With the *Pickering* decision, however, public employee speech was protected provided it met certain limited conditions.<sup>10</sup> Fifteen years later, the Court clarified and narrowed the First Amendment protections in *Connick v. Myers*.<sup>11</sup> The Court significantly "raised the threshold of protection of free speech for public employees under the *Pickering-Connick* test" with its decision in *Garcetti v. Ceballos*.<sup>12</sup> In *Garcetti*, the Court declared that "[w]hen public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>13</sup> The decision has the potential to have great impact on speech that involves

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8. 391 U.S. 563 (1968).

9. See e.g., Kathryn B. Cooper, *Garcetti v. Ceballos: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 LOY. J. PUB. INT. L. J. 73 (2006).

10. *Pickering*, 391 U.S. 563 (1968) (setting forth, as described below, a two-pronged test for assessing public employee speech protections under the First Amendment).

11. 461 U.S. 138 (1983).

12. David L. Hudson Jr., *The Garcetti Effect*, ABA JOURNAL, (Jan. 1, 2008, 8:14 PM), [http://www.abajournal.com/magazine/article/the\\_garcetti\\_effect](http://www.abajournal.com/magazine/article/the_garcetti_effect).

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

reports of government wrongdoing by public employees. Absent First Amendment protections for such speech, whistleblowers that experience retaliation must turn to alternative routes for redress, such as federal and state whistleblower protection laws.<sup>14</sup>

#### A. *Pickering v. Board of Education*

In *Pickering v. Board of Education*, for the first time, the Court extended First Amendment protections to public employee speech that theretofore had not existed.<sup>15</sup> The speech in that case involved a teacher's letter to a local newspaper, which criticized the budgeting policies of the school board of the district for which he was employed.<sup>16</sup> After sending the letter, which was published in the newspaper, the teacher was terminated.<sup>17</sup> He filed suit pursuant to 42 U.S.C. §1983 for First Amendment violations.<sup>18</sup> The unanimous Court's decision in *Pickering* set forth a two-prong balancing test for assessing First Amendment protections for public employee speech.<sup>19</sup>

The test became known as the *Pickering* standard, *Pickering* doctrine, or *Pickering* balancing test. The threshold inquiry in First Amendment cases involving public employee speech, according to *Pickering*, is whether "the employee spoke as a citizen on a matter of public concern."<sup>20</sup> Once this is affirmed, courts are to determine "whether the government employer had an adequate justification for treating the employee differently from any other member of the general public."<sup>21</sup> When the government cannot provide such a justification, the employee speech is protected by the First Amendment.<sup>22</sup> In these cases, if the employer subjects the employee to some form of retaliation, employees can sue under 42 U.S.C §1983 for redress.<sup>23</sup>

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14. *See id.*

15. *Pickering*, 391 U.S. 563.

16. *Id.* at 566.

17. *Id.* at 564.

18. *Id.*

19. *Id.* at 586.

20. *Garcetti*, 547 U.S. at 410 (citing *Pickering*, 391 U.S. at 568).

21. *Id.*

22. *Id.*

23. *See, e.g., id.; see also* 42 U.S.C. § 1983.

*B. Connick v. Myers*

Fifteen years after *Pickering*, the Court, in *Connick v. Myers*,<sup>24</sup> upheld *Pickering*, but its interpretation of that case clarified and effectively narrowed the circumstances under which public employees' expressions are constitutionally protected. The speech at issue in *Connick* was made by an assistant district attorney who was upset with a decision by her superiors to transfer her to a different office.<sup>25</sup> After receiving the transfer order, she circulated a questionnaire to fellow employees, which polled them about their satisfaction with office policies, morale, and other personal observations about the office.<sup>26</sup> She was terminated for failing to agree to the transfer, and she was told by her supervisor that circulating the questionnaire was an act of insubordination.<sup>27</sup> In response, she filed suit under Section 1983 for First Amendment violations.<sup>28</sup>

The Court's decision in *Connick* clarified that employee grievances are not protected by the First Amendment.<sup>29</sup> It did so by upholding that the threshold question, as established by *Pickering*, was whether the public employee's expression for which protection is sought involves issues of public concern.<sup>30</sup> However, the precedential value of the *Connick* decision was in its reliance upon the following language in the *Pickering* majority opinion: "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>31</sup> Focusing on this language, the *Connick* Court refined instructions to lower courts by directing them to first consider whether the expressions in question are made "as a *citizen* upon matters of public concern."<sup>32</sup> If the answer is no, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."<sup>33</sup> However, if the answer is yes, courts can then proceed to balance the "government's interest in the effective and efficient fulfillment

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24. 461 U.S. 138 (1983).

25. *Id.* at 140.

26. *Id.* at 141.

27. *Id.*

28. *Id.*

29. *Id.* at 147.

30. *Connick*, 461 U.S. at 154.

31. *Id.* at 138 (citing *Pickering*, 391 U.S. at 568).

32. *Id.* at 147 (emphasis added).

33. *Id.*

of its responsibilities to the public<sup>34</sup> against the employee's interest in making the expression. Also noteworthy was the Court's conclusion that in addition to the *content* of the expression, its *form* and *context* should be considered in assessing whether it was worthy of First Amendment protections.<sup>35</sup>

### C. *Garcetti v. Ceballos*

In *Garcetti v. Ceballos*, the Court continued to narrow the applicability of *Pickering* and constrict the First Amendment rights of public employees.<sup>36</sup> The speech in this case was uttered by an assistant district attorney, Richard Ceballos, who was working as a calendar deputy and was responsible for some supervisory responsibilities over other attorneys.<sup>37</sup> Pursuant to these duties, he received a call from a defense attorney who was concerned about several inaccuracies in an affidavit filed by a deputy sheriff to obtain a search warrant.<sup>38</sup> When Ceballos reviewed the warrant and visited the location it described, he concluded that it did contain several serious misrepresentations.<sup>39</sup> Upon discovering this, Ceballos contacted the deputy sheriff who filed the affidavit, but he failed to obtain any sufficient explanations for the inaccuracies.<sup>40</sup> He then briefed his supervisors on his findings and followed up by drafting a disposition memorandum in which he set forth his concerns about the affidavit and recommended dismissal of the case.<sup>41</sup>

Despite Ceballos' concerns, his office proceeded with the prosecution.<sup>42</sup> Although Ceballos was called to testify for the defense regarding the motion challenging the warrant, the trial court rejected the motion.<sup>43</sup> Following these events, Ceballos claims that he was subjected to a series of retaliatory actions for bringing his concerns to light.<sup>44</sup> Specifically, he was reassigned from calendar deputy to trial deputy, he was transferred to a different courthouse, and he was denied a promotion.<sup>45</sup>

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34. *Id.* at 150.

35. *Id.* at 147.

36. 547 U.S. 410.

37. *Id.* at 413.

38. *Id.*

39. *Id.* at 414.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 415.

44. *Id.*

45. *Id.*

Based on these actions, Ceballos filed an employee grievance, but the grievance was denied by his employer based on the finding that he had not experienced any retaliation.<sup>46</sup>

Ceballos then filed a federal lawsuit pursuant to Section 1983, in which he claimed that his employer had violated his First and Fourteenth Amendment rights based on his memo.<sup>47</sup> His employer claimed that no retaliation occurred; rather, according to the employer, all of the actions taken related to Ceballos were due to legitimate staffing needs.<sup>48</sup> Further, the employer argued that Ceballos' actions were not protected under the First Amendment, and it sought summary judgment.<sup>49</sup> The district court granted the employer's motion, citing that Ceballos wrote his memo as a part of his employment duties, and he was, therefore, not entitled to First Amendment protection for its contents.<sup>50</sup> The Court of Appeals for the Ninth Circuit reversed the district court's ruling, holding that "Ceballos allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment."<sup>51</sup>

The U.S. Supreme Court granted *certiorari*, reversed the appellate court's ruling, and remanded the case back to the district court.<sup>52</sup> The Court concluded, as did the district court, that public employees are not insulated from disciplinary action taken by their employers for making statements pursuant to their official job duties.<sup>53</sup> The majority opinion written by Justice Kennedy opined that the paramount fact upon which the case turned – and what distinguished this case from others that came before – is that Ceballos' expressions were made pursuant to his duties as a public employee.<sup>54</sup> Justice Kennedy noted that because Ceballos was not acting as a citizen when he drafted the memo to his superiors, he gave his supervisors the authority to take corrective action, if they found the content of the memo to be inflammatory or misguided degrading efficient agency operations.<sup>55</sup> Justice Kennedy opined that "[t]o hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. 361 F.3d 1168, 1173 (9th Cir. 2004).

52. *Garcetti*, 547 U.S. at 417.

53. *Id.* at 422.

54. *Id.* at 421.

55. *Id.* at 422-423.

the separation of powers.”<sup>56</sup> Further, Justice Kennedy expressed the importance of exposing government misconduct, but he cited means other than the U.S. Constitution for ensuring that it will be reported and that those reporting it will be protected. Specifically, he pointed to the “powerful network of legislative enactments such as whistleblower protection laws and labor codes available to those who seek to expose wrongdoing.”<sup>57</sup>

#### D. *Lane v. Franks*

In 2014, the Court revisited its prior decisions regarding public employee speech protections in *Lane v. Franks*.<sup>58</sup> The Court’s *Lane* decision upheld *Garcetti*, but it appears to have attempted to stem a bit of the “post-*Garcetti* chaos.”<sup>59</sup> At issue in *Lane*, was a very specific type of public employee speech—“truthful, subpoenaed testimony outside the course of a public employee’s ordinary job responsibilities.”<sup>60</sup> According to the Court, it granted *certiorari* in the case to “resolve discord among the Courts of Appeals as to whether public employees may be fired – or suffer other adverse employment consequences – for providing” such testimony.<sup>61</sup>

Edward Lane, the Director of Community Intensive Training for Youth at Central Alabama Community College, through a comprehensive audit of the program’s finances, discovered an employee that was on the payroll, but not reporting for work.<sup>62</sup> The “no-show” employee, Suzanne Schmitz, also happened to be an Alabama State Representative.<sup>63</sup> Lane attempted to get Schmitz to come to work, but Schmitz claimed she wanted to “continue to serve the CITY program in the same manner as [she had] in the past.”<sup>64</sup> Lane subsequently terminated Schmitz, who threatened to “get

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56. *Id.* at 423.

57. *Id.* at 425.

58. 134 S. Ct. 2369 (2014).

59. Parker Graham, *Whistleblowers in the Workplace: The Government Employee’s “Official Duty” to Tell the Truth*, 65 S.M.U. L. Rev. 685, 694 (2012) (referring to the “post-*Garcetti* chaos,” noting that *Garcetti*’s “fledgling legacy is one of ambiguity and uncertainty,” and discussing the split in *Garcetti* interpretation between the D.C and the 2nd circuits).

60. *Lane*, 134 S. Ct. at 2377.

61. *Id.*

62. *Id.* at 2375

63. *Id.*

64. *Id.* (citing *Lane v. Central Ala. Cmty. Coll.*, 523 Fed. Appx. 709, 710 (11th Cir. 2013)).

[Lane] back” for firing her.”<sup>65</sup> Schmitz’ actions were investigated by the Federal Bureau of Investigation, and Lane was called to testify before a federal grand jury regarding his reasons for terminating Schmitz, who was subsequently indicted for mail fraud and theft concerning a program receiving federal funds.<sup>66</sup> Lane also testified, under subpoena, at trial regarding his decision to fire Schmitz, and she was eventually convicted and sentenced to 30 months in prison and ordered to pay restitution.<sup>67</sup> Several months following the trial, Lane was terminated – purportedly due to budget shortages.<sup>68</sup> Lane sued Steve Franks, the president of the college and his former manager, under Section 1983, alleging a First Amendment rights violation for firing him in retaliation for testifying against Schmitz.<sup>69</sup>

The Alabama district court and the Eleventh Circuit both relied heavily on the Court’s *Garcetti* decision, both ruled against Lane, holding that he had no First Amendment protection for his subpoenaed testimony against Schmitz.<sup>70</sup> The Court, however, disagreed, charging that “in holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly.”<sup>71</sup> The Court pointed out that “[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen,”<sup>72</sup> and that to conclude such speech “may never form the basis for a First Amendment retaliation claim...would be to place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.”<sup>73</sup>

#### *E. Impact of Garcetti on Government Whistle-blowing*

Despite the Court’s decision in *Lane*, the effect of *Garcetti*, remains.<sup>74</sup> Legal scholars agree that the *Garcetti* decision altered the legal

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65. *Id.* (citing *Lane v. Central Ala. Cmty. Coll.*, 2012 WL 5289412, \*1 (N.D. Ala., Oct. 18, 2012)).

66. *Id.* (citing *United States v. Schmitz*, 634 F.3d 1247, 1256-1257 (11th Cir. 2011)).

67. *Id.*

68. *See id.* at 2376.

69. *Id.*

70. *Id.* (noting the lower court’s “extensive reliance” on *Garcetti*).

71. *Id.* at 2379.

72. *Id.*

73. *Id.* at 2380.

74. *Id.* at 2383 (Thomas, J. concurring) (alluding to the fact that the Court’s *Garcetti* decision was not negatively impacted by *Lane*; instead, that *Lane* merely

landscape for public employee speech by narrowing free speech rights and protections<sup>75</sup>—for a rather large class of citizens—the nation’s approximately 20 million public employees.<sup>76</sup> One author concluded that as a result of *Garcetti*, “the Court has now made it nearly impossible for conscientious public servants to speak out in the best interests of the public without jeopardizing their careers.”<sup>77</sup> Some also said that the case could cause greater harm to the interests and operations of the very public entities that the Court claimed to seek to protect.<sup>78</sup> This is because *Garcetti* has “undoubtedly chilled speech in federal, state, and local governments throughout the nation,”<sup>79</sup> making government “less transparent, accountable, and responsive.”<sup>80</sup> Less government transparency “increases the risk of fraud, abuse, and corruption.”<sup>81</sup> Further, threats of retaliation that suppress public employee reports of wrongdoing, “deprive the public of information that is critical to a well-organized democracy.”<sup>82</sup> Thus, as one author noted, the “big loser of the *Garcetti* decision is the American taxpayer.”<sup>83</sup> Just as consequential is the potential negative impact on the public’s confidence in the integrity of its government.<sup>84</sup>

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required an appropriate reading of *Garcetti* – noting that the *Lane* case “requires little more than a straightforward application of *Garcetti*,” that is, Mr. Lane was not speaking “pursuant to” his official job duties, because his official duties did not include testifying in court proceedings; therefore, Mr. Lane’s speech, unlike Mr. *Garcetti*’s should be afforded First Amendment protection).

75. See e.g., Graham, *supra* note 59, at 696 (“*Garcetti* drastically changed the analysis for government employee free-speech cases”); Raj Chohan, *Tenth Circuit Interpretations of Garcetti: Limits on First Amendment Protections for Whistle-Blowers*, 85 DENV. U. L. REV. 573, 574 (2007) (noting the impact of broad application of *Garcetti* by the Tenth Circuit has resulted in a “substantial erosion of speech protections for government employees”).

76. Lara Geer Farley, *A Matter of Public Concern: “Official Duties” of Employment Gag Public Employee Free Speech Rights*, 46 WASHBURN L.J. 603 (2007).

77. Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117 (2008).

78. See e.g., Chohan, *supra* note 75, at 593 (“*Garcetti* has been accused of undermining the state’s ability to operate efficiently by implicitly encouraging the non-reporting of waste and corruption”).

79. Howard Kline, *Garcetti v. Ceballos: The Cost of Silencing Public Employees*, 28 J. L. & COM. 75, 77 (2009).

80. Secunda, *supra* note 77, at 119.

81. *Id.* at 83 (citing Chohan, *supra* note 75).

82. Julian W. Kleinbrodt, *Pro-Whistleblower Reform in the Post-Garcetti Era*, 112 MICH L. REV. 111, 114 (2013).

83. Kline, *supra* note 79, at 83.

84. Kleinbrodt, *supra* note 82, at 114.

In the years since *Garcetti* was decided, the lower courts have been divided<sup>85</sup> – some even say confused<sup>86</sup> – as to its application. Courts in some circuits have applied the case’s bright line rule very broadly,<sup>87</sup> resulting in “lower courts granting summary judgment in favor of employers at an unprecedented rate.”<sup>88</sup> Others circuits have applied *Garcetti* a bit more narrowly.<sup>89</sup> The critical determination is how a court assesses the nature of the speech in question. This is because “*Garcetti* acts as a razor;” that is, if a court finds that the speech of a government employee is “pursuant to official duties,” *Garcetti* “cut[s] off the possibility of constitutional protection.”<sup>90</sup> Where, however, a court finds that an employee’s speech is outside of the normal job duties, the possibility of First Amendment protection remains, and the court must proceed to the *Connick-Pickering* test.<sup>91</sup> The determination of whether speech is made pursuant to one’s job duties under *Garcetti*, is far from straightforward,<sup>92</sup> and the result is what one author called “post-*Garcetti* chaos.”<sup>93</sup>

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85. See e.g., Diane Norcross, *Separating the Employee from the Citizen: The Social Science Implications of Garcetti v. Ceballos*, 40 *Balt. L. Rev.* 543, 556-558 (2011); see also, Graham, *supra* note 59, at 694-700 (exploring the split between the D.C. and Second Circuit’s interpretations of *Garcetti*).

86. See e.g., Ashley M. Cross, *The Right to Remain Silent? Garcetti v. Ceballos and a Public Employee’s Refusal to Speak Falsely*, 77 *Mo. L. Rev.* 805, 810 (2012) (noting that although the *Garcetti* Court sought to clarify the *Pickering-Connick* analysis by precluding protection of speech made pursuant to an employees official duties, it “ultimately perpetuated confusion when it declined to provide a framework for determining the scope of an employee’s duties”); Kleinbrodt, *supra* note 82, at 115 (“*Garcetti* has produced general confusion in the lower courts” and “it has the potential to generate anomalous results”)

87. See, Norcross, *supra* note 61, 557 (The author cites cases from the U. S. Courts of Appeals for the D.C., Tenth, and Eleventh Circuits, which “have interpreted *Garcetti* to broadly encompass speech related to the completion of the employee’s work duties and blocked First Amendment protections thereof.”). See also, Chohan, *supra* note 75, 587-590 (exploring both “expansive” and “narrow” interpretations of *Garcetti*, which revolve around how the courts interpreted the concept of “pursuant to official duties.”).

88. Kline, *supra* note 79, at 83.

89. Norcross, *supra* note 85, 557 (noting that in contrast to the D.C., Tenth, and Eleventh Circuits, the Fourth and Seventh Circuits have “interpreted *Garcetti* to require that the act of speaking was an official duty itself, not merely that the speech related in subject matter to an employee’s job or fulfilled a general duty.”)

90. Chohan, *supra* note 75, at 579.

91. Lane, 134 S. Ct. 2369, 2377 (2014); See also, *id.*

92. See, e.g., Cross, *supra* note 86, at 810; Graham, *supra* note 59, 701; Norcross, *supra* note 85, at 556-558.

93. Graham, *supra* note 59, at 694.

In *Garcetti*, the Court agreed that “[e]xposing governmental inefficiency and misconduct is a matter of considerable significance.”<sup>94</sup> However, Justice Kennedy argued that constitutional protection under the First Amendment was not needed when the good, sound judgment of public managers serves a better purpose.<sup>95</sup> He also noted that the “dictates of sound judgment are reinforced by the powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – available to those who seek to expose wrongdoing.”<sup>96</sup> Justice Souter, in his dissent, argued that no such “powerful network” of options really exists that provides the same level of protection as the First Amendment would through § 1983 lawsuits.<sup>97</sup> Justice Souter rejected the Court’s assertion of a “powerful network,” noting that it was a “mistaken assessment of protection available under whistle-blower statutes.”<sup>98</sup> Specifically, he argued that “speech addressing official wrongdoing may well fall outside of protected whistle-blowing” under such statutes.<sup>99</sup>

Indeed, legal scholars have expressed doubts about the protections afforded by government whistle-blower statutes, one scholar concluding “current whistleblower protections remain limited and sparse.”<sup>100</sup> Another wrote “legislative protections are neither uniform, comprehensive, nor existent in all jurisdictions.”<sup>101</sup> One author argued “legislation to protect government whistleblowers is inherently limited by the fact that the very people creating the legislation are likely to be the targets of the whistleblowing.”<sup>102</sup> Even where legislative protections exist, they often do not allow for the same level of relief that federal lawsuits under § 1983 provide, including the possibility for successful plaintiffs to obtain economic damage pain and suffering, injunctions resulting in reinstatement, and attorney’s fees.<sup>103</sup> Additionally, before initiating the protections offered by non-constitutional sources, such as whistleblower protection statutes,

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94. *Garcetti*, 547 U.S. at 425.

95. *Id.* at 425.

96. *Id.* at 425.

97. *Id.* at 440-41 (2006) (Souter, J. dissenting).

98. *Id.* at 436.

99. *Id.* at 440.

100. Norcross, *supra* note 85, at 558.

101. Chohan, *supra* note 75, at 592-93.

102. Ruben J. Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMEND. L. REV. 22, 23 (2008).

103. See e.g., Leonard J. Dietzen, III, *The U.S. Supreme Court Announces New Rule for First Amendment Free Speech Cases: Public Employee Whistle-Blowers Need Not Apply*, 80 FLA. B.J. 59, 62 (2006).

employee claims must meet many requirements – designed, in part, to screen out a large number of claims,<sup>104</sup> while requirements for filing a federal Section 1983 claim are not so onerous.<sup>105</sup>

Though the general consensus appears to be that statutory whistleblower protections are lacking, no comprehensive analysis of such statutes has been done. This article seeks to address that issue. Specifically, the article explores whether Justice Kennedy’s reliance on the nation’s body of legislative protections against whistleblower retaliation is well-deserved or whether Justice Souter’s dissenting sentiments that such protections are more of a mirage is more accurate. In the next section, the importance and impact of having effective avenues to safely report government misconduct and corruption is addressed.

### III. THE IMPORTANCE AND IMPLICATIONS OF REPORTING GOVERNMENT WRONGDOING

#### A. *Effects of Government Wrongdoing*

Government’s fundamental role is to provide a variety of critical services to its citizenry. These services include: making and enforcing laws; providing safe drinking water; collecting and disposing of garbage; building and maintaining roadways, parks, and libraries; educating children; administering various social service programs; and collecting taxes to fund public endeavors. In a representative democracy such as the United States, the expectation is that government functions will be carried out in a transparent fashion by elected and appointed officials according to the desires of the citizens they serve. When government officials engage in corruption or misconduct, however, they violate the public’s trust, the consequences of which can be serious.

At its broadest level, government corruption can limit investment and development, threatening economic growth.<sup>106</sup> When public servants

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104. See e.g., *id.* See also, Garcia, *supra* note 102, at 34-42 (discussing the onerous and complex administrative procedures and barriers built into whistleblower protection states that render them less than attractive or effective for those seeking relief from retaliation).

105. Dietzen, *supra* note 103, at 62.

106. See e.g., MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY 18 (2005) (citing evidence suggesting that “corruption delays and distorts economic growth, rewards inefficiency, and short-circuits open competition”); SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM, 9-26 (1999).

predicate government decision-making on personal benefits rather than the public good, the government's role in resource allocation can become distorted, and the result can increase income inequality.<sup>107</sup> This is particularly the case for small businesses and traditionally disadvantaged businesses that rely on fair competition to bid on government jobs, who do not have the same access to high-level officials or have the same capital with which to make corrupt deals.<sup>108</sup> In effect, corruption limits both their legitimate and illegitimate opportunities for competition between individuals and businesses.<sup>109</sup> Corruption, which serves to benefit the rich to the detriment of the poor, effectively perpetuates class and social divisions, fuels societal strain, and prevents social cohesion.<sup>110</sup>

Corruption and misconduct by public officials leads to non-transparent, non-competitive, and ineffective government, which can threaten the very democratic ideals upon which participative government is based.<sup>111</sup> When government decisions are made "under the table" for inappropriate reasons rather than openly for legitimate reasons, the link between "...collective decision-making and people's powers to influence collective decisions through speaking and voting, the very link that defines

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107. Sanjeev Gupta, et al., INTERNATIONAL MONETARY FUND, FISCAL AFFAIRS DEPARTMENT, *Does Corruption Affect Income Inequality and Poverty?* 29 (1998).

108. JOHNSTON, *supra* note 106, at 26-28 (discussing that businesses unprotected by rules of fair play leads to inefficiencies because corruption becomes more expensive decreasing growth); David C. Nice, *The Policy Consequences of Political Corruption*, 8 POL. BEHAV. 287, 288 (1986) (explaining that without access to officials, the resources available through corruption will remain unavailable to many individuals).

109. *Id.*

110. See e.g., Anthony Ogus, *Corruption and Regulatory Structures*, 26 L. & POL'Y 329, 335 (2004) (citing support for the hypothesis that corruption benefits the rich at the expense of the poor, specifically those in the lowest twenty percent income group); Gerald E. Caiden & Naomi J. Caiden, *Administrative Corruption*, 37 PUB. ADMIN. REV. 301, 307 (1977).

111. See e.g., Christopher J. Anderson & Yuliya V. Tverdova, *Corruption, Political Allegiances, and Attitudes Toward Government in Contemporary Democracies*, 47 AM. J. OF POL. SCI. 91, 104 (2003) (arguing that corruption causes an erosion of fundamental democratic principles calling into question the legitimacy of the government which is built upon those principles); ROSE-ACKERMAN, *supra* note 81, at 26 (concluding that "pervasive corruption undermines the legitimacy of government"); *id.* at 127-142 (discussing the political effects of government corruption).

democracy” is broken.<sup>112</sup> The results include loss of trust in government<sup>113</sup> and cynicism about participating in democratically-based activities, such as public speech, deliberations, and voting.<sup>114</sup>

*B. Implications of Reporting Wrongdoing: Whistleblower Retaliation*

These detrimental effects make it clear that both the government and the public it serves have an interest in detecting, reporting, and reducing corruption and misconduct by public officials and employees. Despite this, government employees – those most likely to witness instances of corruption and misconduct – are reluctant to report such behavior. According to results of a 2007 National Government Ethics Survey conducted by the Ethics Resource Center,<sup>115</sup> the two primary reasons that government employees do not report misconduct are fear of retaliation and doubts that appropriate corrective action would be taken if a report was made.<sup>116</sup> With respect to the fear of retaliation, of those surveyed who had witnessed government misconduct, approximately thirty percent did not report the misconduct because they feared retaliation from management.<sup>117</sup> Further, twenty-five percent of all employees surveyed believed that top leadership tolerates retaliation against those who report violations.<sup>118</sup> Finally, seventeen percent of employees surveyed who had reported

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112. Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 AM. J. POL. SCI. 328 (2004).

113. See e.g., ROSE-ACKERMAN, *supra* note 106, at 97-99 (discussing the impact of corrupt activities on the people’s trust of their governments); Johnston, *supra* note 106, at 73 (citing the view of corruption as “a deterioration of a state’s capacity to elicit the loyalty of its citizens,” and arguing that a corrupt system “risks losing the trust of citizens and its ability to draw upon private participation and preferences to make legitimate, genuinely *public* policies”) (original emphasis).

114. Warren, *supra* note 112, at 335.

115. ETHICS RESOURCE CENTER, *National Government Ethics Survey* (2007), available at <http://www.ethics.org> (last visited 2/16/2016) (noting that the Ethics Resource Center is a U.S. non-profit, nonpartisan organization that conducts research aimed at the “advancement of high ethical standards and practices in public and private institutions”). According to the report (page III), the 2007 National Government Ethics Survey was administered via telephone interview to 774 randomly selected – and nationally distributed – employees from local, state, and the federal government.

116. *Id.* at 8.

117. *Id.*

118. *Id.* at 9.

misconduct claim they experienced some form of retaliation as a result.<sup>119</sup> These findings suggest a need for comprehensive protections for government whistleblowers, as well as well-communicated, unambiguous options for reporting misconduct and for filing claims of retaliation.

#### IV. REVIEW OF STATE WHISTBLOWER PROTECTION STATUTES

Given the importance of providing adequate protection for employees who report government malfeasance – and in light of the Supreme Court’s decision in *Garcetti* that constitutional protections are less available than before *Garcetti* – this article evaluates whistleblower protection statutes of each of the 50 states.

##### A. *Research Questions and Method*

The article seeks to determine which was more accurate: (a) Justice Kennedy’s assertion that the whistleblower protection statutes of the states constitute the “powerful network” of protections,<sup>120</sup> or (b) Justice Souter’s characterization of the legislation as more of a “patchwork” of limited protections.<sup>121</sup> More specifically, the article compares the scope and strength of protections afforded by state statutes to those contained in a model international whistleblower protection statute. From that comparison, conclusions are drawn regarding the relative comprehensiveness of each state’s statutes compared to the model statute and compared to those of other states.

To address these issues, a systematic content analysis of the whistleblower statutes of all 50 states was conducted. The results of the content analysis were used to compare the components of the state statutes to selected components of a model whistleblower protection statute. The data for this article was gathered by first identifying and reviewing state statutes, which contained language that prohibited retaliatory action against those who report government wrongdoing. This endeavor was complicated by the fact that scarcely any two states have the same statutory scheme related to whistleblower protection laws. However, using a combination of

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119. *Id.*

120. *Garcetti*, 547 U.S. at 425 (citing the “powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing”).

121. *Id.* at 440 (Souter, J. dissenting).

electronic legal resources and secondary subject matter-relevant sources, a comprehensive list of state statutes, which prohibited retaliation for reporting of government law violations or other misconduct, was developed.<sup>122</sup>

### *B. Components of a Model Whistleblower Statute*

Once the relevant state statutes were identified, each state's statute was evaluated against criteria obtained from a model whistleblower protection statute. Specifically, the statutory evaluation criteria chosen for the analysis was obtained from model legislation developed by the Organization of American States (OAS).<sup>123</sup> The OAS is an international organization comprised of 35 nations of the Western Hemisphere which form the "world's oldest regional organization" which "uses a four-pronged approach to effectively implement its essential purposes, based on its main pillars: democracy, human rights, security, and development."<sup>124</sup> One of the OAS programs is the Inter-American Program for the Development of International Law, which "provides advisory services concerning international law and the development and codification of inter-American law" through, among other methods, the development and issuance of model legislation concerning a variety of topics of international interest.<sup>125</sup> Those topics include transparency in public administration and anticorruption cooperation, including efforts to ensure the protection of

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122. To identify relevant state statutes, several searches were conducted using Lexis-Nexis various key word searches of the laws of each state. Once the list of relevant statutes was compiled and documented, it was cross-referenced to lists from other whistleblower sources, including the catalogue of state whistleblower laws compiled by the National Conference of State Legislatures, as well as the list compiled (and analyzed) by the Public Employees for Environmental Responsibility. *State Whistleblower Laws*, *supra* note 3; *Whistleblowers/Eco-Heros*, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, <http://www.peer.org/campaigns/whistleblowers-scientists/whistleblowers/eco-heroes/> (last visited Feb. 21, 2017). Using these sources, the comprehensive list of relevant state statutes was developed for this analysis.

123. ORG. AM. STS., DRAFT MODEL LAW TO FACILITATE AND ENCOURAGE THE REPORTING OF ACTS OF CORRUPTION AND TO PROTECT WHISTLEBLOWERS AND WITNESSES, [http://www.oas.org/juridico/english/draft\\_model\\_reporting.pdf](http://www.oas.org/juridico/english/draft_model_reporting.pdf) (last visited Jan. 22, 2017).

124. *Who We Are*, ORG. OF AM. STS., [http://www.oas.org/en/about/who\\_we\\_are.asp](http://www.oas.org/en/about/who_we_are.asp) (last visited Feb. 15, 2016).

125. *Welcome to the Secretariat*, ORG. OF AM. STS. SECRETARIAT FOR LEGAL AFFAIRS, <http://www.oas.org/en/sla/> (last visited Feb. 15, 2016).

people who report government corruption.<sup>126</sup> Thus, for this analysis, the OAS' *Model Law Protecting Freedom of Expression Against Corruption*, which was developed by participants of the OAS's Inter-American Convention Against Corruption was used.<sup>127</sup> According to the OAS, the purpose of the model law is to "protect freedom of expression for individuals who bear witness against betrayal of the public trust by challenging corruption."<sup>128</sup>

The components of the model law that were judged to be the most relevant to this review were identified, and the statutes of the 50 states were reviewed for the existence of those key components. The key components of the model legislation were categorized according to the: (1) persons protected; (2) disclosures protected; (3) required disclosure audience; (4) prohibited actions; (5) available remedies; (6) confidentiality requirements; (7) time limitations for whistleblower claims; and (8) posting/notification requirements.

#### 1. Persons protected by the statute

Consideration of the classes of people protected under a whistleblower protection statute is one critical component for assessing its relative breadth and strength. Different whistleblower laws protect different classes of people. Some statutes protect both public employees and private citizens who report government misconduct, while others protect only public employees.<sup>129</sup> On the other hand, some statutes are narrower and only apply to state-level public employees, thereby excluding all county and municipal employees from protection.<sup>130</sup> The OAS model statute protects

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126. *Anti-Corruption Portal of the Americas*, ORG. OF AM. STS. SECRETARIAT FOR LEGAL AFFAIRS, <http://www.oas.org/juridico/english/FightCur.html> (last visited Feb. 15, 2016).

127. Thomas Devine et al., *Model Law Protecting Freedom of Expression Against Corruption*, ORG. OF AM. STS. SECRETARIAT FOR LEGAL AFFAIRS,, [http://www.oas.org/juridico/english/model\\_law\\_whistle.htm](http://www.oas.org/juridico/english/model_law_whistle.htm) (last visited Feb. 15, 2016). This model law has two main parts: (1) Section-by-Section Explanatory Notes, which includes detailed explanations of each section of the model law to both clarify their intent and explain their importance or reason for inclusion in the law; and (2) the Text of the Model Law. [hereinafter Explanatory Notes or Model Law].

128. Model Law, *supra* note 127, at Article 2.

129. *Compare* Whistleblower Protection Act of 1989, 103 Stat. 16 with Conn. Gen. Stat. § 4-61dd (2016).

130. *E.g.*, Colo. Rev. Stat. § 24-50.5-101 (2016).

“any individual subject to the laws of the nation, and may be a public or private employee, private citizen, or non-profit or for-profit Non-Governmental Organization, without respect to age, sex, religion, or race.”<sup>131</sup> The breadth of the statute’s coverage reflects the importance that the OAS places on maximizing the “flow of information from witnesses who can make a difference by testifying against corruption, without limitation based on whether they discovered the evidence as public employees, private employees, journalists, or as private citizens.”<sup>132</sup>

## 2. Expressions protected by the statute

The breadth of expressions covered by whistleblower protection statutes is also pertinent to the evaluation of statute strength. Expressions warranting protection from retaliation include spoken or written disclosures of government misconduct, as well as express refusals to engage in illegal government activity. Not all statutes protect all types of disclosures – whether written or verbal.<sup>133</sup> Some statutes protect only disclosures of state or federal law violations, while others also protect disclosures of gross mismanagement, waste, abuses of authority, health and safety dangers, and other ethical violations.<sup>134</sup> Reflecting the importance that the OAS places on the prevention and detection of all types of corruption, the model statute protects a broad range of disclosures.<sup>135</sup> First, the statute protects disclosures of illegality, which includes violations of international law, including human rights conventions, and government agency regulations and procedures.<sup>136</sup> Second, reports of gross mismanagement, meaning actions that “significantly interfere with the efficient accomplishment of the agency mission,” are protected.<sup>137</sup> Third, abuses of authority involving

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131. Model Law, *supra* note 127, at Article 2.

132. Explanatory Notes, *supra* note 127, at Article 2.

133. *E.g.*, Conn. Gen. Stat. §4-61dd (2016).

134. *Compare id. with* Colo. Rev. Stat. § 24-50.5-101 (2016).

135. Model Law, *supra* note 127, at Article 2. (“Protected Activity’ means making any lawful disclosure that evidences acts of corruption or other violation of law, rule or regulation before liability for the misconduct has expired or that evidences gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety; refusing to participate in activities that the person believes would violate the law or contribute to corruption; taking or failing to take any other action to assist in achieving the purposes of the Convention; or exercising rights provided by this Law.”).

136. Explanatory Notes, *supra* note 127, at Article 2.

137. *Id.*

“actions that create favoritism or discrimination” are considered protected disclosures under the model statute, as are disclosures of gross waste, which include “patterns of petty misspending, or individual misspending of \$12,000 or more.”<sup>138</sup> Finally, the model statute provides protections for disclosures of tangible threats of “substantial and specific danger to public health or safety.”<sup>139</sup>

In addition to protecting these types of disclosures, the model law also offers protection for persons who are retaliated against for “refusing to participate in activities that the person believes would violate the law or contribute to corruption.”<sup>140</sup> This provision extends safeguards to those who, by refusing to participate in inappropriate government activity, “honor their duties in deeds as well as words.”<sup>141</sup> To qualify for protections, the witness need only have a good faith belief that the refused activity violates a law.<sup>142</sup>

### 3. Required disclosure audience

Statutes that do not place restrictions on the audience to whom government misconduct can be reported offer a broader scope of protections than those that impose such restrictions. For protections to be triggered, some statutes require that whistleblowers make their reports internally within their organization, as either the only reporting option or as the required first option.<sup>143</sup> Others require reports to be made to law enforcement or other investigative agencies such as the state’s attorney general or the state’s auditor. Still others allow reports to be made to any government body or employee.<sup>144</sup>

The OAS model statute protects any lawful disclosure.<sup>145</sup> The explanatory notes to the legislation make it clear that the statute was crafted broadly so that there were “no valid loopholes to protection.”<sup>146</sup> The intent of the crafters was that factors “irrelevant for the public benefit” would not create barriers to protections.<sup>147</sup> Such irrelevant factors include: whether the motives for reporting were pure or tainted, whether the disclosure was made

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138. *Id.*

139. *Id.*

140. Model Law, *supra* note 127, at Article 2.

141. Explanatory Notes, *supra* note 127, at Article 2.

142. *Id.*

143. *E.g.*, La. Stat. Ann. § 30:2027 (2016).

144. *E.g.*, Conn. Gen. Stat. § 4-61dd (2016).

145. Model Law, *supra* note 127, at Article 2.

146. Explanatory Notes, *supra* note, 127 at Article 2.

147. *Id.*

pursuant to professional duties during working hours, or whether the report was made to an audience inside or outside an institution.<sup>148</sup> Thus, the OAS model statute provides for protection of any person making any protected disclosure to any audience.<sup>149</sup>

#### 4. Prohibited actions

Retaliation against whistleblowers can take many forms from overt negative employment actions to subtler discrimination and threats.<sup>150</sup> Whistleblower protection statutes that provide stronger protections prohibit a broad range of retaliatory actions.<sup>151</sup> The OAS model statute prohibits any “discrimination” against persons who make protected disclosures.<sup>152</sup> In the context of the model law, discrimination “should be interpreted broadly, to include any action that chills the exercise of freedom of expression.”<sup>153</sup> According to the statute’s explanatory notes, this covers traditional retaliatory actions, such as “ending a person’s employment, reassignment, removal of duties, or failing to approve promotions or provide training.”<sup>154</sup> The model law also covers actions that become increasingly relevant in international settings, including political discrimination, imprisonment, torture, and civil or criminal prosecution, among others. Thus, the type of retaliatory action is not what triggers the protections of the statute; rather, it is whether that the action “stifle[s] the flow” of protected disclosures from protected persons.<sup>155</sup>

#### 5. Available Remedies

Whistleblower statutes that provide adequate recompense for victims of retaliation, as well as accountability for those responsible for that retaliation, send a stronger message than those that lack such provisions.<sup>156</sup> Some statutes contain provisions that mandate “make-whole” remedies, such as job reinstatement, back pay, and full restoration of employment

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148. *Id.*

149. *Id.*

150. *E.g.*, La. Stat. Ann. § 30:2027(B)(2)(a) (2016).

151. *Id.*

152. Explanatory Notes, *supra* note 127, at Article 2.

153. *Id.*

154. *Id.*

155. *Id.*

156. *50 State Statutory Surveys: Whistleblower Statutes*, WESTLAW (2007).

benefits for victims of whistleblower retaliation.<sup>157</sup> Additionally, statutes may provide for the payment of actual damages for victims and their attorneys' fees.<sup>158</sup> Statutes with these components provide a needed safety net for those concerned about the ramifications of reporting government misconduct. Moreover, statutes that provide for sanctions – such as fines, negative employment action, or others – against those who engage in retaliatory action may provide not only a sense of assurance for would-be whistleblowers, but may also have a deterrent effect for those who may engage in retaliation.<sup>159</sup>

The OAS model statute provides remedies intended to make victims of retaliation whole as well as to sanction those responsible for retaliation.<sup>160</sup> Once victims of retaliation have successfully prevailed in a retaliation claim under the OAS statute, they are “entitled to all relief necessary to be made whole, so that protected activity does not result in any direct or indirect prejudice.”<sup>161</sup> Thus, the relief afforded can be in any form and may be related to professional (e.g., reinstatement of employment rights and protections) or financial (e.g., payment of lost wages and attorney's fees) interests.<sup>162</sup> Explanatory notes to the statute reflect that it also allows for less traditional forms of relief, such as recompense for higher housing costs after a retaliatory transfer or higher interest rates for those who no longer have steady income due to retaliatory discharge.<sup>163</sup>

The OAS model statute provides for sanctions against those who engage in retaliatory behavior.<sup>164</sup> Penalties for retaliatory actions may take the form of professional, financial, or liberty-losing sanctions.<sup>165</sup> Professional sanctions may result in employment disciplinary action, including termination of those who have engaged in unlawful retaliation.<sup>166</sup> Financial sanctions may include judgments, requiring the payment of fines and punitive damages to victims.<sup>167</sup> In some cases, those who unlawfully

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157. *E.g.*, Conn. Gen. Stat. § 4-61dd(e)(2)(A) (2016).

158. *Id.*

159. *See*, Yehonatan Givati, *A Theory of Whistleblower Rewards*, 45 J. LEGAL STUD. 43 (2016).

160. Explanatory Notes, *supra* note 127, at Article 18.

161. Model Law, *supra* note 127, at Article 16.

162. *Id.*

163. Explanatory Notes, *supra* note 127, at Article 16.

164. Explanatory Notes, *supra* note 127, at Article 18.

165. *Id.*

166. Model Law, *supra* note 127, at Article 18.

167. *Id.*

retaliate may be referred for criminal prosecution, the result of which may be deprivation of liberty through incarceration.<sup>168</sup>

## 6. Time limitations for whistleblower claims

Statutes that impose narrow time limitations on those that seek to file whistleblower claims may unreasonably restrict vital protections.<sup>169</sup> Whistleblower protection statutes vary with respect to such time limits – some require claims to be filed in a matter of days while others impose no time limits.<sup>170</sup> The OAS model statute treats such statutes of limitations as unnecessary: they are “interesting, but not relevant to the public interest.”<sup>171</sup> Thus, the statute protects *any* disclosure, “without restriction to time.”<sup>172</sup> Statutes with less restrictive the time limitations for filing a whistleblower claim maximize the free flow of information that can be used to expose government misconduct.

## 7. Confidentiality requirements

In some cases, retaliation from government officials can be so serious that traditional protections and remedies are not enough to encourage prospective whistleblowers to report official misconduct. When retaliation takes the form of physical threats of violence, additional safeguards may be needed. Therefore, confidentiality provisions may be the most important component of statutory protections against retaliation.<sup>173</sup> Laws that enable the identity of whistleblowers to remain confidential, not only reduce the threat of retaliatory action, but also prevent a “chilling effect that stifles the flow of information from witnesses who do not feel safe.”<sup>174</sup> The OAS model legislation allows the whistleblower to control whether his or her identity is kept confidential, as well as whether particular elements of the

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168. *Id.*

169. *See* 50 State Statutory Surveys: Whistleblower Statutes, *supra*, note 156.

170. *Id.*

171. Explanatory Notes, *supra* note 127, at Article 2.

172. Model Law, *supra* note 127, at Article 2.

173. Explanatory Notes, *supra* note 127, at Article 20. (stating that “effective identity protection may be the most significant shield in the Model Law to prevent irreparable losses”).

174. *Id.*

disclosure itself – that may inadvertently provide clues to the person’s identity – are kept confidential.<sup>175</sup>

#### 8. Notification and posting of statutory rights and prohibitions

Statutes that are kept secret, by virtue of inadequate notification processes, are ineffective at encouraging the exercise of the rights it protects and at deterring prohibited conduct.<sup>176</sup> Therefore, statutes that require notification, posting of whistleblower rights, and prohibitions against retaliation help to break “the cycle of secrecy” regarding government misconduct.<sup>177</sup> The OAS model statute requires that every public and private entity covered by the law “prominently post its provisions in an area where they will be normally communicated to all employees and members of the public.”<sup>178</sup>

### V. RESULTS: THE NATURE OF LEGISLATIVE PROTECTION OF WHISTLEBLOWERS

Results revealed that state whistleblower protection laws varied considerably with respect to comprehensiveness of protections they afforded. The research led to the identification of relevant statutes in all states, and it revealed recent improvements to legislative protection for whistleblowers.<sup>179</sup> Currently, all of the 50 states have statutes that in some manner address the persons protected by the law, the types of disclosures that triggered protections, requirements related to the disclosure audience,

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175. *Id.*

176. Explanatory Notes, *supra* note 127, at Article 30. (stating that the law “will not be effective in breaking the cycle of secrecy, if its existence and corresponding freedom of expression rights are a secret.”)

177. *Id.*

178. Model Law, *supra* note 127, at Article 30.

179. For example, both New Mexico and Vermont only adopted any whistleblower protections very recently – New Mexico in 2010, N.M. STAT. ANN. § 13-2304; and Vermont in 2008, VT. STAT. ANN. tit. 3, § 971 – 978. In addition, until 2009, Virginia did not have a general whistleblower protection; instead, statutory protections were limited to healthcare workers who reported significant health and safety concerns. VA. CODE ANN. § 40.1-51.2:1, protecting healthcare workers that reported health and safety concerns, first enacted in 1972. VA. CODE ANN. § 2.2-3009 – 3013, which was enacted in 2009 and provides some whistleblower protection for state employees.

and the remedies that were available if retaliatory action was proven. Not all statutes address the other three components described above – time limits for filing whistleblower claims, confidentiality provisions, and requirements for notification or posting of whistleblower rights. Table 1 summarizes the results of the review by indicating the elements present in the statutes (marked by an X or other indicator) grouped according to the eight categories discussed in the previous section.

#### A. *Persons Protected by State Statutes*

Any person who knows of government wrongdoing and reports it should be offered protection from retaliation under state law; however, no state statute expressly extended protections to *all persons* as reflected in the OAS model statute. Statutes of all 50 states provide protections for state employees who made protected disclosures, and 37 state statutes provide protections for municipal and county government employees.<sup>180</sup> In addition, 10 state laws extend protections to employees of government contractors who make protected disclosures.<sup>181</sup>

#### B. *Disclosures Protected by State Statutes*

Statutes encourage reporting when they provide protections for more types of disclosures and expressions related to government wrongdoing. Every state statute contains language which addresses what disclosures or expressions are protected.<sup>182</sup> Statutes of all 50 states offer some protection for disclosures of law violations by government officials.<sup>183</sup> Twenty-two states also protect disclosures of government mismanagement.<sup>184</sup> Disclosures of government waste are protected in 32 state statutes, while reports of abuse of authority by government officials are protected by 21 states.<sup>185</sup> Reports of significant health and safety issues are protected in 29 states. Statutes of 13 states extend protections for reports of ethical violations other than those specified above.<sup>186</sup> Employees who are directed

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180. See 50 State Statutory Surveys: Whistleblower Statutes, *supra*, note 156.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. For example, other ethical violations specified by state statutes included specific references to: acts violating a “code of conduct or ethics designed to

to engage in illegal government activity, but refuse to do so, are expressly protected from retaliatory action by 25 state statutes.<sup>187</sup> Only New Mexico's statute protects each of the seven types of expression protected under the OAS model statute.<sup>188</sup> However, seven state statutes protect six types of expressions,<sup>189</sup> while 13 states protect five of the seven types.<sup>190</sup> Statutes of five states provide protection for disclosures of law violations only – Alabama, Indiana, Michigan, South Dakota, and Texas.<sup>191</sup>

### C. Disclosure Audience Requirements in State Statutes

Statutes that allow protection for disclosures made to any person or agency provide the strongest incentive for reporting government wrongdoing. Only the statutes of nine states reflected this strong approach.<sup>192</sup> The next best option was adopted by 28 states, which allowed for reports to be made to any public body or employee.<sup>193</sup> However, some states required protected disclosures be made to only a selected audience, such as an investigative or law enforcement body.<sup>194</sup> Even worse, the

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protect the interest of the public or the employer” (35 PA. STAT. § 6020.1112); reports of acts “materially inconsistent with, and a serious deviation from, financial management or accounting standards” (DEL. CODE tit. 19 § 1703); “gross neglect of duty” (Florida); and contract violations (Hawaii).

187. See 50 State Statutory Surveys: Whistleblower Statutes, *supra*, note 156.

188. See *id.*

189. California, Connecticut, Florida, Illinois, North Carolina, Tennessee, and Utah.

190. Alaska, Arizona, Colorado, Iowa, Kentucky, Maryland, Mississippi, Missouri, Oklahoma, Oregon, Vermont, Wisconsin, and Wyoming.

191. See 50 State Statutory Surveys: Whistleblower Statutes, *supra*, note 156.

192. Kansas, Maryland, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, and Tennessee. The Colorado statute protects state employees that report wrongdoing to “any person,” but the statute also stipulates that the employee “who wishes to disclose information under the protection of [the whistleblower protection statute] to make a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure.” *E.g.*, COLO. REV. STAT. ANN. § 24-50.5-103(2).

193. See 50 State Statutory Surveys: Whistleblower Statutes, *supra*, note 156.

194. For example, the Florida statute requires reports of wrongdoing “must be disclosed to any agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act” *see*, FLA. STAT. ANN. § 112.3187 (6); and in North Carolina state employees are protected only if they report wrongdoing to the State Auditor or the state Program Evaluation

statutes of eight states require that employees first make disclosures to their supervisor or chain of command before protections from retaliation attach.<sup>195</sup>

#### *D. Prohibited Actions under State Statutes*

The most comprehensive protection for whistleblowers involves legislation that expressly prohibits any negative retaliatory action against those reporting government wrongdoing. This approach takes into account that retaliation takes many forms that extend beyond termination. Despite this, the statutes of three states (Iowa, Montana, and Wyoming) only prohibited discharge from employment for whistleblowers.<sup>196</sup> Most statutes however, reflected a wider range of prohibitions.<sup>197</sup> Three states (Oregon, Tennessee, and Washington) appear to prohibit the widest range of retaliatory acts, including discharge, demotion, transfer, threats, and discrimination.<sup>198</sup> Nine other states have statutes that expressly prohibit at least four of those five retaliatory acts.<sup>199</sup> The breadth of prohibitions reflected in these statutes is most similar to that contained in the OAS model statute.

#### *E. Remedies Available under State Statutes*

Statutes that provide for “make-whole” remedies, as well as sanctions for those who unlawfully retaliate against whistleblowers, send a strong message regarding the importance of reporting government

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Division. See N.C. GEN. STAT. ANN. § 126-85 (c). Also, in Texas, reports of law violations are only protected if they are made to an “appropriate law enforcement authority,” which includes a governmental entity with authority to regulate or enforce the law or to investigate or prosecute violations of the law. See, TEX. GOV'T CODE § 554.002.

195. Colorado, Indiana, Maine, Massachusetts, New Jersey, Ohio, Wisconsin, and Wyoming.

196. IOWA CODE ANN. § 70A.28 (West 2013); MONT. CODE ANN. § 39-3-904 (West 2001); WYO. STAT. ANN. § 9-11-103 (West 2013). (The Wyoming statute also prohibits discipline and retaliation, on top of discharge.)

197. *State Whistleblower Laws*, *supra* note 3.

198. WASH. REV. CODE ANN. § 42.40.030 (West 2008); OR. REV. STAT. ANN. § 659A.199 (West 2009); TENN. CODE ANN. § 50-3-409 (West 1999).

199. Alabama, Colorado, Illinois, Indiana, Missouri, Nebraska, North Dakota, Oklahoma, and Wisconsin.

wrongdoing. The OAS model statute provides for “make-whole” remedies, including employment reinstatement, back-pay, and restoration of benefits, as well as actual and punitive damages.<sup>200</sup> In addition, the model statute contains sanctions for those who have been proven to engage in retaliatory behavior.<sup>201</sup> Only the Alaska, Arizona, and New Jersey statutes contain each of these provisions; however, most state statutes do contain provisions for reimbursement of actual damages (44 states)<sup>202</sup> and for “make-whole” remedies (41 states).<sup>203</sup> Only seven states allow for payment of punitive damages by the person or entity responsible for the retaliation,<sup>204</sup> but 29 states provide for some type of sanction against the person or the entity responsible for the reprisal against the whistleblower (e.g., fines or negative employment action).<sup>205</sup>

#### F. Limitations for Filing Whistleblower Claims under State Statutes

The OAS model statute does not impose a statute of limitations for protections of whistleblowers because time limits were found to be irrelevant to the public good and unnecessarily restrictive.<sup>206</sup> Most state statutes do contain express time limitations for filing claims of retaliation; in fact, all but ten state statutes contain such a provision.<sup>207</sup> Statutes that do impose specific time limitations vary widely with respect to the time period allowed under law. For example, the shortest time period of 10 days is reflected in the Colorado statute, while the longest is three years under the Delaware, Georgia, Nevada, New Hampshire, Rhode Island, and Virginia

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200. Model Law, *supra*, note 127.

201. *Id.* at 21.

202. The only six states *without* specific statutory provisions allowing for actual damages incurred by whistleblowers that are retaliated against are: Kentucky, Maine, Montana, Oklahoma, Oregon, and South Dakota.

203. The nine states *without* “make-whole” remedies specified by state statute include: California, Colorado, Kansas, Kentucky, Maine, Missouri, Oklahoma, Oregon, and South Dakota.

204. States with statutes that specify relief that includes punitive damages are: Alaska, Arizona, California, Kentucky, Montana, New Hampshire, and North Carolina.

205. See the notations in the *Remedies, Reprisal penalty* column in Table 1.

206. Model Law, *supra* note 127, at 14.

207. The whistleblower statutes of Alaska, Arizona, Illinois, Indiana, Louisiana, Maine, Minnesota, Mississippi, Oregon, and South Dakota do not specify any time limitation for filing administrative or civil claims citing retaliation, though in some cases, time limitations within which claims must be brought may be addressed in different statutes or administrative rules, for example.

statutes.<sup>208</sup> Half of the states require whistleblower claims be filed within 60 days to one-year following the retaliatory action.<sup>209</sup>

### *G. Confidentiality and Notice of Rights under State Statutes*

The OAS model statute contains confidentiality provisions to help ensure the protection of whistleblowers and encourage reporting of government wrongdoing. Only 12 states have statutes with such a provision.<sup>210</sup>

Even states with relatively strong whistleblower protection laws cannot hope for them to be effective unless those covered by the law are adequately informed about its prohibitions and rights. Because of this, the OAS model statute contains specific language that requires the notification and posting of the legislation's provisions. The statutes of 31 states contain posting and/or notification requirements.<sup>211</sup>

## VI. CONCLUSION

Results suggest that the body of whistleblower legislation does not reflect a “powerful network” of protections as the *Garcetti* Court concluded.<sup>212</sup> No state's statute contains the scope of protections offered by the OAS model law, which was drafted by a group of representatives considered expert in corruption detection and prevention from member countries. While all states have some level of whistleblower protection, it is clear that not all potential government whistleblowers or every good-faith disclosure is protected from retaliatory action. This is particularly disturbing in light of the *Garcetti* Court's decision that limits protection under the First Amendment.

The Court's ruling in *Garcetti v. Ceballos* effectively dissuades employees from taking all manner of concerns to their supervisors, while perversely creating an incentive for them to first take the speech to a public

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208. 19 DEL. CODE ANN. § 1704 (West 2004); R.I. GEN. LAWS ANN. § 28-50-4 (West 2012); N.H. REV. STAT. ANN. § 275-E:2 (2010); VA. CODE ANN. § 2.2-3011 (West 2014); GA. CODE ANN. § 45-1-4 (West 2012); NEV. REV. STAT. ANN. § 281.645 (West 2001)

209. See the notations in the *Statute of limitations* column in Table 1.

210. States with provisions protecting the confidentiality of whistleblowers include: Arkansas, California, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Nebraska, Oregon, Pennsylvania, and Washington.

211. See the notations in the *Posting/notice of rights* column in Table 1.

212. *Garcetti*, 547 U.S. at 425.

forum to ensure some level of protection from retaliation.<sup>213</sup> The interest of public managers and administrators should be to encourage – though not require – employees to report internally either through their chain of command or to an ombudsperson. However, the interest should not be related to who is reporting or why, but in how the entity responds to report and addresses the allegations of wrongdoing. It is in the public interest that government employers act with due diligence to both address the concerns raised by employees and protect those who come forward. History, however, indicates that not all public entities have the desired policies in place that both encourage honest reporting of wrongdoing and diligence in addressing it.

Instead of holding the line and forcing public employers to be constitutionally accountable for instituting such policies, the Court has made it more attractive for employees to express their concerns publicly, in a local newspaper or on a television news program. Worse yet, in the absence of adequate protections, prospective whistleblowers are more likely to avoid reporting rather than risk retaliation.<sup>214</sup> Public attention from media reports and the continued damage caused by wrongdoing that continues due to a lack of reporting will likely cause more disruption in the efficiency of the operations of the government entity than addressing the matter fairly and appropriately regardless of how or why it came to light.

Absent an adequate network of secondary protections in the form of state whistleblower laws, the *Garcetti* case leaves gaping holes in the First Amendment. Public employees and managers are ultimately beholden to the taxpaying public; thus, government interests should, under some circumstances, take a backseat to the public interest of exposing fraud, waste, or otherwise dishonest or abusive conduct under the auspices of sound government managerial practices. There is no question that government corruption, abuse, and waste do occur, and its employees are best positioned in some cases to detect and report it, and they should receive adequate protection for doing so. The Court's *Garcetti* standard ultimately provides public employers with broad protection for unduly discouraging and disciplining employee speech.<sup>215</sup> Further, *Garcetti* relegates well-meaning public employees to a type of second-class citizen undeserving of

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213. *Id.* at 427 (Stevens, J., dissenting and noting, it “seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors”).

214. Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CAL. L. REV. 1633, 1655 (2008).

215. Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and §1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008).

First Amendment protection for attempting to preserve the public interest by maintaining integrity in government. The government's interests – whatever they are – should rarely come at the cost of integrity, truth, and particularly the risk of the innocent being convicted of crimes.

Prior to the *Garcetti* decision, whistleblowers who experienced retaliation for reporting government wrongdoing – whether on the job or not – could seek redress in federal court under Section 1983, alleging First and Fourteenth Amendment violations.<sup>216</sup> If successful with such a claim, avenged whistleblowers could be awarded injunctive relief, actual and punitive damages, and attorney's fees.<sup>217</sup> After *Garcetti*, however, the route to redress is more complicated and may not be as likely to result in remedies that will satisfy whistleblowers who have faced retaliation at the hands of their employers.<sup>218</sup> As this article shows, state whistleblower statutes, which at best offer a patchwork of protections, need to be expanded to offer public employees the same level of protection against retaliation as that reflected in the OAS model statute. This would effectively encourage reports of government wrongdoing and deter retaliation against those who choose to make such reports. Such a strong stance related to the detection and correction of government misconduct will also serve to revive the public's trust in government and reinforce the democratic ideals upon which this country was founded.

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216. Forsyth v. City of Dallas, 91 F.3d 769 (5th Cir. 1996).

217. Hunter R. Hughes III et al., *Counseling the Whistleblower (Part 1)*, 38 PRAC. L. 37, 44 (1992).

218. Julie A. Wenell, *Garcetti v. Ceballos: Stifling the First Amendment in the Public Workplace*, 16 WM. & MARY BILL RTS. J. 623, 623 (2007).

Table 1. Components of State Whistleblower Statutes

Statute	Persons protected <sup>1</sup>			Protected Disclosures <sup>2</sup>	Statute of limitations	Confidentiality?	Posting/notice of rights
	All persons	Government employees	Gov't contractors				
<b>OAS Model Statute</b>	X			L, M, W, A, HS, E, RI	None	X	X
Ala.		S,C,M		L	2 yr		
Alaska		S,C,M		L, M, W, A, HS	NS		
Ariz.		S,C		L, M, W, A, RI	NS		
Ark.		S,C,M		L, W, RI	180d	X	X
Cal.		S,C,M		L, M, W, HS, E, RI	1 yr	X	X
Colo.		S	X	L, M, W, A, E	10 d		
Conn. <sup>3</sup>		S,C,M	X	L, M, W, A, HS, E	90 d	X	X
Del.		S,C,M	X	L, HS, E, RI	3 yr		X
Fla.		S,C,M	X	L, M, W, A, HS, E	180d	X	
Ga.		S,C,M		L, RI	3 yr	X	
Haw.		S,C,M		L, E	2 yr		X
Idaho		S,C,M		L, W, RI	180d		X
Ill.		S,C,M		L, M, W, A, HS, RI	NS	X	X
Ind.		S,C,M	X	L	NS		
Iowa		S,C,M		L, M, W, A, RI	30 d		X
Kan.		S		L, HS	90 d		X
Ky.		S,C,M		L, M, W, A, HS	90 d		
La.		S,C,M	X	L, E, RI	NS		X
Me.		S,C,M		L, HS, RI	NS		X
Md.		S	X	L, M, W, A, HS	6 m	X	X
Mass.		S,C,M		L, HS, RI	2 yr		X
Mich.		S,C,M		L	90 d		X
Minn.		S,C,M		L, RI	NS	X	X
Miss.		S,C,M		L, M, W, A, HS	NS		
Mo.		S		L, M, W, A, HS	90 d		X
Mont.		S,C,M		L, HS, RI	1 yr		
Neb.		S		L, M, W, HS	2 yr	X	X
Nev.		S,C,M		L, W, A, HS	3 yr		X
N.H.		S,C,M		L, RI	3 yr		X
N.J.		S,C,M		L, RI	1 yr		X
N.M.		S,C,M	X	L, M, W, A, HS, E, RI	2 yr		X
N.Y.		S,C,M		L, HS, RI	1 yr		
N.C. <sup>4</sup>		S		L, M, W, A, HS, RI	1 yr		X
N.D.		S,C,M		L, W, RI	300d		

Ohio		S,C,M		L, W, HS	180d										
Okla.		S		L, M, W, A, HS	60 d		X								
Or.		S,C,M	X	L, M, W, A, HS	NS	X									
Pa.		S,C,M		L, W, E	180d	X	X								
R.I.		S,C,M		L, RI	3 yr		X								
S.C.		S,C,M	X	L, W, E	1 yr										
S.D.		S		L	NS										
Tenn.		S,C,M		L, M, W, A, HS, RI	1 yr										
Tex.		S,C,M		L	90 d		X								
Utah		S,C,M		L, M, W, A, E, RI	180d		X								
Vt.		S		L, W, A, HS, RI	180d		X								
Va.		S		L, W, A, E	3 yr		X								
Wash.		S,C,M		L, M, W, HS	NS/30d	X									
W. Va.		S,C,M		L, W, E	180d		X								
Wis.		S		L, M, W, A, HS	60 d										
Wyo.		S		L, M, W, HS, RI	90 d		X								
Statute	Disclosures must be made to						Prohibited Actions					Remedies			
	Any person	Public body or official	Investigative body	Legislative body	Agency mgr/supv	Supervisor 1 <sup>st</sup>	Discharge	Demotion	Transfer	Threaten	Discriminate	Make-whole <sup>5</sup>	Actual damages	Punitive damages	Reprisal penalty
<b>OAS Model Statute</b>	X						X	X	X	X	X	X	X	X	X
Ala.		X					X	X	X		X	X			
Alaska		X					X		X	X	X	X	X	X	X
Ariz.		X					X	X	X		X	X	X	X	X
Ark.		X	X				X		X	X	X	X			
Cal.		X	X	X	X		X	X	X	X		X	X	X	X
Colo.	X					X	X	X	X		X	X			X
Conn.		X					X	X	X		X	X			X
Del.		X					X		X	X	X	X			
Fla.			X				X	X	X		X	X			
Ga.		X					X	X			X	X			
Haw.		X					X		X	X	X	X			X
Idaho		X					X		X	X	X	X			X
Ill.		X			X		X	X	X		X	X			
Ind.			X		X	X	X	X	X		X	X			X
Iowa		X	X				X				X	X			X
Kan.	X		X	X			X	X	X		X				X
Ky.		X							X	X			X		
La.		X	X		X		X	X		X	X	X			X
Me.		X			X	X	X		X	X					X

Md.	X					X	X	X			X	X		X
Mass.		X			X	X	X				X	X		
Mich.		X				X			X	X	X	X		X
Minn.		X	X		X	X			X	X	X	X		X
Miss.			X			X	X				X	X		X
Mo.			X	X		X	X	X	X			X		X
Mont.	X					X					X		X	
Neb.			X	X		X	X	X		X	X	X		
Nev.	X					X	X	X			X	X		
N.H.	X					X			X	X	X	X		
N.J.		X			X	X	X				X	X	X	X
N.M. <sup>6</sup>	X	X									X	X	X	
N.Y.		X			X	X	X	X			X	X		
N.C.			X			X			X	X	X	X	X	X
N.D.			X		X	X	X	X		X	X	X		X
Ohio					X	X	X	X			X	X		
Okla.	X					X	X	X	X					X
Or.	X					X	X	X	X	X				
Pa.			X	X	X	X			X	X	X	X		X
R.I.		X				X			X	X	X	X		
S.C.		X	X		X	X	X	X			X	X		X
S.D.			X		X	X	X	X						
Tenn.	X					X	X	X	X	X	X	X		X
Tex.			X			X	X	X			X	X		X
Utah		X	X	X	X	X			X	X	X	X		X
Vt.		X	X	X	X	X	X	X						
Va.		X	X	X	X	X			X	X	X	X		X
Wash <sup>7</sup>		X	X			X	X	X	X	X	X	X		X
W.V														
Va.		X	X	X	X	X			X	X	X	X		X
Wis.			X		X	X	X	X	X		X	X		X
Wyo. <sup>8</sup>					X	X	X	X			X	X		

1. S = state employees; C = county employees; M = municipal employees.
2. L = law violations; M = mismanagement; W = waste; A = abuse; HS = health & safety violations; E = ethical violations; RI = refusal act illegally.
3. The Connecticut whistleblower statute (CONN. GEN. STAT. ANN. § 4-61dd (e) (1)) prohibits “any personnel action” against one who makes a protected disclosure, but the statute does not define “personnel action.” For these purposes, we assume the term includes discharge, demotion, or transfer.
4. North Carolina state employees are *encouraged* to report verbally or in writing to their supervisor, department head, or other appropriate authority (N.C. GEN. STAT. ANN. § 126-84(a)). However, the statute specifies that the protections from retaliation cited in the Article cover employees who report prohibited activity to the State Auditor or the Program Evaluation Division (N.C. GEN. STAT. ANN. § 126-85(c)). The North Carolina state statute regarding retaliatory employment

discrimination under the Department of Labor regulations prohibits retaliation by “any person” (including state and local government entities), but only with respect to certain matters: workers’ compensation, the Wage and Hour Act, the Occupational Safety and Health Act, the Mine Safety and Health Act, and a few other categories (N.C. GEN. STAT. ANN. § 95-241(a)).

5. “Make-whole” remedies = employment reinstatement, back pay, and/or restoration of benefits.

6. The New Mexico whistleblower statute (N.M. STAT. ANN. § 10-16C-2) defines retaliatory action as “any discriminatory or adverse employment action against a public employee in the terms and conditions of public employment,” but it does not specify or define “adverse employment action.”

7. Washington has two separate whistleblower protection laws – one for state government employees and one for local government employees. The statute protecting state employee whistleblowers does not specify the statute of limitations or other timeframe within which a whistleblower must make a claim (WASH. REV. CODE ANN. § 42.40.010 – .910). The statute protecting local employee whistleblowers states that a “charge of retaliatory action” must be made “to the local government no later than thirty days after the occurrence of the alleged retaliatory action” (WASH. REV. CODE ANN. § 42.41.040).

8. The Wyoming state employee whistleblower protection statute does not specifically state that notice of whistleblower rights must be posted, but it states, “[a] state employer shall ensure that its employees are aware of their rights under this chapter” (WYO. STAT. ANN. § 9-11-103(d)).

Table 2. State Statutes Analyzed

JURISDICTION	CITATION
ALABAMA	ALA. CODE § 36-26A-1 – 7; § 36-25-24 (2016)
ALASKA	ALASKA STAT. ANN. § 39.90.100 – 140 (West 2016)
ARIZONA	ARIZ. REV. STAT. ANN. § 38-531 – 534 (2016)
ARKANSAS	ARK. CODE ANN. § 21-1-601 – 609 (West 2016)
CAL.	CAL. GOV’T CODE § 8547-8548, § 9149.2, § 53296-98.5; CAL. LAB. CODE § 1102.5-1106 (West 2016)

COLORADO	COLO. REV. STAT. ANN. § 24-50.5-101 – 107 (West 2016)
CONN.	CONN. GEN. STAT. ANN. § 4-61dd, § 31-51m (West 2016)
DEL.	DEL. CODE ANN. tit. 19 § 1701-1708 (West 2016)
FLORIDA	FLA. STAT. ANN. § 112.3187 – 3189 (West 2016)
GEORGIA	GA. CODE ANN. § 45-1-4 (West 2016)
HAWAII	HAW. REV. STAT. ANN. § 378-61 – 69 (West 2016)
IDAHO	IDAHO CODE ANN. § 6-2101 – 2109 (West 2016)
ILLINOIS	5 ILL. COMP. STAT. ANN. 430/15; 20 ILL. COMP. STAT. ANN. 415/19C.1;
INDIANA	IND. CODE ANN. § 4-15-10-4, § 5-11-5.5-8, §22-5-3-3, § 36-1-8-8 (West 2016)
IOWA	IOWA CODE ANN. § 70A.28-29 (West 2016)
KANSAS	KAN. STAT. ANN. § 75-2973 (West 2016)
KENTUCKY	KY. REV. STAT. ANN. § 61.102 – 103 (West 2016)
LOUISIANA	LA. STAT. ANN. § 23:967, § 42:1102, § 42:1169 (2016)
MAINE	ME. REV. STAT. ANN. tit. 26 § 831-838 (2016)
MD.	MD. CODE ANN. § 5-301 – 314, § 11-301 – 306 (West 2016)
MASS.	MASS. GEN. LAWS. ANN. ch. 149 § 185 (2016)
MICHIGAN	MICH. COMP. LAWS ANN. § 15.361 – 369 (West 2016)
MINN.	MINN. STAT. ANN. § 181.931 – 935 (West 2016)
MISS.	MISS. CODE ANN. § 25-971 – 177 (West 2016)
MISSOURI	MO. ANN. STAT. § 105.055 (West 2016)

MONTANA	MONT. CODE ANN. § 39-31-401, § 51-71-123 (West 2016)
NEBRASKA	NEB. REV. STAT. ANN. § 81-2701 – 2711, § 48-1002, § 48-1114 (West 2016)
NEVADA	NEV. REV. STAT. ANN. § 281.611 – 671, § 618.445, § 357.210 – 250 (West 2016)
N. H.	N.H. REV. STAT. ANN. § 275-E:1 – 7 (2016)
N. JERSEY	N.J. STAT. ANN. § 34:19-1 – 8 (West 2016)
N. MEXICO	N.M. STAT. ANN. § 13-2304 (West 2016)
NEW YORK	N.Y. CIV. SERV. § 75(b), N.Y. LAB. LAW § 740 (McKinney 2016)
N. C.	N.C. GEN. STAT. ANN. § 126-84 – 88, § 95-240 – 241; (West 2016)
N. D.	N.D. CENT. CODE ANN. § 34 -11.1-04, § 34-1-20 (West 2016)
OHIO	OHIO REV. CODE ANN. § 4113.51 – 53 (West 2016)
OKLA.	OKLA. STAT. ANN. tit. 74, § 840-2.5 (West 2016)
OREGON	OR. REV. STAT. ANN. § 659A.200 – 224 (West 2016)
PA.	43 PA. STAT. AND CONS. STAT. ANN. § 1421-1428 (West 2016)
RHODE ISLAND	R.I. GEN. LAWS ANN. § 28-50-1 – 9 (West 2016)
SOUTH CAROLINA	S.C. CODE ANN. § 27-10 – 50 (2016)
SOUTH DAKOTA	S.D. CODIFIED LAWS § 3-6A-52 (2016)
TENN.	TENN. CODE ANN. § 8-50-116; § 50-1-304 (West 2016)
TEXAS	TEX. GOVT. CODE ANN. § 554.001 – .010 (West 2016)
UTAH	UTAH CODE ANN. § 67-21-1 – 9 (West 2016)
VERMONT	VT. STAT. ANN. tit. 3, § 971 – 978 (West 2016)

VIRGINIA	VA. CODE ANN. § 2.2-3009 – 3013 (West 2016)
WASH.	WASH. REV. CODE ANN. § 42.40.010 – .910, § 42.41.010 – .900 (West 2016)
WEST VIRGINIA	W.VA. CODE ANN. § 6C-1-8 (West 2016)
WIS.	WIS. STAT. ANN. § 230.80 – .90 (West 2016)
WYOMING	WYO. STAT. ANN. § 9-11-101 – 109 (West 2016)