

ARTICLES

COMPELLED STATEMENTS FROM POLICE OFFICERS AND GARRITY IMMUNITY

STEVEN D. CLYMER*

*In this Article, Professor Steven Clymer describes the problem created when police departments require officers suspected of misconduct to answer internal affairs investigators' questions or face job termination. Relying on the Supreme Court's decision in *Garrity v. New Jersey*, courts treat such compelled statements as immunized testimony. That treatment not only renders such a statement inadmissible in a criminal prosecution of the suspect police officer, it also may require the prosecution to shoulder the daunting and sometimes insurmountable burden of demonstrating that its physical evidence, witness testimony, and strategic decision-making are untainted by the statement. Because police internal affairs investigators decide whether to take and disseminate compelled statements from police officers, prosecutors are powerless to prevent the problem. Yet, as Professor Clymer shows, the Garrity doctrine, as applied by lower courts, has an uncertain foundation. The Supreme Court never has addressed the full range of protections that courts often bestow on compelled statements, such as prohibitions on non-evidentiary and indirect evidentiary use. Furthermore, these stringent use restrictions are difficult to square with the less robust protection that courts afford coerced confessions and with the need to address police criminality effectively. While rejecting the proposition that the Court should overrule Garrity, Clymer argues that courts should relax prohibitions on collateral uses of compelled statements. Clymer also suggests that policymakers require police departments to use sanctions less severe than job termination to prompt police officers to answer questions during administrative investigations. Threats of lesser sanctions often will be sufficient to encourage police officers to answer and will do so without triggering Garrity immunity. This approach fairly balances the competing interests of police departments, police officers, and prosecutors in cases of alleged police criminality.*

INTRODUCTION

In recent years, several well-publicized events have rekindled public concern about police corruption and the use of excessive force. In New York City, police officers shot and killed Amadou Diallo¹ and

* Associate Professor, Cornell Law School; Special Assistant United States Attorney, Northern District of New York. B.A., 1980, Cornell University; J.D., 1983, Cornell Law School. The author, not the Department of Justice, is responsible for the opinions expressed in this article. I thank Forrest G. Alogna, Stephen P. Garvey, Sheri Lynn Johnson, Barry F. Kowalski, Laurie L. Levenson, Brenda K. Sannes, Gary J. Simson, David A. Sklansky, Effie Toshav, and John S. Wiley for their assistance.

¹ See, e.g., Michael Cooper, Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed, N.Y. Times, Feb. 5, 1999, at A1. The officers involved were acquitted in a state

Patrick Dorismond,² neither of whom were armed or involved in criminal activity, and tortured Abner Louima.³ In Los Angeles, a scandal involving the Los Angeles Police Department's (LAPD) Rampart Division generated allegations of police involvement in drug dealing, fabrication of evidence, perjury, beatings, thefts, and attempted murder.⁴ In Cincinnati, a police officer fatally shot an unarmed black teenager who was wanted for misdemeanor violations, igniting several days of civil unrest.⁵ In Philadelphia, police officers beat a suspect while a television news crew filmed the action.⁶

court trial. See, e.g., Jane Fritsch, 4 Officers in Diallo Shooting Are Acquitted of All Charges, N.Y. Times, Feb. 26, 2000, at A1. The United States Department of Justice determined that it would not seek federal charges against the suspect officers. See, e.g., Susan Sachs, U.S. Decides Not to Prosecute 4 Officers Who Killed Diallo, N.Y. Times, Feb. 2, 2001, at B1.

² See, e.g., William K. Rashbaum, Undercover Police in Manhattan Kill an Unarmed Man in a Scuffle, N.Y. Times, Mar. 17, 2000, at A1. A state grand jury declined charges against the officer involved. See, e.g., C.J. Chivers, Grand Jury Clears Detective in Killing of Unarmed Guard, N.Y. Times, July 28, 2000, at A1.

³ See, e.g., Dan Barry, Leaders of Precinct Are Swept Out in Torture Inquiry, N.Y. Times, Aug. 15, 1997, at A1. Justin Volpe, the officer who tortured Louima, pled guilty and received a thirty-year sentence; another involved officer was convicted at trial and sentenced to fifteen years, eight months. Four other officers who participated in a cover-up and lied to investigators about the incident also were convicted. See, e.g., Alan Feuer, 3 Ex-Officers Are Sentenced for Roles in Louima Torture, N.Y. Times, June 28, 2000, at B3; Alan Feuer, Officer Convicted of Lying, In Last of the Louima Cases, N.Y. Times, June 22, 2000, at B3.

⁴ See, e.g., Terry McDermott, Perez's Bitter Saga of Lies, Regrets and Harm, L.A. Times, Dec. 31, 2000, at A1. For articles about the scandal, see generally The LAPD Corruption Scandal, <http://www.streetgangs.com/topics/rampart> (last visited Sept. 19, 2001).

⁵ See, e.g., Tom Jackman, Cincinnati Mourners Urged Not to Resort to Violence, Wash. Post, Apr. 15, 2001, at A3.

⁶ See, e.g., Paul Farhi, New on Video: Another Controversy, Wash. Post, July 15, 2000, at A3. Similar events elsewhere also have received attention. See, e.g., S.K. Bardwell, Police Shot Man 12 Times in Raid, Houston Chron., July 21, 1998, at 1 (describing shooting inside apartment during warrantless drug raid); Josh Kovner, Family, Police Want Answers, Hartford Courant, Apr. 14, 1999, at A1, available at 1999 WL 6359549 (describing police shooting of unarmed and fleeing fourteen-year-old mugging suspect); Evelyn Nieves, Police Corruption Charges Reopen Wounds in Oakland, N.Y. Times, Nov. 30, 2000, at A18 (reporting criminal indictment of Oakland police officers for conspiracy to obstruct justice, kidnapping, assault, filing false reports, and making false arrests); Fauve Yandel, Public Outcry Follows Shooting Death, Atlanta J. & Const., Aug. 18, 2000, § D, at 6, available at 2000 WL 5471620 (reporting police shooting). There also has been attention focused on police use of authority to commit sexual assaults. See, e.g., Al Baker, Sex and Power vs. Law and Order, N.Y. Times, Jan. 28, 2001, at 21.

Urban minority communities often bear the brunt of criminal conduct by police officers. See, e.g., Human Rights Watch, *Shielded From Justice: Police Brutality and Accountability in the United States* 39-43 (1998) ("Race continues to play a central role in police brutality in the United States."); Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. Cal. L. Rev. 1453, 1471-72 (1993) (describing abusive police conduct in minority communities in Los Angeles).

Such incidents often generate demands for more vigorous administrative oversight, harsh discipline, and criminal prosecution of involved police officers.⁷ Those responses—administrative penalties and criminal prosecution—are the principal means of punishing police officers who commit crimes.⁸ There is, however, a troubling conflict

There is no consensus on the frequency with which police engage in corruption or use excessive force. On corruption, see, for example, U.S. Gen. Accounting Office, GAO/GGD-98-111, Law Enforcement: Information on Drug-Related Police Corruption 3, 10-14 (1998) which notes that because of the absence of federally collected “data specifically on drug-related police corruption . . . it was not possible to estimate the overall extent of the problem,” and Comm’n to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Dep’t, City of New York, Commission Report 10 (1994) [hereinafter Mollen Comm’n Rep.], which notes the difficulty in gauging the extent of police corruption in New York City.

On use of excessive force, compare Kenneth Adams, *What We Know About Police Use of Force*, in Nat'l Institute of Justice, U.S. Dep’t of Justice, *Use of Force by Police* 3-6 (NCJ 176330, Oct. 1999) (“Whether measured by use-of-force reports, citizen complaints, victim surveys, or observational methods, the data consistently indicate that only a small percentage of police-public interactions involve the use of force.”), with John V. Jacobi, *Prosecuting Police Misconduct*, 2000 Wis. L. Rev. 789, 802 (“Evidence from both individual incidents and systematic study reports strongly suggests widespread police violence entirely unjustified by the requirements of public safety.”), and Human Rights Watch, *supra*, at 25-26 (finding that “police brutality is persistent” in New York City, Los Angeles, Chicago, Boston, District of Columbia, Atlanta, Detroit, and other large American cities). See also U.S. Comm’n on Civil Rights, *Police Practices and Civil Rights in New York City*, ch. 4 (2000), <http://www.usccr.gov/nypolrc> (describing “differing perspectives of the actual level of police misconduct in New York City”); Fox Butterfield, *When the Police Shoot, Who’s Counting*, N.Y. Times, Apr. 29, 2001, § 4, at 5 (“[S]tatistics on police shootings and use of nondeadly force continue to be piecemeal products of spotty collection.”). A recent survey of 80,543 persons revealed that in 1999, police used or threatened to use force against approximately one percent of persons with whom they had face-to-face contact. See Patrick A. Langan et al., U.S. Dep’t of Justice, *Contacts Between Police and the Public: Findings From the 1999 National Survey* 6 (NCJ 184957, Feb. 2001). Approximately three-quarters of persons reporting a threat or use of force stated their belief that the threat or force used was excessive. *Id.* at 26. There is evidence that police corruption and use of excessive force are related problems. See Paul Chevigny, *The Edge of the Knife: Police Violence in the Americas* 78-79 (1995) (“[T]he police who talked to the [Mollen] commission thought of their corrupt as well as their brutal acts as aspects of vigilante justice.”); Mollen Comm’n Rep., *supra*, at 45-46 (noting that, based on testimonial and empirical sources, “corruption seemingly has a relationship with a penchant for brutality”).

⁷ See, e.g., Human Rights Watch, *supra* note 6, at 10-24 (recommending measures to address “obstacles to justice, problems of investigation and discipline, and public accountability and transparency”). Those making proposals sometimes question whether police departments and local prosecutors will conduct unbiased investigations and often suggest involvement by independent monitors or federal prosecutors. See, e.g., Erwin Chemerinsky, *Perspective on the LAPD Scandal*, L.A. Times, Feb. 15, 2000, at B7 (recommending “an external watchdog . . . charged by law with the task of investigating police wrongdoing and bringing disciplinary actions and criminal prosecutions where appropriate”). For a discussion of the differences between local and federal prosecution of police, see generally Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. Rev. 509 (1994).

⁸ Another sanction is revocation of the suspect officer’s state certification. For a discussion of this option, see generally Roger L. Goldman & Steven Puro, *Revocation of*

between them. Departmental misconduct probes can and often do impair or even foreclose otherwise viable criminal investigations and prosecutions. Indeed, an independent panel formed in the wake of the Rampart scandal recently concluded that LAPD's administrative investigations "seriously compromise[] criminal investigations of officer-involved shootings and major use of force incidents"⁹

How does this happen? In many police departments, as part of administrative inquiries into alleged misconduct, internal affairs investigators take statements from the police officers who were involved either as participants or witnesses. Statutes, regulations, or departmental policies often impose penalties, including job termination, against officers who refuse to answer questions during such inquiries. When police officers faced with sanctions answer questions, many courts, relying on the Supreme Court's 1967 decision in *Garrity v. New Jersey*,¹⁰ treat officers' "compelled statements" as the equivalent of formally immunized testimony. Although such "*Garrity* immunity" does not bar later prosecution of a police officer who has given a compelled statement, it does impose on the prosecution the substantial burden of demonstrating that it has not made direct or indirect use of the defendant officer's statement. If investigators, prosecutors, or witnesses have learned the contents of a compelled statement, that burden can create difficult or even insurmountable impediments to criminal prosecution.

Prosecutors have near-complete discretion to determine whether and when a witness who also is a potential defendant will receive

Police Officer Certification: A Viable Remedy for Police Misconduct?, 45 St. Louis U. L.J. 541 (2001).

Although there are other legal responses to police criminality, such as the exclusion of illegally obtained evidence from criminal trials, civil lawsuits, and federal "pattern or practice" lawsuits under the Police Accountability Act, 42 U.S.C. § 14141 (1994), they do not sanction the suspect police officer. Even if a civil lawsuit naming an individual police officer is successful, the officer's department usually will indemnify him. See, e.g., Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, in *Police Violence* 247, 268 (William A. Geller & Hans Toch eds., 1996) ("[I]t is a rare case where an officer personally feels the financial sting of a judgment. . . . As far as individual officers are concerned, monetary awards to plaintiffs generally imply no real punishment"). For a discussion of § 14141, which permits the Department of Justice to seek injunctive relief against police departments, see 42 U.S.C. § 14141(b) (1994), and has led to consent decrees in Pittsburgh, Pennsylvania; Steubenville, Ohio; New Jersey; and Los Angeles, California; see generally Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 Buff. Crim. L. Rev. 815 (1999), which examines the provisions of the Pittsburgh and Steubenville consent decrees, and Marshall Miller, Note, *Police Brutality*, 17 Yale L. & Pol'y Rev. 149 (1998), which describes the Department of Justice's strategy in implementing § 14141.

⁹ Report of the Rampart Independent Review Panel 110 (Nov. 16, 2000).

¹⁰ 385 U.S. 493 (1967).

court-ordered immunity. Cognizant of the danger of tainting a later prosecution, they exercise that discretion with considerable care. In contrast, prosecutors do not control decisions to take or to disseminate compelled statements. Internal affairs investigators make those decisions, and thus inadvertently or intentionally can jeopardize criminal prosecutions of police officers. In addition, police witnesses, who may be reluctant to testify against colleagues, can avoid having to do so by claiming to be tainted by a defendant officer's compelled statement. Although prosecutors can, and often do, employ prophylactic measures to guard against some of the difficulties that *Garrity* immunity creates, those safeguards are not entirely effective and can be costly to criminal investigations.

The legal protection that police officers' compelled statements receive is extraordinary when considered in isolation. When compared to the protection that courts afford to coerced confessions, police immunity borders on absurd. Simply put, courts place more stringent restrictions on prosecutors' use of compelled statements than internal affairs investigators take from police officers in noncustodial, noncoercive settings than on their use of confessions that police extract from in-custody suspects by use of illegal physical force or psychological coercion.

Police criminality undermines the legitimacy of the nation's justice system. Effective punishment of officers who commit crimes is essential if we are to maintain public trust in that system. *Garrity* immunity jeopardizes that goal by creating tension between administrative and criminal investigations and impairing prosecutions of criminal police officers.¹¹

¹¹ Professor Kate Bloch has addressed some of the hazards of *Garrity* immunity. Kate E. Bloch, Police Officers Accused of Crime: Prosecutorial and Fifth Amendment Risks Posed by Police-Elicited "Use Immunized" Statements, 1992 U. Ill. L. Rev. 625. I take issue with her proposed solution in Part III.B.1, *infra*. Others have examined related issues. See, e.g., Robert M. Myers, Code of Silence: Police Shootings and the Right to Remain Silent, 26 Golden Gate U. L. Rev. 497, 523 (1996) (contending that police officers involved in shootings can be required to provide written account without immunity or face job loss); Byron L. Warnken, The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination, 16 U. Balt. L. Rev. 452, 515-16, 525-27 (1987) (proposing comprehensive police officers' "Bill of Rights" to include formal immunity grants or *Miranda*-type warnings before police officers can be sanctioned for refusal to answer questions); Andrew M. Herzog, Note, To Serve and Yet to Be Protected: The Unconstitutional Use of Coerced Statements in Subsequent Criminal Proceedings Against Law Enforcement Officers, 35 Wm. & Mary L. Rev. 401, 404 (1993) (contending that compelled statements should not be admissible in grand jury proceedings); William W. Senft, Note, Use Immunity Advisements and the Public Employee's Assertion of the Fifth Amendment Privilege Against Self-Incrimination, 44 Wash. & Lee L. Rev. 259, 280-81 (1987) (advocating use immunity advisements for public employees).

Part I describes prevailing doctrine—the treatment of police officers' compelled statements as immunized testimony. It explains the stringent restrictions on prosecutorial use of immunized testimony and shows how those constraints are particularly troublesome when applied to police officers' compelled statements. Part I also discusses federal prosecutors' attempts to limit the damage that *Garrity* immunity can cause.

Part II explores the origin of the *Garrity* rule. It notes that the *Garrity* Court explained the suppression of compelled statements by likening them to coerced confessions and characterizing the threat of sanctions for refusal to answer questions as an "unconstitutional condition." Part II demonstrates that both prongs of this explanation were flawed and describes how the Court later shifted to a different approach, treating compelled statements as immunized testimony. It also shows how this shift produced a more robust and problematic exclusionary rule.

Part III examines responses to the problems that *Garrity* immunity creates. First, it addresses the possibility of judicial abolition or modification of the *Garrity* doctrine. Next, it discusses statutory and procedural strategies to control decisions to take and disseminate compelled statements. Finally, it proposes that states and police departments impose sanctions less severe than job loss when suspect police officers refuse to cooperate with internal affairs investigators. The threat of lesser sanctions often will provide ample incentive for police officers to answer investigators' questions and, at the same time, minimize the risk that courts will prohibit use of the resulting statements in criminal cases.

I

COMPELLED STATEMENTS AND THE THREAT TO POLICE PROSECUTIONS

A. *Compelled Statements and Garrity Immunity*

Police departments routinely conduct noncriminal, administrative investigations into allegations of police misconduct to determine whether discipline is warranted.¹² As part of those investigations, investigators often interview the suspect officer or officers along with witness officers.¹³ In cases in which alleged misconduct may result in

¹² See Warnken, *supra* note 11, at 453-57.

¹³ See Douglas W. Perez, *Common Sense About Police Review* 95 (1994) (describing internal investigation procedures); Levenson, *supra* note 7, at 536 ("It is standard procedure for internal investigators to require the charged officers to provide a full statement regarding their actions."); Douglas W. Perez & William Ker Muir, *Administrative Review*

criminal charges, suspect officers have a valid basis for asserting their Fifth Amendment privilege and refusing to answer questions on the ground that their statements may incriminate them.¹⁴ To promote thorough investigations, and perhaps to avoid the unseemly spectacle of officers refusing to cooperate with their own departments, regulations, state statutes, and departmental policies often require that police officers, whether suspects or witnesses, answer questions that investigators pose. Refusal to do so can result in discipline, including job loss.¹⁵

In a series of cases decided from 1967 to 1977, the Supreme Court confronted states' use of economic sanctions—job termination, loss of pension benefits or political office, disbarment from legal practice,

of Alleged Police Brutality, in Police Violence, *supra* note 8, at 213, 215 (noting that, in Oakland Police Department, “[o]fficers charged with misconduct and witness officers are required to give truthful statements to the [Internal Affairs] section”). Investigation may be conducted by an internal affairs unit of the police department, a civilian review board, or both. See, e.g., U.S. Comm'n on Civil Rights, *supra* note 6, at ch. 4 (describing process by which Civilian Complaint Review Board in New York City compels statements from police officers named in citizen complaints). In some systems, police have no obligation to submit to civilian review board interviews. Perez & Muir, *supra*, at 217.

¹⁴ The Fifth Amendment privilege against self-incrimination, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, see, for example, *Malloy v. Hogan*, 378 U.S. 1, 8, 10-11 (1964), provides that: “No person . . . shall be compelled in any criminal case to be a witness against himself” U.S. Const. amend. V. The Supreme Court has interpreted the privilege as prohibiting the government from compelling a statement that later could incriminate the declarant in a criminal prosecution. See, e.g., *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (“The Amendment . . . privileges [the individual] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”). A person may assert the privilege whenever his statement “would furnish a link in the chain of evidence needed to prosecute” him. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

¹⁵ For example, the LAPD Manual provides that:

When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so, even at the risk of self-incrimination. It is a violation of duty for police officers to refuse to disclose pertinent facts within their knowledge, and such neglect of duty can result in disciplinary action up to and including termination.

1 Los Angeles Police Dep't Manual § 210.47 (2000); see also New York Police Department Patrol Guide, Procedure 206-13 (Jan. 1, 2000) (warning officers that “if [they] refuse to testify or to answer questions relating to the performance of [their] official duties, [they] will be subject to departmental charges, which could result in [their] dismissal from the Police Department”); *United States v. Corrao*, No. CR-91-1343(S-1), 1993 WL 63018, at *1 (E.D.N.Y. Mar. 1, 1993) (mem.) (quoting same language in earlier version of NYPD Patrol Guide, from Procedures 118-9 and 118-10); Perez & Muir, *supra* note 13, at 215 (“[O]fficers who refuse to . . . cooperate can be disciplined or even fired.”); *Warnken*, *supra* note 11, at 457 (“The investigating officer either expressly states or implies, or custom dictates, that the officer must cooperate during questioning or face possible adverse personnel action.” (footnotes omitted)).

and ineligibility for state contracts—to compel cooperation in criminal and noncriminal investigations.¹⁶ In all but one of these “so-called ‘penalty’ cases,”¹⁷ public employees and officials, contractors, and others refused to waive immunity or answer questions and later contested the resulting economic sanctions. *Garrity v. New Jersey*¹⁸ arrived in the Supreme Court in a different posture. In *Garrity*, the employees, most of whom were police officers, answered the questions, thus avoiding the threatened economic sanctions, and challenged the state’s subsequent use of their answers in criminal prosecutions.¹⁹ *Garrity*, unlike the other penalty cases, presented the question whether compelled statements were admissible in criminal prosecutions.

Edward Garrity, the Chief of Police for the New Jersey Borough of Bellmawr, other police officers, and a court clerk were suspected of fixing traffic tickets.²⁰ The Supreme Court of New Jersey ordered the state Attorney General to conduct an investigation into the alleged misconduct and report his findings.²¹ A deputy attorney general questioned the suspects.²² A state statute required that they answer questions or lose their jobs and pensions.²³ Before conducting the interrogation, the deputy attorney general told each interviewee that

¹⁶ See *Garrity v. New Jersey*, 385 U.S. 493 (1967) (preventing state from using statements that police gave under threat of job forfeiture in criminal prosecutions); *Spevack v. Klein*, 385 U.S. 511 (1967) (plurality opinion) (prohibiting disbarment of attorney who refused to comply with subpoena duces tecum by asserting Fifth Amendment privilege); *Gardner v. Broderick*, 392 U.S. 273 (1968) (prohibiting state from firing police officer who refused to waive Fifth Amendment privilege and testify before grand jury); *Uniformed Sanitation Men Ass’n, Inc. v. Comm’r of Sanitation*, 392 U.S. 280 (1968) (prohibiting state from firing state employees who refused to waive privilege and answer questions); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (prohibiting state from terminating contracts for five years because of contractors’ refusal to waive immunity and answer questions); *Lefkowitz v. Cunningham*, 431 U.S. 801, 802-04 (1977) (prohibiting state from removing political party officer from position for five years because of refusal to waive immunity and answer questions).

¹⁷ *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984).

¹⁸ 385 U.S. 493. The Supreme Court consolidated two state cases for review: *State v. Naglee*, 207 A.2d 689 (N.J. 1965), and *State v. Holroyd*, 208 A.2d 146 (N.J. 1965) (per curiam). In *Naglee*, Edward Garrity, chief of police for the Borough of Bellmawr, New Jersey; Edward Virtue, a police officer in that department; and Helen Naglee, a court clerk, were defendants. *Garrity*, 207 A.2d at 691. In *Holroyd*, defendants James Holroyd, Eugene Elwell, and Donald Murray were police officers in the Borough of Barrington, New Jersey. *Holroyd*, 208 A.2d at 147; *Garrity*, 385 U.S. at 502 (Harlan, J., dissenting). Naglee died before the Supreme Court decided the case. *Garrity*, 385 U.S. at 502 (Harlan, J., dissenting).

¹⁹ *Garrity*, 385 U.S. at 494-95.

²⁰ Id. at 494; id. at 502 (Harlan, J., dissenting).

²¹ Id. at 494.

²² Id. at 502 (Harlan, J., dissenting).

²³ Id. at 494-95 n.1 (quoting N.J. Rev. Stat. § 2A:81-17.1 (1953) (repealed 1970)).

his answers could be used in state criminal proceedings and that "if he refused to answer he would be subject to removal from office."²⁴ The interviewees answered the questions posed to them.²⁵ Later, local prosecutors brought criminal charges²⁶ and introduced into evidence at trial the statements that the defendants had made to the deputy attorney general.²⁷ After their convictions, the defendants appealed, claiming that the use of their compelled statements violated their constitutional rights. New Jersey courts rejected those claims.²⁸ But, in a five-to-four decision, the United States Supreme Court reversed, holding the admission of the compelled statements unconstitutional.²⁹ The Court offered two explanations: The statements were inadmissible under the Due Process Clause as coerced confessions, and the state's threat to fire the police officers unless they gave statements was an unconstitutional condition.³⁰

In a later case, the Court offered a different rationale for the result in *Garrity*: The police officers' compelled statements were analogous to immunized testimony and thus inadmissible under the Fifth Amendment privilege.³¹ Many lower courts have followed suit,

²⁴ *Garrity*, 385 U.S. at 494. For a full text of the warnings that the deputy attorney general read to *Garrity*, see *id.* at 504 n.1 (Harlan, J., dissenting).

²⁵ *Id.* at 495.

²⁶ The prosecution charged the defendants with the misdemeanor of "conspiracy to obstruct the due administration of the Motor Vehicle Traffic Laws" in violation of N.J. Stat. Ann. § 2A:98-1 (1952) (repealed 1979). *State v. Holroyd*, 208 A.2d 146, 147 (N.J. 1965) (per curiam); *State v. Naglee*, 207 A.2d 689, 691 & n.1 (N.J. 1965).

²⁷ *Garrity*, 385 U.S. at 495.

²⁸ *Holroyd*, 208 A.2d at 148; *Naglee*, 207 A.2d at 693-96.

²⁹ *Garrity*, 385 U.S. at 500.

³⁰ *Id.* at 497-98, 500. In contrast, in cases in which states imposed sanctions for refusals to answer questions or waive immunity, the Court determined that the privilege against self-incrimination governed. See, e.g., *Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation*, 392 U.S. 280, 284-85 (1968); *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *Spevack v. Klein*, 385 U.S. 511, 513-19 (1967).

³¹ See *Lefkowitz v. Turley*, 414 U.S. 70, 82 (1973) ("It seems to us that the State intended to accomplish what *Garrity* specifically prohibited—to compel testimony that had not been immunized."). Justice White, the author of that opinion, had first analogized police officers' compelled statements to immunized testimony in his dissenting opinion in *Spevack v. Klein*, 385 U.S. 511 (1967), the companion case to *Garrity*. Noting the Court's decision in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), which held that a state grant of transactional immunity prevents federal prosecutors from using the immunized testimony or its fruits, *Murphy*, 378 U.S. at 79, he argued that "[a] similar accommodation should be made" when public officials answer job-related questions under threat of discharge. *Spevak*, 385 U.S. at 530-32 (White, J., dissenting).

Later Supreme Court opinions also describe *Garrity* as a case involving the Fifth Amendment privilege or immunity. See, e.g., *Pillsbury Co. v. Conboy*, 459 U.S. 248, 270 n.4 (1983) (Marshall, J., concurring) (describing forfeiture statute in *Garrity* as "allow[ing] the authorities to compel a public officer, under threat of removal from office, to provide incriminating testimony in exchange for immunity from use or derivative use of that testimony at a criminal proceeding"); *Kelley v. Johnson*, 425 U.S. 238, 248 (1976) ("*Garrity*, of

describing *Garrity* as a case involving the privilege³² and compelled statements as "immunized."³³

course, involved the protections afforded by the Fifth Amendment to the United States Constitution . . ."); *Maness v. Meyers*, 419 U.S. 449, 475 (1975) (White, J., concurring) (noting that *Garrity* involved "immunity from being incriminated by his responses to his interrogation"). But see *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) (noting that statements in *Garrity* "were made involuntarily"). The Court never has expressly disavowed the rationales it provided in *Garrity*.

Although one can read *Turley* to require a formal immunity grant before a state can compel a statement from an employee, see *Turley*, 414 U.S. at 70 ("States must offer to the witness whatever immunity is required to supplant the privilege . . ."), courts have determined that *Garrity* immunity attaches automatically when a police officer makes a statement induced by threat of job loss, see *infra* note 43 and accompanying text.

³² See, e.g., *Singer v. Maine*, 49 F.3d 837, 845 (1st Cir. 1995) (stating that *Garrity* involves "Fifth Amendment rights of public employees"); *Wiley v. Mayor of Baltimore*, 48 F.3d 773, 776 (4th Cir. 1995) (characterizing *Garrity* as "[c]ase[] involving the Fifth Amendment rights of public employees"); *Grand Jury Subpoenas Dated December 7 & 8 v. United States*, 40 F.3d 1096, 1101 (10th Cir. 1994) (noting that *Garrity* "address[es] the application of the Fifth Amendment privilege to public employees"); *United States v. Devitt*, 499 F.2d 135, 142 (7th Cir. 1974) (describing *Garrity* as case "provid[ing] adequate protection of the witness's Fifth Amendment rights"); *Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation*, 426 F.2d 619, 624 (2d Cir. 1970) (noting *Garrity*'s reasoning that "the threat of removal constituted the kind of compulsion against which the constitutional privilege was directed and that therefore statements made under such compulsion could not be used at the criminal trial" and that this proposition "followed from the very language of the Fifth Amendment"); *Carney v. City of Springfield*, 532 N.E.2d 631, 634 & n.5 (Mass. 1988) (holding that statements taken from public employees under threat of job loss "are inadmissible in a subsequent criminal proceeding because they [are] compelled testimony under the Fifth Amendment"); see also *Charles B. Craver, The Inquisitorial Process in Private Employment*, 63 Cornell L. Rev. 1, 37 n.169 (1977) (describing *Garrity* as case involving violation of privilege against self-incrimination).

³³ See, e.g., *Grand Jury Subpoenas Dated December 7 & 8*, 40 F.3d at 1102 ("*Garrity*'s protection . . . acts to immunize these compelled statements . . ."); *United States v. Koon*, 34 F.3d 1416, 1433 n.13 (9th Cir. 1994) (discussing "immunity [that] attaches in the *Garrity* context"), rev'd on other grounds, 518 U.S. 81 (1996); *In re Federal Grand Jury Proceedings*, 975 F.2d 1488, 1490 (11th Cir. 1992) (per curiam) ("[*Garrity*] provides immunity to police officers who witness potentially criminal activity and are asked to provide information to police internal investigation personnel."); *United States v. Friedrick*, 842 F.2d 382, 396 (D.C. Cir. 1988) (holding that defendant "enjoyed use immunity conferred upon him as an FBI employee subject to an administrative investigation"); *Benjamin v. City of Montgomery*, 785 F.2d 959, 960-61 (11th Cir. 1986) (describing protection of compelled statements as "*Garrity*-type immunity"); *Hester v. City of Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985) (relying on *Garrity* to hold that "the privilege against self-incrimination affords a form of use immunity which, absent waiver, automatically attaches to compelled incriminating statements as a matter of law"); *Nat'l Acceptance Co. v. Bathalter*, 705 F.2d 924, 928 (7th Cir. 1983) ("Statements made under . . . threat [of job termination] would be 'immunized' by *Garrity*."); *Weston v. HUD*, 724 F.2d 943, 948 (Fed. Cir. 1983) (referring to grants of "immunity through . . . *Garrity* exclusion rule"); *Carney*, 532 N.E.2d at 634 n.5 ("Informal 'immunity' under the Fifth Amendment to the United States Constitution can also arise where public employees are compelled to answer questions . . ."); *Matt v. Larocca*, 518 N.E.2d 1172, 1174 (N.Y. 1987) (noting that "when a public employee is compelled to answer questions or face removal upon refusing to do so, the responses are cloaked with immunity automatically," prohibiting use of "the compelled statements [and] their fruits"); see also *Larry J. Ritchie, Compulsion That Violates the Fifth Amendment*:

The compelled statements in *Garrity* resembled formally immunized testimony. When a witness before a court or a grand jury asserts the privilege against self-incrimination, the prosecution can compel her testimony by securing an immunity grant.³⁴ In *Kastigar v. United States*,³⁵ the Court held that “use and derivative use” immunity³⁶ (often simply called “use immunity”)³⁷ is sufficient to require a witness to testify despite an assertion of the privilege.³⁸ If an immunized

The Burger Court’s Definition, 61 Minn. L. Rev. 383, 388-89 (1977) (describing *Garrity* protection as “informal use immunity”).

³⁴ 18 U.S.C. §§ 6002-6003 (1994) establish the statutory basis for federal prosecutorial authority to seek immunity grants. Section 6002 provides that “no testimony or other information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.” § 6002. Although 21 U.S.C. contains an analogous immunity provision for drug cases, see 21 U.S.C. § 884 (1994), the Department of Justice relies exclusively on the provisions in 18 U.S.C. See United States Attorneys’ Manual § 9-23.100.

In order to immunize a witness, “a United States Attorney . . . must obtain approval by the Attorney General or Deputy Attorney General and then request the court to order the witness to testify.” *United States v. Harvey*, 869 F.2d 1439, 1450 (11th Cir. 1989) (Clark, J., dissenting); see also 18 U.S.C. § 6003(b) (1994) (requiring approval from high-level Department of Justice officials). Courts must issue immunity orders upon receipt of a proper application from the prosecution. See 18 U.S.C. § 6003(a) (stating that court “shall issue” immunity order upon proper request); *Pillsbury Co.*, 459 U.S. at 254 n.11 (discussing courts’ “minor role” in immunity process). Thus, in effect, prosecutors decide whether a witness receives statutory immunity.

Federal prosecutors sometimes circumvent the above-described requirements by granting “informal” or “hip pocket” immunity—an agreement between the prosecutor and the witness that the witness will provide information in exchange for a prosecutorial promise either to forego prosecution entirely or not to use the witness’s testimony. See *Harvey*, 869 F.2d at 1450-51. This practice sometimes leaves the scope of the immunity unclear, see, for example, *United States v. Kilroy*, 27 F.3d 679, 685 (D.C. Cir. 1994) (determining meaning of term “use immunity” in agreement between prosecution and defendant), and has drawn judicial ire, see, for example, *United States v. Kilpatrick*, 594 F. Supp. 1324 (D. Colo. 1984) (holding grant of pocket immunity to have “violated the applicable statutes and tainted the grand jury indictment with its illegality”). But see *United States v. Kilpatrick*, 821 F.2d 1456, 1470 & n.13 (10th Cir. 1987) (reversing district court’s decision to dismiss indictment based in part on taint caused by pocket immunity and noting that “the use of ‘informal immunity’ . . . is entirely proper”), aff’d in part sub nom *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988).

³⁵ 406 U.S. 441 (1972).

³⁶ The phrase “use and derivative use” has been used synonymously with “direct and indirect use,” the terminology in the immunity statute. See Ronald F. Wright, Congressional Use of Immunity Grants After Iran-Contra, 80 Minn. L. Rev. 407, 418-19 (1995).

³⁷ See *Kilroy*, 27 F.3d at 685 (describing “common understanding” of term “use immunity”).

³⁸ *Kastigar*, 406 U.S. at 462 (holding that grant of use and derivative use immunity “suffices to supplant” privilege).

Before *Kastigar*, a grant of transactional immunity, which precludes the prosecution from bringing charges for any crime described in immunized testimony, was required to supplant the privilege. See *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892) (“In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immu-

witness persists in her refusal to testify, she can be held in contempt.³⁹ The immunized testimony is thus compelled by the contempt threat.

Use immunity does not foreclose later criminal charges against the witness for matters described in the immunized testimony. Rather, it prevents the prosecution from making use of the testimony and any evidence derived therefrom against the witness in a criminal trial.⁴⁰ The *Kastigar* Court reasoned that a grant of such immunity is coextensive with the Fifth Amendment because it leaves the witness-turned-defendant “in substantially the same position as if the witness had claimed the Fifth Amendment privilege” and remained silent.⁴¹

The *Garrity* protection operates in a similar manner—it enables states to compel statements from public employees by threatening job termination but bars use of the statements in later criminal prosecutions.⁴² Accordingly, when the deputy attorney general threatened *Garrity* and the others with loss of their jobs, he granted them de facto use immunity in exchange for their answers.⁴³ Although *Garrity* and

nity against future prosecution for the offence to which the question relates.”). In *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), the Court suggested that use and derivative use immunity might be sufficient to supplant the privilege and later settled the issue in *Kastigar*.

Some have criticized the Court for allowing protection short of transactional immunity to supplant the privilege, see, for example, *Kastigar*, 406 U.S. at 467-71 (Marshall, J., dissenting); others have contended that by barring use of evidence derived from immunized testimony, rather than just the testimony itself, *Kastigar* requires too much, see Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 911 (1995) (“The *Kastigar* rule . . . should be trimmed back Compelled testimony should be excluded from a criminal case . . . but not fruits.”).

Some states continue to require transactional immunity to overcome the provisions in their constitutions analogous to the Fifth Amendment privilege. See, e.g., *State v. Gonzalez*, 853 P.2d 526, 532-33 (Alaska 1993) (construing state constitution to require transactional immunity in exchange for compelled testimony); *State v. Miyasaki*, 614 P.2d 915, 922-23 (Haw. 1980) (same); *Attorney Gen. v. Colleton*, 444 N.E.2d 915, 921 (Mass. 1982) (same); *State v. Soriano*, 684 P.2d 1220, 1232 (Or. Ct. App. 1984) (same).

³⁹ See, e.g., *United States v. Wilson*, 421 U.S. 309, 314-16 & 315 n.7 (1975).

⁴⁰ See *Kastigar*, 406 U.S. at 452-53.

⁴¹ *Id.* at 462; see also *id.* at 457 (holding that witness given use immunity was “in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity” (quoting *Murphy*, 378 U.S. at 79)).

⁴² See, e.g., *Minnesota v. Murphy*, 465 U.S. 420, 436 n.7 (1984) (“Our cases indicate . . . that a State may validly insist on answers [from public employees and others] to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination.”).

⁴³ See, e.g., *Hester v. City of Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985) (describing *Garrity* as requiring “a form of use immunity which, absent waiver, automatically attaches to compelled incriminating statements as a matter of law”). Professor Warnken takes issue with this interpretation of *Garrity*. He maintains that *Garrity* and its progeny do not provide for a self-executing form of immunity. Warnken, *supra* note 11, at 486-88. He contends that in order for a police department to compel answers under threat

the others did not first assert the privilege, an action typically required to trigger its protection,⁴⁴ the Court since has concluded that when assertion itself would be penalized, as was the case in *Garrity*, the protection is self-executing.⁴⁵

B. The Significance of the Immunized Testimony Analogy

1. Restrictions on Prosecutorial Use of Immunized Testimony

Courts' treatment of police officers' compelled statements as "immunized" is significant because of the stringent restrictions that courts impose on prosecutorial use of such testimony. As noted above, the prosecution cannot introduce immunized testimony or any evidence derived therefrom in its case-in-chief,⁴⁶ nor can it use immunized testimony to impeach the person who gave it.⁴⁷

There are important additional limitations on the use of formally immunized testimony. First, relying on *Kastigar's* command that a grant of use immunity "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect,"⁴⁸ and its conclusion that immunity "therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness,"⁴⁹ a number of courts prohibit prosecutors from making "nonevidentiary use" of a criminal

of job loss, it must grant formal immunity or, at the minimum, give the officer *Miranda*-like warnings, including an assurance that any statements are immunized. *Id.* at 482-88. Although language in both *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973), and *Lefkowitz v. Cunningham*, 431 U.S. 801, 809 (1977), suggests that a formal immunity grant may be necessary, Warnken concedes that courts have decided otherwise, treating *Garrity* immunity as self-executing without warnings. Warnken, *supra* note 11, at 488.

⁴⁴ See, e.g., *Murphy*, 465 U.S. at 429 ("[A] witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself."); *United States v. Kordel*, 397 U.S. 1, 10 (1970) (holding that failure of corporate officer who answered interrogatories "to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself").

⁴⁵ See *Murphy*, 465 U.S. at 434-35 (noting that express or implied threat that invocation of privilege will result in penalty, as was case in *Garrity*, excuses failure to assert privilege).

⁴⁶ See, e.g., *United States v. Hubbell*, 530 U.S. 27, 38 (2000) (noting that Fifth Amendment protects "against the prosecution's use of incriminating information derived directly or indirectly from the compelled testimony"); *Kastigar*, 406 U.S. at 453 (holding that immunity that prohibits "the use of compelled testimony, as well as evidence derived directly and indirectly therefrom" affords sufficient protection to supplant privilege). If a portion of a witness's immunized testimony is materially false, both his false testimony and his truthful testimony are admissible in a perjury prosecution. See *United States v. Apfelbaum*, 445 U.S. 115, 130-32 (1980).

⁴⁷ See *New Jersey v. Portash*, 440 U.S. 450 (1979).

⁴⁸ *Kastigar*, 406 U.S. at 453.

⁴⁹ *Id.*

defendant's previously given immunized testimony.⁵⁰ There is no agreed-upon definition of "nonevidentiary uses,"⁵¹ but they are

⁵⁰ See, e.g., *United States v. Semkiw*, 712 F.2d 891, 893-94 (3d Cir. 1983) (remanding case to lower court to determine whether prosecutor "made use of [immunized testimony] in the preparation and conduct of the trial"); *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) ("[I]f the immunity protection is to be coextensive with the Fifth Amendment privilege . . . then it must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury."); *United States v. Harris*, 780 F. Supp. 385, 390 (N.D. W. Va. 1991) (holding that "no use whatsoever" can be made of immunized statements); *People v. Gwillim*, 274 Cal. Rptr. 415, 426 (Cal. Ct. App. 1990) ("The district attorney . . . may not use defendant's [compelled] statement to advance the criminal prosecution *in any way.*" (emphasis added)); *State v. Gault*, 551 N.W.2d 719, 724-25 (Minn. 1996) (following *McDaniel* and holding that privilege prohibits nonevidentiary use of compelled statements); *State v. Irizarry*, 639 A.2d 305, 310 n.1 (N.J. Super. Ct. App. Div. 1994) (interpreting New Jersey Supreme Court precedent as prohibiting non-evidentiary uses).

Some courts have rejected the notion that the Fifth Amendment bars nonevidentiary uses. See, e.g., *United States v. Bolton*, 977 F.2d 1196, 1199 (7th Cir. 1992) (holding that "tangential" effect of immunized testimony on prosecutor's thought process not prohibited); *United States v. Byrd*, 765 F.2d 1524, 1531 (11th Cir. 1985) ("It is our view that the privilege against self-incrimination is concerned with direct and indirect *evidentiary* uses of compelled testimony, and not with the exercise of prosecutorial discretion."). Other courts have yet to decide the issue. See, e.g., *United States v. Kilroy*, 27 F.3d 679, 687 (D.C. Cir. 1994) (assuming, without deciding, that nonevidentiary use is prohibited); *United States v. Serrano*, 870 F.2d 1, 17 (1st Cir. 1989) (rejecting notion that "all nonevidentiary use necessarily violates the Fifth Amendment" but leaving open possibility that some such uses may require dismissal of indictment). There appears to be a difference of opinion among Ninth Circuit panels about the status of nonevidentiary uses. Compare *United States v. Mapelli*, 971 F.2d 284, 287 (9th Cir. 1992) (citing *McDaniel*, 482 F.2d at 311, to support proposition that prosecutors may not use immunized testimony to plan trial strategy), with *United States v. Montoya*, 45 F.3d 1286 (9th Cir. 1995) (assuming that Fifth Amendment bars some nonevidentiary uses but noting that circuit has not yet decided and concluding that "[w]e need not decide that general issue in this case").

For a general discussion of nonevidentiary use of immunized testimony, see *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) (per curiam) [hereinafter *North I*], opinion partially withdrawn and superseded in part on reh'g by 920 F.2d 940 (D.C. Cir. 1990) (per curiam) [hereinafter *North II*], cert. denied, 500 U.S. 941 (1991); Gary S. Humble, Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment, 66 Tex. L. Rev. 351 (1987) (contending that federal immunity statute and Fifth Amendment do not preclude nonevidentiary uses); Kristine Strachan, Self-Incrimination, Immunity, and Watergate, 56 Tex. L. Rev. 791, 806-10 (1978) (contending that courts should bar nonevidentiary uses); Jefferson Keenan, Note, Nonevidentiary Use of Compelled Testimony and the Increased Likelihood of Conviction, 32 Ariz. L. Rev. 173 (1990) (examining prejudicial effects of nonevidentiary use of compelled testimony); Douglas A. Turner, Note, Nonevidentiary Use of Immunized Testimony: Twenty Years After *Kastigar* and the Jury Is Still Out, 20 Am. J. Crim. L. 105, 132 (1992) (arguing that nonevidentiary use of immunized testimony is prohibited by Fifth Amendment and federal immunity statute).

⁵¹ See *North I*, 910 F.2d at 857 (noting that precise definition is "elusive"); Humble, supra note 50, at 353 (defining nonevidentiary uses as "uses that do not furnish a link in the chain of evidence"); Strachan, supra note 50, at 807 (defining nonevidentiary uses as those that do not "culminate directly or indirectly in the presentation of evidence against the immunized person").

Because a prosecutor's strategic use of immunized testimony, such as in the formulation of questions, can alter the evidence presented at trial, the line between evidentiary and

thought to include “assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.”⁵²

Second, in *United States v. North*,⁵³ the Court of Appeals for the District of Columbia, also relying on the above-quoted language in *Kastigar*, held that the privilege bars the prosecution from making “indirect evidentiary use” of immunized testimony by calling witnesses whose testimony has been shaped, altered, or affected by the defendant’s earlier immunized testimony.⁵⁴ In “the most expansive reading of the Fifth Amendment to date regarding the evidentiary use of immunized testimony,”⁵⁵ *North* prohibited admission of testimony from witnesses who had employed a criminal defendant’s previously given immunized testimony “to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or con-

nonevidentiary uses of immunized testimony can be fuzzy and perhaps is nonexistent. See Kate E. Bloch, Fifth Amendment Compelled Statements: Modeling the Contours of Their Protected Scope, 72 Wash. U. L.Q. 1603, 1605 n.14 (1994) (arguing that line between evidentiary and nonevidentiary uses “remains to be clearly drawn”); Turner, *supra* note 50, at 130 (concluding that “a nonevidentiary use is really an indirect evidentiary use that is yet to be proven”). Courts sometimes differ on whether uses are “evidentiary” or “nonevidentiary.” Compare *Senkiv*, 712 F.2d at 895 (adopting *McDaniel* definition of nonevidentiary use to include “planning cross-examination”), with *Byrd*, 765 F.2d at 1531 (holding that prosecutor’s use of knowledge of immunized testimony to elicit answers on cross-examination probably would constitute evidentiary use).

⁵² *McDaniel*, 482 F.2d at 311-12; see also *North I*, 910 F.2d at 857-58 (explaining that immunized testimony “may help explicate evidence theretofore unintelligible, and it may expose as significant facts once thought irrelevant (or vice versa). Compelled testimony could indicate which witnesses to call, and in what order. Compelled testimony may be helpful in developing opening and closing arguments”).

⁵³ *North I*, 910 F.2d 843. On the *North* decisions, see generally Wright, *supra* note 36, at 423-29; Michael Gilbert, Note, The Future of Congressional Use Immunity After *United States v. North*, 30 Am. Crim. L. Rev. 417, 423-30 (1993); Jerome A. Murphy, Comment, The Aftermath of the Iran-Contra Trials: The Uncertain Status of Derivative Use Immunity, 51 Md. L. Rev. 1011, 1035-45 (1992).

⁵⁴ *North I*, 910 F.2d at 860. In *North*, former National Security Council staff member Lieutenant Colonel Oliver L. North gave nationally televised testimony before Congress pursuant to a grant of immunity. *Id.* at 851. Later, an independent prosecutor brought charges against North and secured convictions. *Id.* at 851-52. The court of appeals reversed in part because the prosecution had called witnesses whose trial testimony may have been affected by watching the immunized testimony on television. *Id.* at 852.

⁵⁵ *United States v. Helmsley*, 941 F.2d 71, 82 (2d Cir. 1991).

temporaneous statements.”⁵⁶ Several appellate courts have followed *North*.⁵⁷

2. *The Prosecution's Burden*

Restrictions on the use of immunized testimony do more than limit the prosecution’s arsenal. If a particular use is prohibited, the prosecution bears the burden of demonstrating that it has not employed the defendant’s previously given immunized testimony in that manner.⁵⁸ The more uses prohibited, the greater the burden on the prosecution to demonstrate that its presentation of the case is untainted.⁵⁹ *Kastigar* describes this “heavy burden”⁶⁰ in no uncertain terms: “This burden of proof, which we reaffirm as appropriate, is not

⁵⁶ *North I*, 910 F.2d at 860. Before *North*, Professor Strachan had suggested that such use of immunized testimony might run afoul of the Fifth Amendment. See Strachan, *supra* note 50, at 817 (noting possibility that witnesses who saw immunized testimony “would shape their testimony as a result of knowledge of . . . immunized testimony”).

⁵⁷ See *United States v. Schmidgall*, 25 F.3d 1523, 1528 (11th Cir. 1994) (“The protection against self-incrimination is violated whenever the prosecution presents a witness whose testimony is shaped—directly or indirectly—by immunized testimony”); *People v. Reali*, 895 P.2d 161, 166 (Colo. Ct. App. 1994) (citing *North* for proposition that “to the extent that another person has been exposed to the immunized testimony, the testimony of that other person may be so ‘tainted’ that it would be a violation of the defendant’s rights to make use of that person’s testimony”); *State v. Vallejos*, 883 P.2d 1269, 1276-78 (N.M. 1994) (applying *North* to reverse murder conviction when prosecution called witness whose trial testimony appeared to have been altered by defendant’s immunized testimony). The Court of Appeals for the Ninth Circuit has rejected *North*, holding instead that the prosecution can call a witness whose testimony may have been affected by a defendant’s testimony so long as the witness has a source for the information in his testimony that is independent of the immunized testimony. See *United States v. Koon*, 34 F.3d 1416, 1431-33 (9th Cir. 1994), rev’d on other grounds, 518 U.S. 81 (1996).

Some courts have determined that *Kastigar* also prohibits prosecutors from calling a witness if the prosecution used the defendant’s previously given immunized testimony to indict the witness and secure his cooperation. See, e.g., *United States v. Hampton*, 775 F.2d 1479, 1488-89 (11th Cir. 1985) (holding that if defendant’s immunized testimony or its fruits contributed directly or indirectly to case against witness, witness’s testimony was not allowed); *United States v. Kurzer*, 534 F.2d 511, 517-18 (2d Cir. 1976) (remanding for determination of whether immunized testimony was used or relied on in negotiations leading to witness’s cooperation).

⁵⁸ See *Kastigar*, 406 U.S. at 460-62 (describing prosecution’s burden).

⁵⁹ Courts have rejected speculative claims of taint involving convoluted theories of causation. See, e.g., *United States v. Kilroy*, 27 F.3d 679, 681-82, 687 (D.C. Cir. 1994) (rejecting defendant’s immunity claim based on allegation that retroactively immunized statements given in connection with unrelated out-of-state investigation led to brief newspaper article that may have prompted private audit of pension plan that defendant had defrauded when audit led to referral of case for prosecution and then to charges that defendant challenged as tainted); *Helmsley*, 941 F.2d at 76-78 (rejecting defendant’s challenge based on claim that her immunized testimony before state grand jury on unrelated matter prompted *New York Times* story that caused *New York Post* reporter to reopen inquiry that triggered state and federal tax fraud investigations that ultimately led to federal indictment).

⁶⁰ *Kastigar*, 406 U.S. at 461.

limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.”⁶¹ Mere denials of use of immunized testimony often are inadequate to satisfy the burden.⁶² If the prosecution fails to demonstrate affirmatively that its case is untainted by a defendant’s immunized testimony, it may suffer dismissal or suppression of critical evidence, even if it has not made use of the testimony.⁶³ All that a witness-turned-defendant need do to benefit from this “very substan-

⁶¹ *Id.* at 460. Despite the Court’s description of the burden as “heavy,” some courts require that the prosecution prove by only a “preponderance of the evidence” that its case is untainted. See, e.g., *Schmidgall*, 25 F.3d at 1528; *United States v. Byrd*, 765 F.2d 1524, 1529 (11th Cir. 1985). Courts reason that the burden nonetheless remains “heavy” because the prosecution suffers exclusion of evidence if it fails to meet the burden. See *United States v. Montoya*, 45 F.3d 1286, 1292 n.6 (9th Cir. 1995) (quoting *North I*, 910 F.2d at 873). If a hearing is necessary to resolve such a claim, “a trial court may hold . . . pre-trial, post-trial, [or] mid-trial [hearings] (as evidence is offered), or it may employ some combination of these methods. A pre-trial hearing is the most common choice.” *North I*, 910 F.2d at 854. For a discussion of the types of hearings used and the standard of proof the prosecution must satisfy, see, for example, *Wright*, *supra* note 36, at 419-21; *Murphy*, *supra* note 53, at 1023-27.

⁶² *Hampton*, 775 F.2d at 1485.

⁶³ See, e.g., *Braswell v. United States*, 487 U.S. 99, 117 (1988) (“Even in cases where the government does not employ the immunized testimony for any purpose—direct or derivative—against the witness, the Government’s inability to meet the ‘heavy burden’ it bears may result in preclusion of crucial evidence that was obtained legitimately.”).

The remedies for the prosecution’s failure to satisfy *Kastigar* differ, depending on the nature of the alleged use. If the prosecution cannot disprove a claim that a defendant’s previously given immunized testimony shaped a witness’s testimony or recollection, the appropriate remedy is the suppression of that witness’s testimony at trial. See, e.g., *People v. Reali*, 895 P.2d 161, 166 (Colo. Ct. App. 1994) (holding that prosecution cannot use testimony of tainted witness); *State v. Gault*, 551 N.W.2d 719, 724-25 (Minn. Ct. App. 1996) (upholding suppression of tainted witness testimony). Arguably, the same result will follow if the prosecution cannot disprove that the immunized testimony led it to a witness or motivated a witness to testify against the defendant. Cf. *United States v. Ceccolini*, 435 U.S. 268, 278-79 (1978) (assuming that absent attenuation, testimony of witness discovered by exploitation of illegally seized evidence must be excluded). But see *United States v. Kurzer*, 534 F.2d 511, 514 (2d Cir. 1976) (reviewing lower court’s order dismissing indictment based on finding that grand jury witness was motivated to testify by defendant’s earlier immunized testimony); *People v. Gwillim*, 274 Cal. Rptr. 415, 427-28 (Cal. Ct. App. 1990) (assuming that if compelled statement motivated essential prosecution witness to press charges, remedy would be dismissal).

In most jurisdictions, mere exposure to immunized testimony does not disqualify a prosecutor from working on a case. See, e.g., *United States v. Palumbo*, 897 F.2d 245, 251 (7th Cir. 1990). But, if the prosecutor is unable to prove her ability to make strategic and tactical decisions free of her knowledge of the immunized testimony, the court may require disqualification. See, e.g., *United States v. Mapelli*, 971 F.2d 284, 288 (9th Cir. 1992) (holding that prosecutor should have been disqualified where “[t]he government offered no evidence whatsoever that it would not use [immunized] information”). Courts are reluctant to require dismissal when the decision to prosecute may have been influenced by immunized testimony. See *Montoya*, 45 F.3d at 1295-97 (rejecting as “too remote” defendant’s contention that decision to prosecute him was based on prosecutor’s assessment that he

tial protection" is demonstrate that he has testified under a grant of immunity about matters related to the prosecution.⁶⁴

This robust exclusionary rule creates substantial risks when prosecutors bring charges against previously immunized witnesses.⁶⁵ The prosecution can satisfy its burden by showing that witnesses, investigators, and prosecutors have not been exposed to the immunized testimony, either directly by reading it, or indirectly by otherwise learning of it.⁶⁶ But if there has been exposure, the prosecution can prevail only if it can establish that exposed witnesses, investigators, or prosecutors have not been "tainted" by the immunized testimony.⁶⁷ This

gave false immunized testimony); *Byrd*, 765 F.2d at 1530 (declining to inquire into prosecutor's motive to indict).

There is a split in authority whether derivative use of a defendant's immunized testimony before a grand jury requires dismissal of the indictment. Compare *United States v. Rivieccio*, 919 F.2d 812, 816 (2d Cir. 1990) (holding that derivative use of immunized testimony before grand jury does not require dismissal of indictment; appropriate remedy is suppression at trial), with *North I*, 910 F.2d at 869 (finding that when "the grand jury process itself is violated and corrupted," then "the indictment becomes indistinguishable from the constitutional . . . transgression"), and *North II*, 920 F.2d at 947-49 (holding that indirect evidentiary use of defendant's previously given immunized testimony before grand jury that returns indictment requires dismissal). Some jurisdictions carve out two "narrow exceptions" when dismissal is required: (1) "when the defendant testifies under immunity before the same grand jury returning the indictment or when the immunized testimony is placed before the indicting grand jury"; and (2) "when the government concedes that the indictment rests almost exclusively on tainted evidence." *Rivieccio*, 919 F.2d at 816 n.4. But see *United States v. Zielezinski*, 740 F.2d 727, 729 (9th Cir. 1984) (rejecting view that indictment returned by grand jury that heard defendant's immunized testimony must be dismissed).

⁶⁴ *Kastigar*, 406 U.S. at 461-62 ("One raising a claim under this [immunity] statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.").

⁶⁵ See, e.g., *Braswell*, 487 U.S. at 117 n.10 (recognizing that "the burden of proving an independent source that a grant of immunity places on the Government" could have "a deleterious effect on law enforcement efforts").

⁶⁶ See, e.g., *Mapelli*, 971 F.2d at 287-88 (finding that assignment of case to unexposed prosecutor defeats *Kastigar* claim); *North I*, 910 F.2d at 872 (holding that prosecution can meet *Kastigar* burden by showing "that the witness was never exposed to North's immunized testimony").

⁶⁷ Most courts have determined that exposure to immunized testimony alone does not necessarily taint either a prosecutor or a witness. See, e.g., *North II*, 920 F.2d at 944 ("Some [witnesses] might convincingly testify that their exposure had no effect on their trial or grand jury testimony."); *Palumbo*, 897 F.2d at 251 (refusing to disqualify exposed prosecutor even though "it may be wise for the government to ask another attorney to take over this case"; prosecution might be able to prove all evidence used in future was derived from independent sources); *United States v. Serrano*, 870 F.2d 1, 17-18 (1st Cir. 1988) (rejecting view that prosecutor's exposure to immunized testimony necessarily taints her and results in nonevidentiary use); *United States v. Pantone*, 634 F.2d 716, 720 (3d Cir. 1980) ("We do not believe that mere access to immunized grand jury testimony prevents the government from carrying its burden under *Kastigar*."); *Gwillim*, 274 Cal. Rptr. at 425 ("[A] witness's knowledge [of immunized testimony] does not necessarily nullify the wit-

requires a showing that the immunized testimony has not shaped or affected a witness's testimony or influenced investigative or prosecutorial decisions in the case.

C. "Garrity Immunity" and Threats to Police Prosecutions

Despite their use of the term "immunized" to describe police officers' compelled statements, courts need not vest those statements with the full measure of protection they bestow on formally immunized testimony.⁶⁸ Nonetheless, appellate courts that have considered the matter have concluded that the scope of *Garrity* immunity is commensurate with that of formally immunized testimony, signaling that the use restrictions applicable to immunized testimony and compelled statements are the same.⁶⁹ But circumstances surrounding immunity

ness's testimony."); see also Turner, *supra* note 50, at 128 ("The courts of appeals agree that a prosecutor's mere knowledge of immunized testimony does not bar prosecution for crimes to which the compelled testimony relates."). But see *United States v. McDaniel*, 482 F.2d 305, 311-12 (8th Cir. 1973) (finding that when prosecutor read immunized testimony in early stages of investigation, was then unaware that testimony had been immunized, and made no efforts to segregate information learned from immunized testimony, "although [the prosecutor] asserts that he did not use [the immunized] testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of this case"); *State v. Gonzalez*, 853 P.2d 526, 531 (Alaska 1993) (rejecting view that "procedures exist to probe the mind of a witness" to determine extent to which exposure resulted in taint of testimony).

Even if a witness, investigator, or prosecutor claims that exposure did not prevent him from giving untainted testimony or making decisions independent of the immunized testimony, a court may find those claims unpersuasive. See *United States v. Schmidgall*, 25 F.3d 1523, 1529 (11th Cir. 1994) (noting that uncorroborated testimony from agent "would not generally be sufficient to carry the burden"); *United States v. Harris*, 780 F. Supp. 385, 391-93 (N.D. W. Va. 1991) (holding that when prosecutor took immunized statement from witness and had copy of immunized statement in file, his testimony that he had forgotten interview and was unaware of statement in file was insufficient to satisfy *Kastigar*).

⁶⁸ See *infra* Part III.A.2 (arguing that courts should relax prohibitions on some uses of police officers' compelled statements); see also *Bloch*, *supra* note 11, at 638-39 ("Precisely what 'exempt from use' meant [in *Garrity*] or means today is both complex and open to debate.").

⁶⁹ See *United States v. Veal*, 153 F.3d 1233, 1240 n.7 (11th Cir. 1998) ("We can analogize between the scope of the federal use immunity statute . . . and *Garrity* analysis under the Fifth Amendment because our court has held that a *Garrity*-protected statement is tantamount to use immunity."); *Kinamon v. United States (In re Grand Jury Proceedings)*, 45 F.3d 343, 347 (9th Cir. 1995) (treating compelled statement as equivalent of formally immunized testimony); *United States v. Koon*, 34 F.3d 1416, 1431 n.11 (9th Cir. 1994) (noting that despite government concern about applying immunity doctrine to police officers' compelled statements, "[b]ecause the use of compelled testimony in the *Garrity* context also directly implicates the individual's Fifth Amendment right against self-incrimination, *Kastigar*'s discussion of the scope of the Fifth Amendment privilege against self-incrimination is directly relevant in the *Garrity* context"), rev'd on other grounds, 518 U.S. 81 (1996). The Ninth Circuit, however, does not extend formally immunized testimony as much protection as some other appellate courts. See *supra* note 57 (describing *Koon* court's rejection of *North* rule).

grants are very different from those surrounding a police department's acquisition of compelled statements. Those differences make the use restrictions considerably more troublesome in prosecutions of police officers for a number of reasons.

First, *Garrity* immunity is likely to plague prosecutions of police officers far more often than analogous immunity issues will surface in other sorts of prosecutions. Prosecutors seldom grant formal immunity⁷⁰ and almost never immunize witnesses whom they may later prosecute.⁷¹ In contrast, some police departments routinely compel statements from both officers suspected of potentially criminal misconduct and police witnesses to alleged misconduct, who later may become suspects. If sufficient evidence exists to prosecute a police officer from such a department, the chances are good that internal affairs investigators have started an administrative investigation and have compelled a statement.⁷²

⁷⁰ For example, in 1998, federal prosecutors in the U.S. Attorneys' Offices and the Criminal Division of the Department of Justice requested departmental approval to seek immunity for only 1616 witnesses. Sourcebook of Criminal Justice Statistics 1999, at 396 tbl.5.1 (Ann L. Pastore & Kathleen Maguire eds., 1999). The same year, the Department prosecuted 69,769 defendants. *Id.* at 419 tbl.5.21. It is worth noting that it is unclear how many witnesses actually received immunity from federal prosecutors. On one hand, prosecutors may request authorization from the Department but never apply for or use an immunity grant. On the other, the number of requests for authorization does not reflect the use of informal immunity agreements. See *supra* note 34 (describing hip-pocket immunity).

⁷¹ See *Pillsbury Co. v. Conboy*, 459 U.S. 248, 288 & n.8 (1983) (Stevens, J., dissenting) ("[I]n almost all cases, an offer of immunity—even of use immunity—means sacrificing the chance to prosecute the witness for his own role in the criminal enterprise."). Although I am not aware of any statistics on this point, after a decade of service as an Assistant U.S. Attorney in the Central District of California and the Northern District of New York, which included several supervisory positions, I cannot recall a case in which a previously immunized witness was prosecuted for matters described in his testimony. The Department of Justice imposes a stringent approval requirement for such prosecutions. See U.S. Attorneys' Manual § 9-23.400 (requiring Attorney General to approve prosecution after compulsion).

⁷² See, e.g., *Indep. Comm'n on the L.A. Police Dep't, Report of the Independent Commission on the Los Angeles Police Department* 161-62 (1991) [hereinafter Christopher Comm'n Report] (describing routine LAPD practice of taking compelled statements in police shooting investigations despite adverse impact on criminal prosecutions); *Perez & Muir*, *supra* note 13, at 215 (describing routine practice of taking compelled statements in Oakland); *id.* at 217 (noting that civilian police review commission in Berkeley takes compelled statements); *Warnken*, *supra* note 11, at 456-57 (describing routine practice of compelled questioning of police officers suspected of misconduct). But see *L.A. County Sheriff's Dep't, Report by Special Counsel James G. Kolts & Staff* 149 (1992) [hereinafter Kolts Comm'n Report] (noting that Los Angeles County Sheriff's Department does not interview police officers involved in shootings "[i]n order not to compromise a possible criminal prosecution"); *Report of the Rampart Independent Review Panel*, *supra* note 9, at 111 (describing practice of some police departments of conducting criminal investigation before administrative investigation).

Second, prosecutors can better avoid problems arising from immunized testimony than from compelled statements. Prosecutors usually control whether a court will grant formal immunity.⁷³ As a result, they can refrain from seeking immunity if later prosecution of the witness is a possibility. In contrast, prosecutors are powerless to prevent internal affairs investigators from "immunizing" suspect officers.

Third, even when an immunity grant is unavoidable, prosecutors have greater ability to minimize potential hazards than when police investigators compel statements. If it is necessary to immunize a witness who likely will be prosecuted, prosecutors may be able to postpone the immunity grant until after prosecution, eliminating *Kastigar*

⁷³ Other governmental actors, such as prosecutors from other jurisdictions and legislative bodies, can secure judicially ordered grants of immunity without a prosecutor's consent. See, e.g., *United States v. Serrano*, 870 F.2d 1, 13 (1st Cir. 1989) (involving defendant immunized by Puerto Rican House of Representatives and later prosecuted by federal government); *United States v. First W. State Bank of Minot*, 491 F.2d 780, 782 (8th Cir. 1974) (involving state grant of immunity and federal prosecution); see also *North I*, 910 F.2d at 851 (involving federal prosecution following congressional grant of immunity pursuant to 18 U.S.C. § 6005 (1988)). One federal court has held that, in some circumstances, a trial court can immunize a witness without a request from the prosecution. See *Virgin Islands v. Smith*, 615 F.2d 964, 973-74 (3d Cir. 1980) ("[I]n cases where the government can present no strong countervailing interest, a court has inherent authority to immunize a witness"). But see *United States v. Turkish*, 623 F.2d 769, 771-78 (2d Cir. 1980) (criticizing doctrine of "judicial immunity" and noting widespread rejection of doctrine by courts, despite academic endorsement). Although immunity that other actors confer can impair a prosecutor's efforts to later prosecute the immunized witness, that threat is less troubling than *Garrity* immunity for several reasons.

First, it is uncommon for either prosecutors or other investigative bodies to grant immunity. For example, in fiscal year 1992, Congress sought immunity for only one witness, and federal agencies sought immunity for only 198 witnesses. See Wright, *supra* note 36, at 427 n.91. It is unlikely that more than a small fraction of those witnesses, if any, were later prosecuted for matters described in their testimony.

Second, because prosecutors' offices share the common objective of effective law enforcement, they likely will exercise caution before immunizing witnesses subject to possible prosecution elsewhere. For example, federal prosecutors must inform the Department of Justice of any opposition by state or local prosecutors when seeking authorization to request that a court order immunity. See U.S. Attorneys' Manual § 9-23.130; U.S. Attorneys' Criminal Resource Manual § 721 (1997), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00721.htm. Likewise, Congress has exhibited a willingness to forgo immunity grants that may impair criminal investigations. See Wright, *supra* note 36, at 429-35 (noting that "Congress has been stingy with grants of immunity over the last twenty-five years," and that results in *North* and in *United States v. Poindexter*, 698 F. Supp. 300 (D.D.C. 1988), rev'd 951 F.2d 369 (D.C. Cir. 1991), cert. denied 506 U.S. 1021 (1992), have discouraged congressional use of immunity). Even if a prosecutor or another entity does grant immunity despite another prosecutor's interest in a later prosecution of the witness, the immunizing agency can prevent harm by limiting dissemination of the immunized testimony.

Third, prosecutors from other jurisdictions and legislators are likely to be more accountable to the electorate for decisions to grant immunity than police internal affairs units are for their decisions to compel statements and thus confer *Garrity* immunity.

problems.⁷⁴ If it is impracticable to prosecute before granting immunity, the prosecution can delay the immunity grant to provide time to implement measures to reduce the possibility of taint and marshal evidence to prove at a *Kastigar* hearing that its evidence is untainted.⁷⁵

For example, before granting immunity, the prosecution can preserve (or “can”) statements from witnesses who may later testify against the soon-to-be-immunized potential defendant.⁷⁶ If the prosecution later brings charges against the immunized witness, it can rebut a claim that its evidence has been derived from the witness-turned-defendant’s immunized testimony by demonstrating that it gathered the evidence before the immunity grant. If the witness-turned-defendant claims that the immunized testimony has affected the testimony of prosecution witnesses, comparison of preimmunity canned statements to postimmunity challenged testimony can disprove that claim.⁷⁷

⁷⁴ See United States Attorney’s Manual § 9-23.212 (“It is preferable as a matter of policy to punish offenders for their criminal conduct prior to compelling them to testify.”). Preimmunity prosecution solves immunity-related problems in two ways. First, it enables prosecutors to secure a taint-free conviction before granting immunity. Second, a final conviction and sentence, or an acquittal, extinguishes the defendant-witness’s Fifth Amendment rights with respect to the charges that are the subject of the disposition. See, e.g., *Mitchell v. United States*, 526 U.S. 314, 315 (1999) (holding that privilege survives until sentencing); *Ibarra v. Martin*, 143 F.3d 286, 288-89 (7th Cir. 1998) (finding no privilege after acquittal).

⁷⁵ See Keenan, *supra* note 50, at 187 (“[I]n all but the most exceptional cases, the government is, prior to granting immunity, in a unique position to evaluate any possible [*Kastigar*] proof problems and take the necessary prophylactic measures to insure that its burden can be met.”).

⁷⁶ “Canning” is the process by which the prosecutor seals and files or otherwise documents and preserves preimmunity testimony and other evidence. See *North I*, 910 F.2d at 871 (describing “canning” as sealing and filing evidence and prosecution theories); U.S. Attorneys’ Criminal Resource Manual, § 726 (1997), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00726.htm (recommending steps to avoid taint); Turner, *supra* note 50, at 114 (describing “canning”). A common method of “canning” is to question the witness before a grand jury.

⁷⁷ See, e.g., *United States v. Koon*, 34 F.3d 1416, 1433 n.13 (9th Cir. 1994) (“The process of formal grants of immunity . . . provides time for the prosecutor to protect the testimony of potential witnesses by obtaining canned statements and by shielding these witnesses from exposure to the immunized testimony.” (citation omitted)), rev’d on other grounds, 518 U.S. 81 (1996); see also *North I*, 910 F.2d at 872-73 (holding that prosecution can meet burden by establishing “that the allegedly tainted testimony contains no evidence not ‘canned’ by the prosecution before such exposure occurred”); *North II*, 920 F.2d 940, 943 (D.C. Cir. 1990) (“[I]f such steps are not taken, it may well be extremely difficult for the prosecutor to sustain its burden of proof that a witness exposed to immunized testimony has not shaped his or her testimony in light of the exposure”).

Canning witness testimony does not guarantee that the witnesses will escape later exposure to, or be untainted by, immunized testimony. It merely creates a record of what the witness knew and remembered before exposure. If the witness gives substantially identical testimony after exposure, it should satisfy the prosecution’s burden of proving that the immunized testimony did not shape the witness testimony. See *North I*, 910 F.2d at 872-73.

In contrast, prosecutors are unable to dictate the timing of police officers' compelled statements. Internal affairs investigators decide when to take compelled statements and may do so without considering the potential fallout from *Garrity* immunity. Indeed, they often compel statements at the outset of an investigation, foreclosing opportunities for preimmunity prosecution or evidence gathering.⁷⁸

Fourth, prosecutors are more likely to be forewarned of previously immunized testimony by a potential defendant than of a compelled statement by a police officer. Advance notice provides an opportunity to minimize exposure. In many cases, the prosecutor's office that is considering charges against a defendant will have been involved in, and thus will be aware of, an earlier decision to grant immunity. Even if a different prosecutor's office or another governmental entity granted immunity,⁷⁹ the formal process surrounding immunity grants⁸⁰ may give the charging prosecutor adequate notice.⁸¹ Alerted to a possible *Kastigar* challenge, prosecutors can take precautionary measures. For example, if a transcript of a potential defendant's testimony from an earlier proceeding exists, the prosecutor's office can ensure that the prosecutors and investigators assigned to the case do not read it, enhancing the chances of later proving that the

If a witness whose testimony has been canned changes his testimony after exposure, canning may be insufficient to satisfy the *Kastigar* burden in a jurisdiction that follows the *North* rule prohibiting witness testimony shaped by immunized testimony.

Although it may be possible to prove that testimony from a witness who was exposed to a compelled statement is untainted even in the absence of canned testimony, see *North II*, 920 F.2d at 944 (suggesting that witnesses "might convincingly testify that their exposure had no effect on their trial or grand jury testimony"), that method of satisfying *Kastigar* is of little use if the witness is uncooperative. See *infra* notes 97-101 and accompanying text (describing police officers' reluctance to testify against fellow officers).

⁷⁸ See *Koon*, 34 F.3d at 1433 n.13 (

[T]he individuals who question the employee are concerned about potential misconduct, and their goal is generally to learn the facts of a situation as quickly as possible. They do not necessarily act with the care and precision of a prosecutor weighing the benefits of compelling testimony against the risks to future prosecutions; indeed, they may not even have the prospect of prosecution and the requirements of the Fifth Amendment in mind.).

Internal investigators may take a statement before the local district attorney is aware of potential criminal conduct. Some police departments postpone efforts to take a compelled statement until after completion of any criminal investigation. *Supra* note 72 (describing policy in some police departments of postponing compelled statements).

⁷⁹ See *supra* note 73 (describing immunity grants by government actors other than prosecutor's office that brings charges).

⁸⁰ See *supra* note 34 (describing formal process).

⁸¹ Sometimes formal immunity catches prosecutors unaware. See, e.g., *United States v. McDaniel*, 482 F.2d 305, 307 (8th Cir. 1973) (involving case where both local and federal prosecutors were unaware of state statute conferring transactional immunity on all witnesses who testify before state grand jury).

prosecution team has not derived evidence from the immunized testimony or made nonevidentiary use of it.⁸²

Garrity immunity is more likely to operate as a trap for an unwary prosecutor. It may not be apparent that a police officer's oral or written statement is "compelled" within the meaning of *Garrity*. Unlike formal immunity grants, it is not always clear whether or when *Garrity* immunity has attached. In *Garrity*, there was both a state statute requiring job termination for failure to answer questions and an express threat of that result.⁸³ Although some early decisions suggested that both were necessary to trigger *Garrity* protection,⁸⁴ courts more recently have found statements to be "compelled" if a suspect officer believes that refusal to answer questions will cause him to lose his job and if there is an objective basis for that belief rooted in official action.⁸⁵ Application of this test expands the universe of police officers' statements that a court may deem "compelled," possibly including statements other than those made to internal affairs investigators, such as arrest reports, use-of-force reports, or postincident oral statements to supervisors.⁸⁶ It also leaves the status of a police officer's statement uncertain until there has been litigation to determine whether the subjective and objective prongs of the test have been satisfied. Without a clear warning, prosecutors and investigators may overlook the possibility that *Garrity* immunity has attached and thus neglect to avoid exposure or take other precautions.

⁸² See, e.g., United States v. Semkiw, 712 F.2d 891, 895 (3d Cir. 1983) ("[T]he government might easily have removed any cloud from the trial by assigning it to another attorney who did not and would not review the immunized testimony.").

⁸³ See *supra* notes 23-24 and accompanying text.

⁸⁴ See, e.g., United States v. Indorato, 628 F.2d 711, 716 (1st Cir. 1980) (holding that explicit threat of discharge and state statute or ordinance mandating discharge was required to trigger *Garrity* immunity); People v. Sapp, 934 P.2d 1367, 1370-71 (Colo. 1997) (discussing *Indorato* rule).

⁸⁵ See, e.g., United States v. Friedrich, 842 F.2d 382, 395 (D.C. Cir. 1988) (holding objectively reasonable belief sufficient to trigger *Garrity* protection); United States v. Camacho, 739 F. Supp. 1504, 1515 (S.D. Fla. 1990) (adopting *Friedrich* test); *Sapp*, 934 P.2d at 1372-73 (adopting *Friedrich* test over *Indorato* test).

⁸⁶ See, e.g., *Camacho*, 739 F. Supp. at 1511-12 (holding that informal statements to investigators who were at defendant's home to recover clothing were compelled). Courts have not been receptive to claims that the threat of discipline for insubordination alone renders police reports or oral statements "compelled." See, e.g., *Sapp*, 934 P.2d at 1373-74 (holding that subjective fear of discipline for insubordination without reasonable basis for fear of termination is insufficient); People v. Bynum, 512 N.E.2d 826, 827 (Ill. App. Ct. 1987) (holding accident report not compelled despite possibility of discipline for refusal to complete); Commonwealth v. Harvey, 491 N.E.2d 607, 609-11 (Mass. 1986) (holding tape-recorded statements from interviews admissible despite "possibility of adverse consequences from the defendant's failure to cooperate"). Robert Myers has argued that police reports fall within the "required records" exception to the Fifth Amendment privilege, rendering the *Garrity* doctrine inapplicable. Myers, *supra* note 11, at 539.

Fifth, prosecutors are better able to limit dissemination of immunized testimony than compelled statements. Prosecutors often elicit immunized testimony in secret before a grand jury.⁸⁷ A prosecutor's office can satisfy its burden of disproving taint at a *Kastigar* hearing if it has prevented dissemination to potential witnesses and assigned unexposed prosecutors and investigators to the case against the person who gave the immunized testimony.⁸⁸ When police department investigators take compelled statements, however, the prosecution has no similar ability to prevent or delay dissemination.⁸⁹ Internal affairs investigators may show or describe a suspect officer's compelled statements to complainants and witnesses as a routine investigative technique.⁹⁰ Indeed, they may have a legal obligation to disclose the compelled statements to all officers subject to possible disciplinary proceedings arising from the same incident, including police officers who were present at the scene of the misconduct and therefore are potential prosecution witnesses.⁹¹ Thus, once an internal affairs inves-

⁸⁷ See Fed. R. Crim. P. 6(e)(2) (mandating that matters occurring before federal grand jury remain secret); Wright, *supra* note 36, at 427-28 (describing prosecutors' ability to limit dissemination of immunized testimony). If disclosure of immunized grand jury testimony is necessary to comply with the prosecution's discovery obligations, the prosecution can seek a protective order limiting unnecessary dissemination. See Fed. R. Crim. P. 16(d)(1).

⁸⁸ See *United States v. Bolton*, 977 F.2d 1196, 1199 (7th Cir. 1992) (finding that assignment of new prosecutors who had only minimal exposure to immunized testimony defeats claim of nonevidentiary use); *North I*, 910 F.2d 843, 872 (D.C. Cir. 1990) (holding that prosecution can meet *Kastigar* burden by showing "that the witness was never exposed to North's immunized testimony"); *United States v. First W. State Bank of Minot*, 491 F.2d 780, 785-87 (8th Cir. 1974) (holding that proof that prosecutors were unexposed to immunized testimony satisfies prosecution's burden of disproving nonevidentiary use); *State v. Irizarry*, 639 A.2d 305, 312 (N.J. Super. Ct. App. Div. 1994) ("[S]ubstituting an assistant prosecutor with no knowledge of the immunized testimony for one who does have knowledge would seemingly be an effective step to bolster the State's position that no taint is present").

⁸⁹ See *United States v. Koon*, 34 F.3d 1416, 1433 n.13 (9th Cir. 1994) ("[B]ecause statements [from police officers] may be compelled soon after the event in question, it is far more likely that these statements will be circulated before there is an opportunity to can testimony."), rev'd on other grounds, 518 U.S. 81 (1996).

⁹⁰ See *id.* (noting that internal affairs investigators may circulate compelled statements "out of a legitimate desire to ascertain the truth of the matter"); *People v. Gwillim*, 274 Cal. Rptr. 415, 423 (Cal. Ct. App. 1990) (noting that victims and witnesses are frequently exposed to police officers' compelled statements); Perez & Muir, *supra* note 13, at 219 (describing general practice of civilian review boards to allow complainants access to entire administrative investigation file); Jim Newton, LAPD Revamping Probes of Shootings by Officers, L.A. Times, Sept. 14, 1994, at A1 ("[The LAPD] circulates copies of the compelled statements to investigators and to other officers involved in a shooting who may be facing discipline.").

⁹¹ For example, California law requires such disclosure to all officers who face disciplinary proceedings in connection with an incident. Cal. Gov't Code § 3303(g) (West 1995); see also *Skelly v. State Pers. Bd.*, 539 P.2d 774, 782 (Cal. 1975) (en banc) (holding that due

tigator has taken a police officer's compelled statement, the danger is great that she will disseminate it in a manner detrimental to later prosecution.

Compounding these problems is the fact that exposure to a compelled statement need not be direct (such as through reading or hearing the statement itself); it can be indirect. For example, a prosecutor or investigator may be exposed by interviewing a witness who communicates facts derived from her exposure to a compelled statement.⁹² Similarly, an exposed prosecutor or investigator can taint a witness.⁹³ Whether exposure is direct or indirect, the prosecution's failure to disprove taint can result in loss of the evidence or dismissal of the charges.⁹⁴

In short, the fact that internal affairs investigators control the taking and dissemination of police officers' compelled statements creates substantial dangers that are absent when prosecutors immunize witnesses. Police investigators making good-faith efforts to probe allegations of misconduct can derail a criminal case inadvertently. Moreover, even if committed to the task of properly investigating police misconduct for purposes of imposing administrative discipline, some internal affairs investigators, who may know or have worked with the suspect officer, may disfavor criminal prosecution.⁹⁵ If in-

process requires that civil servants facing disciplinary procedures receive "written notice of the proposed action . . . [and] all materials relied upon to support the charges").

⁹² See, e.g., *State v. Gault*, 551 N.W.2d 719, 725 (Minn. Ct. App. 1996) (noting that prosecutor can be "exposed indirectly" by discussing case with person exposed to *Garrity* statements).

⁹³ See, e.g., *Sex Charge Dismissed Against Brainerd Cop*, Star Trib. (Minneapolis-St. Paul), Sept. 22, 1998, at 2B, 1998 WL 6369045 (describing case where court held that witnesses were tainted when prosecutor informed them of contents of compelled statement). In addition, even the questions that a prosecutor or investigator poses to a witness may be tainted by a compelled statement. See *Pillsbury Co. v. Conboy*, 459 U.S. 248, 255 (1983) (holding that questions based on transcript of immunized testimony were "derived" from that testimony).

⁹⁴ See supra note 63 and accompanying text (discussing sanctions for failure to disprove taint).

⁹⁵ See, e.g., Scott Glover & Matt Lait, *Prosecutors Say LAPD Hindered Probe*, L.A. Times, Oct. 6, 2000, at B1 (quoting from pleading from Los Angeles County District Attorney's Office filed in connection with prosecution of police officers stating that "[m]any of these investigators from [the] LAPD have relationships, even friendships, with some of the individuals under investigation. Accordingly, it is not surprising that there are some LAPD investigators who have difficulty conducting a thorough and complete investigation of the police agency to which they belong"); Matt Lait & Scott Glover, *Police Cases Sent to D.A. Drop Sharply*, L.A. Times, Oct. 23, 2000, at A1 (discussing failure of LAPD to notify district attorney's office of possible police criminality); see also Christopher Comm'n Report, supra note 72, at 161-62 (describing LAPD investigation of shootings by police officers to include group interviews during which officers involved can "get their stories straight," unrecorded preinterviews of police witnesses before tape-recorded interviews, and exclusion of district attorney personnel until completion of LAPD investigation); Kolts

clined to jeopardize a prosecution, an unscrupulous internal affairs investigator can compel a statement when not required to do so in order to "immunize" the target officer. Similarly, such an investigator can expose potential prosecution witnesses to compelled statements in order to taint and possibly disqualify them from testifying.⁹⁶

Garrity immunity also provides police officers who witness misconduct or otherwise know of incriminating information with a means of evading their obligation to testify truthfully.⁹⁷ Police officers often are reluctant to testify against colleagues.⁹⁸ Departmental regulations

Comm'n Report, *supra* note 72, at 138-42 (describing Los Angeles County Sheriff's Department practices of preinterviewing suspect police officers, shutting off tape recorder during interviews, and using leading questions to assist officers involved in shootings to give exculpatory explanations). A recent report prepared at the request of the police union in Los Angeles found that "Internal Affairs is run by officers steeped in LAPD's codes of silence and loyalty, aggression, retaliation and image protection." Erwin Chemerinsky, An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal, pt. V.C (Sept. 11, 2000), http://www.usc.edu/dept/law/faculty/chemerinsky/rampart_finalrep.html; see generally Human Rights Watch, *supra* note 6, at 5 (describing "apparent bias in favor of fellow officers" within internal affairs divisions).

⁹⁶ See *United States v. Koon*, 34 F.3d 1416, 1433 n.13 (9th Cir. 1994) (noting that taking and circulating compelled statement may "occur out of a desire to protect one's colleagues. Thus, in the context of internal affairs investigations, police officers could protect each other by compelling testimony and disseminating it widely, placing any criminal investigation at serious risk and possibly barring prosecution altogether"), rev'd on other grounds, 518 U.S. 81 (1996); Bloch, *supra* note 11, at 677 ("[P]olice officers in many circumstances can insulate their colleagues inadvertently, and, of course, intentionally, from any consequence in the criminal realm."); Newton, *supra* note 90 (describing complaints by local district attorney about police practice of taking compelled statements from police officers involved in shootings and concern that unit assigned to such shootings "is less of an aggressive investigative unit than a protective shield that buffers officers from prosecution"). Because the *Garrity* doctrine only prohibits use of compelled statements in criminal prosecutions, dissemination will not damage the internal affairs investigation.

An internal affairs investigator also may choose to "leak" a compelled statement to the media. In high-profile cases, which investigations into police criminality often are, such leaks can result in widely circulated news stories about the statements, thus exposing potential witnesses, investigators, or prosecutors. See, e.g., Richard A. Serrano, 3 in King Beating Say They Feared for Lives, L.A. Times, May 21, 1991, at A1 (summarizing and quoting from compelled statements of LAPD officers Koon, Powell, and Wind in Rodney King beating case).

⁹⁷ For a discussion of police perjury, see, for example, Gabriel J. Chin & Scott C. Wells, The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. Pitt. L. Rev. 233, 255 (1998) (considering problem of police lying to "conceal police abuses or corruption in various forms"); see also Donald A. Dripps, Police, Plus Perjury, Equals Polygraphy, 86 J. Crim. L. & Criminology 693, 694-98 (1996) (describing police perjury in suppression hearings); Christopher Slobogin, Testilying: Police Perjury and What to Do About It, 67 U. Colo. L. Rev. 1037, 1040-48 (1996) (discussing police "lying to convict the innocent and lying to convict the guilty").

⁹⁸ See, e.g., Jerome H. Skolnick & James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* 108-12, 122 (1993) (discussing operation of "code of silence" among police officers); Chin & Wells, *supra* note 97, at 236-40 & nn.15-22 (citing authorities); Wayne A. Kerstetter, *Toward Justice for All: Procedural Justice and the Review of Citizen*

nonetheless may require that officers truthfully report misconduct.⁹⁹ That obligation, coupled with the threat of administrative discipline or prosecution for false statements or perjury, may prompt some officers to provide truthful information against fellow officers. In order to avoid the difficult choice between providing truthful testimony against a fellow officer or risking administrative sanction or prosecution for nondisclosure or false statements, unscrupulous officers falsely may claim to be tainted by a compelled statement. Even if the prosecution can demonstrate that such a claim of taint is not credible, that alone may be insufficient to satisfy the prosecution's heavy burden of presenting affirmative proof that the witness's testimony is untainted.¹⁰⁰ If the prosecution is unable to meet the *Kastigar*-imposed burden, *Garrity*'s progeny require suppression of the testimony.¹⁰¹ At the same time, it will be difficult to bring a perjury prosecution, which would require proof beyond a reasonable doubt that the witness officer's claim of taint was false.

Complaints, in Police Violence, *supra* note 8, at 234, 240 (noting "unwillingness of officers to testify against other officers"). Commissions in New York City and Los Angeles found that the police "code of silence" is a pervasive impediment to investigations into police criminality. See Mollen Comm'n Rep., *supra* note 6, at 53-58 ("Officers who report misconduct are ostracized and harassed; become targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis."); Christopher Comm'n Report, *supra* note 72, at 168-71 ("Perhaps the greatest single barrier to the effective investigation and adjudication of complaints is the officers' unwritten 'code of silence' . . . [which] consists of one simple rule: an officer does not provide adverse information against a fellow officer.").

⁹⁹ See, e.g., 3 L.A. Police Dep't Manual § 815.05 (2000) ("When any employee who is not a supervisor becomes aware of possible misconduct by another member of this Department, the employee shall immediately notify a supervisor.").

¹⁰⁰ See *United States v. Poindexter*, 951 F.2d 369, 376 (D.C. Cir. 1991) (

[E]ven if North's assertion [that, when called as a prosecution witness against Poindexter, he was unable to segregate his personal knowledge of events surrounding the Iran-Contra scandal from what he heard from Poindexter's televised immunized testimony] were to be given no weight, the [independent counsel] would still have failed to meet his burden, which is to demonstrate that the immunized testimony did *not* influence the witness.).

The prosecutor could prevail in such a situation only if she could demonstrate that the allegedly tainted witness had not been directly or indirectly exposed to the compelled statement.

¹⁰¹ Claims of taint also enable witness officers to avoid speaking to criminal investigators or prosecutors. If an officer maintains that he is tainted by a compelled statement, investigators or prosecutors likely will refrain from interviewing him to avoid a claim that, through information received from him, they have been exposed to the content of the compelled statement. See *State v. Gault*, 551 N.W.2d 719, 725 (Minn. Ct. App. 1996) (noting that prosecutor can be "exposed indirectly" by discussing case with person exposed to *Garrity* statements).

Unfortunately, the danger of a witness engaging in such conduct is not fanciful.¹⁰² In the California state prosecution of the police officers who used excessive force when arresting Rodney King, a crucial witness successfully made such a claim. The prosecution planned to call Sergeant Fred Nichols to testify that the defendants' conduct violated LAPD use-of-force policy.¹⁰³ Nichols, a nationally known use-of-force expert, was a compelling witness, having served as "officer-in-charge" of the LAPD physical training and self-defense unit.¹⁰⁴ He already had appeared before the state grand jury that returned the indictment in the case, testifying that the defendants' conduct violated LAPD use-of-force policy.¹⁰⁵ The LAPD later demoted Nichols,¹⁰⁶ who took a stress-related leave of absence.¹⁰⁷ When the prosecution

¹⁰² The dissenting judge in *North I* and *North II* suggested that witnesses against North may have watched North's immunized testimony in order to undermine the criminal prosecution, *North I*, 910 F.2d at 920 n.7 (Wald, C.J., dissenting) (asserting that Justice Department officials from same Administration as North, "presumably aware of . . . *Kastigar* . . . soaked *themselves* in the immunized testimony"); and that similar sabotage could occur in the future, *North II*, 920 F.2d at 953 (Wald, C.J., dissenting) ("[T]he majority provides an easy out for conflicted government officials; they can immunize *their colleagues* from prosecution by exposing *themselves* to immunized testimony."). The majority did not deny that such a scenario could occur. Rather, it concluded that proof of such conduct would not matter when assessing whether use of the immunized testimony violated the Fifth Amendment.

The more important point, however, is that such a conspiracy—even if it existed—would be entirely irrelevant to the issue before us, which is whether or not North's Fifth Amendment right was violated. The Department of Justice could have held evening classes in "The Parsing and Deconstruction of *Kastigar*" for the very purpose of "derailing" the [Independent Counsel's] prosecution, and such a curriculum would have been simply irrelevant to the question of whether or not the prosecution's case made use of North's compelled testimony.

North I, 910 F.2d at 865.

¹⁰³ Reporter's Daily Transcript of Proceedings, Vol. 71, Apr. 14, 1992, at 12,608-09, *People v. Powell*, No. BA035498 (Cal. Super. Ct. 1991) [hereinafter *Powell Transcript*] (proffer by Deputy District Attorney Alan Yochelson based on Nichols's grand jury testimony) (on file with the *New York University Law Review*). Expert testimony about the proper use of force by police officers played an important role in both the federal and state cases. See, e.g., George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* 46-47, 57-61 (1995). Professor Fletcher concludes that courts should not admit such testimony in police brutality cases. *Id.* at 255-56. For a response to Fletcher, see Robert P. Mosteller, *Popular Justice*, 109 Harv. L. Rev. 487, 506 n.71 (1995) (reviewing Fletcher, *supra*, and contending that Fletcher proposal would improperly deny prosecutors method of proving that police defendants acted with requisite mental state).

¹⁰⁴ Richard A. Serrano, *LAPD Reassigns Training Expert*, L.A. Times, Sept. 21, 1994, at B1.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Linda Deutsch, *King Trial Judge Excuses Officer Who Didn't Want to Testify*, Orange County Reg. (Cal.), Apr. 15, 1992, at A3, 1992 WL 6346645.

called him as a witness at trial, Nichols was unwilling to testify.¹⁰⁸ At a *Kastigar* hearing, he claimed that he had been exposed to the defendant officers' compelled statements and that he could not distinguish between the statements and other sources of information when forming his opinion.¹⁰⁹ Even though Nichols had never before claimed that the self-serving and exculpatory compelled statements¹¹⁰ influenced his opinion,¹¹¹ the state court determined that the prosecution had failed to meet its burden under *Kastigar* and disqualified Nichols.¹¹² As a result, in the middle of trial, the state prosecutors found themselves without a crucial witness.¹¹³ They were forced to rely on the testimony of a less-impressive expert witness who had little "experience on the street."¹¹⁴ Trial observers concluded that the contrast between that unimpressive prosecution testimony and the contrary opinion of the more experienced and qualified defense expert witness was a major factor in the acquittals.¹¹⁵

D. Measures to Address Garrity Hazards

It is difficult to measure the full impact of *Garrity* immunity. Reported appellate decisions demonstrate that *Garrity* immunity can, and does, result in dismissals, lost convictions, and suppression of criti-

¹⁰⁸ *Id.*

¹⁰⁹ *Powell* Transcript, supra note 103, at 12,625-30.

¹¹⁰ See Serrano, supra note 96 (describing self-exculpating compelled statements of LAPD officers Koon, Powell, and Wind).

¹¹¹ See Deutsch, supra note 107.

¹¹² See *Powell* Transcript, supra note 103, at 12,723-27. The court recognized that Nichols was reluctant to testify and that his claim that his testimony was affected by the compelled statements may have been false, but noted that the prosecution had not met its burden of proof under *Kastigar*. *Id.* A federal court had reached a similar conclusion when Oliver North, when called as a prosecution witness against his former boss, John Poindexter, in a prosecution arising out of the Iran-Contra scandal, claimed that Poindexter's immunized testimony had affected his memory of events. *United States v. Poindexter*, 951 F.2d 369, 376 (D.C. Cir. 1991) (holding that, even if North's claim that he was immersed in and tainted by Poindexter's immunized testimony was likely false, prosecution did not meet "heavy burden" of demonstrating that North's testimony was not influenced).

¹¹³ The prosecution had difficulty finding an expert who was willing to testify against the defendants. See *Powell* Transcript, supra note 103, at 12,610.

¹¹⁴ Fletcher, supra note 103, at 47; see also Roger Parloff, *Maybe the Jury Was Right*, Am. Law., June 1992, at 7, 79 ("The prosecution expert, Commander Michael Bostic, who had not served in the field for many years, arrived at his own conclusion about when the officers should have stopped hitting King by repeatedly watching the tape in the tranquility of his office or home.").

¹¹⁵ See Fletcher, supra note 103, at 46-47, 51; John Riley, *What the Jury Heard That the Public Didn't*, Newsday (New York) (Nassau Ed.), May 13, 1992, at 5 (comparing defense expert, "whom several observers described as the trial's single most riveting and effective witness" with only expert whom prosecution used, "a white-collar cop who hadn't been on the street in more than a decade").

cal evidence.¹¹⁶ Courts also suppress evidence or dismiss charges without published decisions.¹¹⁷ Perhaps more significantly, *Garrity* may cause prosecutors to refrain from bringing charges or calling witnesses at trial.¹¹⁸ When investigating cases and determining whether to seek charges, prosecutors have little choice but to assume (absent clear authority to the contrary) that the full panoply of use restrictions applies to compelled statements. Although some courts have not yet determined whether to adopt restrictions on nonevidentiary and indirect evidentiary uses of compelled statements or to equate the scope of *Garrity* immunity with that of formal immunity, it would be foolhardy to bring a case against police officers built on potentially tainted evidence or strategy, particularly in light of possible judicial sympathy for such defendants.¹¹⁹

One indication of the severity of the problem is that the Department of Justice has developed an elaborate approach to evidence

¹¹⁶ See, e.g., *Kinamon v. United States (In re Grand Jury Proceedings)*, 45 F.3d 343, 347-48 (9th Cir. 1995) (holding that use of compelled statement before grand jury may require dismissal); *United States v. Friedrick*, 842 F.2d 382, 400-02 (D.C. Cir. 1988) (suppressing compelled statement of FBI agent); *United States v. Camacho*, 739 F. Supp. 1504, 1512 (S.D. Fla. 1990) (suppressing statements that followed formally compelled statements); *State v. Gault*, 551 N.W.2d 719, 724-25 (Minn. Ct. App. 1996) (upholding trial court's suppression of witness testimony because of prosecution's failure to disprove direct and indirect exposure to compelled statements and dismissal of indictment for failure to disprove nonevidentiary use); cf. *Holloway v. State*, 339 A.2d 319 (Md. Ct. Spec. App. 1975) (holding admission of compelled statement erroneous but harmless).

¹¹⁷ See, e.g., *Sex Charge Dismissed Against Brainerd Cop*, *supra* note 93 (describing dismissal of sexual misconduct case because witnesses were informed of contents of compelled statements); *Stalking Charges Against Policeman Dropped*, *Star Trib.* (Minneapolis-St. Paul), July 19, 1996, at 3B, 1996 WL 6921117 (describing dismissal of stalking charges against police officer resulting from prosecutor's access to compelled statement).

¹¹⁸ See, e.g., *Newton*, *supra* note 90 (describing complaints from prosecutors that compelled statements served as obstacles to prosecution); cf. *Wright*, *supra* note 36, at 436 & n.117 (suggesting that congressional immunity grants, although far less common, may have same effect).

A recent, and bizarre, manifestation of the *Garrity* immunity problem occurred in connection with efforts to investigate the LAPD Rampart Division scandal. Apparently concerned that the local district attorney was not willing or able to avoid taint from compelled statements, LAPD officials refused to share evidence with the district attorney until federal prosecutors had first screened it. The district attorney accused the police chief of withholding evidence, and the police chief called the district attorney a liar. See *Jim Newton & Tina Daunt, Police Panel Forced to Sit Out Feud*, *L.A. Times*, Mar. 17, 2000, at A1.

¹¹⁹ See, e.g., *Alexa P. Freeman, Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 Hastings L.J. 677, 727 (1996) (describing federal prosecutors' beliefs that judges exercise discretion to sentence police defendants more leniently than civilians who commit analogous offenses); *id.* at 741 ("[M]ost of the prosecutors interviewed think that the elimination of judicial discretion in [police brutality] cases is a change for the better because courts tended to sympathize with police and excuse their criminal behavior."); cf. *Levenson*, *supra* note 7, at 564-67 (noting law enforcement backgrounds of many federal and state court judges).

gathering and review in investigations of police criminality.¹²⁰ The approach is designed to minimize potential damage by identifying compelled statements, determining whether witnesses or evidence are tainted, ascertaining whether there are independent sources for possibly tainted evidence, and ensuring that the prosecutors and investigators assigned to the case are not exposed to tainted evidence.

In order to accomplish those objectives, one team of investigators and prosecutors—the “*Garrity* team” or “dirty team”—is assigned to review all of the evidence in the criminal investigation of a law enforcement officer.¹²¹ A separate team of investigators and prosecutors—the “trial team” or “clean team”—is responsible for presenting the case to a grand jury, and, if appropriate, trying the case.¹²² The trial team cannot interview any witnesses or review any documents until the *Garrity* team has given its approval.¹²³

The *Garrity* team first determines whether the target of the investigation made statements. As noted above, courts apply a test with subjective and objective elements that requires consideration of the circumstances under which a police officer made a statement in order to determine whether it is “compelled.”¹²⁴ The *Garrity* team can release to the trial team any documents generated before the target made statements, confident that they are untainted. If the *Garrity* team concludes that a target police officer has made one or more possibly compelled statements, it screens all witnesses and documents to determine whether they have been tainted. For witnesses, this requires that the *Garrity* team interview them to ascertain whether they have been exposed, either directly or indirectly, to the contents of a compelled statement, and if so, whether they have an independent source for the information they possess and whether exposure to the

¹²⁰ See Declaration of Karla Dobinski, filed in support of Government’s Consolidated Response to Defense Motions for *Kastigar* Hearing and to Exclude Defendant Powell’s Compelled IAD Statements, at 1-2, United States v. Powell, CR No. 92-686-JGD, slip op. (C.D. Cal. Nov. 12, 1992) [hereinafter Dobinski Declaration] (on file with the *New York University Law Review*) (describing “standard practice” that Criminal Section of Department of Justice’s Civil Rights Division uses “to ensure that no administratively compelled statements . . . are used against [the officer who gave the statement] in a federal criminal prosecution”).

The author is familiar with these procedures by virtue of his participation as one of the trial attorneys in United States v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993), the federal prosecution arising from the use of force against Rodney King, and in several *Garrity* workshops for federal prosecutors conducted by the Civil Rights Division and the Office of Legal Education of the Department of Justice.

¹²¹ See *id.* at 2.

¹²² See, e.g., Scott Glover & Matt Lait, Parks Excludes Garcetti From Rampart Inquiry Scandal, *L.A. Times*, Mar. 15, 2000, at A1 (describing clean team/dirty team approach).

¹²³ See Dobinski Declaration, *supra* note 120, at 2.

¹²⁴ See *supra* notes 83-86 and accompanying text (describing test).

compelled statement has affected their recollection of events.¹²⁵ Unless the *Garrity* team is satisfied that it can meet its *Kastigar* burden of disproving taint with respect to a witness, it will deny the trial team access to that witness.¹²⁶

This process places considerable constraints on a criminal investigation. First, it requires that the investigating agency and the prosecutor's office assign a full team of investigators and prosecutors to screen witnesses and documents and to litigate *Kastigar/Garrity* issues.¹²⁷ Although the Department of Justice is able to muster sufficient resources to accomplish this, state and local prosecutors' offices with small staffs may be unable to do so. They instead may be faced with a choice of conducting an investigation that may prove fruitless because investigators and prosecutors become tainted, or foregoing prosecution of police officers who have made compelled statements.

Second, it makes the investigative process cumbersome and inefficient. The trial team receives evidence only as it trickles through the *Garrity* team filter. This generally slows an investigation, and can delay the availability of specific pieces of evidence that the trial team needs to investigate the case properly. As a result, the trial team may be forced to conduct interviews of some witnesses without having done a complete preliminary investigation—such as reviewing pertinent documents or interviewing other witnesses—because needed documents or witnesses are not yet screened.

Nor does this process eliminate the possibility of lost evidence. If the *Garrity* team identifies witnesses or documents that are tainted, that evidence remains unavailable to the trial team. At best, the process prevents damage from further direct or indirect exposure to compelled statements.

II

THE GARRITY DOCTRINE'S UNCERTAIN FOUNDATION

When the Supreme Court decided *Garrity* and *Kastigar*, it did not anticipate the robust protection that lower courts later would give to police officers' compelled statements. Nor did it foresee the resulting

¹²⁵ See Dobinski Declaration, supra note 120, at 2. In the Ninth Circuit, the existence of an independent source is enough to satisfy the Fifth Amendment without consideration of the effect the compelled statement may have had on witnesses. See supra note 57 (describing Ninth Circuit rule).

¹²⁶ See Dobinski Declaration, supra note 120, at 2-3. The *Garrity* team uses a similar process to screen documents. If a document or portions thereof contain information either derived from a compelled statement or created by a tainted witness, the *Garrity* team denies the trial team access to the tainted portions. *Id.*

¹²⁷ See *North I*, 910 F.2d at 861 ("[A] *Kastigar* proceeding could consume substantial amounts of time, personnel, and money . . .").

problems described above. Indeed, the *Garrity* majority made no mention of the immunity analogy.¹²⁸ Instead, it determined that the due process protection for coerced confessions (and, to a lesser extent, the unconstitutional conditions doctrine) required suppression.¹²⁹ Even had the *Garrity* Court equated compelled statements with immunized testimony, however, it likely would not have contemplated the extraordinary protection that compelled statements now receive. When the Court decided *Kastigar* five years after *Garrity*, it assumed that restrictions on use of immunized testimony were the same as those applied to coerced confessions.¹³⁰ Only later would lower courts interpret *Kastigar* and the privilege to impose prohibitions on nonevidentiary and indirect evidentiary use of immunized testimony,¹³¹ restrictions that courts never have applied to coerced confessions.¹³²

Although the *Garrity* and *Kastigar* Courts did not foresee either the shift to the immunity analogy as an explanation for suppression of compelled statements or the rigorous prohibitions that lower courts have imposed on use of immunized testimony, both developments are understandable. First, as described below, the immunity analogy better explains the suppression of compelled statements than the rationales that the *Garrity* Court offered.¹³³ Second, the imposition of more stringent restrictions on prosecutorial use of immunized testimony, and, by analogy, police officer's compelled statements, is consistent with differences between the Court's reasons for suppressing immunized testimony and coerced confessions.¹³⁴

A. The *Garrity* Court's Analysis

I. Compelled Statements as Coerced Confessions

The *Garrity* majority relied primarily on the due process protection against coerced confessions to justify suppression of the com-

¹²⁸ At the outset of its opinion, the Court noted that “[n]o immunity was granted [to *Garrity* and the others who were questioned], as there is no immunity statute applicable in these circumstances.” *Garrity v. New Jersey*, 385 U.S. 493, 495 (1967). The Court made only passing reference to the Fifth Amendment privilege. *Id.* at 497 & n.5, 499-500. Only Justice White, in dissent in the companion case of *Spevack v. Klein*, 385 U.S. 511 (1967), acknowledged the similarity between police officers' compelled statements and immunized testimony. *Id.* at 532 (White, J., dissenting).

¹²⁹ See *infra* notes 135-36, 163-64 and accompanying text. The Court later embraced the view that the Fifth Amendment privilege itself mandates the suppression of police officers' compelled statements as “immunized.” See *supra* note 31 and accompanying text.

¹³⁰ See *infra* notes 200-01 and accompanying text.

¹³¹ See *supra* notes 48-57 and accompanying text.

¹³² See *infra* note 203 and accompanying text.

¹³³ See *infra* Parts II.A and II.B.

¹³⁴ See *infra* Part II.C.

elled statements. The Court framed the issue as whether “the statements [were] products of coercion in violation of the Fourteenth Amendment”¹³⁵ and held that “the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office”¹³⁶

However, even a cursory examination of the due process voluntariness test reveals that the *Garrity* Court’s conclusion is problematic. The Court has described the due process test as follows:

The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.¹³⁷

The Court uses a fact-specific approach when entertaining allegations that a confession was coerced. “In determining whether a defendant’s will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.”¹³⁸ Indeed, “a detailed account . . . is unavoidable.”¹³⁹

The inquiry into whether a person’s decision to answer questions is “involuntary,” “coerced,”¹⁴⁰ or the result of an “overborne will” is hardly an exact science.¹⁴¹ In practice, two concerns that are only

¹³⁵ *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967).

¹³⁶ *Id.* at 500.

¹³⁷ *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961); see also *Dickerson v. United States*, 530 U.S. 428, 432-34 (2000) (describing voluntariness test).

¹³⁸ *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); see also *Withrow v. Williams*, 507 U.S. 680, 689 (1993) (noting Court’s use of totality of circumstances test); *Haynes v. Washington*, 373 U.S. 503, 513 (1963) (“[W]hether the confession was obtained by coercion or improper inducement can be determined by an examination of all of the attendant circumstances.”).

¹³⁹ *Culombe*, 367 U.S. at 606.

¹⁴⁰ The Court treats the terms “coerced confession” and “involuntary confession” as synonyms. *Arizona v. Fulminante*, 499 U.S. 279, 287 n.3 (1991).

¹⁴¹ See Joseph D. Grano, *Confessions, Truth, and the Law* 60 (1993) (“[T]he issue of voluntariness [of confessions], in all its component parts, requires normative rather than empirical judgments.”); Albert A. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2626 n.6 (1996) (“Efforts to define compulsion and related words like coercion, duress, and involuntariness in terms of a subjective sense of constraint are unproductive.”); cf. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1428 (1989) (“[A]lthough the Court frequently treats coercion as a matter of mere description or measurement . . . such an empirical account of coercion is unsustainable. . . . [A]ny useful conception of coercion is irreducibly normative.”). There are two simple approaches to the voluntariness inquiry that avoid normative

somewhat related to the defendant's exercise of free will have guided the Court¹⁴²—fear of unreliable confessions resulting from coercive interrogation techniques¹⁴³ and condemnation of improper police methods of extracting confessions.¹⁴⁴ Although some older decisions suggest that confessions that are not the result of free will should be suppressed regardless of the methods police used to obtain them,¹⁴⁵ the Court repudiated that view in *Colorado v. Connelly*.¹⁴⁶ There, the Court held that police misconduct is a prerequisite for finding that a confession violates due process.¹⁴⁷ The *Connelly* majority also concluded that concern about the reliability of a confession “is a matter to

judgments, but neither is satisfactory. One defines “voluntary” as the result of a conscious effort by the actor. Under this view, even the confession of a defendant who is tortured is voluntary because he consciously chooses to confess rather than endure additional torture. The other approach defines as involuntary any choice that the actor would not have made but for official action. Even the mildest forms of official pressure could render confessions coerced under this approach. For a discussion of these issues, see Grano, *supra*, at 59-83.

¹⁴² See *Miller v. Fenton*, 474 U.S. 104, 116 (1985) (describing “the Court’s consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant’s will was in fact overborne”).

¹⁴³ See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 282 (1936) (

“[T]hey were likewise made by the said deputy definitively to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.”

(quoting *Brown v. State*, 161 So. 465, 470 (Miss. 1935) (Griffith, J., dissenting))).

¹⁴⁴ See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (explaining that all cases in which Supreme Court has found confessions to be involuntary “contained a substantial element of coercive police conduct”); *Haynes v. Washington*, 373 U.S. 503, 519 (1963) (finding confession to be involuntary in case where police used “oppressive and unfair methods”).

¹⁴⁵ See, e.g., *Townsend v. Sain*, 372 U.S. 293, 308 (1963) (stating that if drugs that police physician administered to alleviate defendant’s heroin withdrawal symptoms had effect of “truth serum” promoting confession to robbery and murder, “[a]ny questioning by police officers which produces [such] a confession . . . renders that confession inadmissible” even if police did not intend that effect); 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.2(b) (1999) (noting that voluntariness test once barred admission of confessions “obtained under circumstances in which the defendant’s free choice was significantly impaired, even if the police did not resort to offensive practices”).

¹⁴⁶ 479 U.S. 157.

¹⁴⁷ See *id.* at 167. In *Connelly*, the Court stated that its due process cases all shared “the crucial element of police overreaching,” *id.* at 163, and held “that coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment,” *id.* at 167; see also LaFave et al., *supra* note 145, § 6.2(b) (analyzing *Connelly*). But see *Connelly*, 479 U.S. at 177-81 (Brennan, J., dissenting) (contending that Court has suppressed confessions as involuntary absent police coercion).

be governed by the [state's] evidentiary laws," not federal constitutional doctrine.¹⁴⁸

It is difficult to explain *Garrity* given the Court's coerced confession jurisprudence either before or after *Connelly*. First, the interrogation method did not threaten to produce an unreliable confession. The warning that the deputy attorney general gave to Garrity and the others made clear that they could avoid job loss simply by answering questions. Thus, unlike some coerced confession cases, there was no pressure likely to induce the interviewees to give false incriminating statements.¹⁴⁹

Second, there was no improper conduct. The deputy attorney general's warning of job termination in *Garrity* was perfectly legal.¹⁵⁰ Had Garrity chosen to remain silent, it is likely that the Court would have found that both the imposition of the economic sanction and the warning thereof were constitutional.¹⁵¹ The following Term, at least eight Justices agreed that "[i]f . . . a policeman [refuses] to answer questions specifically, directly, and narrowly relating to the performance of his official duties . . . the privilege against self-incrimination [is not] a bar to his dismissal,"¹⁵² a view that the Court later would reiterate.

¹⁴⁸ *Connelly*, 479 U.S. at 167. For a discussion of the development of confession law, see, for example, Yale Kamisar, On the "Fruits" of *Miranda* Violations, Coerced Confessions, and Compelled Testimony, 93 Mich. L. Rev. 929, 936-46 (1995), which traces the changes in the treatment of confessions' reliability as a rationale for their exclusion.

¹⁴⁹ Although the interviewees may have feared a prosecution for perjury or false statements if they falsely exonerated themselves or others, they made no claim that they were coerced into wrongly confessing to the suspected offenses or that compulsion was likely to lead to that result. See *Garrity*, 385 U.S. at 503 (Harlan, J., dissenting) ("The defense did not contend that the statements were the result of physical or mental coercion, or that the wills of the . . . petitioners were overborne.").

¹⁵⁰ The defendants challenged the constitutionality of the job forfeiture statute. However, the Supreme Court, like the New Jersey courts, did not consider that issue, instead focusing on the voluntariness of the statements. *Id.* at 496.

¹⁵¹ In *Spevack v. Klein*, 385 U.S. 511 (1967), decided the same day as *Garrity*, five Justices suggested as much. In *Spevack*, the Court considered whether a state could disbar an attorney for asserting the privilege rather than complying with a subpoena related to a judicial inquiry. A four-member plurality held that "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion" and concluded that a disbarment in response to a valid assertion of the privilege violated the Fifth Amendment. *Id.* at 516. But Justice Fortas, who provided the decisive fifth vote, noted that "[t]his Court has never held . . . that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer" and made clear that he "would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties . . ." *Id.* at 519 (Fortas, J., concurring in the judgment). The four *Spevack* dissenters also would have allowed the termination of an uncooperative police officer, *id.* at 528 (Harlan, J., dissenting); *id.* at 531 (White, J., dissenting).

¹⁵² *Gardner v. Broderick*, 392 U.S. 273, 278 (1968) (footnote and citation omitted). Although Justices Harlan and Stewart concurred in the result only, they considered it a "wel-

ate.¹⁵³ If it is constitutional to dismiss a police officer who refuses to answer questions related to a disciplinary matter, it could not have been improper for the deputy attorney general to provide Garrity and the others notice of that consequence.¹⁵⁴ Unlike interrogators in other coerced confession cases, the questioner in *Garrity* did nothing wrong.¹⁵⁵

Third, in *Garrity*, the Court departed from the methodology that it uses elsewhere to decide whether a confession is “coerced.” Rather than examine all of the available evidence to determine whether the statements were voluntary, the majority ignored significant facts that undercut a finding of coercion. Garrity and the others were not in custody when questioned.¹⁵⁶ They made the statements during sworn depositions recorded by a stenographer, rather than in the secrecy of a police interrogation room.¹⁵⁷ Garrity himself had selected the room where he was to be questioned.¹⁵⁸ Three of the officers had counsel present.¹⁵⁹ When they sought suppression of the statements before trial, the defendants presented no evidence of coercion other than the threat of job forfeiture.¹⁶⁰ Not surprisingly, both the trial courts and the Supreme Court of New Jersey determined that the statements were voluntary.¹⁶¹ Of course, the threatened loss of their employment

come breakthrough” that the Court had made clear that “public officials may now be discharged . . . for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices.” *Id.* at 285 (Harlan, J., concurring). Justice Black concurred without writing or joining an opinion. *Id.* at 279.

¹⁵³ See *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (“Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity.”); *Lefkowitz v. Turley*, 414 U.S. 70, 80-82 (1973) (noting that public officials may be discharged for failing to answer questions regarding official duties).

¹⁵⁴ See *Garrity*, 385 U.S. at 506-07 (Harlan, J., dissenting) (“If the consequence is constitutionally permissible, there can surely be no objection if the state cautions the witness that it may follow if he remains silent.”).

¹⁵⁵ The deputy attorney general’s additional admonition that any statements would be admissible in a later criminal prosecution ultimately proved to be incorrect, but that warning could not have induced the interviewees to give a statement. If anything, it would have dissuaded them from answering questions.

¹⁵⁶ *Garrity*, 385 U.S. at 503.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 504 (Harlan, J., dissenting). Garrity told the deputy attorney general who was to question him that he had arranged for counsel but did not think it was necessary to have his attorney present for questioning. *Id.* at 503.

¹⁶⁰ *Id.* at 504.

¹⁶¹ See *State v. Naglee*, 207 A.2d 689, 695 (N.J. 1965) (“Here there is no physical coercion, no overbearing tactics of psychological persuasion, no lengthy incommunicado detention, or efforts to humiliate or ridicule the defendants. The overt circumstances show that the interrogation was conducted with a high degree of civility and restraint.”); *State v. Holroyd*, 208 A.2d 146, 149 (N.J. 1965) (per curiam) (“Indeed, the circumstances of the

and pensions was relevant to a determination of voluntariness. But rather than weigh that fact against others which suggested that the statements were voluntary, the *Garrity* majority neglected to consider countervailing facts, an approach at odds with its established practice.¹⁶²

2. *Compelled Statements as the Product of an Unconstitutional Condition*

Perhaps cognizant of deficiencies in its due process explanation, the *Garrity* majority also suggested in a single sentence that the choice that New Jersey presented to the police officers—of making potentially self-incriminating statements or losing their jobs—was an unconstitutional condition.¹⁶³ Although the majority did not elaborate on that suggestion, the dissenting Justices contended that “the majority believe[d] that the possibility that these policemen might have been discharged had they refused to provide information pertinent to their public responsibilities [was] an impermissible ‘condition’ imposed by New Jersey upon petitioners’ privilege against self-incrimination.”¹⁶⁴

giving of the defendants’ statements in the present case are even more persuasive of voluntariness than in *Naglee*. For here the defendants gave their statements . . . in the presence of their lawyer.”).

¹⁶² See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (“The significant fact about all of these [coerced confession] decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances.”).

¹⁶³ See *Garrity*, 385 U.S. at 500 (“There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.”). Justice Douglas (the author of *Garrity*) and commentators have characterized *Garrity* as a case that turned on application of the “unconstitutional conditions doctrine.” See *Jones v. State Bd. of Educ.*, 397 U.S. 31, 34 (1970) (Douglas, J., dissenting) (citing *Garrity* for proposition that “a government, state or federal, may not grant a benefit or privilege on conditions requiring the recipient to relinquish his constitutional rights”); Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869, 927 n.318 (1985) (citing *Garrity* as case demonstrating that “[t]he doctrine of unconstitutional conditions applies to conditions on the exercise of fifth amendment rights”); *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1746 (1984) (citing *Garrity* as case in which Court relied on doctrine of unconstitutional conditions).

¹⁶⁴ *Garrity*, 385 U.S. at 501 (Harlan, J., dissenting). The Court’s apparent reliance on both the coerced confessions and unconstitutional conditions doctrines prompted the dissenters to accuse the majority of “employ[ing] a curious mixture of doctrines to invalidate these convictions” and “apparently engag[ing] in the delicate task of riding two unruly horses at once” *Id.*

The late Judge Friendly, a student and critic of the Fifth Amendment privilege and the *Garrity* doctrine, see Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968), recognized that “it is not clear whether *Garrity* rests on violation of the privilege or on the basis that the statements ‘were involuntary as a matter of fact’, or on both.” *United States v. Solomon*, 509 F.2d 863, 867 (2d Cir. 1975) (Harlan, J., dissenting) (quoting *Garrity*, 385 U.S. at 501). Friendly con-

In hindsight, the majority's decision not to embrace the doctrine more openly was sensible, as it is neither sufficient nor necessary to explain the outcome in *Garrity*.

The unconstitutional conditions doctrine prohibits governments from conditioning government-sponsored benefits on recipients' willingness to engage in or abstain from activity that the Constitution shields from direct government interference.¹⁶⁵ Because the Fifth Amendment privilege prevents governments from compelling incriminating statements directly, the doctrine casts doubt on New Jersey's attempt to accomplish the same result by threatening to terminate a benefit—state-sponsored employment. Arguably, the remedy for citizens like Garrity, who succumb to the condition, is to deny to the state what the Constitution prevents it from obtaining directly—here, the ability to use the statement in a criminal prosecution.

By prohibiting governments from firing employees for exercising their constitutional rights, the unconstitutional conditions doctrine refutes Holmes's oft-quoted observation that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right

cluded that the Court opted for the Fifth Amendment interpretation of *Garrity* in *Lefkowitz v. Turley*, 414 U.S. 70 (1973). See *Solomon*, 509 F.2d at 867 n.6.

¹⁶⁵ See generally Lynn A. Baker, The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions, 75 Cornell L. Rev. 1185, 1193-94 (1990) ("In its classical formulation, the unconstitutional conditions doctrine prohibits conditions on allocations in which the government indirectly impinges on a protected activity or choice in a way that would be unconstitutional if the same result had been achieved through a direct governmental command."); Sullivan, supra note 141, at 1421-22 ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference."). For a summary of the literature on the doctrine, see William J. Stuntz, Implicit Bargains, Government Power, and the Fourth Amendment, 44 Stan. L. Rev. 553, 567 n.52 (1992).

Courts often apply the doctrine to conditions imposed on the exercise of constitutional rights other than the Fifth Amendment privilege. See, e.g., *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15 (1996) (termination of government contract in retaliation for refusing to respond to requests for political support); *Bd. of County Comm'r's v. Umbehr*, 518 U.S. 668, 673-74 (1996) (termination of government contract in response to exercise of First Amendment rights); *Dolan v. City of Tigard*, 512 U.S. 374, 377, 391 (1994) (grant of building permit conditioned on relinquishment of property rights); cf. id. at 407 n.12 (Stevens, J., dissenting) ("[M]odern decisions invoking the doctrine have most frequently involved First Amendment liberties." (citations omitted)).

Arguably, the Court employed the doctrine to invalidate conditions imposed on the Fifth Amendment privilege in *Griffin v. California*, 380 U.S. 609 (1965). When determining that a law permitting prosecutorial comment on a defendant's failure to testify at trial was unconstitutional, the *Griffin* Court condemned such comment as "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Id. at 614. But see *infra* note 183 (describing view that *Griffin* is best explained as application of Fifth Amendment privilege).

to be a policeman.”¹⁶⁶ Given this, it is remarkable that the *Garrity* Court did not more explicitly embrace the doctrine in response to the similar contention that Justice Harlan made in dissent: that Garrity and the others “had a constitutional right to refuse to answer . . . [but] they had no constitutional right to remain police officers.”¹⁶⁷ Justice Harlan’s point has some appeal. Noting that the state constitutionally could fire a police officer who refused to answer questions related to the performance of his duties,¹⁶⁸ a proposition that the Court later would embrace,¹⁶⁹ Harlan reasoned that “[i]f the consequence is constitutionally permissible, there can surely be no objection if the State cautions the witness that it may follow if he remains silent.”¹⁷⁰

However, Justice Harlan’s position does not answer the critical question in *Garrity*: whether, having obtained a condition-induced statement, the government may *introduce* it in a criminal proceeding. For, although the Court now permits the termination of a police officer or other public employee who refuses to answer job-related questions, it does not allow the government to demand a waiver of immunity under pain of job loss as well.¹⁷¹ In other words, the Court permits the government to put an employee to the choice of either giving a statement that will not be admissible in a criminal proceeding or losing his job. It does not, however, permit the government to use the threat of job termination to obtain *both* a statement *and* the em-

¹⁶⁶ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). As Professor David Cole has noted, because of the Court’s application of the doctrine of unconstitutional conditions, “[t]oday, police officers and other public officials have the right to talk politics *and* retain their jobs” David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675, 676 (1992) (citing *Rankin v. McPherson*, 483 U.S. 378 (1987)); see also *Perry v. Sinderman*, 408 U.S. 593, 598 (1972) (stating that nonrenewal of public school teacher’s contract due to his exercise of First Amendment rights would be impermissible). But see *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that public employee could be fired for challenging internal office policies since this did not offend employee’s First Amendment right to speech “upon issues of public concern”).

¹⁶⁷ *Garrity*, 385 U.S. at 509, n.3 (Harlan, J., dissenting) (emphasis omitted) (quoting *United States v. Field*, 193 F.2d 92, 106 (2d Cir. 1951) (Frank, J., concurring and dissenting) (quoting *Christal v. Police Comm’n of S.F.*, 92 P.2d 416, 419 (Cal. Ct. App. 1939))). Not surprisingly, the *Christal* Court cited Justice Holmes’s opinion in *McAuliffe*, see *supra* note 166 and accompanying text, as authority. *Christal*, 92 P.2d at 419.

¹⁶⁸ *Garrity*, 385 U.S. at 507-09 (Harlan, J., dissenting).

¹⁶⁹ See *supra* notes 151-53 and accompanying text.

¹⁷⁰ *Garrity*, 385 U.S. at 506-07.

¹⁷¹ See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (permitting discharge of public employees for refusal to answer questions only if they have not been required to waive immunity); *Uniformed Sanitation Men Ass’n, Inc. v. Comm’r of Sanitation*, 392 U.S. 280, 284-85 (1968) (reversing dismissal of public employees who were required to testify and to waive immunity); *Gardner v. Broderick*, 392 U.S. 273 (1968) (invalidating provision of New York City Charter permitting termination of employment because of employee’s refusal to waive immunity).

ployee's waiver of immunity, allowing later use of the statement against the employee in a criminal prosecution.¹⁷² In *Garrity*, the deputy attorney general told the interviewees that their statements would be admissible in criminal prosecutions.¹⁷³ They had no reason to disbelieve that assertion. As a result, he presented them with the equivalent of the government-induced choice that the Court has since condemned: giving a statement without immunity or being fired.¹⁷⁴ In short, suppression of the statements in *Garrity* was necessary to prevent the state from carrying out what the Court later determined to be an unconstitutional threat.

But this does not explain why it was unconstitutional to confront the *Garrity* defendants with these options. Given the importance of the government interest in the administrative and criminal investigation and prosecution of police criminality, it is not immediately obvious that the Constitution should preclude the government from compelling a police officer's statement and later using it in a criminal proceeding.¹⁷⁵ At times, the Court does not bar the government from conditioning benefits on recipients' willingness to forego constitu-

¹⁷² The Court has not decided whether an express immunity waiver, if obtained, would be valid. See, e.g., *Gardner*, 392 U.S. at 278-79 (refusing to decide whether *Garrity* would "nullify" waiver made under threat of job loss).

¹⁷³ See *Garrity*, 385 U.S. at 494.

¹⁷⁴ When the Court first decided *Garrity* and the companion case of *Spevack v. Klein*, 385 U.S. 511 (1967), it appeared that it may have been prohibiting both sanctions for refusals to answer questions and the use of statements in criminal cases. In *Spevack*, a plurality of the Court prohibited imposition of sanctions—disbarment—following an attorney's assertion of the privilege in response to a subpoena duces tecum. Id. Because *Garrity* would have prevented use of any self-incriminating statements compelled by a threat of disbarment, Justice White criticized the apparently contradictory double prohibition. Id. at 531 (White, J., dissenting).

Later, however, the Court made clear that states can impose economic sanctions for refusals to answer so long as the interviewees retain their right to exclude their answers in criminal proceedings. It explained its refusal to enforce economic sanctions in cases like *Spevack* by noting that before the *Garrity* decision, it was uncertain whether compelled statements would be admissible. See *Sanitation Men*, 392 U.S. at 283-84. Without assurance of exclusion, the subject of the compulsion could assert the privilege and escape sanction. Justice Harlan, who had dissented in both *Garrity* and *Spevack*, found some consolation in the conclusion that economic sanctions were still available so long as there was no required waiver of immunity. He concurred in *Gardner* and *Sanitation Men*, which permitted that outcome,

with a good deal less reluctance than would otherwise have been the case because . . . I find in these opinions a procedural formula whereby, for example, public officials may now be discharged . . . for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices.

I add only that this is a welcome breakthrough in what *Spevack* and *Garrity* might otherwise have been thought to portend.

Sanitation Men, 392 U.S. at 285 (Harlan, J., concurring).

¹⁷⁵ For a discussion of criticism of the *Garrity* rule, see *infra* notes 235-39 and accompanying text.

tional protections.¹⁷⁶ Indeed, as students of the unconstitutional conditions doctrine have noted, it is difficult to predict how cases will come out when the Court applies it.¹⁷⁷ In short, reliance on the doctrine alone is insufficient to explain the outcome in *Garrity*.

In addition, resort to the doctrine may be unnecessary. Cass Sunstein has argued that “[w]hether a condition is permissible is a function of the particular constitutional provision at issue” and cannot be answered by “anything so general as an unconstitutional conditions doctrine.”¹⁷⁸ He recommends discarding the doctrine in favor of a more detailed assessment of the specific constitutional right to determine whether the government’s exercise of economic or regulatory authority violates the right.¹⁷⁹ Whatever the merit of Sunstein’s position generally, the doctrine seems particularly redundant when the Fifth Amendment privilege is at issue, as the following discussion illustrates.¹⁸⁰

¹⁷⁶ See, e.g., *Wyman v. James*, 400 U.S. 309, 324 (1971) (holding that government can condition receipt of public assistance on permission to allow caseworker to enter home, even though warrantless entry by state actor without consent would otherwise violate Fourth Amendment).

¹⁷⁷ See Baker, *supra* note 165, at 1187 (“The unconstitutional conditions doctrine itself remains murky. The Court has provided no coherent explication of when and how it will apply the doctrine in [the public assistance benefits area], and commentators’ attempts to make sense of these cases have produced only expressions of despair and normative proposals.”); Sullivan, *supra* note 141, at 1415-16 (“[R]ecent Supreme Court decisions on challenges to unconstitutional conditions seem a minefield to be traversed gingerly. Just when the doctrine appears secure, new decisions arise to explode it. . . . As applied . . . the doctrine . . . is riven with inconsistencies.”); see also *Dolan v. Tigard*, 512 U.S. 374, 407 n.12 (1994) (Stevens, J., dissenting) (“Although it has had a long history, the ‘unconstitutional conditions’ doctrine has for just as long suffered from notoriously inconsistent application . . .” (internal citation omitted)).

¹⁷⁸ Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 San Diego L. Rev. 337, 338 (1989); see also Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. Rev. 593, 595 (1990) [*hereinafter Sunstein, Anachronism*] (arguing that “[i]nstead of a general unconstitutional conditions doctrine . . . what is necessary is . . . an approach that asks whether, under the provision at issue, the government has constitutionally sufficient justifications for affecting constitutionally protected interests”). Justice Stevens, in an opinion that Justices Blackmun and Ginsburg joined, endorsed a similar view. See *Dolan*, 512 U.S. at 407 n.12 (Stevens, J., dissenting) (“[T]he ‘unconstitutional conditions’ doctrine . . . has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question.”).

¹⁷⁹ Sunstein, *Anachronism*, *supra* note 178, at 595 (arguing that doctrine should be “abandoned” in favor of “constitutionally-centered model of reasons”).

¹⁸⁰ For similar reasons, viewing *Garrity* as a case in which the state impermissibly forced the police officers to waive the privilege against self-incrimination, rendering the waiver invalid, is unsatisfactory. Rather, “the proper inquiry . . . concerns the scope of the right itself.” George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 249 (1977); see also *id.* at 246-47 (arguing that reliance on waiver approach to explain outcome in *Garrity* is “grossly simplistic” and “devoid of reasoned

One way of explaining the unconstitutional conditions doctrine is to focus on the coercion that the government-induced condition brings to bear on the rightholder.¹⁸¹ Arguably, at some point, the level of coercion renders the condition unconstitutional. But the Fifth Amendment privilege itself is triggered by “compulsion” exerted by the government to induce self-incrimination.¹⁸² Because both inquiries focus on compulsion, it seems unnecessary, and unduly confusing, to resort to the doctrine and ask whether a government-induced choice is sufficiently coercive to constitute an unconstitutional condition on the exercise of the privilege. A more direct approach is to determine simply whether the government has compelled self-incrimination.¹⁸³

B. Compelled Statements as Immunized Testimony

Resort to the Fifth Amendment privilege and the related immunity analogy avoids the shortcomings of efforts to explain *Garrity* by use of the coerced confessions and unconstitutional conditions doctrines. First, the immunity analogy better explains what occurred in *Garrity*, as well as what typically happens when investigators take compelled statements from police officers. The deputy attorney general questioned *Garrity* and the others as part of a noncriminal judicial inquiry, not an effort to further their prosecution,¹⁸⁴ just as

analysis that permits the drawing of careful lines between permissible and impermissible burdens”).

¹⁸¹ See Sullivan, *supra* note 141, at 1428 (“Directly and through metaphors of duress or penalty, the Court has repeatedly suggested that the problem with unconstitutional conditions is their coercive effect.”).

¹⁸² See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (stating that compulsion is “touchstone” of Fifth Amendment privilege); *Amar & Lettow*, *supra* note 38, at 865 (“The Fifth Amendment does not prohibit all self-incrimination but only *compelled* self-incrimination.”).

¹⁸³ Professor Albert Alschuler has made a similar contention about *Griffin v. California*, 380 U.S. 609 (1965), in which the Supreme Court determined that prosecutorial comment on a defendant’s silence at trial is unconstitutional. Alschuler, *supra* note 141, at 2628 n.11 (contending that resort to unconstitutional conditions doctrine was unnecessary as “the Fifth Amendment [privilege], pure and simple” explains the outcome in *Griffin*); see also *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285-86 (1998) (finding it unnecessary to address lower court’s unconstitutional conditions analysis because challenged state clemency procedures “do not under any view violate the Fifth Amendment privilege”).

¹⁸⁴ The deputy attorney general questioned *Garrity* and the others pursuant to orders from the Supreme Court of New Jersey directing the Attorney General or a deputy attorney general to conduct an investigation into “alleged irregularities in the handling of cases in the Municipal Court” in the boroughs of Bellmawr and Barrington. Brief for Appellants app. B at 3a-4a, 6a-7a, *Garrity v. New Jersey*, 385 U.S. 493 (1967) (No. 66-13). Initially, the Attorney General or deputy attorney general was to investigate the irregularities and present the evidence in an *in camera* hearing before a Master who was to prepare a report for the Supreme Court. *Id.* at 4a, 7a. The court later amended its orders to allow the Attorney

prosecutors seek immunity orders in the hope of using the resulting testimony for purposes other than prosecution of the immunized witness.¹⁸⁵ Similarly, as a general matter, when internal affairs investigators compel statements from police officers, they do so to further noncriminal disciplinary investigations, not to gather evidence for prosecutions.¹⁸⁶

Second, reliance on the immunity analogy avoids the above-described problems with the due process approach. Perfectly lawful pressure, such as the threat of judicial contempt sanctions, can trigger the protections of the privilege. Thus, although the lawfulness of firing a police officer who refuses to answer questions undercuts a due process claim for want of official misconduct,¹⁸⁷ it is consistent with treatment of the officer's answers as immunized.¹⁸⁸

Third, application of the privilege is typically determined based solely on the nature of the threatened sanction, without assessment of the surrounding circumstances.¹⁸⁹ As a result, evidence that the state-

General or a deputy to file a report with the court without a hearing. *Id.* at 5a, 8a. When questioned at the hearing on the motion to suppress the statements, a deputy attorney general assigned to the investigation testified that he had no power to arrest the suspects and was not assigned to prosecute the case, but once he "was fairly certain offenses were in fact committed . . . [he] knew that the Prosecutor's office would ultimately have it." Transcript of Testimony Vol. 1, at 39-40, *Garrity v. New Jersey*, 385 U.S. 493 (1967) (No. 66-13).

¹⁸⁵ Because the immunity grant bars use and derivative use of the immunized testimony, it would be senseless for a prosecutor to immunize in order to develop a case against that witness. Indeed, the immunity grant would impose potential obstacles to prosecution. See *supra* Part I.B.2. Not surprisingly, the Department of Justice requires that a federal prosecutor seeking to prosecute a previously immunized person for "offenses first disclosed in, or closely related to," immunized testimony first receive written approval from the Attorney General. U.S. Attorney's Manual § 9-23.400. A request for approval to bring such a prosecution must establish that the evidence to be used in the prosecution meets the requirements of *Kastigar*. *Id.*

¹⁸⁶ See *supra* note 13 and accompanying text (discussing internal police investigation procedures).

¹⁸⁷ See *supra* notes 150-55 and accompanying text.

¹⁸⁸ Similarly, the privilege against self-incrimination is not driven by fear of unreliable statements. See *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415 (1966) ("[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction . . ."). But see *Amar & Lettow*, *supra* note 38, at 859, 898-901, 924-25 (contending that, properly construed, Fifth Amendment privilege should embody this concern). Thus, the fact that there is little danger of a police officer falsely incriminating himself when compelled to answer an investigator's questions does not undermine application of the privilege as a rationale for suppression.

¹⁸⁹ See Donald Dripps, Is the *Miranda* Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis, 17 Const. Comment. 19, 25 (2000) ("Fifth Amendment law generally, however, defines compulsion according to general categories rather than on a case-by-case, totality-of-the-circumstances approach."). For example, the threat of a contempt sanction for failure to comply with a subpoena is sufficient compulsion to trigger the privilege without consideration of the penalty to be imposed for the contempt. See Stephen J. Schulhofer, Reconsidering *Miranda*, 54 U. Chi. L. Rev. 435, 443 (1987) (noting that threat

ments in *Garrity* were voluntary—such as the suspects' control over the location of interrogation and representation by counsel—play no role in the Fifth Amendment calculus.¹⁹⁰

Finally, by focusing on the Fifth Amendment privilege itself, asking whether the government has compelled statements that would incriminate the speaker, the immunity analogy is more persuasive and straightforward than the unconstitutional conditions doctrine.¹⁹¹

If the Fifth Amendment privilege better explains the outcome in *Garrity* than due process or the unconstitutional conditions doctrine, why didn't the *Garrity* Court rely on it? Before deciding *Garrity*, the Court had determined that the privilege was applicable to the states,¹⁹² required suppression of statements resulting from "compulsion,"¹⁹³ and could be triggered by compulsion imposed outside of formal legal or administrative proceedings.¹⁹⁴ It would have been consistent with these developments to conclude that the deputy attorney general's threat of job termination was sufficient compulsion to trigger the privilege and render the resulting statements immunized.

The Court may have avoided relying on the Fifth Amendment because it was unwilling to confer on the police officers the protection that the privilege, as then construed, seemed to require. When the Court decided *Garrity*, the prevailing rule of *Counselman v. Hitchcock*¹⁹⁵ required a grant of *transactional* immunity to supplant the privilege.¹⁹⁶ It was one thing to tell states, as the Court did, that they could not both compel police officers' statements and introduce them at trial. It would have been quite another to permit states to conduct administrative questioning only if they were willing to forego the possibility of subsequent prosecutions altogether. Significantly, a majority of the Court first characterized the statements in *Garrity* as "immunized"¹⁹⁷ the term after it decided *Kastigar v. United States*,¹⁹⁸

of \$100 fine is sufficient to trigger Fifth Amendment privilege even if such penalty would not render statement involuntary under due process approach).

¹⁹⁰ "Our decisions make clear that the threat alone is sufficient to render all subsequent testimony 'compelled.'" *Minnesota v. Murphy*, 465 U.S. 420, 445-46 (1984) (Marshall, J., dissenting).

¹⁹¹ See supra notes 176-83 and accompanying text (arguing that unconstitutional conditions doctrine is neither sufficient nor necessary to explain *Garrity*).

¹⁹² *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

¹⁹³ See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 57 n.6 (1964) ("[T]he Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion.").

¹⁹⁴ See *Miranda v. Arizona*, 384 U.S. 436, 444-45, 457 (1966) (holding that Fifth Amendment privilege applies to police interrogation inside station house).

¹⁹⁵ 142 U.S. 547 (1892).

¹⁹⁶ See supra note 38 (describing *Counselman* rule).

¹⁹⁷ *Lefkowitz v. Turley*, 414 U.S. 70, 82 (1973).

¹⁹⁸ 406 U.S. 441 (1972).

which overruled *Counselman* and embraced use and derivative use immunity as a constitutionally adequate replacement for the privilege.¹⁹⁹

C. Suppression of Immunized Testimony and Coerced Confessions

The Court never has acknowledged that it supplanted the coerced confession approach with the immunized testimony analogy as the means of explaining the suppression of compelled statements. Nor has it recognized that the shift has significant consequences for judicial treatment of compelled statements. Indeed, in *Kastigar*, the Court assumed that immunized testimony and coerced confessions receive the same amount of protection.²⁰⁰ There is some merit to that assumption. Courts bar use of both coerced confessions and immunized testimony in the government's case-in-chief, prevent use of both to impeach defendants, and exclude evidence that police discover by exploiting both.²⁰¹ But while many lower courts interpret *Kastigar* to prohibit nonevidentiary and indirect evidentiary use of immunized testimony as well,²⁰² no court has imposed similar restrictions on use of coerced confessions.²⁰³

¹⁹⁹ Id. at 453.

²⁰⁰ Id. at 461-62; see also Humble, *supra* note 50, at 363 & n.72 (noting that *Kastigar* Court likened immunized testimony to coerced confession and excluded both as compelled incrimination).

Congress made the same assumption when it enacted the use immunity statute. See *Pillsbury Co. v. Conboy*, 459 U.S. 248, 276-78 (1983) (Blackmun, J., concurring in the judgment) (reviewing statutory history and intent of use immunity statute). The assumption has been the subject of considerable criticism. See, e.g., *Kastigar*, 406 U.S. at 470-71 (Marshall, J., dissenting) (arguing that this assumption "turns reason on its head"); *Strachan*, *supra* note 50, at 823-32 (contrasting policies behind use immunity and immunity from coerced confessions and arguing for different treatment of them); *Murphy*, *supra* note 53, at 1032 n.180 (citing authorities).

²⁰¹ On the rules regarding coerced confessions, see *Mincey v. Arizona*, 437 U.S. 385, 402 (1978) (holding coerced confession not admissible in case-in-chief or to impeach). Although the Supreme Court has never held that evidence derived from a coerced confession should be suppressed as "fruit of the poisonous tree," it likely would do so. See, e.g., *Kastigar*, 406 U.S. at 470 (Marshall, J., dissenting) (describing need to suppress "the fruits of the illegal search or interrogation"); *Kamisar*, *supra* note 148, at 990-1004 (contending that "fruit of the poisonous tree" doctrine applies to evidence derived from coerced confessions). But see *Amar & Lettow*, *supra* note 38, at 880-89 (arguing that evidence derived from coerced confessions is admissible).

On the rules regarding immunized testimony, see *supra* notes 46-47 and accompanying text.

²⁰² See *supra* notes 49-57 and accompanying text (discussing courts' prohibition of prosecution's nonevidentiary use of immunized testimony).

²⁰³ See *United States v. Serrano*, 870 F.2d 1, 18 (1st Cir. 1989) ("[N]o case involving a coerced confession has prohibited the nonevidentiary use of an involuntary statement."); *Johnson v. United States*, 609 A.2d 1112, 1118 n.7 (D.C. 1992) (refusing to apply *North* rule

The *Kastigar* Court's assumption of equivalent protection makes clear that it did not anticipate that lower courts would afford greater protection to immunized testimony than to coerced confessions. But although the Court did not address it, there is some justification for the differential treatment. Significantly, both the Supreme Court and lower courts use dissimilar rationales to justify suppression of immunized testimony and coerced confessions. The differences between the rationales can explain why immunized testimony receives more robust protection.²⁰⁴

Courts prohibit use of immunized testimony because the privilege against self-incrimination, which itself is an exclusionary rule, expressly requires that result.²⁰⁵ Consequently, judicial interpretation of the scope of the privilege dictates the reach of the exclusionary rule, such as whether it precludes nonevidentiary or indirect evidentiary uses.²⁰⁶ Because *Kastigar* interpreted the privilege generously in the context of formally immunized testimony, the resulting exclusionary rule is a robust one. The language in *Kastigar* describing the scope of the privilege to require that the immunized witness be left "in substantially the same position as if [he] had claimed the Fifth Amendment privilege"²⁰⁷ is the basis for the stringent restrictions on nonevidentiary and indirect evidentiary uses.²⁰⁸

to coerced confession); Humble, *supra* note 50, at 375 n.154 ("Outside of the immunity context, no court has prohibited nonevidentiary uses of an involuntary statement.").

²⁰⁴ For a discussion of the development of the divergent approaches to immunized testimony and coerced confessions, see Bloch, *supra* note 51, at 1608-48.

²⁰⁵ The privilege is an exclusionary rule, one that is violated when compelled testimony is used at trial. See, e.g., *New York v. Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting) ("All the Fifth Amendment [privilege] forbids is the introduction of coerced statements at trial."); *United States v. Hampton*, 775 F.2d 1479, 1486 n.35 (11th Cir. 1985) (noting that Fifth Amendment privilege is "an exclusionary rule of a very broad scope"); *United States v. Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976) ("The Fifth Amendment . . . is by its terms an exclusionary rule"); Alan M. Dershowitz & John H. Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 Yale L.J. 1198, 1214 (1971) ("[The Fifth Amendment] is an exclusionary rule—and a constitutionally created one."); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 Mich. L. Rev. 907, 926 (1989) ("[T]he [F]ifth [A]mendment does not contain an exclusionary rule; it is itself an exclusionary rule.").

²⁰⁶ See Amar & Lettow, *supra* note 38, at 910-11 (recognizing that question of "what the scope of immunity should be" is same as question of how Fifth Amendment privilege should be interpreted).

²⁰⁷ *Kastigar*, 406 U.S. at 462.

²⁰⁸ In fact, debate over the scope of the privilege can turn on interpretation of the language that *Kastigar* used to describe the exclusionary rule. See, e.g., Humble, *supra* note 50, at 362-63 (focusing on *Kastigar* Court's use of term "evidence" when describing exclusionary rule and contending that rule does not require prohibition on nonevidentiary uses); Strachan, *supra* note 50, at 806-07 (focusing on *Kastigar* Court's comment that immunity bars use of compelled testimony "in any respect" and reference to "a sweeping proscrip-

In contrast, courts exclude confessions in order to deter police from using improper coercion when questioning suspects.²⁰⁹ Although this deterrence rationale supports suppression of both coerced confessions and evidence that police and prosecutors derive by exploiting them as "fruit of the poisonous tree,"²¹⁰ deterrence-based exclusionary sanctions are limited. When applying the analogous Fourth Amendment exclusionary rule, the Court has reasoned that if there is only a tenuous causal connection between illegal police conduct and derivative evidence, suppression of such "attenuated" evidence serves little deterrent function and thus is unnecessary.²¹¹ When derivative evidence involves an individual exercise of free will, such as witness testimony or a defendant's statement to police, rather than physical evidence, the Court is more prone to find attenuation.²¹² Because the Court's treatment of coerced confessions appears to resemble its ap-

tion of any use'" to argue that nonevidentiary use is prohibited (quoting *Kastigar*, 406 U.S. at 453, 460)).

²⁰⁹ See *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) ("The purpose of excluding evidence seized in violation of the Constitution [such as a coerced confession] is to substantially deter future violations of the Constitution."). The focus on police misconduct as the rationale for the suppression of coerced confessions is a recent development. See, e.g., *Kamisar*, supra note 148, at 936-41 (describing how in recent decades courts have "down-played the unreliability of a coerced or 'involuntary' confession" and instead focused on "condemnation and deterrence of offensive police interrogation methods" as "a principal reason for barring the resulting confessions" (emphasis omitted)).

Because it is legal to grant immunity to a witness, the deterrence rationale plays no role in suppression of immunized testimony. See *Bloch*, supra note 51, at 1641-42 (noting that "a formal grant of immunity exemplifies the legally authorized means of compelling testimony" and that deterrence rationale should therefore not apply "since there is no constitutional violation from which the government should be deterred").

²¹⁰ See, e.g., *Nix v. Williams*, 467 U.S. 431, 442-43 (1984) ("The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections."); see also supra note 201 and accompanying text (addressing question whether "fruit of the poisonous tree" analysis applies to coerced confessions).

²¹¹ See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 280 (1978) (rejecting application of exclusionary rule to attenuated evidence where it "could not have the slightest deterrent effect on the behavior of an officer"); *Nardone v. United States*, 308 U.S. 338, 341 (1939) ("As a matter of good sense, however, such connection [between unconstitutional government conduct and acquisition of evidence] may have become so attenuated as to dissipate the taint."); 5 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 11.4(a), at 235-36 (1996) (summarizing development of attenuation jurisprudence); *Bloch*, supra note 51, at 1638 ("At some point, the chain linking the illegality to the suspect evidence is so convoluted and strained, suppression is unlikely to deter the police misconduct.").

²¹² See *Ceccolini*, 435 U.S. at 276-77 (finding that degree of exercise of free will by witness is relevant factor); see also *Rawlings v. Kentucky*, 448 U.S. 98, 106-10 (1980) (finding that "petitioner's statements were acts of free will unaffected by any illegality in the initial detention" where statements were apparently made spontaneously in response to police discovery of drugs in petitioner's companion's possession).

proach to Fourth Amendment violations,²¹³ this aspect of attenuation doctrine likely applies to evidence derived from coerced confessions.²¹⁴

Thus, although courts interpret the privilege to require exclusion of all evidence derived from immunized testimony, no matter how attenuated,²¹⁵ when applying the deterrence-based “fruit of the poisonous tree” doctrine, they permit the introduction of derivative evidence if it is sufficiently removed from the underlying illegality.²¹⁶ Similarly, courts do not consider whether the prosecution has made nonevidentiary use of a coerced confession or whether witness testimony has been shaped or altered by it.²¹⁷ Indeed, it is routine for police officers, investigators, and prosecutors to elicit, listen to, or read suspects’ confessions. Even if a court later suppresses a confession as involuntary, the prosecutor apparently remains free to make nonevidentiary use of it and present witness testimony that may have been shaped by it.

²¹³ Like Fourth Amendment cases, the Court now deems police misconduct a prerequisite for suppression of a coerced confession, see *supra* note 209 and accompanying text, and views “[t]he purpose of excluding evidence” as an attempt “to substantially deter future violations of the Constitution.” *Connelly*, 479 U.S. at 166. Indeed, in *Connelly*, the Court cited Fourth Amendment cases when discussing the rationale for suppressing coerced confessions. See *id.* Yale Kamisar also has likened the Court’s treatment of coerced confessions to the suppression of evidence seized in violation of the Fourth Amendment. See Kamisar, *supra* note 148, at 940 (arguing that “due process exclusionary rule for confessions (in much the same way as the Fourth Amendment exclusionary rule for physical evidence) is . . . intended to deter improper police conduct” (quoting 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.2, at 443 (1984))).

²¹⁴ See, e.g., *Mapys v. United States*, 409 F.2d 964, 966 (10th Cir. 1969) (concluding that attenuation doctrine could apply to statements given after illegal confession); *United States v. Matthews*, 488 F. Supp. 374, 379-80 n.2 (D. Neb. 1980) (suggesting that statement that is fruit of illegal confession may be admissible if “any causal connection had become so attenuated that the taint was dissipated”).

²¹⁵ In *United States v. Kurzer*, 534 F.2d 511 (2d Cir. 1976), the court rejected the application of the attenuation doctrine to evidence derived from immunized testimony because:

The Fifth Amendment . . . is by its terms an exclusionary rule, and as implemented in the immunity statute it is a very broad one, prohibiting the use not only of evidence, but of “information,” “directly or indirectly derived” from the immunized testimony. The statute requires not merely that the evidence be excluded when such exclusion would deter wrongful police or prosecution conduct, but that the witness be left “in substantially the same position as if [he] had claimed the Fifth Amendment privilege.”

Kurzer, 534 F.2d at 516; see also *North II*, 920 F.2d at 946 n.7 (“The fruit of the poisonous tree metaphor is actually backwards as applied to a *Kastigar* problem. The ‘tree’—the immunized testimony—is not poisonous; it is perfectly legal and only turns poisonous when used against the defendant.”); Bloch, *supra* note 51, at 1639-41 (rejecting as “improbable” interpretation of dicta in *Nix*, 467 U.S. 431, to apply attenuation doctrine to immunized testimony).

²¹⁶ See *supra* notes 210-14 and accompanying text (noting that exclusionary rule is inapplicable to attenuated evidence).

²¹⁷ See *supra* note 203.

Such derivative uses, which involve investigators, prosecutors, and witnesses exercising free will, apparently are too attenuated to warrant suppression as fruit of the coerced confession.²¹⁸

D. The Need for Reform

Although the above-described steps in the development of the *Garrity* rule—the shift to the immunity analogy and the increased protection that immunized testimony receives—are consistent with Fifth

²¹⁸ Although these differences between treatment of immunized testimony and coerced confessions are firmly entrenched in governing doctrine, there is reason to question them. The Supreme Court has determined that, like due process, the privilege prohibits the use of involuntary confessions. See *Dickerson v. United States*, 530 U.S. 428, 433 (2000) ("Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment."); *Malloy v. Hogan*, 378 U.S. 1, 6-11 (1964) (determining that Fifth Amendment privilege governs admissibility of confessions in state criminal proceedings); *Bram v. United States*, 168 U.S. 532, 542-43 (1897) (holding that privilege governs admissibility of confessions in federal court); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 Ohio St. L.J. 497, 529-50 (1992) (arguing that Fifth Amendment privilege prohibits use of involuntary confessions). If so, coerced confessions merit no less legal protection than immunized testimony. See *Bloch*, *supra* note 51, at 1619 ("If both [immunized testimony and coerced confessions] receive their primary protection from the Self-Incrimination Clause, what justification provides for the disparate treatment of the two types of compelled utterances?"). But in *Connelly*, without explicit consideration of these issues, the Court maintained that, despite the availability of the privilege, it "has retained [a] due process focus" to address coerced confessions. *Connelly*, 479 U.S. at 163; see also *Miller v. Fenton*, 474 U.S. 104, 110 (1985) ("[E]ven after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, and is binding on the States, the Court has continued to measure confessions against the requirements of due process." (internal citations omitted)). Although the import of those passages from *Connelly* and *Miller* is not clear, they can be read to mandate that due process (which apparently permits use of evidence derived from coerced confessions if sufficiently attenuated), not the privilege (which does not exempt attenuated evidence), dictates the admissibility of allegedly coerced confessions and their fruits, at least outside the special privilege-based rules set forth in *Miranda* and its progeny. See Herman, *supra*, at 521-28 (discussing *Connelly*'s implication that due process may determine admissibility of coerced confessions). Indeed, when assessing the admissibility of confessions, lower courts routinely rely on due process, not the privilege. See, e.g., *United States v. McCurdy*, 40 F.3d 1111, 1118 (10th Cir. 1994) (holding that admissibility of statement taken in compliance with *Miranda* should be determined by application of due process voluntariness test); *Weaver v. Brenner*, 40 F.3d 527, 536 (2d Cir. 1994) ("[T]he Supreme Court continues to analyze coercive interrogation techniques under the Due Process Clause."); *United States v. Swint*, 15 F.3d 286, 289 (3d Cir. 1994) (discussing application of due process test); *People v. Sexton*, 601 N.W.2d 399, 405 (Mich. Ct. App. 1999) (applying due process test), rev'd on other grounds, 609 N.W.2d 822 (Mich. 2000); *State v. Bittick*, 806 S.W.2d 652, 658 (Mo. 1991) (same); *Passama v. State*, 735 P.2d 321, 323 (Nev. 1987) ("The [C]ourt has retained this due process focus even after developing extensive law on the Fifth Amendment privilege against self-incrimination and applying it to the states."). But see *United States v. Braxton*, 112 F.3d 777, 780 (4th Cir. 1997) (citing to both privilege and Due Process Clause as bases for suppressing coerced confessions).

Amendment doctrine, the result—rigid restrictions on prosecutorial use of police officers' compelled statements—is neither fair nor sensible. *Garrity* immunity saddles prosecutors with the obligation to disprove any use of compelled statements, often including nonevidentiary and indirect evidentiary use.²¹⁹ Even when police internal affairs investigators act in good faith, *Garrity* immunity can create difficult, sometimes insurmountable, impediments to investigations and prosecutions of police criminality.²²⁰ It also provides opportunities for sabotage by unscrupulous police investigators and witnesses.²²¹ Unable to prevent the taking and dissemination of compelled statements, prosecutors are powerless to do more than attempt to minimize the adverse consequences of *Garrity* immunity and prepare to satisfy their burden at a *Kastigar* hearing. These responses, which are only partially effective, require the expenditure of considerable resources to identify and isolate tainted witnesses and evidence.²²²

Police prosecutions face unique and formidable challenges: the “code of silence,”²²³ citizens’ reluctance to make complaints against police,²²⁴ prosecutors’ aversion to bringing charges against members of police departments with which they must maintain working relationships,²²⁵ the prevalence of one-on-one “swearing contests” between single complainants and police officers,²²⁶ the questionable credibility of many complainants and witnesses, the difficulty in deter-

²¹⁹ The use restrictions unique to immunized testimony and, by analogy, to police officers' compelled statements—the prohibitions on nonevidentiary and indirect evidentiary uses—are the most problematic. The proscription on nonevidentiary use requires that an exposed prosecutor refrain from decisionmaking influenced by compelled statements. Because strategic and tactical decisions are likely the result of all information available to a prosecutor, it may be difficult or impossible for a prosecutor to determine whether, and to what extent, her exposure to a compelled statement tainted that process. This is particularly true when the exposure occurs early in the investigation. The ban on indirect evidentiary use makes avoidance of exposure and taint contingent on witnesses whose conduct and thought processes are beyond the prosecution’s control.

²²⁰ See *supra* notes 68-94 and accompanying text.

²²¹ See *supra* notes 95-115 and accompanying text.

²²² See *supra* Part I.D.

²²³ See *supra* note 98.

²²⁴ Cf. Christopher Comm'n Report, *supra* note 72, at 158 (describing ways in which LAPD discourages citizen complaints).

²²⁵ See, e.g., Kolts Comm'n Report, *supra* note 72, at 110-11 (describing “apparent disinclination on the part of the [Los Angeles County] D.A.’s Office to prosecute excessive force cases”); Cheh, *supra* note 8, at 252 (“[An] explanation for the low number of criminal prosecutions is the reluctance of local and even state authorities to proceed against local officers.”); Scott Glover & Matt Lait, LAPD Misconduct Cases Rarely Resulted in Charges, L.A. Times, Oct. 22, 2000, at A1 (reporting that Los Angeles County district attorneys prosecute small fraction of potential criminal cases against police officers).

²²⁶ See Cheh, *supra* note 8, at 253 (“In many cases the only witnesses will be the victim and the police, and medical data may be inconclusive.”); Kerstetter, *supra* note 98, at 234 (noting prevalence of cases with no corroborating testimony or witnesses).

mining when police use of force becomes criminal,²²⁷ and the fact that jurors and judges are often sympathetic to police defendants.²²⁸ Adding *Garrity* immunity makes a difficult situation worse and may cause prosecutors either to forego or lose otherwise meritorious cases against police officers who commit crimes.²²⁹ Because it enables police investigators to grant the functional equivalent of formal immunity to other officers, the *Garrity* doctrine is difficult to square with judicial efforts to limit the availability of immunity in other contexts. Most notably, absent a request from the prosecution, courts steadfastly have refused to grant immunity for witnesses who, if immunized, would provide exculpatory testimony for criminal defendants.²³⁰

The contrast between the protection that courts provide for coerced confessions and compelled statements also is troubling.²³¹ In the former situation, police bent on solving a crime use illegal physical or psychological pressure to coerce a possibly unreliable confession from an uncounseled in-custody suspect in the secrecy of an interrogation room. In the latter, internal affairs investigators conduct a civil, administrative interview of a suspect police officer, affording him a host of procedural protections, including representation by counsel or

²²⁷ See, e.g., Carl B. Klockars, *A Theory of Excessive Force and Its Control*, in *Police Violence*, supra note 8, at 1, 2 ("The enormous range of the legitimate authority of the police to use force is at the heart of the problem of defining and controlling its excessive use.").

²²⁸ See id. at 3 (describing public reluctance to punish police officers "with penalties normally reserved for criminals"); supra note 119 (citing authority describing judicial attitudes in police prosecutions).

²²⁹ See supra Part II.C.

²³⁰ See, e.g., Amar & Lettow, supra note 38, at 862-64, 863 n.15 (noting that courts have refused to grant immunity to witnesses who, if immunized, would give self-incriminating testimony that would exculpate criminal defendants); Peter W. Tague, *The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One*, 78 Geo. L.J. 1, 1 (1989) (noting that privilege can "shackle the innocent defendant from attempting to prove that another person committed the crime"); see also *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261 (1983) (noting in context of civil deposition that "[n]o court has authority to immunize a witness. That responsibility . . . is peculiarly an executive one").

²³¹ See supra notes 202-03 and accompanying text (discussing differences). Several scholars have noted the apparent anomaly that coerced confessions receive less protection than immunized testimony. See Herman, supra note 218, at 525 n.661 (discussing "irony . . . that a counselled [and immunized] witness at a televised legislative hearing into matters of national significance [i.e., Oliver North] was given more protection than a suspect isolated with an interrogator at the police station"); Strachan, supra note 50, at 823-30 ("The so-called 'immunity' inadvertently conferred by an unconstitutional interrogation cannot properly be compared with statutory immunity."). Courts also have commented on the differences. See, e.g., *United States v. Kurzer*, 534 F.2d 511, 515-17 (2d Cir. 1976) (distinguishing Fourth Amendment exclusionary rule, which focuses on deterring unlawful police conduct, from Fifth Amendment exclusionary rule, which confers broad prohibition on use of immunized testimony against witness).

a union official and a tape-recorded interview.²³² Prevailing doctrine gives prosecutors free rein to use coerced confessions, but not compelled statements, to determine trial strategy and shape witness testimony.²³³

As one observer has noted, the *Garrity* "status quo . . . is contrary to fundamental tenets of our system of justice" and conflicts with "the need to hold those who wear the public trust accountable in the same system of criminal justice that they enforce and to which the rest of us subscribe."²³⁴ Although the desire for more effective criminal prosecution of police officers alone cannot justify diminution of their constitutional rights, these problems make clear that the constitutional and legislative framework supporting *Garrity* immunity is ripe for reconsideration.

III

RESPONSES TO *GARRITY* IMMUNITY PROBLEMS

A. *Judicial Responses*

1. *Rethinking Garrity*

One approach to reform is to reassess *Garrity*. Should official threats of job loss made to a government employee as a sanction for silence trigger the privilege against self-incrimination? Building on the claim that "[n]othing in the historical development of the privilege suggests that threatened loss of employment was the kind of compulsion against which the [Fifth] amendment aimed to protect,"²³⁵ some

²³² See, e.g., Cal. Gov't Code § 3303 (West 1995) (describing procedural rights of police officers during administrative questioning to include receiving compensation if questioned while off-duty, questioning by no more than two interrogators, receiving copy of transcript and recording of interview if one is made, retaining ability to make own recording of the interview, receiving advance notice of nature of investigation, and retaining representation); see also Lisa Petrillo, *Woman Is Dead; Police-Shootings Debate Lives On*, S.D. Union-Trib., Aug. 10, 1993, at B1, 1993 WL 7503947 (describing ability of police officers suspected of improper shootings to confer with attorneys before questioning).

²³³ See *supra* note 203 and accompanying text (noting that courts do not apply restrictions on nonevidentiary and indirect evidentiary uses in cases involving coerced confessions).

Of course, one response to this disparity in treatment is to increase the protection that coerced confessions receive. Indeed, some reasons offered for the greater protection for immunized testimony are unpersuasive. See *infra* note 258 (responding to policy arguments that immunized testimony merits more protection than coerced confessions). But see *supra* Part II.C (describing differences between rationales for suppression of coerced confessions and immunized testimony). Whatever the merits of that position, a topic beyond the scope of this Article, there is no evidence that courts are inclined to prohibit nonevidentiary and indirect evidentiary uses of coerced confessions.

²³⁴ Bloch, *supra* note 11, at 680.

²³⁵ Friendly, *supra* note 164, at 707.

scholars have called for *Garrity* to be overruled.²³⁶ Noting that *Garrity* has no application when private employers use similar threats to investigate employee misconduct,²³⁷ they conclude that *Garrity* impairs the government's ability to function like a responsible employer²³⁸ and bestows on government employees rights not shared by those in the private sector.²³⁹ Thus, the critics reason, *Garrity* sets the "compulsion" threshold too low: Threats of job termination should not trigger the privilege, and police officers' resulting answers should be admissible.²⁴⁰

The Court should be hesitant to adopt this view. First, it overstates both the impediments to the government as an employer and the advantages that government employees enjoy. *Garrity* and its progeny leave the government as free as private employers to demand answers to job-related questions from employees on pain of job termination.²⁴¹ Although *Garrity* may foreclose the government from using statements that it compels from its employees in a criminal prosecution, private employers are under no obligation to notify police or prosecutors about similar statements that they compel from employees. Without such notice, government employees and private employees stand in roughly the same position—both can be required to make statements that either cannot be (in the case of government employees) or likely will not be (in the case of private employees) used in criminal prosecutions.²⁴²

²³⁶ See, e.g., Amar & Lettow, *supra* note 38, at 868-69, 905-06 (proposing that government should be able to fire employees "without detriment to its law enforcement function"); Friendly, *supra* note 164, at 706-08 (arguing that public employees' answers should be admissible even if compelled by threat of job loss).

²³⁷ See Amar & Lettow, *supra* note 38, at 868-69 (noting that unlike "[a] responsible private employer [who] may draw sensible inferences from silence and fire [employees] who refuse[] to respond to accusations," government can do so only if it confers immunity and risks loss of evidence of criminal wrongdoing); Friendly, *supra* note 164, at 707 (comparing *Garrity* to situation in which private employer makes similar inquiry into misconduct).

²³⁸ See Amar & Lettow, *supra* note 38, at 905 (noting that government is currently forced to choose between "act[ing] sensibly as an employer" and "act[ing] efficiently in its sovereign capacity as a law enforcer").

²³⁹ See Friendly, *supra* note 164, at 707 ("It thus seems morally wrong that if [public employees] opt for answering questions in order to protect their jobs, their answers should enjoy greater protection than those of an employee responding to a similar inquiry by a private employer.").

²⁴⁰ Id. at 708 n.158 ("I propose a return to the pre-*Garrity* . . . world, in which the nation lived quite happily without giving . . . public officials . . . a super first-class citizenship.").

²⁴¹ See *supra* notes 151-53, 167-70 and accompanying text (discussing ability of government to demand answers to job-related questions from public employees and fire them if they refuse).

²⁴² There are two significant *Garrity*-generated differences between treatment of private- and public-sector employees. First, if the government learns of a private-sector em-

Second, absent the *Garrity* doctrine or something like it, the government, which investigates and prosecutes as well as employs, can impose unique obligations on its employees. Without *Garrity*, criminal investigators and prosecutors could use the threat of job loss to compel statements from government employees suspected of job-related crimes, not to impose workplace discipline, but for the purpose of criminal investigation and prosecution.²⁴³ Police and prosecutors cannot exercise the same leverage over private-sector employees suspected of crimes. Thus, abolition of *Garrity* would impose unique restrictions on public employees' ability to exercise their Fifth Amendment rights.

The Court could address this disparity by permitting prosecutors to introduce only those compelled statements elicited during noncriminal investigations. But it is difficult, if not impossible, to interpret the privilege against self-incrimination to support such a rule. The government's threat of job loss seems to be equally "compelling" whether it comes during an administrative or a criminal investigation.²⁴⁴ Indeed, when compared to the kind of judicial compulsion clearly suffi-

ployee's compelled statement, it can introduce it in a criminal case. *Garrity* would bar use of an analogous statement from a government employee. Second, dissemination of a private employee's compelled statement does not pose the risk of tainting a prosecution as does dissemination of a government employee's compelled statement. There are, however, less drastic means of eliminating or minimizing these differences than abolition of the *Garrity* rule. See *infra* Parts III.A.2 and III.B (suggesting alternatives).

²⁴³ Indeed, this happened in *Garrity*. After the deputy attorney general interviewed *Garrity* and the other suspects, an assistant county prosecutor, whose office later brought and prosecuted the criminal charges, also interviewed them. *State v. Naglee*, 207 A.2d 689, 692 (N.J. 1965). The state forfeiture statute required *Garrity* and the others to answer the prosecutor's questions. At trial, the defendants' statements to both the deputy attorney general and the district attorney were admitted into evidence. *Id.* at 692, 696-97.

²⁴⁴ Although the Court has carved out exceptions to the privilege in noncriminal, regulatory contexts, those decisions do not support a rule permitting introduction of statements compelled during administrative investigations of police conduct and excluding statements compelled during criminal investigations. First, "[t]he Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." *Balt. City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 556 (1990). But in doing so, the Court addressed only the ability of the state to compel statements, not whether the prosecution can later use the statements in a criminal case. See *id.* at 561 (suggesting that person who complies with regulatory requirement by giving testimonial evidence may be entitled to "limitations on the direct and indirect use of that testimony").

Second, the Court has refused to apply the privilege altogether—thus permitting both governmental compulsion to obtain statements and later use in a prosecution—when the information is necessary for the operation of a noncriminal regulatory scheme, and there is little chance that the required disclosures, taken as a whole, will result in criminal prosecution. See, e.g., *California v. Byers*, 402 U.S. 424 (1971) (holding that state statute requiring automobile driver involved in accident to stop and self-identify did not trigger privilege). Because there is a fair possibility that police officers' statements regarding alleged miscon-

cient to trigger the privilege—the possibility of a contempt sanction for refusal to answer questions—the threat used in *Garrity* can be considerably more daunting.²⁴⁵ Many employees would prefer a contempt conviction, a fine, and a short jail sentence to the loss of their chosen employment and perhaps their pension and career.²⁴⁶ If the threat of a contempt sanction is enough to activate the privilege, it seems that the threat in *Garrity* is sufficient as well, whether made during an administrative or criminal investigation.

In addition, if the government were able to terminate a police officer's employment for his assertion of the right to avoid self-incrimination, in effect forcing a waiver of the privilege, it may be able to condition other government-sponsored economic benefits, such as housing subsidies and health care funding, on similar waivers. To some, the public interest may demand that police officers, who are vested with the responsibility of upholding the law and given the legal right to use force, be held to answer for alleged misconduct under pain of losing their jobs and without receiving immunity.²⁴⁷ But if economic pressure is a permissible means of compelling waivers of constitutional safeguards in that setting, the government's ability to make similar demands on others who also are financially dependent on it may be enhanced. For example, it may be permissible for the government to require a waiver of constitutional rights as a condition of residence in publicly funded housing.²⁴⁸

2. Rethinking the Formal Immunity Analogy

Even if *Garrity* remains intact, it need not require that courts afford police officers' compelled statements the same stringent protection that formally immunized testimony receives. Even a modest

duct will expose them to criminal prosecution, *Byers* likely has no force in the *Garrity* context.

²⁴⁵ See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (noting that "touchstone" of Fifth Amendment privilege is compulsion, and sanctions involving "substantial economic impact" trigger protections); *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (describing "[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood" as "powerful forms of compulsion to make a lawyer relinquish the privilege" and as "powerful an instrument of compulsion" as use of legal process).

²⁴⁶ See *Friendly*, supra note 164, at 707 (noting "that from a practical standpoint threatened loss of a government job carrying valuable vested benefits or suspension from a profession may be a more effective compulsion than a small fine or even a few days in jail").

²⁴⁷ For a discussion of an approach to cases like *Garrity* using such a cost-benefit analysis, see *Bloch*, supra note 51, at 1665-72.

²⁴⁸ See, e.g., Monica L. Selter, *Comment, Sweeps: An Unwarranted Solution to the Search for Safety in Public Housing*, 44 Am. U. L. Rev. 1903, 1938-40 (1995) (describing tension between Clinton Administration policy of including consent-to-search clauses in leases of federally subsidized housing and *Garrity* decision).

relaxation of prohibitions on collateral uses of compelled statements would markedly improve the prospects of prosecutions of police officers. For example, courts could treat compelled statements as they do coerced confessions, barring use of the statement itself in the prosecution's case-in-chief and for impeachment and suppressing nonattenuated evidence derived from it, but imposing no prohibition on nonevidentiary use or indirect evidentiary use through witness testimony.²⁴⁹ This approach, which is consistent with the assumptions underlying the Court's decisions in *Garrity* and *Kastigar*,²⁵⁰ would free prosecutors from the burden of demonstrating that neither they nor their witnesses had been exposed to or tainted by police officers' compelled statements.²⁵¹ It also would eliminate the threat of police witnesses' avoiding their obligation to testify by claiming to be tainted.²⁵²

Indeed, justifications for the robust protection of immunized testimony do not apply to the compelled statements of police officers. Professor Kristine Strachan, an advocate of strict limits on prosecutorial use of immunized testimony,²⁵³ defended heightened protection for immunized testimony by comparing the process of questioning a suspect with that of immunizing a witness. She contended that coerced confessions deserve less protection because they often result from hasty interrogation decisions made "under pressure, often inadvertently . . . by persons unaware of or not concerned with legal consequences."²⁵⁴ The sanction of preclusion attaches only after a court later determines that such "constable's blunders" violate due process.²⁵⁵ In contrast, decisions to immunize witnesses "are made before interrogation, normally by lawyers, acting with sufficient time to decide, calmly and rationally, whether it is more valuable to compel the testimony and suffer the resulting use preclusion or to forego the testimony and retain the unfettered ability to prosecute."²⁵⁶ Professor

²⁴⁹ See supra notes 201, 203 and accompanying text (discussing treatment of information obtained through coerced confessions).

²⁵⁰ See supra notes 128-30, 200 and accompanying text (discussing assumptions of *Garrity* and *Kastigar* Courts).

²⁵¹ If there were no bar on nonevidentiary use of compelled statements, prosecutorial exposure would not present a problem, unless it led to the discovery of evidence. See supra notes 49-52 and accompanying text. Removal of the prohibition on indirect evidentiary use of compelled statements would eliminate the need to show that witnesses' recollections had not been affected by compelled statements. See supra notes 53-57 and accompanying text.

²⁵² See supra notes 97-101.

²⁵³ Strachan, supra note 50, at 814-20 (advocating restrictions on nonevidentiary use and witness testimony affected by immunized testimony).

²⁵⁴ Id. at 831.

²⁵⁵ Id.

²⁵⁶ Id.

Strachan also maintained that, unlike police officers, who only learn after a suppression ruling that a confession is coerced, prosecutors, who make the decision to immunize, will know that they must take steps in advance to ensure that they later will be able to establish that there was no use of immunized testimony.²⁵⁷ Finally, she noted that “grants of immunity probably occur much less frequently” than coerced confessions.²⁵⁸

These points lose force when applied to police officers’ compelled statements rather than formally immunized testimony. Indeed, all of the reasons that Strachan gives for affording less protection to coerced confessions—the possible inadvertence of the conduct triggering suppression of evidence, the concerns for attaching too harsh a consequence to “blunders,” the prosecution’s inability to prepare in

²⁵⁷ Id.

²⁵⁸ Id. Strachan’s effort to distinguish between coerced confessions and immunized testimony is not altogether persuasive. Police officers who seek confessions may be neither ignorant of, nor apathetic about, the legal consequences of their tactics. See, e.g., *Cooper v. Dupnick*, 963 F.2d 1220, 1223-24 (9th Cir. 1992) (describing plan employed by officers involved in serial rapist investigation to ignore suspect’s assertions of rights to silence and legal counsel in hopes of obtaining statement that could be used to impeach, thereby preventing suspect from testifying at trial). Indeed, the exclusionary rule presupposes that police officers make informed decisions about interrogation tactics that can be influenced by suppression. See *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (holding that purpose of suppressing coerced confessions “is to substantially deter future violations of the Constitution”).

Similarly, Strachan’s use of the well-known Fourth Amendment term “constable’s blunders” to describe the cause of a coerced confession is misplaced. Although police may not know exactly how much pressure will prompt a court to find a confession to be involuntary, they are aware that at some point coercive tactics will result in suppression. Thus, as they increase the pressure to elicit a statement, they cannot help but be aware that they tread on thin ice. This stands in marked contrast to police officers who are either unaware of or baffled by Fourth Amendment doctrine, that “vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse.” Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 758 (1994). Thus, the case for allowing collateral uses when police coerce a confession is less compelling than when they inadvertently run afoul of the intricacies of the Fourth Amendment.

Even if Strachan’s characterization of differences between the processes of coercing confessions and immunizing testimony is accurate, however, it is not self-evident that those differences should cause courts to apply a less robust exclusionary rule for coerced confessions. If police engage in conduct sufficiently egregious to violate due process, there should be little judicial sympathy for claims that police often must act hastily or under pressure, are ignorant of, or apathetic about, the legal consequences of their conduct, or normally do not take steps to minimize the consequences flowing from a coerced confession. Indeed, one plausibly could contend that the need to deter police misconduct, especially misconduct sufficiently flagrant to violate due process, requires use of an exclusionary rule as robust as the one applied to immunized testimony. The danger that such misconduct will increase the risk of unreliable confessions, and thus wrongful convictions, lends further support to that contention. By requiring the prosecution to disprove all use of coerced confessions, including nonevidentiary and indirect evidentiary use, courts could increase the incentive for police to refrain from use of offensive interrogation tactics.

advance for the fallout of such blunders, and the greater frequency with which the prosecution will have to contend with the problem—apply with equal force to statements compelled from police officers.²⁵⁹

Nor does resort to the Fifth Amendment privilege as the reason for suppression and the related use of the “immunity” label require that courts treat compelled statements and immunized testimony identically. As Professor Bloch has demonstrated, the Court employs a multitiered approach to the Fifth Amendment privilege, affording different levels of protection in different circumstances.²⁶⁰ For example, when a defendant testifies at a pretrial suppression hearing to establish standing, the Court recognizes a limited privilege-based form of “use immunity”²⁶¹ that bars admission of the testimony in the prosecution’s case-in-chief at trial, but may permit impeachment and nonevidentiary use.²⁶² And, although Bloch does not discuss it, the privilege-based *Miranda* exclusionary rule,²⁶³ which requires suppression of statements taken either without proper warnings or following police failure to honor a suspect’s invocation of rights, but permits collateral uses that are prohibited of immunized testimony,²⁶⁴ is an-

²⁵⁹ See *supra* Part I.C (discussing circumstances surrounding internal affairs investigators’ use of compulsion to take statements from suspect police officers).

²⁶⁰ Bloch, *supra* note 51, at 1646-48. Professor Bloch describes three tiers of Fifth Amendment protection. Formally immunized testimony (Tier One) receives the most robust protection, a prohibition on direct and derivative evidentiary use, as well as at least some nonevidentiary use. Coerced confessions (Tier Two) enjoy protection from direct and derivative evidentiary use, but not from nonevidentiary use. Statements made as a result of the need to choose between constitutional rights—specifically, a criminal defendant’s pretrial suppression hearing testimony necessary to establish standing to contest the legality of a search or seizure (Tier Three)—are excluded only from use in the prosecution’s case-in-chief. *Id.*; see also Bloch, *supra* note 11, at 640-64 (surveying spectrum of protection under rubric of “use immunity”). Bloch argues that the Court has acknowledged, at least implicitly, that the Fifth Amendment privilege provides different levels of protection in different contexts. See Bloch, *supra* note 51, at 1645-46.

²⁶¹ *United States v. Salvucci*, 448 U.S. 83, 90 (1980).

²⁶² See *id.* at 93-94 & nn.7-8 (implicitly rejecting prohibition on nonevidentiary use and leaving intact lower court decisions permitting use of suppression hearing testimony to impeach defendant at trial); *Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (holding that defendant’s suppression hearing testimony to establish standing “may not thereafter be admitted against him at trial *on the issue of guilt*,” thus suggesting it could be used to impeach or discover other evidence (emphasis added)). For a discussion of the Court’s subsequent interpretation of *Simmons*, see Bloch, *supra* note 51, at 1620-23, 1634-35.

²⁶³ The Court recently reiterated that the Fifth Amendment serves as the foundation for the *Miranda* rule. See *Dickerson v. United States*, 530 U.S. 428, 434-35 (2000).

²⁶⁴ Prosecutors can use statements taken in violation of *Miranda* to impeach a defendant, see *Oregon v. Hass*, 420 U.S. 714, 722-24 (1975) (holding statement obtained following failure to honor invocation of right to counsel admissible to impeach); *Harris v. New York*, 401 U.S. 222, 223-26 (1971) (holding statement obtained after defective *Miranda* warnings admissible to impeach), and develop leads to other evidence, see, for example, *Oregon v. Elstad*, 470 U.S. 298, 300-06 (1985) (holding that defendant’s voluntary statement following *Miranda* warning was admissible without consideration of possible taint

other example. Courts can and should show the same flexibility when determining whether to permit collateral uses of compelled statements, particularly in light of the significant differences between formal grants of immunity and *Garrity* immunity.²⁶⁵

B. Legislative Responses

For policymakers, the situations in which *Garrity* immunity attaches involve three competing concerns: the suspect officers' Fifth Amendment rights, the need for effective administrative investigation

from defendant's previous statements made without having received warnings, since "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have . . . mandated a broad application of the 'fruits' doctrine"); Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466, 2523-24 (1996) (noting that lower courts have read *Elstad* "to mean that *Miranda* violations simply produce no suppressible 'fruits' at all").

²⁶⁵ See *supra* Part I.C (describing differences). Professor Bloch proposes two models for determining the appropriate level of protection available for various forms of compelled statements, a "Compulsion Model," Bloch, *supra* note 51, at 1651-64, and a "Balancing Model," *id.* at 1665-72. The former "posits a correlation between the extent of compulsion and the extent of protection: the greater the compulsion, the greater the protection." *Id.* at 1651. The latter "weighs the pertinent governmental interests against the speaker's privilege . . ." *Id.* at 1665. When Bloch applies the models to compelled statements taken from police officers as part of an administrative investigation, she concludes that they merit less protection than immunized testimony but more protection than coerced confessions. *Id.* at 1693-1700. She concludes that her models would permit at least some non-evidentiary use of police officers' compelled statements. *Id.* at 1695, 1698.

Even if reluctant to apply less stringent exclusionary rules to compelled statements, courts could reallocate the burden of proof regarding some collateral uses. For a discussion of a similar approach in the context of congressional immunity, see Wright, *supra* note 36, at 445-48. The *Kastigar* Court's decision to make the prosecution shoulder the burden of disproving taint makes sense when it is the prosecutor who chooses to immunize a witness and later to prosecute. In such a situation, the prosecutor can weigh the benefits of immunity against the costs, employ prophylactic measures such as "canning" testimony before granting immunity, and take steps to avoid dissemination of the immunized testimony. See *supra* notes 76-77, 82, 87-88 and accompanying text. As noted above, none of these things is true of *Garrity* statements. See *supra* notes 78, 83-86, 89-91 and accompanying text.

If the prosecution can demonstrate that it has played no role in the decision to confer *Garrity* immunity and disseminate a compelled statement, courts could reallocate the burden by requiring that the defendant prove witness taint, particularly if there is reason to doubt the sincerity of an allegedly tainted witness. See *supra* notes 97-112 and accompanying text. Although such a shift would not alleviate all the problems that *Garrity* immunity creates, it would reduce the threat of witness sabotage, enabling courts to reject witnesses' incredible claims of taint, even if the prosecution was unable to affirmatively establish an absence of taint. It would make sense to continue to allocate to the prosecution the burden of proving that prosecutors, investigators, and physical evidence are free from taint. Despite the prosecution's inability to control the decisions to take and disseminate a compelled statement, the prosecution team can ensure that its own members remain free from exposure. The prosecution also has better access to information concerning the prosecution team's exposure to and taint by compelled statements for purposes of a *Kastigar* hearing than does the defendant police officer who gave the *Garrity* statement.

and discipline of police misconduct, and the need to preserve the option of criminally prosecuting rogue officers.²⁶⁶ Generous interpretation of the privilege in the *Garrity* context and the practice of taking compelled statements from police officers before prosecution favor the first two concerns at the expense of the third.²⁶⁷ Although it is impossible to eliminate the tension between the concerns entirely, legislators or police department policymakers should minimize the threat to prosecutions without infringing on officers' rights or impairing the administrative discipline process to the extent that they can do so. At least three approaches are possible: (1) controlling the decision to take compelled statements; (2) restricting the dissemination of compelled statements; and (3) using less coercive methods to persuade suspect officers to cooperate with internal affairs investigations.

1. Controlling the Decision to Take Compelled Statements

Professor Bloch has proposed a "notice and veto" mechanism as a legislative response to the *Garrity* predicament—requiring that internal affairs investigators obtain prosecutorial approval to compel statements.²⁶⁸ Before taking a compelled statement, the "internal affairs units provide notice to the requisite prosecuting authorities of their intention to [do so]."²⁶⁹ After receipt of that notice, "[p]rosecuting authorities then would have a limited period in which to submit an objection to the taking of the statement."²⁷⁰ An objection would preclude internal affairs from taking the statement.²⁷¹ Professor Bloch acknowledges that this response may impair administrative investigations by denying investigators a statement from suspect police officers in cases when prosecutors exercise their veto, but suggests that this burden is not prohibitive.²⁷²

²⁶⁶ See Bloch, *supra* note 11, at 628 ("The tripartite goals of 'use immunity' are to: (1) protect the accused's Fifth Amendment right, (2) secure information from the accused, and (3) preserve accountability in the justice system."); see also *Pillsbury Co. v. Conboy*, 459 U.S. 248, 257-58 (1983) (identifying interests of party seeking to assert Fifth Amendment privilege; information was sought for purpose other than criminal prosecution).

²⁶⁷ Not all police departments take and disseminate compelled statements before there has been a criminal investigation. See *supra* note 72. But the decision to forego administrative questioning altogether or delay it pending a determination whether there will be prosecution reduces the efficacy of the internal disciplinary option. See *infra* notes 274, 280, 282 and accompanying text.

²⁶⁸ Bloch, *supra* note 11, at 682-84.

²⁶⁹ *Id.* at 684.

²⁷⁰ *Id.*

²⁷¹ *Id.*; see also Report of the Rampart Independent Review Panel, *supra* note 9, at 112 (suggesting possibility of conducting criminal investigations before compelled statements are taken from suspect officers, as is done by some police departments).

²⁷² Bloch, *supra* note 11, at 684. She notes that police departments can adjudicate misconduct allegations without compelled statements just as trial juries often render verdicts

For this approach to properly balance the competing needs of internal affairs investigators for compelled statements and prosecutors to maintain the possibility of viable prosecutions, prosecutors would have to be able to assess the probability of future criminal prosecution accurately when deciding whether to exercise a veto. Ideally, they would veto compelled statements only when later criminal prosecution is likely. If they under-vetoed, *Garrity* immunity still would plague prosecutions; if they over-vetoed, they would deny administrative investigations important evidence. Unfortunately, practical problems likely would undermine the predictive accuracy necessary to make this proposal attractive.

First, internal affairs investigators might provide incomplete notice. At the minimum, they would have to notify at least two or three different prosecutors—the local district attorney, the state Attorney General, and the United States Attorney—all of whom may have jurisdiction to bring criminal charges that *Garrity* immunity could jeopardize.²⁷³ Otherwise, they may neglect to notify a prosecutor who, if alerted, would veto the compelled statement.

Second, the content of the notice may be inadequate. Investigators may want to elicit officers' statements at the outset of an investigation, before suspect officers have an opportunity to "get their stories straight." Thus, they may seek approval to compel statements before developing sufficient evidence to enable prosecutors to make intelligent decisions about whether to exercise a veto. The delay necessary to provide more information may render the statement less valuable because of witness collusion.²⁷⁴ Being forced to make decisions without full knowledge of the facts may cause prosecutors to authorize compelled statements in cases in which they would exercise a veto had they received a fuller account.

without a pretrial statement or trial testimony from a defendant. *Id.* For a response to that view, see *infra* note 280.

²⁷³ Indeed, in the case upon which Bloch relies for her proposal, *Daly v. Superior Court*, 560 P.2d 1193 (Cal. 1977) (*en banc*), in which the California Supreme Court employed a notice-and-veto procedure to determine whether a trial court should grant use immunity to allow questioning in a civil suit, "the court mandated that the litigants notify the 'district attorney of the county, the California Attorney General, and the United States Attorney for the district in which the county is located.'" Bloch, *supra* note 11, at 683 (quoting *Daly*, 560 P.2d at 1204). Because police criminality may cross local jurisdictional boundaries, internal affairs investigators sometimes would have to notify prosecutors in several local, state, and federal jurisdictions.

²⁷⁴ See, e.g., U.S. Comm'n on Civil Rights, *supra* note 6, ch. 4 (criticizing New York Police Department rule requiring forty-eight-hour delay before internal affairs investigators can question suspect police officers because it "creates opportunities for subject officers to corroborate their versions of the alleged misconduct incident").

The mixed motives that some internal affairs investigators may harbor could exacerbate these notice problems. For the same reasons that police investigators may improperly compel a statement or disseminate a compelled statement,²⁷⁵ they may neglect to notify a concerned prosecutor or provide incomplete or misleading information in hopes of avoiding a veto, permitting them to confer *Garrity* immunity and thwart criminal prosecution.²⁷⁶ Because it would be difficult to prove that failure to provide complete and accurate notice was done in bad faith, and because sanctions to deter such conduct would not salvage a criminal prosecution impaired by the taking of a compelled statement, these problems make the notice-and-veto solution unattractive.

Moreover, prosecutors may over-veto, thus impairing the internal administrative disciplinary process.²⁷⁷ A prosecutor's cost-benefit assessment heavily favors vetoes, even when inappropriate. An unwarranted veto may deny an internal affairs investigator an important source of evidence, but imposes no direct costs on the prosecutor.²⁷⁸ Prosecutors' suspicions that internal affairs investigators, for whatever reason, are not providing complete details, will exacerbate this problem. The safe thing for a prosecutor to do is to veto, particularly if forced to make a decision quickly.²⁷⁹ If prosecutors are given time to

²⁷⁵ See *supra* notes 95-96 and accompanying text.

²⁷⁶ See Kolts Comm'n Report, *supra* note 72, at 144-45 (

The deputy district attorneys [in Los Angeles County] stressed other ways in which investigations can be manipulated. A deputy district attorney who has the reputation of being hard on the police may be given the run-around, kept in the dark about investigative details, or simply be kept waiting interminably at the scene of the shooting or later when he or she attempts to follow up. Deputy district attorneys state that passive noncooperation, delays, mix-ups, unavailability of personnel and other similar tactics by the Sheriff's Department can severely prejudice an investigation or prosecution of a deputy for misconduct);

see also *id.* at 144 (describing other methods of frustrating criminal investigations of officer-involved shootings, including denying district attorney personnel ability to interview involved officers, giving insufficient or untimely notice of shootings, and manipulation of investigations); Christopher Comm'n Report, *supra* note 72, at 162 (noting that LAPD prevents district attorney representatives from interviewing officers involved in shooting until LAPD internal investigations are complete).

²⁷⁷ Cf. Wright, *supra* note 36, at 437 (noting that prosecutors are likely to be overinclusive when identifying witnesses who may later be prosecuted and thus should not receive congressional immunity in exchange for testimony).

²⁷⁸ Although the law enforcement effort in general suffers from less thorough internal investigations of police officers, because it may both enable officers to escape deserved discipline and diminish the certainty and deterrent effect of administrative sanctions, those costs are likely too remote to shape prosecutors' decisions.

²⁷⁹ Bloch proposes that "[p]rosecuting authorities . . . would have a limited time period in which to submit an objection to the taking of the statement." Bloch, *supra* note 11, at 684. Such a time limit would increase the incentive to over-veto.

assemble more facts before making their determination, it may be too late for internal affairs to obtain a useful statement.

Excessive exercise of vetoes could substantially undermine efforts to address police misconduct by depriving investigators of critical evidence.²⁸⁰ For all the shortcomings of administrative review and discipline of police misconduct,²⁸¹ it remains the most widely used method of addressing police misconduct. In addition, if police departments routinely act on complaints without statements from the suspect or-

²⁸⁰ See, e.g., Newton, *supra* note 90 (reporting LAPD police chief's contention that compelled statements "are essential to the department as it conducts its internal review of shootings and decides whether administrative action is warranted"); cf. Wright, *supra* note 36, at 436 (arguing that reluctance to use compulsion orders will mean "less-than-complete congressional investigations").

Professor Bloch's contention that overinclusive use of vetoes would leave police disciplinary boards in no worse a position than trial juries resolving guilt or innocence without the benefit of a defendant's statement or testimony, see *supra* note 272, is not reassuring. First, in many cases juries do have a defendant's pretrial statements to police, even if the defendant chooses to remain silent at trial. Second, because of the importance of criminal prosecutions, society devotes considerable resources to the investigation of crime. A thorough investigation may partially compensate for evidence unavailable due to a defendant's silence before and during trial. Because police departments may, and perhaps should, devote fewer resources to administrative investigations than to criminal investigations, there is more reason to be troubled by the loss of evidence resulting from an inability to take statements from suspect police officers. Finally, although juries routinely decide cases without a defendant's statements and testimony, we accept that state of affairs because the Constitution compels it. If it were a policy choice, perhaps we would compel defendants to submit to orderly pretrial interrogation or require that they testify at trial. Indeed, a number of scholars have argued that operation of the privilege in this context is indefensible. See, e.g., David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. Rev. 1063, 1064 (1986) (suggesting that efforts to justify privilege "as more than a historical relic are uniformly unsatisfactory"); Donald A. Dripps, *Supreme Court Review—Foreword: Against Police Interrogation—and the Privilege Against Self Incrimination*, 78 J. Crim. L. & Criminology 699, 723 (1988) (identifying privilege as "chief legal obstacle to achieving . . . an accomodation" that permits confessions without "needless brutality" by pretrial judicial interrogation); Friendly, *supra* note 164, at 713-15 (endorsing proposal for pretrial judicial interrogation of criminal defendants).

²⁸¹ Those shortcomings are considerable. See, e.g., *Shielded From Justice*, *supra* note 6, at 5 ("In each city we examined, internal affairs units too often conducted substandard investigations, sustained few allegations of excessive force, and failed to identify and punish officers against whom repeated complaints had been filed."). The Mollen Commission Report paints a particularly troubling portrait of the New York City Police Department Internal Affairs Division (IAD):

We found that IAD had virtually abandoned its primary functions over the past years . . . [a]nd . . . no one in the Department seemed to care. . . . IAD investigators . . . told us that the work ethic in IAD was to close cases with as little effort as possible. . . . One officer told us they sit around and "eat doughnuts and do crossword puzzles"

Mollen Comm'n Rep., *supra* note 6, at 85; see also Christopher Comm'n Report, *supra* note 72, at 153 ("[I]n cases involving allegations of excessive force, the system is unfairly skewed against the complainant."); Hoffman, *supra* note 6, at 1478-82 (discussing abuses by Los Angeles Sheriff's Department).

ficers, the disciplinary system may lose legitimacy in the eyes of officers.²⁸²

Even if the notice-and-veto solution worked, and prosecutors exercised vetoes in only those cases in which criminal prosecution appeared likely, the results would be undesirable. In cases in which the prosecutor exercised the veto, the suspect police officer would escape administrative questioning without cost. In cases in which the prosecutor did not exercise a veto, the suspect officer would enjoy the benefits of immunity if evidence discovered later resulted in a prosecution that was not foreseeable when the prosecutor permitted the compelled statement. If there are constitutional alternatives, we should not settle for these options.

2. *Controlling Dissemination of Compelled Statements*

The taking of a compelled statement alone does not create *Garrity* immunity problems. The problems arise when investigators disseminate the compelled statement. If prosecutors, investigators, and witnesses are never exposed to a compelled statement, it cannot taint them.²⁸³ Thus, an alternative approach would be to restrict dissemination of compelled statements. For example, internal affairs investigators could be required to seal compelled statements and refrain from using them during investigations.

The cost of such an approach is difficult to gauge. There may be legitimate reasons for police investigators to expose witnesses and complainants to the substance of a compelled statement to verify or contradict the suspect officer's version of events.²⁸⁴ Exposure may be direct, by having witnesses read the statement, or indirect, such as when an internal affairs investigator asks questions formulated from the suspect officer's compelled statement that impart otherwise unavailable information.

If a blanket prohibition on dissemination would impair internal investigations too greatly, a notice-and-veto procedure governing dissemination decisions, similar to the one that Professor Bloch proposes for the decision to take a compelled statement, might be more feasible. Such a procedure would give investigators unfettered discretion to take compelled statements but would require prosecutorial ap-

²⁸² See Perez & Muir, *supra* note 13, at 217 (describing police view of Berkeley Police Review Commission as "kangaroo court" because it conducts investigations without interview of suspect police officer).

²⁸³ See *supra* note 66 and accompanying text.

²⁸⁴ See *People v. Gwillim*, 274 Cal. Rptr. 415, 423 (Cal. Ct. App. 1990) ("[V]ictims and witnesses participating in administrative proceedings will frequently and necessarily be exposed to [a police officer] defendant's [*Garrity*] immunized statement.").

proval to disseminate them, including use in witness interviews. Although a veto might impair an administrative investigation somewhat, the suspect officer's statement still would be available to adjudicate the misconduct allegation.

This approach has shortcomings as well. First, it would be difficult to enforce. Particularly challenging would be any effort to restrict use of compelled statements to frame questions for witnesses. Even conscientious investigators might be unable to avoid communicating something about the contents of a compelled statement inadvertently during an interview.²⁸⁵ Second, this approach might run afoul of laws and regulations requiring police departments to give officers involved in an investigated incident copies of compelled statements from that investigation.²⁸⁶ Similarly, statutory and constitutional discovery obligations in multidefendant cases, requiring that the prosecution disclose all the defendant officers' compelled statements,²⁸⁷ would undermine efforts to limit dissemination. Once a police officer has obtained a fellow officer's compelled statement, he may have legitimate reasons to show it to potential witnesses, thereby tainting them. A police officer could challenge testimony from witnesses exposed to

²⁸⁵ An approach by which only internal affairs investigators who were not familiar with a suspect police officer's compelled statements conducted all follow-up investigation also would be problematic. One of the principal functions of follow-up investigation is to test the veracity of the suspect officer's version of events. It would be difficult, if not impossible, for an investigator who was unfamiliar with the officer's statement to perform that function.

²⁸⁶ See, e.g., Cal. Gov't Code § 3303(g) (West 1995) (requiring that officers who are interrogated during investigation have access to tape recordings and stenographers' notes of their interrogation, as well as "any reports or complaints made by investigators or other persons, except those which are deemed . . . confidential").

²⁸⁷ Statutory discovery rules may require disclosure of codefendants' compelled statements. See, e.g., N.Y. Crim. Proc. Law § 240.20 (McKinney 1989) (requiring disclosure of statements of jointly tried codefendants). But see Fed. R. Crim. P. 16(a) (requiring disclosure of certain documents, but not codefendant statements). Even absent a statutory mandate, it may be prudent for a prosecutor to disclose codefendants' compelled statements to a defendant police officer. Because sound practice dictates that the trial prosecutor not read or otherwise be exposed to the contents of the compelled statement, see *supra* notes 63-67 and accompanying text, she will not know if the compelled statements contain exculpatory information that must be disclosed under the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Prosecutors in the office not assigned to the case may be able to read the statement without fear of tainting the prosecution, but their lack of familiarity with the case may render them unable to identify exculpatory evidence in the statements. Because even an inadvertent failure to disclose exculpatory evidence violates *Brady*, see *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (holding that prosecutor has duty to discover and produce favorable and material evidence), the best course of action might be to disclose the codefendants' compelled statements in all cases.

his compelled statement through actions of a fellow officer, even if the prosecutor was not responsible for the exposure.²⁸⁸

3. *Encouraging Cooperation Without “Compulsion”*

An alternative approach would be to permit police departments to use only sanctions less severe than job termination to encourage cooperation with internal affairs investigators. For example, if a police officer suspected of misconduct refused to answer questions, a department could be permitted to do no more than draw an adverse inference from his silence when adjudicating the misconduct allegation.²⁸⁹ Two Supreme Court decisions, *Baxter v. Palmigiano*²⁹⁰ and *Ohio Adult Parole Authority v. Woodard*,²⁹¹ suggest that statements made under those circumstances are admissible in criminal cases.²⁹²

Palmigiano was an inmate in a state penitentiary. The institution accused him of conduct that both violated prison disciplinary rules and exposed him to possible criminal prosecution.²⁹³ When he appeared before the disciplinary board, prison authorities told him that he had a right to remain silent but that his silence could be held against him.²⁹⁴ He remained silent. Although silence alone was insufficient to justify disciplinary measures, the prison board gave it the “evidentiary value [that] was warranted by the facts surrounding his

²⁸⁸ See *supra* note 102 (noting that tainted witness testimony may be inadmissible without regard to whether prosecution was responsible for exposure).

²⁸⁹ Although the Court has prohibited juries from drawing adverse inferences from criminal defendants’ failure to testify at trial, see *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (holding defendant entitled to instruction prohibiting adverse inference from silence); *Griffin v. California*, 380 U.S. 609, 615 (1965) (prohibiting prosecutorial comment on defendant’s silence), it “has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause,” *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (citations omitted); see also *Mitchell v. United States*, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting) (“If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear.”).

²⁹⁰ 425 U.S. 308.

²⁹¹ 523 U.S. 272 (1998).

²⁹² Another decision, *Minnesota v. Murphy*, 465 U.S. 420 (1984), just misses the mark. Murphy was a probationer subject to a probation condition that he be truthful with his probation officer. In response to questions from the probation officer, Murphy admitted involvement in a rape and murder unrelated to the crime for which he was on probation. The Court considered whether Murphy’s statement fell within *Garrity*, which would have required that “the probationer’s [statement] . . . be deemed compelled and inadmissible in a criminal prosecution.” *Id.* at 435-36. Because the “precise contours of Murphy’s obligation to respond to questions” were not clear, the Court declined to assume that he would have been penalized for refusing to answer. *Id.* at 437-38.

²⁹³ *Baxter*, 425 U.S. at 312. *Palmigiano* had incited a disturbance and disruption of prison operations, which might have resulted in a riot. *Id.*

²⁹⁴ *Id.* at 312, 316.

case.”²⁹⁵ After assessing the evidence against Palmigiano, including his silence, the board imposed thirty days of punitive segregation and altered his prison classification status. He sued, contending that use of his silence violated his constitutional rights.²⁹⁶

The *Baxter* Court recognized that *Garrity* and the other “penalty cases” established the applicable legal framework.²⁹⁷ It also confirmed that the Fifth Amendment requires that “if inmates are compelled in those proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered ‘whatever immunity is required to supplant the privilege’ and may not be required to ‘waive such immunity.’”²⁹⁸ But, although there had been no offer or guarantee of immunity, the Court concluded that the prison properly could draw an adverse inference from Palmigiano’s silence.²⁹⁹

Because Palmigiano had remained silent, the Court had no reason to address directly the issue of concern here: whether, had he chosen to answer questions rather than suffer the consequences of remaining silent, a prosecutor would have been able to use his statement in a criminal prosecution.³⁰⁰ But there is good reason to believe that the Court would have permitted such use.

If the Court had concluded the opposite—that threatened evidentiary use of silence gives rise to de facto immunity, as had the threatened job termination in *Garrity*—there would have been no reason to distinguish *Garrity* and the other penalty cases. The *Baxter* Court could have resolved Palmigiano’s claim simply by applying the principle from the penalty cases that a state validly can threaten sanc-

²⁹⁵ *Id.* at 318.

²⁹⁶ *Id.* at 313, 317.

²⁹⁷ *Id.* at 316-17.

²⁹⁸ *Id.* at 316 (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973)).

²⁹⁹ *Baxter*, 425 U.S. at 320 (“[P]ermitting an adverse inference to be drawn from an inmate’s silence at his disciplinary proceedings is not, on its face, an invalid practice . . .”).

³⁰⁰ But see *McCracken v. Corey*, 612 P.2d 990, 995 (Alaska 1980) (“The [Baxter] Court held [sic], in dictum, however, that use immunity would be required should criminal proceedings later be instituted against the inmate . . .”). Actually, the *Baxter* Court stated that “if inmates are compelled in [prison disciplinary proceedings] to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered ‘whatever immunity is required to supplant the privilege.’” *Baxter*, 425 U.S. at 316 (citations omitted). But, as that passage makes clear, immunity is required only if inmates are “compelled.” As noted below, see *infra* notes 301-16 and accompanying text, *Baxter* is better read to hold that the threatened evidentiary use of silence was not sufficient “compulsion” to trigger the privilege. Thus, no immunity was required.

The *Baxter* majority did note that “[n]o criminal proceedings are or were pending against Palmigiano,” *Baxter*, 425 U.S. at 317, but, as Justice Brennan pointed out in dissent, the applicability of the privilege is not contingent on whether criminal charges have been filed, *id.* at 327-28 (Brennan, J., concurring in part and dissenting in part).

tions for refusal to answer questions pertinent to an administrative inquiry because any resulting statements are not admissible in criminal cases.³⁰¹ Instead, it distinguished those decisions. They involved "threats of serious economic reprisal,"³⁰² while the warning to Palmigiano was no more than "advice" and "merely a realistic reflection of the evidentiary significance of the choice to remain silent."³⁰³ In addition, in the penalty cases, "failure to respond to interrogation was treated as a final admission of guilt,"³⁰⁴ whereas in *Baxter*, it was "undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board."³⁰⁵ The Court's approach suggests that it permitted the adverse inference from Palmigiano's silence not because any resulting statements would be immunized, but because the threat to draw the inference, unlike the threat in *Garrity*, was not sufficient "compulsion" to trigger the Fifth Amendment privilege.³⁰⁶

This interpretation is supported by the Court's conclusion that the threatened use of Palmigiano's silence as evidence in the disciplinary proceeding "*does not smack of an invalid attempt by the State to compel testimony* without granting immunity or to penalize the exercise of the privilege."³⁰⁷ Although he disagreed with the outcome, Justice Brennan read the majority opinion in *Baxter* precisely that way.³⁰⁸

³⁰¹ See *supra* notes 171-72 and accompanying text.

³⁰² *Baxter*, 425 U.S. at 317.

³⁰³ *Id.* at 318.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 317. For a rejection of the Court's reasoning in *Baxter* and an alternative explanation for the distinction between the *Garrity* line of cases and *Baxter*, see *In re Moses*, 792 F. Supp. 529, 535-38 (E.D. Mich. 1992) (noting that in both lines of authority, there is direct causal link between assertion of Fifth Amendment privilege and sanction, but that in *Baxter*, "penalty" is imposed "either to facilitate the proceeding or to make it more equitable for the non-invoking party," rather than "either to punish the claimant or to compel testimony, or both").

³⁰⁶ See *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977) (interpreting *Baxter* to hold that evidentiary use of silence in civil proceeding was insufficient to trigger protections of privilege). The *Baxter* Court's repeated references to *Garrity* also are significant. *Baxter*, 425 U.S. at 316-18. As noted earlier, among the Court's Fifth Amendment cases, *Garrity* alone addressed the later use in a criminal case of statements given by a municipal employee. See *supra* notes 16-19 and accompanying text. By referring to and distinguishing *Garrity* rather than only the later cases discussing the constitutionality of the penalty for silence, the Court may have been indicating its view that any statements would have been freely admissible in a criminal case.

³⁰⁷ *Baxter*, 425 U.S. at 318 (emphasis added).

³⁰⁸ Noting that the *Garrity* line of cases made clear that threats of noncriminal penalties can trigger the privilege, Justice Brennan expressed his disagreement with what he perceived to be the majority position:

The compulsion upon Palmigiano is as obvious as the compulsion upon the individuals in *Garrity-Lefkowitz*. He was told that criminal charges might be

The Court's more recent decision in *Ohio Adult Parole Authority v. Woodard*³⁰⁹ supports this view of *Baxter*. At issue there was the constitutionality of a portion of Ohio's clemency process by which a death row inmate seeking clemency had the option of interviewing with one or more parole board members, who in turn would make recommendations to the governor.³¹⁰ Inmate Woodard claimed that this procedure violated his Fifth Amendment privilege because his statements at the interview could incriminate him in other crimes.³¹¹ Although the Court assumed that the parole board “[would] draw adverse inferences from [an inmate’s] refusal to answer questions,”³¹² relying on *Baxter*, the Court determined that the threat of an adverse inference from silence did not constitute compulsion under the privilege.³¹³

Lower courts also have read *Baxter* to hold that sanctions less severe than job loss do not constitute “compulsion” sufficient to trigger the privilege³¹⁴ and have applied it to disciplinary proceedings in-

brought against him. He was also told that anything he said in the disciplinary hearing could be used against him in a criminal proceeding. Thus, the possibility of self-incrimination was just as real and the threat of a penalty just as coercive. Moreover, the Fifth Amendment does not distinguish among types or degrees of compulsion. It prohibits “inducement of any sort.” *Bram v. United States*, 168 U.S. 532, 548 (1897). . . . Palmigiano was forced to choose between self-incrimination and punitive segregation or some similar penalty. Since the Court does not overrule the *Garrity-Leskowitz* group of decisions, those precedents compel the conclusion that this constituted impermissible compulsion.

Id. at 333 (Brennan, J., dissenting).

³⁰⁹ 523 U.S. 272 (1998).

³¹⁰ *Id.* at 276-77.

³¹¹ *Id.* at 285. In its brief in the Supreme Court, the Ohio Adult Parole Authority agreed that Woodard’s statements during the interview were not immunized. *Id.*

³¹² *Id.* at 286. The Court did not make clear whether it was addressing a situation in which the inmate chose to forgo the interview altogether or one in which the inmate chose to have an interview and then refused to respond to specific inquiries. The opinion suggests that the analysis is the same in both situations.

³¹³ *Id.* (“[W]e do not think that respondent’s testimony at a clemency interview would be ‘compelled’ within the meaning of the Fifth Amendment.”); see also *id.* at 287 (“[I]t has never been suggested that such pressures constitute ‘compulsion’ for Fifth Amendment purposes.”).

³¹⁴ See, e.g., *Lynott v. Story*, 929 F.2d 228, 230-32 (6th Cir. 1991) (noting that inferences that flow from silence at probation revocation hearing are not “compulsion”); *Ryan v. Montana*, 580 F.2d 988, 990-92 (9th Cir. 1978) (Kennedy, J.) (“As in *Baxter*, Ryan’s decision whether or not to testify [at combined probation revocation and deferred sentencing hearing] was a strategic choice” and thus, “from a self-incrimination standpoint, noncompulsive”); *Roberts v. Taylor*, 540 F.2d 540, 542-43 (1st Cir. 1976) (holding inmates not entitled to use immunity because, absent conclusive presumption of guilt from silence, there is no attempt to compel statement).

volving police and other municipal employees.³¹⁵ Like *Ohio Adult Parole Authority*, the lower courts' reading suggests that if a threat of evidentiary use of silence in a disciplinary proceeding persuades an officer suspected of misconduct to answer questions, the privilege does not bar use of the resulting statements in a criminal prosecution.³¹⁶

If this interpretation of *Baxter* is correct, it offers an attractive solution to *Garrity* immunity problems. State statutes, municipal ordinances, and departmental policies could be rewritten to reduce the sanction for police officers' refusal to answer internal affairs investigators' questions. If officers suspected of misconduct chose to remain silent, that silence would be admissible, not conclusive, in departmental disciplinary hearings to support an adverse inference.³¹⁷ Internal affairs investigators would be permitted to explain that consequence to suspect police officers. If officers answered questions to avoid evidentiary use of their silence, prosecutors would be free to introduce the statements in criminal prosecutions and would have no burden of disproving any use of the statements.

This approach accommodates the competing concerns of administrative investigators, prosecutors, and suspect officers. In most cases, suspect officers likely will give statements to internal affairs investigators rather than permit use of their silence in a disciplinary proceeding. Many misconduct accusations involve one-on-one situations, with no evidence other than a complainant's claim and the police officer's

³¹⁵ See, e.g., *Hoover v. Knight*, 678 F.2d 578 (5th Cir. 1982) (disciplinary proceeding against police officer); *Book v. Postal Serv.*, 675 F.2d 158 (8th Cir. 1982) (disciplinary hearing against postmaster).

³¹⁶ See, e.g., *Diebold v. Civil Serv. Comm'n*, 611 F.2d 697, 698-99 (8th Cir. 1979) (holding that civil servant who chooses to testify in administrative hearing regarding alleged misconduct that is also subject of pending criminal charges waives immunity even if decision to remain silent would "virtually guarantee the loss of his job"); *Ryan*, 580 F.2d at 993 (holding that so long as "parole or probation system [is not used] as a subterfuge for a criminal investigation," parolee's or probationer's "statements made in the course of [a] probation revocation hearing might possibly be used against him in a subsequent criminal proceeding"); *United States v. Najarian*, 915 F. Supp. 1460, 1478-83 & n.25 (D. Minn. 1996) (holding threat of loss of indemnification for legal fees not sufficient compulsion to require suppression of resulting statements under *Garrity* doctrine); see also *Asherman v. Meachum*, 957 F.2d 978, 980-81 (2d Cir. 1991) (assuming but not deciding that, had sentenced prisoner answered questions at psychiatric evaluation to avoid threatened termination of supervised home release, answers would be admissible in later criminal prosecution).

³¹⁷ See *LaChance v. Erickson*, 522 U.S. 262, 267-68 (1998) (holding that government agency was entitled to consider employee's failure to respond to investigative questions when deciding whether to take adverse action and that this did not violate Fifth Amendment privilege).

response.³¹⁸ In such cases, as well as similar situations in which there is scant corroborating evidence, the threat of criminal prosecution is minimal. In contrast, the impact of the officer's silence could prove significant, leaving the disciplinary board with only a complainant's uncontested allegation of misconduct and an adverse inference from the silence. This will provide police officers with a powerful incentive to make a statement. Internal affairs investigators likely will obtain statements helpful to their investigation without triggering *Garrity* immunity.³¹⁹

The cases in which police officers are least likely to make statements are those where there is considerable incriminating evidence, leading suspect officers to believe that there is a realistic possibility of criminal prosecution. Although silence in such cases will deprive internal affairs investigators of evidence, other proof will compensate for that loss. If officers do choose to make statements in such cases, it will not impair any criminal investigation or prosecution.

This approach should satisfy police officers as well as prosecutors and internal affairs investigators. It reduces the sanction for officers' refusal to answer questions from internal affairs investigators, making their jobs more secure. And, because police are not entitled to *Garrity* immunity for statements that are not the product of "compulsion," they have no legitimate complaint if statements that they make to internal affairs investigators in order to avoid the adverse inference from silence are later used in criminal cases.

CONCLUSION

The substantial authority that society vests in police officers makes their violations of the criminal law especially menacing. *Garrity* immunity creates conflicts between administrative and criminal investigations and erects unnecessary impediments to the effective prosecution of police criminality. It can operate as a trap for investi-

³¹⁸ See Cheh, *supra* note 8, at 253 ("In many cases the only witnesses will be the victim and the police . . ."); Kerstetter, *supra* note 98, at 234 (noting that there are no independent witnesses in most cases of police misconduct); Perez & Muir, *supra* note 13, at 223 ("[T]he system cannot develop evidence independent of the statements of officers and citizens . . .").

³¹⁹ Even if a person's sole means of defending himself in an administrative proceeding is to testify, and thus possibly provide self-incriminating information, such testimony is not immunized even if a failure to testify almost certainly would guarantee an adverse administrative determination. See *Diebold*, 611 F.2d at 698-99 (holding that it was "constitutionally permissible" to force employee to choose between remaining silent, which would "virtually guarantee the loss of his job," and waiving Fifth Amendment privilege); cf. *United States v. White*, 589 F.2d 1283, 1286 (5th Cir. 1979) (holding that defendant's incriminating testimony given in civil trial was admissible in related criminal proceeding).

gators and prosecutors who fail either to take steps to minimize exposure to compelled statements or to prepare to disprove taint. It can serve as a tool for unscrupulous internal affairs investigators who seek to undermine criminal prosecutions by disseminating compelled statements and treacherous police witnesses who allege that they are tainted in order to avoid giving prosecution testimony. Even if alert to those dangers, prosecutors can only minimize, not eliminate, them, and must expend significant resources to do so.

Although there may be reason for the Supreme Court's determination that the Fifth Amendment privilege protects police officers' compelled statements, courts need not employ a robust exclusionary rule that forces prosecutors to demonstrate that all evidence, prosecutorial decisionmaking, and witness testimony is wholly unaffected by such statements. Absent judicial limitations on the scope of *Garrity*, legislatures and police departments can and should modify policies and practices surrounding the acquisition and use of compelled statements in internal affairs investigations. Instead of compelling statements by threatening job loss, statutes and departmental policies should encourage cooperation by notifying suspect police officers that a refusal to answer questions will have evidentiary significance in administrative adjudicatory proceedings. This should permit prosecutors to make full use of any resulting statements. Alternatively, legislatures and police departments can and should impose constraints on dissemination of compelled statements.