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The Law Enforcement Officers' Privilege against Compelled Self-Incrimination

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THE LAW ENFORCEMENT OFFICERS' PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION

Byron L. Warnken† ††

Although the fifth amendment privilege against compelled self-incrimination applies to all citizens, law enforcement officers traditionally have had to either waive the privilege when subjected to questioning or face punitive personnel action. Courts consistently held that a law enforcement officer's right to retain office depended on a willingness to forego constitutional protections.

The Supreme Court decided several cases beginning in the late 1960's that extended the full fifth amendment privilege to law enforcement officers, but lower courts have misconstrued these cases and have continued to deny fifth amendment protections. In 1974, Maryland became the first of four states to enact a law enforcement officers' bill of rights. Although the Maryland statute is more comprehensive than those in California, Florida, and Virginia, it has received narrow judicial interpretation.

This article first reviews the history of the law enforcement officer's fifth amendment and statutory protections. The article then proposes a Model Law Enforcement Officers' Bill of Rights. This bill insures not only fifth amendment protection, but provides officers with a full complement of substantive and procedural protections.

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I. INTRODUCTION

The fifth amendment privilege against government compelled self-incrimination is most often examined in situations in which a law enforcement officer is the government "compellor" and a private citizen is the accused person from whom an incriminating statement is sought. This article examines the situation in which the accused, as well as the accuser, is a law enforcement officer, and it focuses on the accused officer's privilege against compelled self-incrimination.

The law enforcement officer is intimately familiar with both the substantive and procedural law pertaining to investigatory interrogation. For this reason, it may first appear that the officer needs less, or certainly no more, protection from abuse than a private citizen. The same status that endows the officer with intimate knowledge of the law, however, also creates a problem that the accused private citizen does not face. When the law enforcement officer is the accused, the accuser is usually the police department itself. As the officer's employer, the accuser has an additional weapon in the interrogation arsenal: the threat of adverse personnel action if the accused officer does not cooperate fully.

A law enforcement agency may "charge" a law enforcement officer through a noncriminal administrative process. The administrative regulations of virtually every law enforcement agency prohibit "conduct un-

becoming an officer,"¹ "insubordination,"² and "neglect of duty."³ Conduct unbecoming an officer is generally defined as "any conduct which adversely affects the morale or efficiency of the bureau to which he is assigned."⁴ As courts have recognized, "[t]he standard 'conduct unbecoming a police officer' is an elastic term subject to a wide variety of differing interpretations depending on the individual conception of how policemen should conduct themselves."⁵ Conduct unbecoming an of-

1. For example, the Maryland State Police Administrative Manual defines "unbecoming conduct" as follows:

Every employee shall conduct himself at all times, both on and off duty, in a manner which reflects most favorably on the Agency. The phrase "reflects most favorably" pertains to the perceptions of both citizens and other Agency employees. Conduct unbecoming an employee shall include that which tends to bring the Agency into disrepute, or reflects discredit upon the employee as a representative of the Agency, or that which tends to impair the operation or efficiency of the Agency or employee.

MD. STATE POLICE ADMIN. MANUAL ch. 5, § I-3-1 (2d. ed. 1977 & Supp. 1984).

2. For example, the Maryland State Police Administrative Manual defines "insubordination" as follows:

An employee shall promptly obey all lawful orders of a superior, including those from a superior relayed by an employee of equal or lesser rank. A lawful order is any order, either verbal or written, which an employee should reasonably believe to be in keeping with the performance of the duties or the responsibilities of his post.

Id. § I-4-2.

3. For example, the Maryland State Police Administrative Manual defines "neglect of duty" as follows: "The failure of a police employee to take appropriate action, either on or off duty, on the occasion of a crime, disorder, or other condition deserving police or Agency administrative attention is considered neglect of duty." *Id.* § I-28-3.
4. *Jacocks v. Montgomery County*, 58 Md. App. 95, 112, 472 A.2d 485, 493 (1984) (quoting *Shannon v. Civil Serv. Comm'n*, 4 Pa. Commw. 492, 496, 287 A.2d 858, 861 (1972)); see *In re Zeber*, 398 Pa. 35, 43, 156 A.2d 821, 825 (1959); *Upper Moreland v. Mallon*, 9 Pa. Commw. 618, 627 n.5, 309 A.2d 273, 279 n.5 (1973), *aff'd*, 461 Pa. 241, 336 A.2d 266 (1975); see also *Becker v. Merrill*, 155 Fla. 379, 382, 20 So. 2d 912, 914 (1944) ("behavior . . . not calculated to instill respect for him in his subordinates or to win for himself or his force the confidence of the general public . . . is indecorous and unbecoming to his high office").
5. *Hruby v. Board of Fire & Police Comm'rs*, 22 Ill. App. 3d 445, 453, 318 N.E.2d 132, 138 (1974); accord *Gaudette v. Board of Public Safety*, 20 Conn. Supp. 147, 127 A.2d 836 (1956); *People ex rel. Dougan v. Greene*, 97 A.D. 404, 89 N.Y.S. 1067 (1904).

In *Jacocks*, 58 Md. App. 95, 472 A.2d 485, the law enforcement officer went on a tirade directed toward a superior officer. The court held that the use of insulting and offensive language and the allegation of incompetence, in the presence of a third police officer, would probably have an adverse effect on morale, efficiency, and discipline and thus was conduct unbecoming an officer. In *Shannon*, 4 Pa. Commw. 492, 287 A.2d 858, on the other hand, the court found similar conduct not to constitute conduct unbecoming an officer. In that case, the officer said, "I will be a son of a bitch. . . . [Y]ou will regret and remember this day." *Id.* at 495, 287 A.2d at 860. The holding was supported by the fact that (1) the statement was directed toward the police chief in the absence of civilian witnesses, (2) the profane portion of the statement was actually directed toward the officer himself, (3) the police chief was not intimidated by the remark, and (4) the statement was in response to the chief's

ficer, insubordination, and neglect of duty may include such activities as disobeying the order of a superior officer⁶ and withholding information related to an investigation.⁷ A determination that an officer has committed one of these offenses can result in a variety of adverse personnel actions: reprimand, reassignment, loss of leave, suspension, reduction in rank, or even dismissal from the law enforcement agency. Imposition of the most severe sanction, that of dismissal, usually requires "cause," a concept that one court has defined as "some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognizes as good cause for his no longer holding the position."⁸

Investigations of law enforcement officers are rarely purely criminal in nature. Most investigations deal with situations that are hybrid administrative-criminal or are purely administrative. A common example of the hybrid situation is a complaint by an arrestee that the officer used excessive force. The allegation, if substantiated, constitutes both a violation of an administrative regulation⁹ and a criminal battery.¹⁰ The

instructions to the officer to report for duty timely, notwithstanding emergency medical needs of his son.

Because "unbecoming conduct" is such an elastic term, it has been the subject of void-for-vagueness attacks. *E.g.*, *Cranston v. City of Richmond*, 40 Cal. 3d 755, 762-72, 710 P.2d 845, 849-56, 221 Cal. Rptr. 779, 782-89 (1985). Most "unbecoming conduct" cases do not implicate first amendment protections. As such, constitutionality is evaluated as applied under the facts of the case. *United States v. Mazurie*, 419 U.S. 544, 550 (1975). An officer cannot complain that the regulation is void-for-vagueness if the conduct is such that the officer must have known that it could lead to discipline or dismissal. *Cranston*, 40 Cal. 3d at 770, 710 P.2d at 854, 221 Cal. Rptr. at 787-88; *accord* *Suddarth v. Slane*, 539 F. Supp. 612, 619-20 (W.D. Va. 1982).

6. *See* *Upper Moreland*, 9 Pa. Commw. at 627, 309 A.2d at 279; *Gaudette*, 20 Conn. Supp. 147, 127 A.2d 836.
7. *Id.*; *Coursey v. Board of Fire & Police Comm'rs*, 90 Ill. App. 2d 31, 234 N.E.2d 339 (1967).
8. *Davenport v. Board of Fire & Police Comm'rs*, 2 Ill. App. 3d 864, 869, 278 N.E.2d 212, 215 (1972) (quoting *Coursey*, 90 Ill. App. 2d 31, 234 N.E.2d 339). The court also stated that "'cause' is to be decided and applied in the discretion of the Board and a court should not reverse unless the Board's findings are so unrelated to requirements of the service or are so trivial as to be unreasonable or arbitrary." *Id.* (quoting *Davis v. Board of Fire & Police Comm'rs*, 37 Ill. App. 2d 158, 185 N.E.2d 281 (1962)); *see* *Souder v. City of Philadelphia*, 305 Pa. 1, 8, 156 A. 245, 247-48 (1931) ("What constitutes cause for removal must necessarily be a matter of discretion in the commission.").
9. For example, the Maryland State Police Administrative Manual's instruction with regard to the use of force is as follows: "A police employee, acting in his official capacity, will not use unnecessary or excessive force." MD. STATE POLICE ADMIN. MANUAL ch. 5, § I-33-0.
10. Battery is the unjustified, offensive, and nonconsensual application of force by direct or indirect physical conduct to the person of another. *See generally* R. PERKINS & R. BOYCE, CRIMINAL LAW 151-58 (3d ed. 1982) [hereinafter PERKINS]; W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 685-91 (2d ed. 1986) [hereinafter LAFAVE & SCOTT]. Use of excessive force to effectuate an arrest is a criminal bat-

purely administrative situations include violations and infractions of a myriad of departmental regulations.¹¹ However, even if an investigation commences as a purely administrative matter, a violation of virtually any departmental rule or regulation could lead to criminal charges under the common law misdemeanor of misconduct in office.¹² This offense includes malfeasance, misfeasance, and nonfeasance by a public officer while in the exercise of official duties or while acting under color of law,¹³ provided the conduct is a wilful abuse of authority and not merely an error in judgment.¹⁴

When an officer is suspected of some wrongdoing, the officer is notified that a superior officer or a member of an internal investigating unit

tery and may be resisted by self-defense. See *People v. Soto*, 276 Cal. App. 2d 81, 80 Cal. Rptr. 627 (1969); *Boyes v. Evans*, 14 Cal. App. 2d 472, 479, 58 P.2d 922, 925 (1936); *Jones v. United States*, 512 A.2d 253, 259 n.8 (D.C. App. 1986); *State v. Holley*, 480 So. 2d 94, 95-96 (Fla. 1985); *State v. Franz*, 9 Kan. App. 2d 319, 676 P.2d 157 (1984); *State v. Austin*, 381 A.2d 652, 655 (Me. 1978); *State v. Nunes*, 546 S.W.2d 759, 761 (Mo. App. 1977); MODEL PENAL CODE § 3.04(2)(a)(ii)(3) (1962); see also *Rodgers v. State*, 280 Md. 406, 373 A.2d 944, cert. denied, 434 U.S. 928 (1977); Annotation, *Modern Status of Rules as to Right to Forcefully Resist Illegal Arrest*, 44 A.L.R.3d 1078, 1091-94 (1972).

11. These violations and infractions include unbecoming conduct, see *supra* note 1; insubordination, see *supra* note 2; neglect of duty, see *supra* note 3; criticizing the agency, MD. STATE POLICE ADMIN. MANUAL ch. 5, § I-5-0; immoral conduct, *id.* § I-8-0; incompetence. *Id.* § I-36-0.
12. Misconduct in office is also known as official misconduct, misbehavior in office, malconduct in office, malpractice in office, misdemeanor in office, and corruption in office. *Duncan v. State*, 282 Md. 385, 387 n.1, 384 A.2d 456, 458 n.1 (1978).
13. See generally PERKINS, *supra* note 10, at 540-50; e.g., *Chester v. State*, 32 Md. App. 593, 601-10, 363 A.2d 605, 610-13, cert. denied, 278 Md. 718 (1976); *State v. Carter*, 200 Md. 255, 89 A.2d 586 (1952). "The corrupt behavior may be (1) the doing of an act which is wrongful in itself - malfeasance, or, (2) the doing of an act otherwise lawful in a wrongful manner - misfeasance; or, (3) the omitting to do an act which is required by the duties of the office - non-feasance." *Duncan*, 282 Md. at 387, 384 A.2d at 458. "The word 'corruption,' as an element of misconduct in office, is used in the sense of depravity, perversion or taint." PERKINS, *supra* note 10, at 542.

Although it is true that not every set of facts sufficient to constitute conduct unbecoming an officer or neglect of duty is sufficient for misconduct in office, the crime is broad, particularly in its nonfeasance mode.

Any intentional and deliberate refusal by an officer to do what is unconditionally required of him by the obligations of his office is *corrupt* as the word is used in this connection because he is not permitted to set up his own judgment in opposition to the positive requirement of the law. Since this is corrupt behavior by an officer in the exercise of the duties of his office there is no reason to require more for conviction. On the other hand, when the officer has discretion in regard to a certain matter, his intentional and deliberate refusal to act indicates no more, on its face, than that this represents his judgment as to what will best serve the public interest. Even in such a case the officer will be guilty of misconduct in office if his forbearance results from corruption rather than from the exercise of official discretion

Id. at 546 (emphasis in original).

14. See H. GINSBERG & I. GINSBERG, MARYLAND CRIMINAL LAW AND PROCEDURE 152 (1940) [hereinafter GINSBERG].

wishes to make some inquiries.¹⁵ The investigating officer either expressly states¹⁶ or implies, or custom dictates, that the officer must cooperate during questioning or face possible adverse personnel action.¹⁷ The penalty or threatened penalty for failure to cooperate is typically greater in situations in which the department believes that the information is vital to an investigation and believes that the officer is the only or best source of the information.

The United States Supreme Court has held that citizens have the right to refuse "to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, when the answers might incriminate him in future criminal proceedings."¹⁸ Although law enforcement officers presumably are entitled to that same right, they are often required to give statements under threat of adverse personnel action or have been discharged for the failure to give statements.¹⁹ This dilemma has never received more than sporadic, short-lived, and incomplete attention.

When law enforcement officers early in this century began to litigate to secure the guarantees of the fifth amendment, courts took the position that the privilege of being a public servant is dependent upon a willingness to forego constitutional rights and privileges.²⁰ It was not until the late 1960's that the United States Supreme Court undertook to rectify the situation. In 1967, in *Garrity v. New Jersey*,²¹ and in 1968, in *Gardner v. Broderick*,²² the Court set out to eliminate the law enforcement officer's dilemma of having to choose between maintaining employment and exercising the privilege against compelled self-incrimination.

Together, *Garrity* and *Gardner* stand for the following propositions: (1) if a law enforcement officer is not provided with immunity, any state-

15. See MD. ANN. CODE art. 27, § 728(b) (1987).

16. For example, the Maryland State Police Administrative Manual's instruction with regard to interrogations is as follows: "During any administrative investigation an accused employee shall, at the request of competent authority, submit to an interrogation and polygraph examination." MD. STATE POLICE ADMIN. MANUAL ch. 5, § I-16-1.

17. For example, the Maryland Annotated Code provides:

This subtitle does not prevent a law enforcement agency from commencing any action which may lead to a punitive measure as a result of a law enforcement officer's refusal to submit to a blood alcohol test, blood, breath, or urine tests for controlled dangerous substances, polygraph examination, or interrogation, after having been ordered to do so by the law enforcement agency.

ANN. CODE art. 27, § 728(b)(7)(ii).

18. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); see *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (includes administrative and investigatory proceedings); *In re Criminal Investigation No. 1-162*, 307 Md. 674, 683, 516 A.2d 976, 981 (1986).

19. Failure to give a statement is usually charged as insubordination or failure to obey a lawful order. See *supra* note 2.

20. *E.g.*, *Christal v. Police Comm'r*, 33 Cal. App. 2d 564, 567-68, 92 P.2d 416, 419 (1939); see *infra* part II.B.

21. 385 U.S. 493 (1967).

22. 392 U.S. 273 (1968).

ment given under threat of adverse personnel action is unconstitutionally coerced;²³ (2) if a law enforcement officer is not provided with immunity, the taking or threatening to take any adverse personnel action in response to the assertion of the privilege against compelled self-incrimination has an unconstitutional, chilling effect upon the privilege;²⁴ (3) if a law enforcement officer is granted immunity but nonetheless refuses to answer questions specifically, directly, and narrowly related to official duties, the officer may be dismissed;²⁵ and (4) if a law enforcement officer is granted immunity and answers questions specifically, directly, and narrowly related to official duties, the officer may be dismissed if the answers provide cause for dismissal.²⁶ Consistently, however, courts have misunderstood, misapplied, or simply evaded *Garrity*, *Gardner*, and their progeny.²⁷

Since 1970, and with greatest frequency between 1973 and 1977, there have been many unsuccessful attempts in Congress to enact a law enforcement officers' bill of rights. These legislative efforts have been designed to accomplish what *Garrity* and *Gardner* sought to accomplish.²⁸ Although federal legislation has never been enacted, congressional efforts have served as an impetus for state statutes providing law enforcement officers' bills of rights.²⁹ Maryland in 1974 enacted the Law Enforcement Officers' Bill of Rights (LEOBOR).³⁰ By 1978, California, Florida, and Virginia had also enacted statutory protection.

Maryland's statute is by far the most comprehensive, but Maryland courts have interpreted the Maryland statute narrowly.³¹ The Florida and Virginia laws, which are the two weakest statutes, have similarly been narrowly interpreted by their respective state courts. The California statute, stronger than the Florida or Virginia statutes but weaker than the Maryland statute, has received the broadest judicial interpretation. The Supreme Court of California, in the course of interpreting its state statute, has understood and correctly applied *Garrity* and *Gardner* and their progeny.

This article first analyzes the fifth amendment privilege against compelled self-incrimination as it applies to law enforcement officers.³² It then examines legislative efforts to secure these and other rights for law enforcement officers, including the unsuccessful federal attempt³³ and the

23. *Garrity*, 385 U.S. at 497-500.

24. *Gardner*, 392 U.S. at 278-79.

25. *Id.* at 278.

26. *Id.*

27. See *infra* part III.B.

28. See *infra* part IV.A.

29. See *infra* parts IV.B., C.

30. Act of May 31, 1974, ch. 722, 1974 MD. LAWS 2471-77 (codified as amended at MD. ANN. CODE art. 27, §§ 727-734D (1987)).

31. See *infra* part IV.B.

32. See *infra* parts II., III.

33. See *infra* part IV.A.

somewhat successful attempts in four states just mentioned.³⁴ Finally, the article proposes a Model Law Enforcement Officers' Bill of Rights.³⁵

II. THE FIFTH AMENDMENT PRIVILEGE PRIOR TO INCORPORATION AGAINST THE STATES

A. *The Status of the Privilege*

The notion that an individual should not be compelled to incriminate himself evolved as a common law doctrine in England³⁶ and thus became part of the common law in this country before 1776.³⁷ After the United States gained independence, states adopted this concept as part of their state constitutions.³⁸ And when, in 1791, the first ten amendments

34. See *infra* parts IV.B., C.

35. See *infra* Appendix.

36. See generally E. CLEARY, MCCORMICK ON EVIDENCE § 114(a) (3d ed. 1984) [hereinafter MCCORMICK]; 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.2(a) (1984 & Supp. 1987) [hereinafter LAFAVE & ISRAEL]; O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 18-23 (1973); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); Sherman, *Informal Immunity: Don't You Let That Deal Go Down*, 21 LOY. L.A.L. REV. 1, 6-9 (1987) [hereinafter Sherman]. In *Bram v. United States*, 168 U.S. 532 (1897), the Supreme Court stated:

There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguishing attributes.

Id. at 545.

37. See *Hillard v. State*, 286 Md. 145, 150-51, 406 A.2d 415, 418 (1979); *Watts v. State*, 99 Md. 30, 35-36, 57 A. 542, 544 (1904); *Biscoe v. State*, 67 Md. 6, 7, 8 A. 571, 571 (1887); *Young v. State*, 68 Md. App. 121, 127-32, 510 A.2d 599, 602-05, *cert. denied*, 307 Md. 599, 516 A.2d 569 (1986).

By state constitution, Maryland adopted all of the common law of England as it existed on July 4, 1776, subject to change by the Maryland General Assembly. MD. CONST., DECL. RIGHTS art. 5. The other twelve original states did likewise, either by constitutional provision or a "reception statute." As other states joined the union, they either expressly adopted the common law or were at least heavily influenced by it. LAFAVE & SCOTT, *supra* note 10, at 66; see generally Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910).

38. Forty-eight states have adopted the privilege against compelled self-incrimination by constitution, and Iowa and New Jersey have accomplished the same result through legislation. Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21, 30 (1965). The Declaration of Rights of the Maryland Constitution provides "[t]hat no man ought to be compelled to give evidence against himself in a criminal case." MD. CONST., DECL. RIGHTS art. 22. This provision of the Maryland Constitution has been held to be in *pari materia* with its federal counterpart. *Richardson v. State*, 285 Md. 261, 401 A.2d 1021 (1979). The language in a few state constitutions may provide a guarantee that is slightly broader in scope than the federal constitution. See MCCORMICK, *supra* note 36, at 115. Moreover, in the last decade, a few state courts of last resort have interpreted their state constitutional provision to provide greater protection. *E.g.*, *People v. Disbrow*, 16 Cal. 3d 101, 113-15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976); *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971); *Commonwealth v. Triplett*, 462 Pa. 244, 341 A.2d 62 (1975); see Wilkes,

to the Bill of Rights were added to the United States Constitution, the fifth amendment included the prohibition that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself" ³⁹

The Supreme Court in 1897 recognized in *Bram v. United States*⁴⁰ that the fifth amendment standard should be the same as the common law standard.⁴¹ A year earlier, the Court had stated that "the true test of admissibility [under the common law was whether] the confession is made freely, voluntarily, and without compulsion or inducement of any sort."⁴²

The existence of the common law privilege, state constitutional provisions, and the fifth amendment suggest that there must have been considerable protection against compelled self-incrimination. In fact, the scope of the privilege against compelled self-incrimination was quite narrow before 1964 and rarely, if ever, afforded protection to law enforcement officers. First, the fifth amendment privilege against compelled self-incrimination was not a limitation upon state governments until it was incorporated against the states in 1964 in *Malloy v. Hogan*.⁴³ Sec-

The New Federalism in Criminal Procedure Revisited, 64 KY. L.J. 729, 735-41 (1976). See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Comment, *Expanding Criminal Procedural Rights Under State Constitutions*, 33 WASH. & LEE L. REV. 909 (1976).

39. U.S. CONST. amend. V. In *Brown v. Walker*, 161 U.S. 591 (1896), the Court stated that the privilege:

has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Id. at 597.

40. 168 U.S. 532 (1897).

41. The Court in *Bram* stated:

A brief consideration of the reasons which gave rise to the adoption of the Fifth Amendment, of the wrongs which it was intended to prevent and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted

Id. at 543.

42. *Wilson v. United States*, 162 U.S. 613, 623 (1896) (citing *Hopt v. Utah*, 110 U.S. 574, 583-87 (1884)). In *Bram v. United States*, the Court stated:

As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind, that is, hope or fear, so that, however diverse might be the facts, the test for whether the confession was voluntary would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create.

168 U.S. at 548.

43. 378 U.S. 1 (1964). In *Twining v. New Jersey*, 211 U.S. 78, 106 (1908), the Supreme Court rejected incorporating against the states the fifth amendment privilege against

ond, courts rarely invoked the common law as a source for the privilege against compelled self-incrimination after the Bill of Rights was ratified.⁴⁴ Third, state courts of last resort have only recently, and then to a limited degree, relied on state constitutional provisions to protect individual liberties.⁴⁵

Even though the fifth amendment did not apply to the states, the Supreme Court in 1936 began to address the most egregious state cases of compelled self-incrimination. In *Brown v. Mississippi*,⁴⁶ the Court found a violation of the fourteenth amendment due process clause when a state official obtained a confession by brutality and violence.⁴⁷ Over the next three decades, the Court resolved numerous cases under the due process

compelled self-incrimination, holding that such a protection was neither "a fundamental principle of liberty and justice which inheres in the very idea of free government [nor] the inalienable right of a citizen of such a government" Citing *Twining*, the Court later stated that "[t]he privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). For over 55 years, the Court consistently reaffirmed the nonincorporation of the privilege against compelled self-incrimination. *E.g.*, *Cohen v. Hurley*, 366 U.S. 117, 127-28 (1961); *Adamson v. California*, 332 U.S. 46, 53-58, *reh'g denied*, 332 U.S. 784 (1947); *Palko v. Connecticut*, 302 U.S. 319, 323-24 (1937).

44. Courts purport to adhere to the principle of deciding cases on nonconstitutional grounds if possible. *Hillard v. State*, 286 Md. 145, 150 n.1, 406 A.2d 415, 418 n.1 (1979) (quoting *State v. Raithal*, 285 Md. 478, 484, 404 A.2d 264, 267 (1979)). Instead, courts usually either (1) use the constitutional analysis for constitutional protections that had their roots in the common law, or (2) deem the constitutional and nonconstitutional analysis to be identical. In *Hillard*, the Court of Appeals of Maryland "rediscovered" the common law basis for the prohibition against compelled self-incrimination after years of dormancy. Just two years earlier, in *State v. Kidd*, 281 Md. 32, 375 A.2d 1105 (1977), the court stated that voluntariness of a statement "is bottomed upon constitutional grounds [and] . . . The imposition upon the state of the federal constitutional prohibition against compelled self-incrimination effected no change in the voluntariness requirement followed by Maryland for the admissibility of confessions and admissions." *Id.* at 34-35, 375 A.2d at 1107-08; *see also Young v. State*, 68 Md. App. 121, 127-32, 510 A.2d 599, 602-05, *cert. denied*, 307 Md. 599, 516 A.2d 569 (1986).
45. *See supra* note 38. As recently as 1974, one commentator considered it an astonishing development that courts were "willing to protect rights of criminal defendants that are no longer guaranteed under the Federal Constitution." Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 425 (1974). In 1977, Justice Brennan wrote:

I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.

[T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them.

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977).

46. 297 U.S. 278 (1936).

47. *Id.* at 285-86.

clause, using a voluntariness test, applied on a case-by-case basis.⁴⁸ Voluntariness encompasses a totality of the circumstances analysis, which usually depends on either the conduct of the interrogating police officers, or the characteristics of the accused, or both.⁴⁹ Unacceptable police conduct ranges from trickery and subtle coercion⁵⁰ to threats of physical harm⁵¹ to actual physical brutality and torture.⁵² Evaluation of police conduct also includes the length of time the accused is subjected to questioning⁵³ and the conditions during questioning.⁵⁴ The determinative characteristics of the accused include age,⁵⁵ physical condition,⁵⁶ mental condition,⁵⁷ and education.⁵⁸

B. *The Status of Law Enforcement Officers*

Prior to incorporation of the fifth amendment in 1964,⁵⁹ the law enforcement officer enjoyed virtually no protection against compelled self-incrimination. In no reported opinion did a law enforcement officer in a criminal case make an incriminating statement later found to be involuntary because it was made under threat of loss of job. On the contrary, many judicial decisions affirmed the administrative sanction of dismissal for a law enforcement officer who remained silent.⁶⁰ The ma-

48. See generally 1 LAFAYETTE & ISRAEL, *supra* note 36, § 6.2; Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

49. C. WHITEBREAD & C. SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* § 16.02 (2d ed. 1986) [hereinafter WHITEBREAD].

50. *E.g.*, Spano v. New York, 360 U.S. 315 (1959); Leyra v. Denno, 347 U.S. 556 (1954). See generally White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968).

51. *Payne v. Arkansas*, 356 U.S. 560 (1958); *Ward v. Texas*, 316 U.S. 547 (1942); *Chambers v. Florida*, 309 U.S. 227 (1940).

52. *E.g.*, *Brown v. Mississippi*, 297 U.S. 278 (1936).

53. *E.g.*, *Haley v. Ohio*, 332 U.S. 596 (1948) (five hours of interrogation); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 hours of interrogation); *Chambers v. Florida*, 309 U.S. 227 (1940) (five days of interrogation).

54. *E.g.*, *Reck v. Pate*, 367 U.S. 433 (1961) (deprivation of sleep); *Payne v. Arkansas*, 356 U.S. 560 (1958) (deprivation of food); *Malinski v. New York*, 324 U.S. 401 (1945) (deprivation of clothes); *Chambers v. Florida*, 309 U.S. 227 (1940) (held incommunicado).

55. *E.g.*, *Haley v. Ohio*, 332 U.S. 596 (1948) (15-year-old).

56. *E.g.*, *Beecher v. Alabama*, 389 U.S. 35 (1967) (bullet wound); *Jackson v. Denno*, 378 U.S. 368 (1964) (bullet wound).

57. *E.g.*, *Townsend v. Sain*, 372 U.S. 293 (1963) ("truth serum" type of medication); *Culombe v. Connecticut*, 367 U.S. 568 (1961) (low intelligence quotient); *Fikes v. Alabama*, 352 U.S. 191 (1957) (schizophrenic).

58. *E.g.*, *Clewis v. Texas*, 386 U.S. 707 (1967) (fifth grade education); *Payne v. Arkansas*, 356 U.S. 560 (1958) (fifth grade education); cf. *Gallegos v. Nebraska*, 342 U.S. 55 (1951) (non-English speaking).

59. See *supra* note 43 and accompanying text.

60. *E.g.*, *McCain v. Sheridan*, 160 Cal. App. 2d 174, 324 P.2d 923 (1958); *Christal v. Police Comm'r*, 33 Cal. App. 2d 564, 92 P.2d 416 (1939); *Fallon v. New Orleans Police Dep't*, 238 La. 531, 115 So. 2d 844 (1959); *Canteline v. McClellan*, 282 N.Y. 166, 25 N.E.2d 972 (1940); *Souder v. City of Philadelphia*, 305 Pa. 1, 156 A. 245 (1931); see Recent Decision, 34 BROOKLYN L. REV. 91, 98-101 (1968) (brief history

jority of these cases rejected an assertion of the privilege against compelled self-incrimination.⁶¹ In others, particularly the earlier cases, the compelled self-incrimination issue was neither raised by the law enforcement officer nor addressed by the court.⁶²

The law enforcement officer's privilege against compelled self-incrimination was not recognized when the officer was called before a grand jury,⁶³ was forced to execute a waiver of immunity from prosecution,⁶⁴ was ordered to submit to a polygraph examination,⁶⁵ or administratively questioned.⁶⁶ Regardless of the context or the forum, the result was the same: discharge from the law enforcement agency, usually for conduct unbecoming an officer, or for insubordination, or both, followed by affirmance of that action by the courts.⁶⁷ These cases conveyed the message that in order to remain employed, a law enforcement officer must renounce constitutional freedoms available to the public at large. The consistent theme of the early decisions was that a law enforcement officer not only accepts employment under these terms but also that he has a duty to dispel suspicion by full explanation.

The leading authority for more than a quarter century for the proposition that the waiving of constitutional rights is one of the duties of a law enforcement officer was *Christal v. Police Commissioner*,⁶⁸ a case decided in 1939 by the Court of Appeal of California. In *Christal*, police officers who refused to answer questions before a grand jury were charged administratively with "conduct unbecoming an officer and disobedience of orders."⁶⁹ The officers appealed their dismissals, asserting that they had a constitutional privilege of refusing to testify before the grand jury. The court agreed that the officers had a right to remain silent but held that duty required them to disclose information, even to the point of incriminating themselves, and that they could be dismissed if they refused to answer.⁷⁰ The court stated:

When police officers acquire knowledge of facts which 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 before any duly constituted court or grand jury. It is for the performance of these duties that police of-

of forfeiture of government employment as punishment for those who "plead the fifth").

61. *E.g.*, *McCain*, 160 Cal. App. 2d 174, 324 P.2d 923; *Christal*, 33 Cal. App. 2d 564, 92 P.2d 416; *Fallon*, 238 La. 531, 115 So. 2d 844; *Canteline*, 282 N.Y. 166, 25 N.E.2d 972.

62. *E.g.*, *Souder*, 305 Pa. 1, 156 A. 245.

63. See *infra* notes 68-71 and accompanying text.

64. See *infra* notes 74-76 and accompanying text.

65. See *infra* notes 72-73 and accompanying text.

66. See *infra* notes 77-78 and accompanying text.

67. See *supra* notes 1-8 and accompanying text.

68. 33 Cal. App. 2d 564, 92 P.2d 416 (1939).

69. *Id.* at 566, 92 P.2d at 418.

70. *Id.* at 567, 92 P.2d at 419.

ficers are commissioned and paid by the community, and it is a violation of said duties for any police officer to refuse to disclose pertinent facts within his knowledge even though such disclosure may show, or tend to show, that he himself has engaged in criminal activities.

We are not unmindful of the constitutional privilege above mentioned which may be exercised by all persons, including police officers, in any proceeding, civil or criminal. . . . As we view the situation, when pertinent questions were propounded to appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them. . . .

. . . .

There is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsistent with the performance of the duties of his office or employment.⁷¹

Almost twenty years later, the same court held that even the exercise of a

71. *Id.* at 567-69, 92 P.2d at 419 (citations omitted). One of the omitted citations is to *McAuliff v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892), in which Justice Holmes, upholding an officer's dismissal for violating the rule prohibiting political activity, stated that a law enforcement officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517.

Cf. Wendland v. Alameda, 46 Cal. 2d 786, 298 P.2d 863 (1956) (police officer with more than 25 years service could be discharged for refusal to testify before the grand jury but could not be denied a pension); *In re Hoertkorn*, 15 Cal. App. 2d 93, 59 P.2d 218 (1936); *In re Lemon*, 15 Cal. App. 2d 82, 59 P.2d 213 (1936) (companion cases indicating that although police officers could assert a privilege against compelled self-incrimination when asked questions before the grand jury, they could not use the privilege to prevent being sworn as a witness before the grand jury).

Christal v. Police Comm'r was relied on by Justice Harlan in dissent in *Garrity v. New Jersey*, 385 U.S. 493, 504 n.3 (1967), the case that extended full fifth amendment privileges to law enforcement officers. See *infra* text accompanying notes 97-105. The year after *Christal*, the Court of Appeals of New York cited *Christal* in upholding the state constitutional requirement that police officers called before the grand jury either execute a waiver of immunity from prosecution or forfeit their public employment. *Canteline v. McClellan*, 282 N.Y. 166, 25 N.E.2d 972. This is the same constitutional provision that was found unconstitutional by the Sup Court in *Gardner v. Broderick*, 392 U.S. 273 (1968). See *infra* notes 110-21 and accompanying text.

constitutional guarantee can support a charge of conduct unbecoming an officer.⁷² The court affirmed a dismissal for insubordination, disobedience, and conduct unbecoming an officer because a police officer refused to take a polygraph test concerning missing cash receipts.⁷³

The following year, the Supreme Court of Louisiana, in *Fallon v. New Orleans Police Department*,⁷⁴ upheld the provision of the state constitution that mandated forfeiture of office for any public employee who refused to waive immunity from prosecution or who refused, on grounds of compelled self-incrimination, to answer any question related to government affairs or the conduct of any employee.⁷⁵ The court reasoned that the public good outweighs one individual's constitutional rights, particularly when holding public office is not a right but is a privilege "conferred only upon such terms and conditions, as the people, speaking through their chosen representatives, might determine."⁷⁶

In *Souder v. City of Philadelphia*,⁷⁷ an officer was charged administratively and criminally. The Supreme Court of Pennsylvania not only denied the officer his fifth amendment privilege against compelled self-incrimination, but essentially shifted the burden of proof in his criminal case. In affirming the civil service commission's dismissal for conduct unbecoming an officer, the court stated that "in order to show his fitness to continue as an officer in the police department, he was bound to exculpate himself from any wrongdoing. This he did not do, but remained silent before the commission. In itself this was conduct unbecoming an officer."⁷⁸

As these cases illustrate, state courts consistently upheld the right to terminate the employment of a law enforcement officer who refused to cooperate in departmental investigations, notwithstanding the right against compelled self-incrimination found in the common law, state constitutions, and the federal constitution. The courts did not engage in any judicial wizardry in barring fifth amendment protection to law enforcement officers. They simply ruled that under state constitutional law, and as a matter of professional standards, law enforcement officers

72. *McCain v. Sheridan*, 160 Cal. App. 2d 174, 324 P.2d 923 (1958); accord *Fichera v. State Personnel Bd.*, 217 Cal. App. 2d 613, 32 Cal. Rptr. 159 (1963). In *Coursey v. Board of Fire & Police Comm'rs*, 90 Ill. App. 2d 31, 234 N.E.2d 339 (1967), the court stated that statutes prohibiting courts from even suggesting to civil and criminal litigants that they submit to a polygraph examination do not apply before a Board of Fire and Police Commissioners because the department must use polygraph testing to meet the statutory requirement that it investigate charges of misconduct.

73. *McCain*, 160 Cal. App. 2d at 177, 324 P.2d at 926.

74. 238 La. 531, 115 So. 2d 844 (1959).

75. LA. CONST. art. XIV, § 15(P)(1).

76. *Fallon*, 238 La. at 546, 115 So. 2d at 849 (quoting *Ricks v. Department of State Civil Serv.*, 200 La. 341, 363, 8 So. 2d 49, 56 (1942)).

77. 305 Pa. 1, 156 A. 245 (1931).

78. *Id.* at 9, 156 A. at 248; see also *Avent v. Police Bd.*, 49 Ill. App. 2d 228, 199 N.E.2d 637 (1964) (refusal to obey an order to answer questions posed by a superior officer concerning a sobriety test constituted conduct unbecoming an officer).

stood outside the purview of the fifth amendment. This view met with no opposition from the Supreme Court, which held that the fifth amendment prohibition against compelled self-incrimination was inapplicable to state court proceedings.

III. THE FIFTH AMENDMENT PRIVILEGE AFTER INCORPORATION AGAINST THE STATES

A. *The Status of the Privilege*

Beginning in 1936, the Supreme Court made limited use of the due process clause of the fourteenth amendment to protect state court defendants, applying it to only the most extreme cases of compelled self-incrimination.⁷⁹ At the same time, the Court continued to hold that the fifth amendment prohibition against compelled self-incrimination was inapplicable to state court proceedings.⁸⁰ With the advent of the Warren Court's constitutionalization of criminal procedure,⁸¹ however, the decade of the 1960's brought rapid and significant change.

In 1961, the Court made the exclusionary rule applicable to the states in *Mapp v. Ohio*.⁸² Two years later, the Court incorporated the sixth amendment right to counsel against the states in *Gideon v. Wainwright*.⁸³ The following year, with the fifth amendment privilege against compelled self-incrimination not yet incorporated, the Court employed a right to counsel approach to exclude statements made at a critical stage subsequent to the attachment of the right to counsel.⁸⁴ The Court then directly and significantly expanded fifth amendment rights in a series of cases beginning with *Malloy v. Hogan*⁸⁵ and ending with *Miranda v. Arizona*.⁸⁶

1. From *Malloy* to *Miranda*

In 1964, the Court made the safeguards of the fifth amendment prohibition against compelled self-incrimination applicable to the states in *Malloy v. Hogan*.⁸⁷ A year later, in *Griffin v. California*,⁸⁸ the Court held

79. See *supra* text accompanying notes 46-58.

80. See *supra* note 43.

81. See generally 1 LAFAYE & ISRAEL, *supra* note 36, §§ 2.1-9.

82. 367 U.S. 643 (1961).

83. 372 U.S. 335 (1963).

84. *Massiah v. United States*, 377 U.S. 201 (1964). See generally WHITEBREAD, *supra* note 49, § 16.03. The right to counsel attaches at the initiation of judicial adversarial proceedings, *Kirby v. Illinois*, 406 U.S. 682 (1972), or at a trial-like confrontation. E.g., *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing); *Memph v. Rhay*, 389 U.S. 128 (1967) (sentencing proceeding). A critical stage is when substantial rights of the defendant may be affected without counsel. E.g., *United States v. Wade*, 388 U.S. 218 (1967) (lineup). See generally WHITEBREAD, *supra* note 49, § 31.03(b)-(c).

85. 378 U.S. 1 (1964).

86. 384 U.S. 436 (1966).

87. 378 U.S. 1 (1964).

88. 380 U.S. 609, *reh'g denied*, 381 U.S. 957 (1965).

that a "chilling effect" upon the exercise of the privilege is as much a constitutional violation as actually compelling witnesses to incriminate themselves. The Court prohibited both jury instructions and prosecutorial comment that would permit a jury to draw a negative inference from a defendant's silence at trial.⁸⁹ Two years after *Malloy*, in *Miranda v. Arizona*,⁹⁰ the Court made clear that the fifth amendment would be the focal point for the analysis of compelled self-incrimination cases.

Malloy and *Miranda* are landmark cases in the history of the fifth amendment. In *Malloy*, the Court broke new ground by squarely holding that states must respect the fifth amendment privileges of their citizens. Justice Brennan stated for the Court: "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."⁹¹

In *Miranda*, the Court found that, notwithstanding its prior holdings, police science literature and police manuals were instructing interrogators to use isolation, persuasion, trickery, and subtle coercion to obtain confessions, and in no way discouraged the use of the "third degree."⁹² Because such practices lead to flagrant constitutional violations, the Court mandated four specific warnings to any person subjected to custodial interrogation.⁹³ Although fifth amendment analysis is typically viewed as the dual approach of voluntariness and *Miranda*,⁹⁴ the goal of *Miranda* was to realize, by the use of per se rules if necessary, the prom-

89. *Id.* at 613. The Court further stated that "comment on the refusal to testify . . . is a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614.

90. 384 U.S. 436 (1966).

91. *Malloy*, 378 U.S. at 8.

92. *Miranda*, 384 U.S. at 448-55. With reference to the "third degree," the Court stated: "Offensive to the Constitutional guarantees of liberty are confessions wrung from an accused by overpowering his will, whether through physical violence or the more subtle forms of coercion commonly known as the 'third degree.'" *Hysler v. Florida*, 315 U.S. 411, 413 (1942). Webster's Dictionary defines the "third degree" as "the subjection of a prisoner to mental torture (as continuous questioning over excessively long periods) or physical torture (as restriction to a meager diet or deprivation of sleep) in an effort to wring a confession from him." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2378 (1976).

93. *Miranda*, 384 U.S. at 467-73. The four warnings are that (1) the defendant has the right to remain silent; (2) if the defendant waives that right, any statement given may be introduced as evidence against the defendant; (3) the defendant has the right to an attorney present during questioning; and (4) if the defendant cannot afford an attorney, one will be provided during questioning. *Id.* De minimus variations are permissible. See *California v. Prysock*, 453 U.S. 355 (1981).

94. The vitality of the Court's mandate in *Miranda* has been lessened by recent decisions. E.g., *New York v. Quarles*, 467 U.S. 649 (1984) (the "public safety exception"); *California v. Beheler*, 463 U.S. 1121 (1983) (custody requires arrest); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (narrowing the scope of interrogation). With the weakening of *Miranda*, the due process and right to counsel approaches are gaining in importance in the analysis of compelled self-incrimination cases. See

ise of the fifth amendment that no person would be compelled to incriminate himself.⁹⁵ Chief Justice Warren advised that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."⁹⁶

2. *Garrity and Spevak*

Beginning in 1967, three years after *Malloy* extended the prohibitions against compelled self-incrimination to state governments, the Court decided six cases that had a significant impact on the fifth amendment rights of law enforcement officers. The first two were the companion cases of *Garrity v. New Jersey*⁹⁷ and *Spevak v. Klein*.⁹⁸ In *Garrity*, police officers were interrogated about an alleged conspiracy to obstruct the administration of traffic laws.⁹⁹ They were informed that under New Jersey law they would be subject to removal from office if they exercised their right to remain silent.¹⁰⁰ The officers answered the questions, their answers were admitted into evidence in their subsequent criminal trials on conspiracy charges, and they were convicted.

In resolving the issue of whether a state can use the threat of discharge to obtain incriminating statements from a public employee, the

Colorado v. Connelly, 107 S. Ct. 515, 519-22 (1986) (due process approach); Michigan v. Jackson, 475 U.S. 625 (1986) (right to counsel approach).

95. *Miranda*, 384 U.S. at 467.

96. *Id.* at 458.

97. 385 U.S. 493 (1967).

98. 385 U.S. 511 (1967).

99. *Garrity*, 385 U.S. at 494. The officers were interrogated by the State Attorney General's Office, under order of the Supreme Court of New Jersey to investigate alleged irregularities in the handling of municipal court cases. *Id.*

100. The New Jersey statute in effect at the time provided:

Any person holding or who has held any elective or appointive public office, position or employment (whether state, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding wherein he is a defendant or is called as a witness on behalf of the prosecution, upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this state which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right of tenure or pension granted to him by any law of this State provided the inquiry related to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in this State.

N.J. REV. STAT. § 2A:81-17.1 (Supp. 1965).

Court did not reach the constitutionality of the forfeiture statute. Instead, the Court focused on whether fear of discharge for refusal to answer, on the one hand, and fear of self-incrimination, on the other, created a "'choice between the rock and the whirlpool' which made the statements products of coercion" ¹⁰¹ In a five-to-four decision, the Court found that duress is inherent when an individual is forced to choose between exercising the fifth amendment privilege and remaining a law enforcement officer and, therefore, the statements were involuntary as a matter of law. Rejecting the State's argument that a law enforcement officer has no constitutional right to employment and must accept the position on the terms under which it is offered, the majority stated that police officers "are not relegated to a watered-down version of constitutional rights."¹⁰² Moreover, "[t]he option [presented to the police officers] to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent."¹⁰³

Writing in dissent, Justice Harlan adopted the pre-incorporation view that a law enforcement officer forfeits constitutional rights as a condition of employment.¹⁰⁴ The other dissent, written by Justice White, recommended the notion that would be adopted as dicta in four subsequent cases. He contended that the appropriate balance between the fifth amendment privilege and the "legitimate interest [of citizens] in ridding themselves of faithless officers [was to exclude the compelled statement in any criminal proceeding but allow its use] to discharge an employee who refuses to cooperate in the State's effort to determine his qualifications for continued employment."¹⁰⁵

In *Garrity's* companion case, *Spevak v. Klein*,¹⁰⁶ the Court followed the *Garrity* analysis, holding that a state cannot disbar an attorney because of a refusal to testify at a judicial inquiry. The Court stated that an

101. *Garrity*, 385 U.S. at 496 (citing *Stevens v. Marks*, 393 U.S. 234, 243 (1966) (quoting *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926))).

102. *Garrity*, 385 U.S. at 500.

103. *Id.* at 497. The Court also relied upon *Slochower v. Board of Educ.*, 350 U.S. 551 (1956), a pre-incorporation case holding that due process was violated by discharging a public school teacher solely for invoking the privilege against compelled self-incrimination before a congressional committee. The Court stated: "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." *Garrity*, 385 U.S. at 499-500 (quoting *Slochower*, 350 U.S. at 557-58).

104. *Garrity*, 385 U.S. at 500-10. Justice Harlan believed that "[t]he validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect." *Id.* at 507 (Harlan, J., dissenting). Relying on *Christal v. Police Comm'r*, 33 Cal. App. 2d 564, 92 P.2d 416 (1939), he concluded that when confronted with alleged police misconduct, the public interests outweigh the integrity of the privilege. *Garrity*, 385 U.S. at 509-10. See *supra* text accompanying notes 68-76.

105. *Garrity*, 385 U.S. at 532 (White, J., dissenting).

106. 385 U.S. at 511 (1967).

individual cannot enjoy the constitutionally guaranteed unfettered exercise of the right to remain silent if there may be a penalty for asserting that right. The Court observed that the instrument of threat is as powerful as actual compulsion by use of the legal process.¹⁰⁷

In *Spevak*, as in *Garrity*, Justice White's suggestion of an appropriate balance between constitutional rights and employment rights was not considered by the majority.¹⁰⁸ However, Justice Fortas' concurrence in *Spevak* did address Justice White's concern, as follows:

I 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 as distinguished from his beliefs on other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding.¹⁰⁹

The fifth amendment, incorporated against the states on behalf of all citizens in *Malloy*, was expressly incorporated on behalf of law enforcement officers in 1967 in *Garrity*. However, at the same time, first in the dissent in *Garrity* and then in the concurrence in *Spevak*, the groundwork was laid for balancing the constitutional rights of law enforcement officers with the historical requirement of full accountability of the public trust.

3. *Gardner and Sanitation Men*

The year after *Garrity* and *Spevak*, the Court decided the companion cases of *Gardner v. Broderick*¹¹⁰ and *Uniformed Sanitation Men Association v. Commission of Sanitation*.¹¹¹ In *Gardner*, a police officer was subpoenaed to testify before a grand jury investigating police corruption and bribery stemming from illegal gambling. He was advised that if he did not waive his right to remain silent and did not waive immunity from prosecution, he would be discharged under New York law.¹¹² Unlike

107. *Id.* at 516 (quoting *United States v. White*, 322 U.S. 694, 698 (1944)).

108. In *Spevak*, Justice Douglas observed that "[w]hether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we did not reach in *Garrity*." *Spevak*, 385 U.S. at 516 n.3.

109. *Id.* at 519-20.

110. 392 U.S. 273 (1968).

111. 392 U.S. 280 (1968).

112. At the time, the New York City Charter provided:

If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body author-

Garrity, in which threat of discharge led the officer to make a statement, in *Gardner* the officer refused to make a statement, which resulted in discharge.¹¹³ The police department argued successfully in state court that it is constitutional to confront a law enforcement officer with a "choice between self-incrimination and forfeiting his means of livelihood, [because] he is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it."¹¹⁴ Unpersuaded, a unanimous Supreme Court¹¹⁵ reversed the Court of Appeals of New York, which had affirmed the trial court's dismissal of the officer's petition for reinstatement. Applying the holding of *Garrity* to a "chilling effect" situation as in *Griffin*, Justice Fortas reasoned that an unsuccessful attempt to coerce is as unconstitutional as a successful one. Accordingly, dismissing an officer for asserting the privilege against compelled self-incrimination is as much a fifth amendment violation as coercing the officer to make a statement by threatening dismissal.¹¹⁶

Thus, the import of *Gardner* is that *Garrity* applies regardless of the choice made by the law enforcement officer when confronted with the dilemma of choosing between a constitutional right and continued em-

ized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

N.Y. CITY CHARTER § 1123. At the time, the New York Constitution provided:

No person shall be . . . compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office . . . or the performance of his official duties . . . refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years . . . and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

N.Y. CONST. art. I, § 6.

113. The Court framed the issue as "whether a policeman who refuses to waive the protections which the privilege gives him may be dismissed from office because of that refusal." *Gardner*, 392 U.S. at 276.

114. *Id.* at 277.

115. Justice Black concurred in the result. *Id.* at 279. Justice Harlan, joined by Justice Stewart, wrote a concurring opinion. *Id.* at 285.

116. The Court stated in *Gardner*: "He was dismissed for failure to relinquish the protections of the privilege against self-incrimination. . . . [T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." *Id.* at 278-79 (footnote and citation omitted).

ployment. Significantly, the Court, in dicta, unanimously heeded Justice White's call for an appropriate balance, issued a year earlier in his *Garrity* dissent and advanced by Justice Fortas in concurrence in *Spevak*. Justice Fortas, writing for the Court in *Gardner*, stated that if a police officer is provided with immunity, then failure to answer questions narrowly relating to the performance of official duties may result in a constitutionally permissible discharge from office.¹¹⁷

Through the holdings of *Garrity* and *Gardner*, the Supreme Court in an eighteen month period rewrote seventy-five years worth of law pertaining to the rights of law enforcement officers. Moreover, applying the appropriate balance, recognized in the dicta of *Gardner*, a law enforcement agency could take disciplinary action against a law enforcement officer without interfering with the privilege against compelled self-incrimination, and an officer could assert the privilege against compelled self-incrimination without interfering with the agency's disciplinary process. Thus, the fifth amendment rights of a law enforcement officer, when appropriately balanced with the rights of a law enforcement agency, produce the following:

(1) if a law enforcement officer is not provided with immunity, any statement given under threat of adverse personnel action is unconstitutionally coerced (*Garrity* holding);¹¹⁸

(2) if a law enforcement officer is not provided with immunity, the taking or threatening to take any adverse personnel action in response to the assertion of the privilege against compelled self-incrimination has an unconstitutional chilling effect upon the privilege (*Gardner* holding);¹¹⁹

(3) if a law enforcement officer is granted immunity but nonetheless refuses to answer questions specifically, directly, and narrowly related to official duties, the officer may be dismissed (*Gardner* dicta);¹²⁰ and

(4) if a law enforcement officer is granted immunity and answers questions specifically, directly, and narrowly related to official duties, the officer may be dismissed if the answers provide cause for dismissal (implicit in the *Gardner* dicta).¹²¹

117. The Court stated:

If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-incrimination would not have been a bar to his dismissal.

The facts of the case, however, do not present this issue. Here, petitioner was summoned to testify before a grand jury in an investigation of alleged criminal conduct. He was discharged from office not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right.

Id. at 278 (citation and footnote omitted).

118. *Garrity*, 385 U.S. at 497-500.

119. *Gardner*, 392 U.S. at 278-79.

120. *Id.* at 278.

121. *Id.*

In *Gardner's* companion case, *Uniformed Sanitation Men Association v. Commission of Sanitation*,¹²² the Court found that fifteen sanitation workers were not discharged because of a refusal to account for their official conduct but because they asserted and refused to waive a constitutional privilege.¹²³ Justice Fortas, again writing for a unanimous Court, reversed the judgment that had affirmed the dismissal of the workers' action for a declaratory judgment and for injunctive relief. He reiterated the *Gardner* dicta but, under the facts before the Court, found that *Garrity* and *Gardner* were dispositive.¹²⁴

4. *Turley* and *Cunningham*

In 1973, in *Lefkowitz v. Turley*,¹²⁵ the Court reaffirmed its prior holdings and more clearly explained the dicta in *Gardner* and *Sanitation Men*. In *Turley*, architects were disqualified from public contracts because they refused to waive their privilege against compelled self-incrimination and immunity from prosecution.¹²⁶ Finding *Garrity*, *Gardner*, and *Sanitation Men* controlling, the Court rejected the State's argument that its interest in disqualifying the architects from public contracts is sufficiently strong to override the privilege against compelled self-incrimination, concluding that a "waiver secured under threat of substantial economic sanction cannot be termed voluntary."¹²⁷

More significant was the Court's amplification of the dicta in *Gardner* and *Sanitation Men*. The term immunity in *Gardner* must have been intended as a constitutional term of art. The Court in *Turley* stated that if a government agency needs or wants information, then the prosecutor must provide a grant of immunity, accompanied by the power of the courts to compel immunized testimony through civil contempt proceedings.¹²⁸ Adhering to the theme of the need for an appropriate balance, the Court stated that "[i]mmunity is required if there is to be 'rational accommodation between the imperatives of the privilege and the legiti-

122. 392 U.S. 280 (1968).

123. *Id.* at 283.

124. The Court stated:

[I]f New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different.

....

They were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally.

Id. at 285 (footnote omitted).

125. 414 U.S. 70 (1973).

126. *Id.* at 75-76.

127. *Id.* at 82-83.

128. *Id.* at 81-82, 84.

mate demands of government to compel citizens to testify.' ”¹²⁹ “It is in this sense that immunity statutes have ‘become part of our constitutional fabric.’ ”¹³⁰ The Court noted that had adequate immunity been given, then cancellation of and disqualification from government contracts would have been permissible.¹³¹

Four years later, in *Lefkowitz v. Cunningham*,¹³² the Court struck down a New York statute that provided for the removal of an officer of a political party, as well as disqualification from holding public office for five years, if the officer refused to waive the privilege against compelled self-incrimination or refused to waive immunity from criminal prosecution.¹³³ The State of New York, having argued the losing side in *Gardner*, *Sanitation Men*, and *Turley*, attempted to distinguish *Cunningham* on the ground that there was no threatened economic loss associated with a non-paying, honorary political position. The State argued further that its interest in the integrity of the political system justified any constitutional infringement. Chief Justice Burger, writing for the Court, declared the statute to be in violation of the fifth amendment, rejecting any attempt to distinguish the facts of *Cunningham* from *Garrity*, *Gardner*, *Sanitation Men*, and *Turley*.¹³⁴ As for the State’s asserted interest, he wrote that the “[g]overnment has compelling interests in maintaining an honest police force and civil service, but this Court did not permit those interests to justify infringement of Fifth Amendment rights in *Garrity*, *Gardner*, and *Sanitation Men*”¹³⁵

Taken together, *Garrity*, *Spevak*, *Gardner*, *Sanitation Men*, *Turley*, and *Cunningham* signalled a new era in the evolution of the fifth amendment rights of law enforcement officers, an era in which their second-class constitutional status was apparently eliminated. The last three decades of the century promised to be an era in which, as Justice Douglas said in *Garrity*, police officers would not receive a “watered-down version

129. *Id.* at 81 (quoting *Kastigar v. United States*, 406 U.S. 441, 446 (1972)).

130. *Id.* at 81-82 (quoting *Ullman v. United States*, 350 U.S. 422, 438 (1956)).

131. *Turley*, 414 U.S. at 84-85.

132. 431 U.S. 801 (1977). This case is sometimes referred to as *Lefkowitz II*.

133. *Id.*

134. The Court stated:

[*Garrity*, *Gardner*, *Sanitation Men*, and *Turley*] settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. It is true . . . that our earlier cases were concerned with penalties having a substantial economic impact. But the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.

[The statute] is therefore constitutionally indistinguishable from the coercive provisions we struck down in *Gardner*, *Sanitation Men*, and *Turley*. . . . The threatened loss of such widely sought positions, with their power and perquisites, is inherently coercive.

Id. at 806-07.

135. *Id.* at 808.

of constitutional rights.”¹³⁶ With the states required to apply federal law under *Malloy*, the *Garrity* and *Gardner* combination appeared to protect law enforcement officers both ways. If an officer gave a statement under threat of adverse personnel action, *Garrity* made the statement involuntary and unconstitutional as a matter of law. If, on the other hand, punitive personnel action was taken when an officer refused to give a statement, the action was unconstitutional under *Gardner*. If there were any concern that these might be short-lived Warren Court era doctrines, that concern was addressed a decade later in *Cunningham* when Chief Justice Burger, speaking for a seven-to-one Court,¹³⁷ relied on *Garrity* and *Gardner*. He emphasized that even the compelling governmental interest in honest law enforcement is not sufficient justification for diluting the privilege against compelled self-incrimination.¹³⁸

B. *The Status of Law Enforcement Officers*

The promises of *Garrity* and *Gardner* were never fully realized for law enforcement officers. Although the blatant contravention of *Garrity* and *Gardner* was remedied, subtle violations were not. In situations in which courts were confronted with constitutional,¹³⁹ statutory,¹⁴⁰ or reg-

136. *Garrity*, 385 U.S. at 500.

137. Justice (now Chief Justice) Rehnquist took no part in the decision. Justice Stevens' dissent in no way undermined *Garrity* or *Gardner* but took the position that they did not apply because those asserting the fifth amendment privilege in *Cunningham* were policymaking government officials and not typical public employees. *Id.* at 810-15.

138. *Cunningham*, 431 U.S. at 804-08.

139. In *Commonwealth v. Triplett*, 462 Pa. 244, 341 A.2d 62 (1975), the court invalidated the so-called "Charter warnings" of section 10-110 of the Philadelphia Home Rule Charter, which provided for forfeiture of office for assertion of the privilege against compelled self-incrimination. The court held that the statement obtained under such threat was not only inadmissible in the prosecution's case in chief, but inadmissible for impeachment purposes because, under Pennsylvania law, use for impeachment would chill the defendant's election to testify. The concurring justice believed that the statement induced by the "Charter warnings" had to be suppressed for impeachment purposes because of federal constitutional law. He stated that *Harris v. New York*, 401 U.S. 222 (1971), constitutionally permitting the use of statements for impeachment, applied only to statements taken in violation of *Miranda* but otherwise trustworthy. According to the concurrence, statements that violate *Garrity* are inherently coercive, involuntary, and untrustworthy and therefore inadmissible both in the case in chief and on cross-examination. 462 Pa. at 252, 341 A.2d at 65-66.

In *Sellers v. Corlberton*, 224 So. 2d 808 (Fla. Dist. Ct. App. 1969), Dade County conceded the unconstitutionality of the county code provision that required forfeiture of office for assertion of the privilege against compelled self-incrimination. The county charter, however, still contained a forfeiture provision. In *Englander v. State*, 246 So. 2d 746 (Fla. 1971), the court applied *Garrity* and *Gardner* to invalidate the waiver of immunity signed by a member of the City Council of the City of Miami Beach and to strike down the charter provision.

140. In *Raphael v. Conrad*, 371 F. Supp. 256, 259 (S.D. Ind. 1974), the court found unconstitutional the state code provision that required an affidavit in order to be eligible to be a paid lobbyist. The affidavit required a statement that the affiant is not, and never was, a member of the communist party, and that the affiant never

ulatory¹⁴¹ provisions similar to those in *Garrity* and *Gardner*, the provisions were struck down quickly by courts or amended by legislatures. However, once across-the-board violations were remedied, unconstitutional actions continued that were more difficult to detect and prove. System-wide, explicit schemes sanctioning punitive personnel action for the assertion of the privilege against compelled self-incrimination were replaced with incident-by-incident threats, either express or implied, and grants of immunity to a law enforcement officer were rare.¹⁴² Law enforcement officers still face the constitutionally impermissible dilemma of attempting to preserve a career by relinquishing the privilege, as in *Garrity*, or preserving the privilege at the cost of a career, as in *Gardner*. Courts confronted with these situations frequently reflect the layman's attitude toward those who "hide behind" the fifth amendment.¹⁴³ Some courts have ruled against law enforcement officers without invoking or misapplying *Garrity* and *Gardner*, resting on grounds such as the inapplicability of the fifth amendment because the officer did not fear a criminal prosecution,¹⁴⁴ because the officer failed to assert the fifth amendment privilege,¹⁴⁵ or because of the lack of either a *Garrity* coercion or a *Gardner* chill.¹⁴⁶ Many more courts either misunderstand, or perhaps even

refused to answer any question posed by any congressional committee concerning communist party affiliation. The court held that refusal to answer these questions on fifth amendment grounds could not be used to deny employment in a field regulated by the state.

141. In *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973), *cert. denied sub nom.*, 416 U.S. 956 (1974), the court found unconstitutional the police department rule that prohibited both the refusal to testify on grounds of self-incrimination and the refusal to waive immunity when so requested by a superior officer; see *Holloway v. State*, 26 Md. App. 382, 389, 339 A.2d 319, 324, *cert. denied*, 276 Md. 745 (1975) ("[w]hether the policy be statutory or by regulation the result would be the same under *Garrity*, for the effect upon the officer would most surely be the same"); cf. *Everitt Lumber Co. v. Industrial Comm'n*, 39 Colo. App. 336, 565 P.2d 967 (1977) (unemployment compensation benefits could not be denied because of assertion of the privilege against compelled self-incrimination before an administrative agency).
142. See *infra* part III.B.2.
143. Of course, there is the occasional court that extends, rather than limits, the *Gardner* rule. E.g., *Baxley v. North Charleston*, 533 F. Supp. 1248 (D.S.C. 1982) (extending *Gardner* to prohibit discharging a law enforcement officer for asserting his sixth amendment right to counsel).
144. *Devine v. Goodstein*, 680 F.2d 243, 246-47 (1982) (finding no evidence of belief that a written report would form the basis of a criminal prosecution); *Johnston v. Herschler*, 669 F.2d 617, 619 (10th Cir. 1982) (when discharged special agent stated in deposition that protecting against compelled self-incrimination was not the reason for his refusal to answer).
145. *United States v. Indorato*, 628 F.2d 711, 717 (1st Cir. 1980) ("defendant did not claim the privilege").
146. The court in *Indorato* stated:

There is nothing in the record to suggest that the rules have been interpreted to mean that a state police officer who refuses on fifth amendment grounds to comply with an order to provide self-incriminating statements would be dismissed. The language used in the rules — providing that for violation a member *may* be tried and upon conviction *may* be subject to dismissal or other disciplinary action — suggests that dismissal

evade, the *Garrity* and *Gardner* holdings, the immunity requirement, or both.

1. Misunderstanding the Fifth Amendment Holdings of *Garrity* and *Gardner*

A number of courts bolster their opposition to fifth amendment rights by quoting *Gardner* out of context to support the erroneous position that officers must relinquish their rights in return for the privilege of being law enforcement officers.¹⁴⁷ In *Gardner*, Justice Fortas noted that the police department had argued that although an attorney cannot be "confronted with Hobson's choice between self-incrimination and forfeiting his means of livelihood, the same principles should not protect a policeman."¹⁴⁸ Before rejecting the department's argument, the Court set forth the argument *presented by the department* that law enforcement officers should be held to a different standard than attorneys, stating:

Unlike the lawyer, [the police officer] is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other "client" or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer. Unlike the lawyer who is directly responsible to his client, the policeman is either responsible to the State or to no

would not have automatically followed defendant's invocation of the fifth amendment.

Id. at 716 (emphasis added).

147. *Grabinger v. Conlisk*, 320 F. Supp. 1213, 1220 (N.D. Ill. 1970) ("high obligation owed by a policeman to his employer and his peculiar position in our society certainly must be taken into account in considering the nature and effect of disciplinary proceedings instituted by the employer"); *Bruns v. Pomerleau*, 319 F. Supp. 58, 65 (D. Md. 1970) ("a police officer holds a position of public trust, and in that respect, his conduct must be of a higher moral character than that of the ordinary citizen"); *Civil Serv. Ass'n, Local 400 v. Civil Serv. Comm'n*, 139 Cal. App. 3d 449, 455, 188 Cal. Rptr. 806, 810 (1983) ("While a public employee cannot be forced to give an answer which may tend to incriminate him or her in criminal proceedings, he may be required to choose between disclosing information and losing his employment."); *Sczaciarz v. California State Personnel Bd.*, 79 Cal. App. 3d 904, 918, 145 Cal. Rptr. 396, 403 (1978) ("Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise."); *Gerace v. Los Angeles*, 24 Cal. App. 3d 350, 358, 100 Cal. Rptr. 917, 923 (1972) ("Fitness to serve as a policeman and criminal behavior are antithetical and antagonistic and cannot coexist."). Other courts have reached the same result without referring to *Gardner*. *E.g.*, *Eshelman v. Blubaum*, 114 Ariz. 376, 378, 560 P.2d 1283, 1285 (1977) ("compulsory use of the polygraph during departmental investigation is consistent with the maintenance of a police or sheriff's department that is of the highest integrity and beyond suspicion"); *Richardson v. City of Pasadena*, 500 S.W.2d 175, 177 (Tex. Civ. App. 1973), *rev'd on other grounds*, 513 S.W.2d 1 (Tex. 1974) ("[b]y accepting public employment as a police officer he subordinated his right of privacy as a private citizen to the superior right of the public to an efficient and credible police department").

148. *Gardner*, 392 U.S. at 277.

one.¹⁴⁹

This distinction, rejected in *Gardner* as a basis for providing less constitutional protection to law enforcement officers than to attorneys, is often erroneously quoted as the *holding* of *Gardner*.¹⁵⁰ Thus, many courts misconstrue *Gardner*, reaching a conclusion totally opposite to the intended holding in that case.

Gardner was especially misunderstood by the United States district court in *Pinkney v. District of Columbia*.¹⁵¹ The court began by misconstruing *Gardner* in the manner just described. This error was then compounded by the court's holding that, although a constitutional privilege may not be totally abridged, no constitutional question is raised when a constitutional right is merely burdened. According to the court:

[T]he government employee, unlike the ordinary citizen, is a "trustee of the public interest" [S]ecuring from government employees an accounting of their public trust by no means justifies the state in totally abridging the fifth amendment rights of public employees. But it does justify the imposition of some burdens on the privilege. The demarcation line between the permissible and impermissible is plainly set out in a line of cases beginning with *Gardner*.

[The public employee] could have either contested his proposed removal by disclosing information about the *pending criminal charges* and in the process exposed himself to potential self-incrimination, or as he did, he could have chosen to remain silent and thereby sacrificed his right to a hearing and, through that, the chance of retaining his job. No waiver of fifth amendment immunity was compelled. To be sure, this choice placed plaintiff on the horns of a dilemma and burdened him in the exercise of his fifth amendment right to remain silent. But under *Gardner* and its progeny the choice that plaintiff was faced with simply did not rise to constitutional proportions.¹⁵²

Employing this extraordinary rationale, the court upheld as constitu-

149. *Id.* at 277-78 (footnote omitted).

150. *E.g.*, *Pinkney v. District of Columbia*, 439 F. Supp. 519, 533 (D.D.C. 1977); *Allen v. Greensboro*, 322 F. Supp. 873, 877 (M.D.N.C. 1971); *Grabinger v. Conlisk*, 320 F. Supp. 1213, 1220 (N.D. Ill. 1970); *Civil Serv. Ass'n, Local 400 v. Civil Serv. Comm'n*, 139 Cal. App. 3d 449, 455, 188 Cal. Rptr. 806, 810 (1983); *cf.* *Matter of Glancey*, — Pa. —, —, 527 A.2d 997, 1002-03 (1987) (judge who refused to answer a question on a required financial disclosure form, based on the fifth amendment privilege against compelled self-incrimination, could be removed from office for misconduct). This misunderstanding also affects the commentators. *See* *Recent Decisions*, 33 ALB. L. REV. 397, 403 (1969); *see also* *Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 415-16 n.116 (1976).

151. 439 F. Supp. 519 (D.D.C. 1977).

152. *Id.* at 533-34 (citations omitted) (emphasis added).

tional the same conduct expressly prohibited by *Garrity* and *Gardner* as a violation of the privilege against compelled self-incrimination.¹⁵³

Some courts have adopted similar reasoning to hold that law enforcement officers may be required to take polygraph examinations as part of their work related responsibilities. Frequently, courts fail even to recognize that polygraph examinations present a fifth amendment *Garrity* and *Gardner* problem. The Court of Civil Appeals of Texas, in *Richardson v. City of Pasadena*,¹⁵⁴ upheld a dismissal for insubordination based on refusal to submit to a polygraph examination. Using language remarkably similar to cases from the pre-incorporation era, the court said:

By accepting public employment as a police officer he subordinated his right of privacy as a private citizen to the superior right of the public to an efficient and credible police department. A police officer is guilty of insubordination in refusing a direct order of a superior officer to submit to a polygraph examination during a departmental investigation of a matter relating to efficiency and credibility when reasonable cause exists to believe that the police officer so ordered can supply relevant knowledge or information. Insubordination in refusing a reasonable and constitutional command cannot be upheld without jeopardizing the system of police administration which is premised on discipline.¹⁵⁵

Even those courts that do recognize polygraph tests as presenting a fifth amendment *Garrity* and *Gardner* issue frequently rule against the law enforcement officer on the merits of the claim.¹⁵⁶

153. A different version of being "only slightly unconstitutional" is *DeWalt v. Barger*, 490 F. Supp. 1262 (M.D. Pa. 1980). After quoting *Pinkney*, the court supported its conclusion that the officer's six week suspension and transfer did not unconstitutionally infringe on his fifth amendment privilege against compelled self-incrimination, in part, because he may have been "suspended and transferred not only for invoking his fifth amendment rights but also for violating . . . the Pennsylvania State Police Field Regulation." *Id.* at 1272 n.6. Justice Douglas stated in *Garrity* that police officers "are not relegated to a watered-down version of constitutional rights [and] a State may not condition [the exercise of a constitutional right] by the exaction of a price." *Garrity*, 385 U.S. at 500.

154. 500 S.W.2d 175 (Tex. Civ. App. 1973), *rev'd on other grounds*, 513 S.W.2d 1 (Tex. 1974) (indefinite suspension and permanent dismissal was lawful for refusing to submit to polygraph examination that was not unreasonable).

155. *Id.* at 177.

156. *Grabinger v. Conlisk*, 320 F. Supp. 1213 (N.D. Ill. 1970) (15-day suspension upheld as not violative of the fifth amendment or due process); *Rivera v. Douglas*, 132 Ariz. 117, 644 P.2d 271 (1982) (directive to submit to polygraph examination did not violate the fifth amendment and was not unreasonable, arbitrary, and capricious); *Eshelman v. Blubaum*, 114 Ariz. 376, 560 P.2d 1283 (1977) (dismissal for refusal to submit to polygraph examination upheld because "the officer [was] informed (1) that the questions [related] specifically and narrowly to the performance of his official duties, (2) answers [could not] be used against him in any subsequent criminal prosecution, and (3) that the penalty for refusing [was] dismissal").

An even more significant misunderstanding of the doctrine of *Garrity* and *Gardner* is the notion that a law enforcement officer may be forced to choose between the constitutional privilege against compelled self-incrimination and a career if the law enforcement agency, in questioning the officer, limits its questions to those "specifically, directly, and narrowly relating to the performance of his official duties."¹⁵⁷ This misunderstanding results from a reading of the *Gardner* dicta out of context.¹⁵⁸ The *Gardner* dicta stands for the proposition that if a law enforcement officer is granted immunity, but nonetheless refuses to answer questions specifically, directly, and narrowly related to official duties, the officer may be dismissed. The thrust of this proposition is that, in order to punish for failure to answer questions, the law enforcement agency must provide as much protection as it is requiring the law enforcement officer to relinquish; that is, immunity must be granted in exchange for the officer's relinquishment of the privilege against compelled self-incrimination.

The *Gardner* requirement that questions be "specifically, directly, and narrowly" related to the performance of official duties¹⁵⁹ provides further limitation on the law enforcement agency. Thus, not only must immunity be granted, there can be no dismissal unless the incriminating answer is in response to an employment-related inquiry. A number of courts, in direct contravention of *Garrity* and *Gardner*, permit disciplinary action against law enforcement officers simply because the questions asked are official in nature, even though the principal requirement that the officer be granted immunity has not been satisfied.¹⁶⁰

157. *Gardner*, 392 U.S. at 278.

158. The language of the dicta in *Gardner* is as follows:

If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey*, *supra*, the privilege against self-incrimination would not have been a bar to his dismissal.

Id. at 278 (footnote omitted).

Although the problem arises from a misreading of *Gardner*, the problem may be slightly exacerbated by use of the unofficial version, published by the West Publishing Company, which incorrectly breaks this one-sentence quote into two sentences by placing a period instead of a comma after "himself" and before "*Garrity*." 88 S. Ct. at 1916. The unofficial version published by the Lawyers Co-operative Publishing Company is consistent with the official United States Reports. 20 L. Ed. 2d at 1086-87.

159. *Gardner*, 392 U.S. at 278.

160. In *O'Brien v. DiGrazia*, 544 F.2d 543, 546 (1st Cir. 1976), the court upheld a 30-day suspension for failure to answer questions on a financial disclosure form. In rejecting the fifth amendment claim, the court held that, as long as the questions are specifically, directly, and narrowly related to official duties, the "privilege [against compelled self-incrimination] is not infringed when public employees are dismissed for failing to answer questions"

In *Marks v. Schlesinger*, 384 F. Supp. 1373, 1378-79 (C.D. Cal. 1974), the court upheld withdrawal of a Department of Defense security clearance for access to classified information because of the failure to answer questions on interrogatories relat-

2. Misunderstanding the Immunity Requirement

The immunity requirement is described in the dicta of *Gardner*, *Sanitation Men*, and *Turley*. These cases stand for the proposition that a law enforcement officer may be dismissed if he is provided with immunity but nonetheless refuses to answer questions specifically, directly, and narrowly related to official duties. *Gardner's* reference to immunity is as follows:

If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, *without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution* of himself, . . . the privilege against self-incrimination would not have been a bar to his dismissal.¹⁶¹

In *Sanitation Men*, the companion case to *Gardner*, the immunity requirement was further explained:

As we stated in *Gardner v. Broderick*, if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment *without requiring relinquishment of the benefits of the constitutional privilege*, and if they had refused to do so, this case would be entirely different.¹⁶²

In *Turley*, the immunity requirement was clarified even further:

Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, *the Constitution permits that very testimony to be com-*

ing to alleged homosexual conduct. Relying on *Gardner* and *Sanitation Men*, the court validated the action because it was not "the result of some governmental suspicion concerning his alleged homosexual conduct, but . . . was based on the inability of the government to continue its clearance procedure without Marks first disclosing additional information."

In *Matter of Glancy*, — Pa. —, 527 A.2d 997 (1987), the court upheld the recommendation of the Judicial Inquiry Panel Review Board that the judge be removed from office. The court stated:

[A]lthough compliance with the reporting requirement is compulsory in the sense that one's right to hold judicial office is conditioned upon it, there is not present the demand for *total* relinquishment of fifth amendment rights. Moreover, the inquiry put to a judge by Question 11 is a type which "specifically, directly and narrowly" relates to the performance of his official duties.

Id. at —, 527 A.2d at 1005; *see also* *Napolitano v. Ward*, 317 F. Supp. 83, 84 (N.D. Ill. 1970), *aff'd*, 457 F.2d 279 (7th Cir.), *cert. denied*, 409 U.S. 1037, *reh'g denied*, 410 U.S. 947 (1972) (denial of motion of a removed judge to prevent nomination of candidates to fill the judicial vacancy caused by his removal).

161. *Gardner*, 392 U.S. at 278 (footnoted omitted) (emphasis added).

162. *Sanitation Men*, 392 U.S. at 284 (citation omitted) (emphasis added).

*elled if neither it nor its fruits are available for such use. . . . Furthermore, the accommodations between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony after a grant of immunity by use of civil contempt and coerced imprisonment. . . . Also, given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment.*¹⁶³

Although compelled testimony may not be used directly or derivatively against an officer in a criminal proceeding, the dicta of *Gardner*, *Sanitation Men*, and *Turley* indicate that compelled testimony may be used against the officer in an administrative or other civil proceeding, provided the testimony follows a grant of immunity. If the fifth amendment privilege is properly protected by a grant of immunity, the content of answers to specific employment-related questions, as well as the failure to answer such questions, can result in disciplinary action and dismissal.

What is less clear from the dicta of these cases is the meaning of "immunity." These cases permit three interpretations of the protection required by the fifth amendment in order to dismiss an officer because of either his refusal to answer or the content of his compelled statement. The three possible minimal levels of fifth amendment protection are: (1) a formal grant of immunity, (2) *Miranda*-like warnings that no compelled statement or other evidence derived from a compelled statement can be admitted in any criminal proceeding, and (3) neither a grant of immunity nor *Miranda*-like warnings. The third interpretation is based on the assumption that the holding of *Garrity* will be self-executing for the officer, providing an automatic immunity as a matter of law.

Resolution of the immunity question requires examination of the Supreme Court's seminal immunity case, *Kastigar v. United States*,¹⁶⁴ decided after *Gardner* and *Sanitation Men* but before *Turley* and *Cunningham*. In *Kastigar*, the Court established the fifth amendment immunity standard as "use and derivative use" immunity. Under use and derivative use immunity, an individual who has been granted immunity may be prosecuted criminally for crimes arising from the criminal transaction in reference to which testimony was compelled.¹⁶⁵ However, the prosecutor may not use the compelled testimony or any information obtained directly or indirectly from such testimony.¹⁶⁶

163. *Turley*, 414 U.S. at 84 (citations omitted) (emphasis added).

164. 406 U.S. 441 (1972); see Sherman, *supra* note 36, at 24-34 (brief history of statutory immunity); Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 797-814 (1978).

165. *Kastigar*, 406 U.S. at 453-54.

166. *Id.* at 454.

The constitutional inquiry, . . . is whether the immunity granted under this statute is coextensive with the scope of the privilege. If so,

Gardner, Sanitation Men, Turley, and Cunningham were each decided in the context of a statute requiring the affirmative waiver of the fifth amendment privilege against compelled self-incrimination. In *Gardner* and *Sanitation Men*, decided prior to *Kastigar*, the Court found unconstitutional the requirement that the officer affirmatively waive immunity, but the Court did not address what, if any, affirmative obligation the government might have. After *Kastigar*, dicta in *Turley* and *Cunningham* strongly suggest that a formal grant of immunity is required.

a. *Interpretation One: Formal Grant of Immunity*

In *Lefkowitz v. Turley*,¹⁶⁷ the Court stated that the fifth amendment requires an affirmative grant of immunity by the State and prohibits requiring an affirmative waiver by the defendant. The Court explained that "if answers are to be required . . . States must offer to the witness whatever immunity is required to supplant the privilege *and* may not insist that the employee . . . waive such immunity."¹⁶⁸ Further supporting the interpretation that the Court intended a formal grant of immunity is its discussion of the consequences of the refusal to answer questions after a grant of immunity. The Court stated:

[T]he accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony, after a grant of immunity, by use of civil contempt and coerced imprisonment.¹⁶⁹

In addition, the *Turley* Court referred with approval to the *Kastigar* standard of use and derivative use as the scope of the immunity grant necessary to comport with the fifth amendment.¹⁷⁰ Thus, the soundest reading of the *Gardner, Sanitation Men, and Turley* dicta, particularly in light of *Kastigar*, is that a formal grant of use and derivative use immunity is required in order to compel testimony when administrative dismissal is the sanction for either the failure to testify or for information revealed in testimony that supports a "for cause" dismissal. Anything less than a formal grant of immunity is probably less than the Supreme Court contemplated. Moreover, only "interpretation one" provides the procedural safeguards necessary to protect the officer.

Nonetheless, lower courts have failed to recognize this interpreta-

petitioners' refusals to answer based on the privilege were unjustified, and the judgments of contempt were proper, for the grant of immunity has removed the dangers against which the privilege protects.

Id. at 149 (footnote omitted) (citation omitted).

167. 414 U.S. 70 (1973).

168. *Id.* at 85 (emphasis added).

169. *Id.* at 84.

170. *Id.* at 85.

tion of immunity as being required by the Supreme Court. There are probably two reasons for this misunderstanding. First, *Gardner*, *Sanitation Men*, and *Turley* were each decided in the context of a statute that unconstitutionally required an affirmative waiver by the individual of his or her fifth amendment privilege against compelled self-incrimination. As a consequence of the holdings in these cases, there are no longer statutes in effect that require individuals to waive formally the fifth amendment privilege. Because the issue is no longer "can the government require the defendant to waive immunity," but is now a question of "what affirmative obligation, if any, does the government have to establish immunity," the significance of the immunity discussion in these cases is easily lost or the cases are incorrectly distinguished, or both. Because the immunity language of these cases is sometimes seen solely as referring to the now defunct waiver of immunity statutes, the issue of whether the government must provide immunity and, if so, what is constitutionally required for immunity is either misunderstood or perceived as inapplicable to the case at bar.

Second, even conscientious attempts on the part of courts to resolve the immunity question often produce inadequate results because of reliance solely on *Gardner* for the immunity dicta. *Garrity* and *Gardner* are the landmark decisions on the fifth amendment rights of law enforcement officers. *Turley*, on the other hand, is not the seminal case and involved a non-public employee's right to contract with the government. Reliance on *Garrity* and *Gardner*, instead of *Turley*, is natural when resolving law enforcement officer cases.

Unfortunately, when attempting to resolve the immunity issue, reliance on *Garrity* and *Gardner*, while ignoring *Turley*, is a fatal flaw. *Garrity* does not contain the immunity requirement. *Gardner*, of course, does. However, both *Gardner* and its companion case, *Sanitation Men*, were decided four years before *Kastigar*. *Turley*, decided a year after the landmark immunity case of *Kastigar*, is the most recent, most complete, and most clear articulation of the Court. The *Turley* immunity language, when read in *pari materia* with *Kastigar*, strongly suggests that the immunity requirement of *Gardner*, *Sanitation Men*, and *Turley* is a formal grant of use and derivative use immunity.

b. Interpretation Two: Miranda-Like Warnings

A middle ground position requires that the law enforcement officer be given *Miranda*-like warnings. Under this approach, a formal grant of immunity is not required on the theory that *Garrity* provides immunity as a matter of law. However, unlike the self-executing theory of the third interpretation, the second interpretation requires that the law enforcement officer be "duly advised of his options and the consequences of his choice."¹⁷¹ As the Supreme Court of California stated, "The logic un-

171. *Westen v. United States Dep't of Housing & Urban Dev.*, 724 F.2d 943, 948 (Fed.

derlying *Gardner* is that an officer under investigation is not required to speculate as to what his constitutional rights are."¹⁷² The second interpretation requires that the law enforcement officer be advised of the *Garrity* exclusionary rule, which provides that no statement given under threat of adverse personnel action can be used against the officer in a criminal proceeding. Moreover, no evidence derived directly or indirectly from a compelled statement may be used in a criminal proceeding. Although this notification is not as protective as a formal grant of immunity, it is probably sufficient to satisfy the constitutional minimum.

The Second Circuit adopted this position when confronted with the immunity issue in *Sanitation Men*, following the remand by the Supreme Court. The sanitation department reinstated the plaintiffs, called them to appear at an inquiry, and advised them: (1) that any answers they provided or any evidence derived from their answers could not be used against them in a criminal case, and (2) that failure to answer could result in disciplinary action.¹⁷³ The sanitation workers asserted their fifth amendment privilege against compelled self-incrimination, were charged with misconduct, and, following a hearing, were dismissed. The district court granted the sanitation workers' motion for summary judgment, adopting the position that a formal grant of immunity was required and that the City of New York lacked the statutory authority to grant immunity.¹⁷⁴

Cir. 1983); *Kalkines v. United States*, 473 F.2d 1391, 1393 (Ct. Cl. 1973); *Unifed Sanitation Men Ass'n v. Commission of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972).

172. *Lybarger v. Los Angeles*, 40 Cal. App. 3d 822, 834, 710 P.2d 329, 336, 221 Cal. Rptr. 529, 536 (1985) (Bird, C.J., concurring).

173. The Deputy Administrator read the following "warnings" to each interrogated employee:

[Y]ou have all the rights and privileges guaranteed by the Laws of the State of New York and the Constitution of the United States, including the right . . . to remain silent, although you may be subject to disciplinary action by the Department . . . for failure to answer material questions relating to the performance of your duties as an employee of the City of New York.

I further advise you that the answers you may give to the questions propounded to you at this proceeding, or any information or evidence which is gained by reason of your answer, may not be used against you in a criminal proceeding except that you may be subject to criminal prosecution for any false answer

Sanitation Men, 426 F.2d at 621; *accord* *United States ex rel Annunziato v. Deegan*, 440 F.2d 304, 306 (2d Cir. 1971); *see* *Kalkines v. United States*, 473 F.2d 1391, 1396 (Ct. Cl. 1973) (emphasizing that warnings must include evidence derived from the compelled statements and not just the statements themselves); *Eshelman v. Blubaum*, 114 Ariz. 376, 378-79, 560 P.2d 1283, 1285-86 (1977) (must also be advised that questions will relate specifically, narrowly, and directly to the performance of official duties); *Rivera v. Douglas*, 132 Ariz. 117, 644 P.2d 271 (1982); *see also* *Westen v. United States Dep't of Housing & Urban Dev.*, 724 F.2d 943, 951 (Fed. Cir. 1983) (when the public employee was properly advised of rights, it was immaterial that her counsel did not understand their significance).

174. *Sanitation Men*, 426 F.2d at 621-22.

Judge Friendly, writing for the Second Circuit, reversed, holding that it was sufficient that the workers were advised of the use and derivative use exclusionary rule. The court stated that *Garrity* and *Gardner* implicitly stand for the proposition that it is not necessary to have a formal grant of immunity,¹⁷⁵ notwithstanding Justice Fortas' reference in *Sanitation Men* to "proper proceedings."¹⁷⁶ The court held that proper proceedings means "proceedings, such as those held here, in which the employee is asked only pertinent questions about the performance of his duties and is duly advised of his options and the consequences of his choice."¹⁷⁷ Moreover, the court also held that it was immaterial that there was no statute authorizing a grant of immunity. Accordingly, the court dismissed as inapplicable the provision of the New York Code of Criminal Procedure that restricted the granting of immunity to "competent authority."¹⁷⁸

The Seventh Circuit, in *Confederation of Police v. Conlisk*,¹⁷⁹ implicitly adopted the middle ground position. The court noted that the police officers in that case were never informed, either at the grand jury proceeding or at the departmental inquiry, that any information they gave could not be used against them in a criminal proceeding.¹⁸⁰ The court dismissed the department's argument that the internal affairs division (IAD) is not empowered to grant immunity, holding that such power is not necessary under *Garrity*. The court stated:

In *Garrity*, the Supreme Court indicated that the Fifth Amendment *itself* prohibited the use of statements or their fruits where the statements had been made under the threat of dismissal from public office. Therefore, by advising the officers that their statements, when given under threat of discharge, cannot be used against them in subsequent proceedings, the IAD is not "granting" immunity from prosecution; it is merely advising the officers of the constitutional limitations on any criminal prosecution should they answer.¹⁸¹

c. *Interpretation Three: Self-Executing Immunity*

The final position is that the authorities are not required either to grant immunity or to inform the officer of the exclusionary rule. This

175. *Id.* at 626-27.

176. *Sanitation Men*, 392 U.S. at 285.

177. *Sanitation Men*, 426 F.2d at 627.

178. *Id.* at 627-28. This case, decided two years before *Kastigar v. United States*, 406 U.S. 441 (1972), established the constitutional minimum for a grant of immunity as "use and derivative use." Thus, Judge Friendly was not only struggling with the need for a grant of immunity versus an exclusionary device, but also with what a grant of immunity means — transactional immunity, use and derivative use immunity, or use immunity. See *infra* text accompanying notes 239-48.

179. 489 F.2d 891 (7th Cir. 1973), *cert. denied sub nom.*, 416 U.S. 956 (1974).

180. *Id.* at 895.

181. *Id.* at 895 n.4 (citing *Sanitation Men*, 426 F.2d at 627) (emphasis in original).

position is premised on the notion that the *Garrity* holding is self-executing, providing immunity as a matter of law, because statements given under threat of adverse personnel action are coerced and, as such, are always suppressed as compelled self-incrimination. This analysis is faulty because it compels a waiver of the fifth amendment privilege without providing a formal grant of immunity or at least expressly advising of the exclusionary rule resulting from *Garrity*. Nonetheless, this approach is often taken by law enforcement agencies and frequently sanctioned by the courts.

The interpretation of a *Garrity* self-executing immunity has been applied with unfortunate results. In *Gulden v. McCorkle*,¹⁸² two public employees were discharged for refusing to submit to polygraph examinations and for refusing to sign departmental waivers that the examinations were conducted consensually.¹⁸³ In their suit for reinstatement, the employees argued that the employer was required to "make an affirmative tender of immunity" once the employees articulated their fifth amendment concerns.¹⁸⁴ Rejecting this position, the Fifth Circuit held that:

An employee who is compelled to answer questions (but who is not compelled to waive immunity) is protected by *Garrity* from subsequent use of those answers in a criminal prosecution. It is the very fact that the testimony was compelled which prevents its use in subsequent proceedings Failure to tender immunity was simply not the equivalent of an impermissible compelled waiver of immunity.¹⁸⁵

If *Garrity* were the self-executing "immunity statute" that this third approach indicates, the Supreme Court would not have felt the need to issue its decisions in *Gardner* or *Sanitation Men* in 1968, *Turley* in 1973,

182. 680 F.2d 1070, *cert. denied*, 459 U.S. 1206 (5th Cir. 1982).

183. *Id.* at 1071.

184. *Id.* at 1074.

185. *Id.* at 1075. The court went on to state that "[w]e, however, decline to answer the highly speculative question whether an affirmative grant of immunity might, at some point, be necessary under controlling Supreme Court authority." *Id.* (emphasis in original). Other courts have held that immunity is an automatic self-executing constitutional protection. *Womer v. Hampton*, 496 F.2d 99, 108 (5th Cir. 1977) (statements and fruit cannot be used anyway under *Garrity*; therefore, there is no need for warnings); *accord DeWalt v. Barger*, 490 F. Supp. 1262, 1272 (M.D. Pa. 1980); *Hank v. Codd*, 424 F. Supp. 1086, 1087 ("immunity . . . flows automatically from the Supreme Court's decision in *Garrity*"); *Grabinger v. Conlisk*, 320 F. Supp. 1213, 1217 (N.D. Ill. 1970) (same as to compelled polygraph examination). In *Gerace v. County of Los Angeles*, 100 Cal. Rptr. 917 (Cal. Ct. App. 1972), the California Court of Appeal found automatic self-executing immunity, stating:

When the department chose to invoke administrative procedures to inquire into their fitness as police officers and most particularly when they chose to compel answers by invoking the Manual of Policy and Ethics, the appellants became secure from prosecution as surely as if a grant of immunity had been given to them.

100 Cal. Rptr. at 923.

or *Cunningham* in 1977. If *Garrity* granted automatic immunity, then the plaintiffs in these four cases could not have argued successfully that their fifth amendment rights had been abridged or chilled and those plaintiffs could have been lawfully discharged, barred from contracting, or barred from public office.

The practical effects of the three different interpretations — granting immunity, providing warnings, or doing neither — are quite different. For example, if a law enforcement officer is asked a narrow, employment-related question during an internal investigation and refuses to answer, he could be charged with violating departmental rules and regulations prohibiting conduct unbecoming an officer, insubordination, or both. The legality of the officer's subsequent dismissal depends on whether the officer's case is governed by the *Gardner* holding or the *Gardner* immunity dicta. If it comes within the *Gardner* holding, it is unconstitutional for the authorities to take, or threaten to take, any adverse personnel action to punish an asserted fifth amendment privilege against compelled self-incrimination. If, on the other hand, the situation comes within the *Gardner* immunity dicta, the officer could be discharged for cause. The question turns on whether the officer's fifth amendment privilege has been protected. If the privilege has not been secured, and the officer is forced to choose between the exercise of constitutional rights and continued employment, then the officials have strayed into unconstitutional territory. If, on the other hand, the officer's privilege against compelled self-incrimination has been constitutionally insured through immunity, yet the officer refuses to answer questions narrowly related to job performance, then the officer has exposed himself to proper disciplinary action.

As the prior survey of cases indicates, courts have misconstrued Supreme Court authority in several fundamental respects. The lack of understanding of the concept of immunity set forth in *Gardner*, *Sanitation Men*, and *Turley* forces upon law enforcement officers the same Hobson's choice that a unanimous Supreme Court intended to eliminate two decades ago. The rationale of many courts is that *Garrity* provides an automatic immunity so that the officer should have no fear that the statement would ever be used against him criminally. Under this overly broad reading of *Garrity*, the officer does not have a right to assert a fifth amendment privilege, and the authorities are within their discretion to dismiss the officer from the police force. Thus, instead of applying *Garrity*, *Gardner*, and their progeny to vindicate the fifth amendment rights of law enforcement officers, courts have applied those cases to sanction yet another generation of constitutional infringement.

IV. THE STATUTORY BILL OF RIGHTS ERA

Any optimism that law enforcement officers may have experienced following *Garrity* and *Gardner* must have been short-lived in light of the judicial and administrative response to these decisions. Courts did not

appear to understand and frequently failed to apply the Supreme Court's interpretation of the fifth amendment privilege against compelled self-incrimination. There was, therefore, no incentive for police departments to change internal investigatory policies. Because the executive and judicial branches were still treating law enforcement officers as constitutionally inferior, Congress, as well as some state legislatures, began to address the problem.

A. The Failed Federal Attempt

Since 1970, seventy-two bills have been introduced in the United States Congress in an attempt to enact a law enforcement officers' bill of rights.¹⁸⁶ Fifty-two of these bills were introduced between 1973 and 1977. Most of these bills were introduced as amendments to the Omnibus Crime Control and Safe Streets Act of 1968.¹⁸⁷ The approach of these bills was to force states to enact legislation substantially similar to

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186. H.R. 19,734, 91st Cong., 2d Sess. (1970); H.R. 16,039, 92d Cong., 2d Sess. (1972); H.R. 163, 93d Cong., 1st Sess. (1973); H.R. 266, 93d Cong., 1st Sess. (1973); H.R. 269, 93d Cong., 1st Sess. (1973); H.R. 394, 93d Cong., 1st Sess. (1973); H.R. 527, 93d Cong., 1st Sess. (1973); H.R. 808, 93d Cong., 1st Sess. (1973); H.R. 1209, 93d Cong., 1st Sess. (1973); H.R. 1531, 93d Cong., 1st Sess. (1973); H.R. 1834, 93d Cong., 1st Sess. (1973); H.R. 1944, 93d Cong., 1st Sess. (1973); H.R. 2149, 93d Cong., 1st Sess. (1973); H.R. 2383, 93d Cong., 1st Sess. (1973); H.R. 3226, 93d Cong., 1st Sess. (1973); H.R. 4477, 93d Cong., 1st Sess. (1973); H.R. 4598, 93d Cong., 1st Sess. (1973); H.R. 4599, 93d Cong., 1st Sess. (1973); H.R. 4600, 93d Cong., 1st Sess. (1973); H.R. 4901, 93d Cong., 1st Sess. (1973); H.R. 5436, 93d Cong., 1st Sess. (1973); H.R. 6632, 93d Cong., 1st Sess. (1973); H.R. 6633, 93d Cong., 1st Sess. (1973); H.R. 7406, 93d Cong., 1st Sess. (1973); H.R. 8604, 93d Cong., 1st Sess. (1973); H.R. 9035, 93d Cong., 1st Sess. (1973); H.R. 9542, 93d Cong., 1st Sess. (1973); H.R. 11,638, 93d Cong., 1st Sess. (1973); H.R. 413, 94th Cong., 1st Sess. (1975); H.R. 843, 94th Cong., 1st Sess. (1975); H.R. 1654, 94th Cong., 1st Sess. (1975); H.R. 3919, 94th Cong., 1st Sess. (1975); H.R. 4476, 94th Cong., 1st Sess. (1975); H.R. 4762, 94th Cong., 1st Sess. (1975); H.R. 5338, 94th Cong., 1st Sess. (1975); H.R. 5476, 94th Cong., 1st Sess. (1975); H.R. 5862, 94th Cong., 1st Sess. (1975); H.R. 6941, 94th Cong., 1st Sess. (1975); H.R. 7215, 94th Cong., 1st Sess. (1975); H.R. 8805, 94th Cong., 1st Sess. (1975); H.R. 10,285, 94th Cong., 1st Sess. (1975); H.R. 11,253, 94th Cong., 1st Sess. (1975); H.R. 12,227, 94th Cong., 2d Sess. (1976); H.R. 181, 95th Cong., 1st Sess. (1977); H.R. 518, 95th Cong., 1st Sess. (1977); H.R. 1030, 95th Cong., 1st Sess. (1977); H.R. 1225, 95th Cong., 1st Sess. (1977); H.R. 1851, 95th Cong., 1st Sess. (1977); H.R. 2801, 95th Cong., 1st Sess. (1977); H.R. 5787, 95th Cong., 1st Sess. (1977); H.R. 6716, 95th Cong., 1st Sess. (1977); H.R. 6717, 95th Cong., 1st Sess. (1977); H.R. 6718, 95th Cong., 1st Sess. (1977); H.R. 6987, 95th Cong., 1st Sess. (1977); H.R. 13,687, 95th Cong., 2d Sess. (1978); H.R. 101, 96th Cong., 1st Sess. (1979); H.R. 1226, 96th Cong., 1st Sess. (1979); H.R. 2443, 96th Cong., 1st Sess. (1979); H.R. 2899, 96th Cong., 1st Sess. (1979); H.R. 3836, 96th Cong., 1st Sess. (1979); S. 2301, 96th Cong., 2d Sess. (1980); H.R. 36, 97th Cong., 1st Sess. (1981); H.R. 354, 97th Cong., 1st Sess. (1981); H.R. 525, 97th Cong., 1st Sess. (1981); H.R. 3596, 97th Cong., 1st Sess. (1981); S. 1168, 97th Cong., 1st Sess. (1981); H.R. 28, 98th Cong., 1st Sess. (1983); H.R. 1894, 98th Cong., 1st Sess. (1983); H.R. 3037, 98th Cong., 1st Sess. (1983); H.R. 124, 99th Cong., 1st Sess. (1985); H.R. 175, 99th Cong., 1st Sess. (1985); H.R. 482, 100th Cong., 1st Sess. (1987).
187. Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 921-29, 2510-21; 18 U.S.C. app. §§ 1201-03; 42 U.S.C. §§ 3701-96c (1982 & Supp. IV 1986)).

the proposed federal law enforcement officers' bill of rights by denying funds from the Law Enforcement Assistance Administration¹⁸⁸ to those states that failed to comply.¹⁸⁹ All seventy-two bills were referred to the Judiciary Committee, which conducted hearings on only two of the bills. None of the bills, however, was reported out of committee. Nonetheless, the existence of these bills — even though never enacted — as well as the testimony of their proponents, confirmed the presence and the extent of the law enforcement officer's fifth amendment dilemma.

The theme echoed on the floor of Congress for almost two decades has been that law enforcement officers are not demanding special privileges but are merely seeking the privileges afforded other citizens. Proponents of federal legislation for law enforcement officers have observed that officers experience frustration, a sense of isolation, and low morale because they enjoy fewer rights than ordinary citizens. In 1972, New York Congressman Edward Koch, now Mayor of New York City, argued before Congress, in conjunction with his cosponsorship of a bill of rights for law enforcement officers, that the legislation would simply insure that officers receive the rights to which they are already entitled as citizens. He stated:

This bill does not provide any special privileges for police officers; it simply affirms the rights they are due as citizens of this country. It is unfortunate that in a nation like ours such a bill is needed; but history has shown all too often that policemen's rights are abridged by local department regulations and procedures. In some communities, . . . when accused of malfeasance, [police officers] are not given the same rights and protections accorded ordinary citizens. Furthermore, an imbalance has evolved because, while we have taken steps to insure the rights of defendants and complainants, we have failed to protect the rights of policemen.¹⁹⁰

The following year, Illinois Congressman Frank Annunzio, upon introducing legislation on behalf of law enforcement officers, similarly re-

188. The Law Enforcement Assistance Administration was created by the Omnibus Crime Control and Safe Streets Act of 1968. *Id.* 42 U.S.C. §§ 3701-96c. The Law Enforcement Assistance Administration ceased operation, due to a lack of appropriations, on April 15, 1982. 47 Fed. Reg. 16,694 (1982).

189. Illinois Congressman Frank Annunzio, speaking on behalf of two of the bills, explained:

[T]he law enforcement officers bill of rights . . . is identical to legislation cosponsored by 125 colleagues in the 92d Congress. It would . . . guarantee police officers the same civil rights enjoyed by all other citizens; set up a grievance panel to hear the grievances of police officers who claim their civil rights had been violated; and would deny LEAA funds to any community that did not conform to the provisions of this bill.

119 CONG. REC. H2051 (daily ed. Jan. 23, 1973).

190. 118 CONG. REC. H23,900 (daily ed. June 30, 1972).

marked that he sought only to afford officers the same legal protection that all other citizens enjoy.

It is regrettable that legislation of this nature is needed at all. Law enforcement officers should be entitled to the same protection of the laws they are required to enforce. Policemen should be as free of intimidation and harassment during the process of a hearing as is the average citizen¹⁹¹

In 1976, a bill was introduced on the floor of the House of Representatives as an amendment to Title I of the Omnibus Crime Control and Safe Streets Act of 1968.¹⁹² Its major protections included (1) procedural safeguards during investigation and interrogation, (2) a prohibition against punitive action and adverse inference in return for assertion of the fifth amendment, unless provided immunity from prosecution, (3) the right to an attorney or another chosen representative present during interrogation, (4) a prohibition against retaliation for the exercise of any of the protections provided, (5) a grievance process to investigate law enforcement officers' complaints of denial of any of the protections provided, and (6) the right to bring a civil suit against anyone violating any of the protections provided.¹⁹³ Illinois Congressman Martin Russo,

191. 119 CONG. REC. H2051 (daily ed. Jan. 23, 1973).

192. 122 CONG. REC. H28,947-49 (daily ed. Sep. 2, 1976).

193. The proposed law enforcement officers' bill of rights provided in part:

[N]o grant . . . shall be made . . . to any State . . . unless there is in effect with respect to such State . . . a law enforcement officers' bill of rights which substantially provides as a minimum the following rights for the law enforcement officers of such State

RIGHTS OF LAW ENFORCEMENT OFFICERS WHILE UNDER INVESTIGATION

Sec. 2. Whenever a law enforcement officer is under investigation for alleged malfeasance, misfeasance, or non-feasance of official duty, with a view to possible disciplinary action, demotion, dismissal, or criminal charges, the following minimum standards shall apply:

(1) No adverse inference shall be drawn and no punitive action taken from a refusal of the law enforcement officer being investigated to participate in such investigation or be interrogated other than when such law enforcement officer is on duty, or when exigent circumstances otherwise require.

(2) Any interrogation of a law enforcement officer shall take place at the offices of those conducting the investigation, the place where such law enforcement officer reports for duty, or such other reasonable place as the investigator may determine.

(3) The law enforcement officer being investigated shall be informed, at the commencement of any interrogation, of the nature of the investigation, the names of any complainants, and the identity and authority of the person conducting such investigation, and at the commencement of any interrogation of such officer in connection with any such investigation shall be informed of all persons present during such interrogation. All questions asked in any such interrogation shall be asked by or through a single interrogator.

(4) No formal proceeding which has authority to penalize a law en-

speaking on behalf of the legislation, stated:

At this late stage of our Nation's history, it seems an anomaly to me that our country's courageous law enforcement officials should be denied the same constitutional protections guaranteed to all other Americans. Many Americans take these liberties and rights for granted, but for those citizens who have ever experienced life without them the saga reads very differently. Congress has extended these safeguards to other groups not previously protected and should continue this process today. This amendment seeks to add legislative substance to the constitutional provisions that protect citizens who are under criminal investigations.¹⁹⁴

On September 2, 1976, after six years of unfavorable committee consideration, a federal law enforcement officers' bill of rights, voted upon as a floor amendment to another bill, was defeated 213 to 148, and no similar legislation has reached the floor of the House of Representatives or the United States Senate since. The activity at the national level, however, has provided an impetus for similar activity in at least a few state legislatures.

B. The Maryland Law Enforcement Officers' Bill of Rights

In 1974, Maryland became the first state to enact a law enforcement officers' bill of rights (LEOBOR).¹⁹⁵ The primary purpose of the LE-

forcement officer may be brought except upon charges signed by the persons making those charges.

(5) Any interrogation of a law enforcement officer in connection with an investigation shall be for a reasonable period of time, and shall allow for reasonable periods for the rest and personal necessities of such law enforcement officer.

(6) No threat, harassment, promise, or reward shall be made to any law enforcement officer in connection with an investigation in order to induce the answering of any question, but immunity from prosecution may be offered to induce such answering.

(7) All interrogatories of any law enforcement officer in connection with the investigation shall be recorded in full.

(8) The law enforcement officer shall be entitled to the presence of his counsel or any other one person of his choice at any interrogation in connection with the investigation.

....

NOTICE OF DISCIPLINARY ACTION

Sec. 6. Whenever a personnel action which will result in any loss of pay or benefits, or is otherwise punitive is taken against a law enforcement officer, such law enforcement officer shall be notified of such action and the reasons therefor a reasonable time before such action takes effect.

RETALIATION FOR EXERCISING RIGHTS

Sec. 7. There shall be no penalty nor threat of any penalty for the exercise by a law enforcement officer of his rights under this Bill of Rights.

122 CONG. REC. H28,947-48 (daily ed. Sep. 2, 1976).

194. *Id.* at H28,950.

195. Act of May 31, 1974, ch. 722, 1974 MD. LAWS 2471-77 (codified as amended at

OBOR is to provide substantive and procedural protections during disciplinary investigations, interrogations, and hearings. As noted by the Court of Special Appeals of Maryland, "[i]n enacting the LEOBOR, the Legislature vested in law-enforcement officers certain 'rights' not available to the general public."¹⁹⁶ The protections provided by the LEOBOR that are relevant to this article are contained in sections 728, 733, and 734 of article 27 of the Maryland Annotated Code.¹⁹⁷

MD. ANN. CODE art. 27, §§ 727-734D (1987)). The LEOBOR has been amended 21 times. Additionally, there are six bills before the 1988 session of the Maryland General Assembly. H. 411, 1988 Md. Leg. Sess.; H. 428, 1988 Md. Leg. Sess.; H. 453, 1988 Md. Leg. Sess.; S. 40, 1988 Md. Leg. Sess.; S. 82, 1988 Md. Leg. Sess.; S. 227, 1988 Md. Leg. Sess.

196. *Nichols v. Baltimore Police Dep't*, 53 Md. App. 623, 627, 455 A.2d 446, 449, *cert. denied*, 296 Md. 111 (1983). *But see Elliott v. Kupferman*, 58 Md. App. 510, 523, 473 A.2d 960, 967 (1984) ("to some extent, by supplanting local merit system laws to which some police officers formerly were subject, LEOBOR may in fact have lessened their procedural rights"). A bill introduced in the 1988 Maryland General Assembly would permit a law enforcement officer to "elect, in the alternative [to the LEOBOR], the procedural or substantive rights or guarantees provided under a collective bargaining agreement." The bill would further provide that LEOBOR "rights . . . may not be diminished or abrogated by any law, ordinance, or regulation . . . or by any provision of any collective bargaining agreement." S. 227, 1988 Md. Leg. Sess.; *see also Abbott v. Admin. Hearing Bd.*, 33 Md. App. 681, 688, 366 A.2d 756, 760 (1976), *cert. denied*, 280 Md. 727 (1977) (LEOBOR preempted county's merit system ordinance, which did not violate the equal protection clause by treating police officers differently, because "[t]he nature of the duties of police officers is sufficiently different from those of other public employees to justify the establishment of different procedures to be employed in disciplinary actions involving police officers").
197. The sections of the LEOBOR not covered in this article are as follows: The definitions in section 727 establish which individuals and situations are within the scope of the LEOBOR. Specifically, subsection 727(b) defines "law enforcement officer" as any person who (1) is authorized to make arrests, and (2) is a member of one of nine classes of law enforcement agencies. *See, e.g., Sheriff of Baltimore City v. Abshire*, 44 Md. App. 256, 263-64, 408 A.2d 398, 402 (1979), *cert. denied*, 287 Md. 756 (1980) (subsection 727(b)(5) includes the office of sheriff of any county, but the legislature excluded Baltimore City because its deputies were included in the State Merit System Law). Subsection 727(c) excludes any officer serving in a probationary status upon initial entry into a law enforcement agency, except when brutality is alleged. To attain the permanent status necessary to come within the protection of the LEOBOR, the officer must complete successfully the police training course established by the Police Training Commission. MD. ANN. CODE art. 41, § 4-201 (1986 & Supp. 1987); *see Moore v. Fairmount Heights*, 285 Md. 578, 585-86, 403 A.2d 1252, 1256 (1979). The LEOBOR has presented some practical problems by including within its protections officers who arguably should not have been included because they serve elected officials who have the constitutionally sanctioned power to appoint and to terminate subordinates. In *Allgood v. State*, 43 Md. App. 187, 403 A.2d 837 (1979), a deputy sheriff, serving at the pleasure of the elected sheriff, argued that the LEOBOR "should be construed as a tenure provision and at the very least sufficiently so as to require a law enforcement officer's employer to justify a dismissal . . ." *Id.* at 190, 403 A.2d at 839. The court of special appeals recognized that, even though the officer had no tenure and served at the pleasure of the sheriff, section 733 might preclude dismissal in response to the exercise or demand of a constitutional right. However, the court affirmed the ruling that the plaintiff failed to state a claim because the section 733 argument was raised for the first time

Section 728¹⁹⁸ establishes procedural safeguards during interroga-

on appeal. *Id.* at 191, 403 A.2d at 839-40. The following year, in addressing the case of a non-tenured police chief who served at the pleasure of the county executive, the court of appeals held that although the LEOBOR excluded certain probationary officers from its scope, it did not exclude non-tenured officers or police chiefs. *DiGrazia v. County Executive*, 288 Md. 437, 446, 418 A.2d 1191, 1196-97 (1980). In an attempt to reconcile the police chief's LEOBOR rights with the newly elected county executive's right to appoint whomever he pleased, the court held that the police chief could be replaced for any reason other than the lawful exercise of his constitutional rights, in this case first amendment freedom of speech. *Id.* at 447-54, 418 A.2d at 1197-1201. Subsequent to *DiGrazia*, the legislature excluded from LEOBOR coverage (1) officers serving at the pleasure of a charter county, Act of May 12, 1981, ch. 328, 1981 MD. LAWS 1675, 1676, and (2) police chiefs of any incorporated city or town. Act of May 4, 1982, ch. 204, 1982 LAWS 1716; see also *Windsor v. Bozman*, 68 Md. App. 223, 511 A.2d 69, *cert. denied*, 308 Md. 237, 517 A.2d 1120 (1986).

Subsection 728(a) provides a right to engage in political activity when off duty. Section 729 provides a protection against disclosure of assets except during a conflict of interest investigation or when required by state or federal law. Section 729A provides for the regulation of secondary employment. Section 730 provides for a hearing prior to any adverse personnel actions recommended as a result of investigation or interrogation, except for summary punishment, emergency suspension, or if the officer is convicted of a felony. Section 731 provides for the procedure for hearing board decisions on the merits, as well as recommendations for punishment. Section 732 provides for appeals of hearing board decisions to the appropriate circuit court. Section 734A provides for summary punishment for minor departmental violations with the consent of the officer. Section 734B provides for preemption by the LEOBOR of other state and local laws. Section 734C controls false statements. Section 734D permits an officer's waiver of LEOBOR rights.

198. The procedural protections of subsection 728(b), not discussed textually are as follows: Subsection 728(b)(12) prohibits placing adverse material in a personnel file without providing an opportunity, unless waived, to review and respond in writing. It also provides a procedure for expungement. Subsection 728(b)(12) was included in the original act, but as an amendment and not as part of the pre-filed bill. See H. 354, 1974 Md. Leg. Sess. Subsection 728(b)(5)(i) requires notification of the nature of the investigation prior to interrogation. Subsection 728(b)(3) requires notification of the name of the officer in charge of the investigation, as well as those present during any interrogation, and limits questioning to one interrogator per interrogation session. In *Widomski v. Chief of Police*, 41 Md. App. 361, 397 A.2d 222, *cert. denied*, 284 Md. 750 (1979), the court held that this subsection does not prohibit successive interrogations, particularly when the questioning is conducted by a different interrogating officer in a different locale, provided successive interrogations do not violate the requirement of subsection 728(b)(6) that any interrogation only continue for a reasonable period of time. *Id.* at 370-73, 397 A.2d at 228-29. Subsection 728(b)(9) requires *Miranda* warnings prior to interrogation of any officer under arrest or likely to be placed under arrest. Subsections 728(b)(1) and (b)(6) require that any interrogation take place at a reasonable time, preferably during duty hours, unless there is an exigency, and continue only for a reasonable period of time. Subsection 728(b)(2) requires that any interrogation take place at a reasonable location, preferably the office of the investigating officer or the police unit where the incident allegedly occurred. Subsection 728(b)(14) provides that polygraph examinations may be administered without a representative present during the actual administration if (1) the questions have been reviewed by the law enforcement officer or representative, (2) the polygraph examination administration is observed by the representative, and (3) the operator's report is made available within 10 days. Subsection 728(b)(5)(ii) requires notification of all charges and witnesses at least 10 days prior to any hearing. Subsections 728(b)(5)(iii)-(iv) require a copy of exculpatory

information at least 10 days prior to any hearing. Cf. *Chief, Montgomery County Dep't of Police v. Jacobs*, 50 Md. App. 132, 436 A.2d 930 (1981) (extending the *Jencks* rule to LEOBOR proceedings). Subsection 728(b)(8) requires a copy of the complete interrogation session, if requested, at least 10 days prior to any hearing. This means that "the record may be wholly written, or wholly taped, or wholly transcribed, or a combination of any two or more of the three methods, so long as there is a complete and preserved record for the review by counsel and by a court, if there be an appeal." *Widomski*, 41 Md. App. at 372-73, 397 A.2d at 229. Subsection 728(b)(4) limits investigations for brutality to duly sworn complaints filed within ninety days of the alleged brutality. In *Maryland State Police v. Resh*, 65 Md. App. 167, 499 A.2d 1303 (1985), the court interpreted this subsection as placing a 90-day statute of limitations on brutality complaints received from outside the law enforcement agency but placed no such limitation on brutality charges filed by superior officers based on the information contained in the detailed report required to be filed by any officer involved in an incident of injury as a result of force used to make an arrest. *Id.* at 177, 499 A.2d at 1309; see also *Walker v. Lindsey*, 65 Md. App. 402, 500 A.2d 1061 (1985) (permitting a complaint to be duly sworn by a minor). Subsection 728(b)(10) provides for the right to have counsel present and available for consultation at all times during interrogation. The "and available for consultation" language was added in 1983. Act of May 31, 1983, ch. 660, 1983 MD. LAWS 2097. This amendment was in response to *Nichols v. Baltimore Police Department*, 53 Md. App. 623, 455 A.2d 446, cert. denied, 296 Md. 111 (1983), which considered counsel's role to be merely that of interposing objections to questions as in the taking of a deposition in a civil case. *Id.* at 629, 455 A.2d at 450. Subsection 728(b)(11) preserves the law enforcement officer's right to file suit for any cause of action arising out of official duties by assuring that neither statute nor regulation will limit that right. This subsection was included in the original act, but as an amendment and not as part of the pre-filed bill. See H. 354, 1974 Md. Leg. Sess. Although the right to file civil suit cannot be limited by the legislature or the law enforcement agency, it can and has been limited by the courts. If a citizen files a false brutality complaint, for example, against an officer, resulting in a disciplinary hearing at which the officer is exonerated, and the officer then sues the citizen, the cause of action would lie in malicious use of civil process, or defamation, or both. For malicious use of civil process, the officer must prove that as a result of the complaint, (1) the law enforcement agency initiated formal disciplinary proceedings, (2) there was no probable cause for the proceeding, (3) the officer suffered a special grievance greater than the inconvenience and cost of the proceedings, and (4) the officer had to initiate formal proceedings to reattain his or her status. *E.g.*, *Imig v. Ferrar*, 70 Cal. App. 3d 48, 57-60, 138 Cal. Rptr. 540, 544-46 (1972). See generally *W. PROSSER & W. KEETON, THE LAW OF TORTS* § 120 (5th ed. 1984). As for defamation, the Court of Appeals of Maryland held in *Miner v. Novotny*, 304 Md. 164, 498 A.2d 269 (1985), that because of the procedural safeguards of the LEOBOR, any citizen filing a brutality complaint has absolute immunity against a cause of action in defamation. The court stated:

We are not unmindful of the deeply disturbing and demoralizing effect a false accusation of brutality may have on a law-enforcement officer. . . . It is regrettable that our holding here will, in some instances, "afford an immunity to the evil disposed and malignant slanderer." We are satisfied, however, that the inhibition of citizens' criticism of those entrusted with their protection is a far worse evil.

Id. at 177, 498 A.2d at 275 (citations omitted). In *Brady v. Mayor of Laurel*, 40 Md. App. 373, 392 A.2d 89 (1978), a law enforcement officer was sued for breaking a citizen's nose while in the course of his duties as an officer. The officer was denied legal representation by the local government. After successfully defending the law suit, he sued for reimbursement of his legal fees. The dismissal of his cause of action was affirmed because there was no basis for recovery in tort or contract and because subsection 728(b)(11) was not violated. The court noted that "a policeman's lot is

tion and investigation of a law enforcement officer.¹⁹⁹ These protections include rights guaranteed during²⁰⁰ and subsequent to investigation;²⁰¹ rights prior to,²⁰² during,²⁰³ and as a consequence of interrogation;²⁰⁴ rights prior to a hearing;²⁰⁵ a statute of limitation on brutality complaints;²⁰⁶ and the right to file suit.²⁰⁷

The legislative counterparts to the applicable Supreme Court holdings and dicta are located in subsection 728(b)(7), subsection 728(c), section 733, and section 734. Subsection 728(b)(7)(i), the provision implementing the *Gardner* holding, prohibits threats of disciplinary action against officers under investigation.²⁰⁸ However, subsection 728(c) permits transfers and reassignments that are not punitive in nature when they are determined to be in the best interest of the internal management of the law enforcement agency.²⁰⁹

Subsection 728(b)(7)(ii), the provision implementing both the *Garrity* holding and the immunity requirement of *Gardner* and its progeny, permits a law enforcement agency to require that the officer submit to (1) tests for alcohol and controlled dangerous substances, (2) polygraph examinations, and (3) interrogations specifically relating to the subject of the investigation. Noncompliance may result in disciplinary action, but compliance makes all results inadmissible and nondiscoverable in a criminal proceeding.²¹⁰ Moreover, polygraph results are inadmissible, with-

not a happy one,' but . . . courts must deal with the law, not morals" *Id.* at 374, 392 A.2d at 90-91 (footnotes omitted).

199. An interrogating or investigating officer can be any sworn law enforcement officer or, if requested by the Governor, the Attorney General of Maryland or his or her designee. MD. ANN. CODE art. 27, § 727(h) (1987). Prior to 1985, an investigating or interrogating officer was not defined by the statute. This definition was added as an emergency measure, passed by a three-fifths vote in each house, and taking effect upon the Governor's signature. Act of May 21, 1985, ch. 249, 1985 MD. LAWS 2019, 2021.

200. MD. ANN. CODE art. 27, § 728(b)(3), (4), (5)(iii).

201. *Id.* § 728(b)(5)(ii), (12).

202. *Id.* § 728(b)(3), (5)(i), (9), (10), (14).

203. *Id.* § 728(b)(1), (2), (3), (6), (7)(i), (8), (10), (14).

204. *Id.* § 728(b)(7)(ii).

205. *Id.* § 728(b)(5)(iv), (b)(8).

206. *Id.* § 728(b)(4).

207. *Id.* § 728(b)(11).

208. "The law enforcement officer under interrogation may not be threatened with transfer, dismissal, or disciplinary action." *Id.* § 728(b)(7)(i).

209. Subsection 728(c) provides:

Effect of subtitle on chief's authority. — This subtitle does not limit the authority of the chief to regulate the competent and efficient operation and management of a law enforcement agency by any reasonable means including but not limited to, transfer and reassignment where that action is not punitive in nature and where the chief determines that action to be in the best interests of the internal management of the law enforcement agency.

Id. § 728(c).

210. Subsection 728(b)(7)(ii) provides:

This subtitle does not prevent any law enforcement agency from requiring a law enforcement officer under investigation to submit to blood alcohol

out mutual agreement, even in an administrative proceeding.²¹¹

Section 733, also a provision implementing the *Gardner* holding, prohibits retaliation in the form of any actual or threatened adverse personnel action in return for exercising or demanding any rights provided by the LEOBOR, the Maryland Constitution, or the United States Constitution.²¹² Finally, section 734 provides, upon the denial of any LEOBOR right, for the right to file in the circuit court a request for a show cause order prior to any hearing here.²¹³

Two particular aspects of the Maryland LEOBOR are analyzed

tests, blood, breath, or urine tests for controlled dangerous substances, polygraph examinations, or interrogations which specifically relate to the subject matter of the investigation. This subtitle does not prevent a law enforcement agency from commencing any action which may lead to a punitive measure as a result of a law enforcement officer's refusal to submit to a blood alcohol test, blood, breath, or urine tests for controlled dangerous substances, polygraph examination, or interrogation, after having been ordered to do so by the law enforcement agency. The results of any blood alcohol test, blood, breath, or urine test for controlled dangerous substances, polygraph examination, or interrogation, as may be required by the law enforcement agency under this subparagraph are not admissible or discoverable in any criminal proceedings against the law enforcement officer when the law enforcement officer has been ordered to submit thereto. The results of a polygraph examination may not be used as evidence in any administrative hearing when the law enforcement officer has been ordered to submit to a polygraph examination by the law enforcement agency unless the agency and the law enforcement officer agree to the admission of the results at the administrative hearing.

Id. § 728(b)(7)(ii). This subsection was added by Act of May 17, 1977, ch. 366, 1977 MD. LAWS 2128, 2132. Four years later, results were made nondiscoverable, as well as inadmissible, in any criminal proceeding. Act of May 12, 1981, ch. 456, 1981 MD. LAWS 1895, 1896. This provision goes further than *Garrity* by prohibiting the use of blood alcohol tests and blood, breath, or urine tests for controlled dangerous substances, even though these are not testimonial in nature and therefore not protected by the fifth amendment privilege against compelled self-incrimination. *Schmerber v. California*, 384 U.S. 757 (1966); see *South Dakota v. Neville*, 459 U.S. 553 (1983).

211. MD. ANN. CODE art. 27, § 728(b)(7)(ii).

212. Section 733 provides:

A law enforcement officer may not be discharged, disciplined, demoted, or denied promotion, transfer, or reassignment, or otherwise discriminated against in regard to his employment or be threatened with any such treatment, by reason of his exercise of or demand for the rights granted in this subtitle, or by reason of the lawful exercise of his constitutional rights.

Id. § 733. Section 733 was included in the original act of 1974. However, as introduced, section 733 only applied to retaliation for the exercise or demand of LEOBOR rights. Constitutional rights were added as an amendment. These provisions go further than *Gardner* by prohibiting the creation of a chilling effect not only on constitutional rights but also on statutory LEOBOR rights that do not have constitutional stature.

213. Section 734 provides:

Any law enforcement officer who is denied any right afforded by this subtitle may apply at any time prior to the commencement of the hearing before the hearing board, either individually or through his certified or recognized employee organization, to the circuit court of the county where

here. First, the threshold issue of investigation or interrogation is examined, demonstrating how narrowly the statute has been interpreted and therefore how easily a court can decide that the protections of the LEOBOR are inapplicable. Second, the LEOBOR's fifth amendment *Garrity* and *Gardner* provisions are analyzed, using a particular case as an example of the inadequacy of the statute.

1. The Threshold to Procedural Safeguards: Investigation or Interrogation

The fifth amendment protections of *Garrity* and *Gardner* are contained in subsection 728(b), which is only applicable "[w]henever a law enforcement officer is under investigation or subjected to interrogation^[214] by a law enforcement agency,^[215] for any reason which could lead to disciplinary action, demotion or dismissal . . ."²¹⁶ Two opinions of the Court of Special Appeals of Maryland demonstrate a result-oriented analysis in holding the LEOBOR inapplicable by finding that the law enforcement officers were neither under investigation nor subjected to interrogation.²¹⁷

he is regularly employed for any order directing the law enforcement agency to show cause why the right should not be afforded.

Id. § 734. This section may create confusion because, on first reading, it appears that statutory rights may be vindicated but not constitutional rights. Not only would that be an absurdity, it is not what the legislature intended. "This subtitle" includes constitutional rights because section 733 of the subtitle protects "the lawful exercise of [the law enforcement officer's] constitutional rights." Sections 733 and 734 are in *pari materia* and should be read together. Nonetheless, clarity would prevail if section 734 were amended to "denied any constitutional right or any right afforded by this subtitle. . . ."

214. If the rights at issue are not merely statutory, but are constitutional, section 733, prohibiting actual or threatened adverse personnel action as a result of exercising or demanding constitutional or LEOBOR rights, does not require meeting the threshold test of "under investigation" or "subject to interrogation." *DiGrazia v. County Executive*, 288 Md. 437, 452, 418 A.2d 1191, 1200 (1980); *Montgomery County Dep't of Police v. Lumpkin*, 51 Md. App. 557, 565, 444 A.2d 469, 473, *cert. denied*, 294 Md. 142 (1982).
215. The law enforcement agency may be the officer's agency or another agency. *Mayor & Comm'rs v. Duckworth*, 49 Md. App. 236, 243, 431 A.2d 709, 713 (1981).
216. MD. ANN. CODE art. 27, § 728(b). Compare subsection (b) with subsection (c). See *supra* note 198.
217. In addition to the two criticized opinions, there are two opinions that are supportable. In *Montgomery County Dep't of Police v. Lumpkin*, 51 Md. App. 557, 444 A.2d 469 (1982), a management report indicated that traffic squads accounted for 9.7% of deployable manpower but accounted for only 3.03% of the work load. Consequently, traffic squads were disbanded and their personnel reassigned on a productivity basis, enabling the department to cut back to a five-day week, which eliminated a five percent pay differential for the reassigned officers. The court of special appeals held that these transfers were not punitive within the meaning of the LEOBOR.

In *Chief, Baltimore County Police Dep't v. Marchsteiner*, 55 Md. App. 108, 461 A.2d 28 (1983), an officer was reassigned to the Police Athletic League in the hope that a reassignment would result in a change of attitude and performance. A report following complaints of foul and abusive language toward juveniles stated:

In *Widomski v. Chief of Police*,²¹⁸ the internal affairs division (IAD) of the Baltimore County Police twice interviewed an officer in connection with illegal police conduct. The suspected officer subsequently submitted to a polygraph examination conducted by a lieutenant to determine if the officer knew anything that had not yet been disclosed. When the lieutenant's suspicion as to the officer's truthfulness became aroused, the lieutenant asked a series of follow-up questions. The polygraph results indicated that the officer had not been truthful in his response to four questions. The court found the LEOBOR inapplicable to the polygraph test results, ruling that the inquiry had not moved from the inquisitorial stage to the investigatory and accusatorial stage until the lieutenant decided that the suspected officer had not been completely truthful in his answers.

In *Leibe v. Police Department*,²¹⁹ the inspectional services division (ISD) made inquiries arising from departmental suspicion that an officer had abused his sick leave allowance. The officer had been reprimanded twice for excessive use of sick leave by his shift commander and the officer's sick leave performance had been evaluated as "unsatisfactory." Although the shift commander did not believe that the officer could be convicted of a departmental violation, he informed the police chief that the officer should be reviewed for demotion. A month later, the police chief rescinded the officer's most recent promotion, primarily because of his excessive use of sick leave.

The trial court found that the protections of the LEOBOR were inapplicable, holding that the demotion was supervisory and administrative rather than investigatory and punitive in nature. According to the trial court, "[t]he demotion was not punishment for any wrongdoing nor the result of a disciplinary type complaint and investigation. The demotion was an exercise of the Chief's power and responsibility to effectively and efficiently operate the law enforcement agency."²²⁰ The court of special appeals agreed. The court stated that Webster's Dictionary defines inves-

"The philosophy of the Youth Division, as a Crime Prevention modality, is to build a positive image of the police officer in the eyes of young people. . . . Det. Marchsteiner's actions are the antithesis of this stated philosophy and are counterproductive of the goals" *Id.* at 111, 461 A.2d at 30. He was involuntarily reassigned to the Patrol Bureau. The court found that this transfer was not punitive and was within the best interests of the law enforcement agency. Recognizing that the facts presented a closer question in *Marchsteiner* than in *Lumpkin*, the court stated:

It is probably not feasible to fashion a simple litmus test for determining whether any given personnel action of a law-enforcement agency falls within the punitive category. The law in this area must be developed on a case-by-case basis, . . . [b]ut on the facts of this case, it appears to us that the ultimate decision was not punitive in nature. It was an effort to place Marchsteiner where his abilities could be used for the benefit of the law enforcement agency, rather than to its detriment.

Marchsteiner, 55 Md. App. at 117, 461 A.2d at 33.

218. 41 Md. App. 361, 397 A.2d 222, cert. denied, 284 Md. 750 (1979).

219. 57 Md. App. 317, 469 A.2d 1287 (1984).

220. *Id.* at 320, 469 A.2d at 1288.

tigation as " 'a detailed examination; a searching inquiry; to observe or study closely,' " ²²¹ and the court concluded that it would take more than these facts to constitute an investigation and thus trigger the protections of the LEOBOR. The court stated:

While we will not here attempt to delineate precisely what actions will involve detailed examinations or searching inquiries, it is clear that the tracking of Leibe's use of sick leave was not an investigation.

The cases demonstrate that something more than counseling sessions, but perhaps less than formal complaints leading to inquiry, is necessary to trigger the LEOBOR. Nevertheless, examination of sick leave records and even comparing them with another employee's is not an investigation as that word is normally and ordinarily used. ²²²

Subsection 728(b) is triggered when an officer is either "under investigation" or "subjected to interrogation" for something that "could lead to disciplinary action, demotion, or dismissal." ²²³ The definition of "investigation" quoted by the court of special appeals is underinclusive because Webster's Dictionary also defines investigation as a "survey" or an "official probe" or an "inquiry." ²²⁴ According to Black's Law Dictionary, investigate means "[t]o follow up step by step by patient inquiry or observation; [t]o trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry." ²²⁵

In *Widomski*, the inquiry was conducted by the IAD, the internal, investigatory arm of the police department. IAD members questioned the suspected officer twice. Five months after the first inquiry, a captain ordered the officer under suspicion to take a polygraph examination. ²²⁶ Even assuming that these facts do not compel a finding that the officer was "under investigation" within the meaning of the LEOBOR, he was "subjected to interrogation" within the meaning of the LEOBOR. Interrogation, in the context of the fifth amendment, was defined by the

221. *Id.* at 323, 469 A.2d at 1290.

222. *Id.* (citation omitted).

223. MD. ANN. CODE art. 27, § 728(b).

224. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1189 (1976).

225. BLACK'S LAW DICTIONARY 740 (5th ed. 1979); see, e.g., *People v. Orr*, 26 Cal. App. 3d 849, 860, 103 Cal. Rptr. 266, 272 (1972) ("investigation is the process by which the police acquire probable cause"); *Meunier v. Bernich*, 170 So. 567, 572 (La. App. 1936) ("we understand investigation to be synonymous with detection"); *Mason v. Peaslee*, 173 Cal. App. 2d 587, 592 n.2, 343 P.2d 805, 808 n.2 (1959) (" 'investigation' means the process of inquiring into or tracing down through inquiry"); *People v. One 1941 Chevrolet Coupe*, 113 Cal. App. 2d 578, 582, 248 P.2d 786, 789 (1952) ("investigation [is] a patient inquiry into, and examination of all reasonably available facts").

226. *Widomski*, 41 Md. App. at 363, 397 A.2d at 224.

Supreme Court in *Rhode Island v. Innis*,²²⁷ to include not only express questioning, but also any words or actions that the police "should know are reasonably likely to elicit an incriminating response from the suspect."²²⁸ Even if two IAD officers asking questions and a lieutenant connecting a polygraph device to the officer's body, followed by questions, is not "express questioning," it certainly comes within the functional equivalent as defined in *Innis*. Subsection 728(b) further requires the kind of investigation or interrogation that "could lead to disciplinary action, demotion, or dismissal."²²⁹ In *Widomski*, the IAD was investigating criminal conduct. All illegal conduct constitutes the departmental violation of conduct unbecoming an officer.²³⁰ The court thus erred in holding that the investigation and interrogation of *Widomski* did not trigger the protections of the LEOBOR.

In *Leibe*, the court similarly erred. The suspected officer was investigated for sick leave abuse for six months by the ISD. He was reprimanded twice, received an "unsatisfactory" performance evaluation, and even had a promotion rescinded.²³¹ The shift commander's belief that the officer could not be convicted of a departmental violation is both incorrect and irrelevant. The trial court's determination that "[t]he demotion was not punishment for any wrongdoing [but merely the] exercise of the Chief's power and responsibility to effectively and efficiently operate the law enforcement agency"²³² is absurd. Fraudulently depriving an employer of work time is chargeable both departmentally²³³ and criminally.²³⁴

2. The *Garrity* and *Gardner* Fifth Amendment Provisions

Holloway v. State,²³⁵ a pre-LEOBOR case, is the only case in which the Maryland courts have addressed the *Garrity* and *Gardner* issue. In *Holloway*, a police officer was convicted of possession of heroin allegedly stolen from the police property room. The officer gave two oral statements and one written statement on three consecutive days, all of which were admitted at trial. In his first statement, he denied having ever been in possession of the heroin. In the second and third statements, he ad-

227. 446 U.S. 291 (1980).

228. *Id.* at 301 (footnotes omitted).

229. MD. ANN. CODE art. 27, § 728(b).

230. See *supra* notes 1-8 and accompanying text.

231. The fact that this probably was discovered pursuant to an audit of personnel records does not make it any less of an investigation. See *Mondovi Coop. Equity Ass'n v. State*, 258 Wis. 505, 46 N.W.2d 825 (1951).

232. *Leibe*, 57 Md. App. at 320, 469 A.2d at 1288.

233. See *supra* notes 1-8 and accompanying text.

234. In addition to the common law misdemeanor of misconduct in office, see *supra* notes 12-14 and accompanying text, this conduct constitutes theft by deception. MD. ANN. CODE art. 27, § 342(b) (1987). If the income for the time fraudulently not worked was \$300 or more, the offense is a felony subject to 15 years imprisonment. *Id.* § 342(f)(1); see also *id.* § 340(l)(5).

235. 26 Md. App. 382, 339 A.2d 319, *cert. denied*, 276 Md. 745 (1975).

mitted signing for the heroin but claimed that he merely took the bags to his automobile, counted them, and returned them. Although none of the statements standing alone was inculpatory, the three combined created a significant issue concerning the officer's credibility. A departmental policy then in effect provided that the refusal to make a statement to a superior officer, when an officer is ordered to do so, could result in disciplinary action, including termination. The court reversed the conviction, finding that the departmental policy made the statements involuntary as a matter of law under *Garrity*.

The statutory language used to implement the *Garrity* and *Gardner* fifth amendment holdings is found in subsection 728(b)(7) and section 733. Subsection 728(b)(7)(ii), which adopts the *Garrity* holding, provides in part:

The results of any blood alcohol test, blood, breath, or urine test for controlled dangerous substances, polygraph examination, or interrogation, as may be required by the law enforcement agency under this subparagraph are not admissible or discoverable in any criminal proceedings against the law enforcement officer when the law enforcement officer has been ordered to submit thereto.²³⁶

Subsection 728(b)(7)(i) and section 733 both implement the *Gardner* holding. The former provides that "[t]he law enforcement officer under interrogation may not be threatened with transfer, dismissal, or disciplinary action."²³⁷ The latter provides that:

A law enforcement officer may not be discharged, disciplined, demoted, or denied promotion, transfer, or reassignment, or otherwise discriminated against in regard to his employment or be threatened with any such treatment, by reason of his exercise of or demand for the rights granted in this subtitle, or by reason of the lawful exercise of his constitutional rights.²³⁸

a. The Immunity Requirement

The legislature's attempt to implement the dicta of *Gardner*, *Sanitation Men*, and *Turley* is contained in the first two sentences of subsection 728(b)(7)(ii), which provides that:

This subtitle does not prevent any law enforcement agency from requiring a law enforcement officer under investigation to submit to blood alcohol tests, blood, breath, or urine tests for controlled dangerous substances, polygraph examinations, or interrogations which specifically relate to the subject matter of the investigation. This subtitle does not prevent a law enforce-

236. MD. ANN. CODE art. 27, § 728(b)(7)(ii).

237. *Id.* § 728(b)(7)(i).

238. *Id.* § 733.

ment agency from commencing any action which may lead to a punitive measure as a result of a law enforcement officer's refusal to submit to a blood alcohol test, blood, breath, or urine tests for controlled dangerous substances, polygraph examination, or interrogation, after having been ordered to do so by the law enforcement agency.²³⁹

The fundamental problem with the LEOBOR is that it fails to incorporate the immunity requirement of *Gardner*, *Sanitation Men*, and *Turley*. Only when immunity is granted may a law enforcement agency require an officer to provide a statement and then take disciplinary action for the officer's failure to do so. The shortcoming of the Maryland statute is twofold. First, the statute does not provide the constitutionally mandated "use and derivative use" immunity. Consequently, any statements taken under the statute's more limited protection are unconstitutionally involuntary under *Garrity*, and any actual or threatened adverse personnel action has a chilling effect on fifth amendment rights under *Gardner*. Second, even if the statute does provide a constitutionally acceptable fifth amendment substitute, it does not provide that the law enforcement officer be informed that his statements will be inadmissible in a criminal proceeding. As far as the officer knows, he or she is still faced with the impermissible Hobson's choice.

In Maryland, there is no inherent or common law power to grant immunity. Such power exists only if the legislature or the state constitution expressly authorizes a grant of immunity.²⁴⁰ Maryland has only a few immunity statutes, each limited to a particular offense that the legislature has determined is difficult to investigate and prosecute without the testimony of participants in the criminal activity.²⁴¹ Maryland's lack of a general immunity statute is not due to legislative oversight. Since 1978, the Maryland General Assembly has considered but rejected at least five general immunity bills.²⁴²

There are three kinds of immunity: (1) transactional immunity, (2) use immunity, and (3) use plus derivative use immunity. "Transactional immunity" prohibits the prosecution of all criminal transactions about which the individual is compelled to testify. Almost all of Maryland's limited number of immunity statutes provide transactional immunity.²⁴³ Mere "use immunity," at the other extreme, merely guarantees that the compelled testimony itself will not be used in court as evidence against the compelled witness. Use immunity is constitutionally defective to

239. *Id.* § 728(b)(7)(ii).

240. *Butler v. State*, 55 Md. App. 409, 418, 462 A.2d 1230, 1234 (1983); *Bowie v. State*, 14 Md. App. 567, 575, 287 A.2d 782, 786 (1972).

241. *In re Criminal Investigation No. 1-162*, 307 Md. 674, 516 A.2d 976, 983 (1986); e.g., MD. ANN. CODE art. 27, §§ 23-24 (1987) (bribery); *id.* § 39 (conspiracy); *id.* § 262 (gambling); *id.* § 371 (lottery).

242. *In re Criminal Investigation*, 307 Md. at 685 n.5, 516 A.2d at 982 n.5.

243. *Butler*, 55 Md. App. at 420, 462 A.2d at 1235.

compel testimony in the face of an assertion of the fifth amendment privilege against compelled self-incrimination. "Use plus derivative use immunity" is the minimum needed to satisfy the fifth amendment because it provides as much as it takes away.²⁴⁴ Use plus derivative use immunity guarantees the compelled witness not only that his words will not be used against him directly but also that they will not be used indirectly as leads to develop other evidence.²⁴⁵ Once a prosecutor gives a constitutional grant of immunity, pursuant to an express immunity statute, "his only guarantees of adequate testimonial performance are the threat of contempt and the threat of perjury."²⁴⁶

There is nothing in subsection 728(b)(7)(ii) to permit reading it as an express grant of immunity by the legislature. If the legislature did provide the power to grant immunity, it would be Maryland's first general immunity statute, that is, the State's first immunity statute to apply to more than one specific crime.²⁴⁷ It also would be unconstitutional because it neither immunizes from prosecution for any transaction for which testimony is compelled nor protects against both the use of the statements as evidence and the use of the statements as leads to develop other evidence. From this standpoint, subsection 728(b)(7)(ii) is merely an exclusionary device rendering statements inadmissible as evidence. The section is thus constitutionally insufficient to compel testimony from an individual desiring to exercise the unfettered fifth amendment right to remain silent without penalty.²⁴⁸

244. *Kastigar v. United States*, 406 U.S. 441, 446 (1972); *In re Criminal Investigation*, 307 Md. at 684, 516 A.2d at 982.

245. *Butler*, 55 Md. App. at 421, 462 A.2d at 1235.

246. *Id.* at 422, 462 A.2d at 1236.

247. The LEOBOR was designed to provide more rights — not fewer — to law enforcement officers. If police officers are now the only citizens upon whom immunity may be "forced" for all crimes, they would be receiving fewer rights than the general citizen because immunity offers no advantage to the one immunized. As the court stated in *Butler v. State*:

Formal immunity is not necessarily the subject of a bargain and is frequently forced upon a reluctant witness against that witness's will. A witness is summonsed to testify at a trial or before a grand jury. The witness claims the privilege against compelled testimonial self-incrimination. The State, upon explicit statutory authorization, may then officially and upon the record confer a grant of the appropriate form of immunity upon the recalcitrant witness, whether that witness wishes it or not.

55 Md. App. at 421, 462 A.2d at 1236. Moreover, if subsection 728(b)(7)(ii) were an immunity statute, Maryland would have an immunity statute enforceable not simply by the judicially approved methods of threat of contempt and threat of perjury but by a new threat, that of disciplinary action and loss of employment.

248. This is not changed by the fact that subsection 728(b)(7)(ii) makes the results of any "interrogation, as may be required by the law enforcement agency . . . not *admissible or discoverable* in any criminal proceedings . . ." MD. ANN. CODE art. 27, § 728(b)(7)(ii) (emphasis added). The fact that it is the law enforcement agency that required the statement renders meaningless for the officer the 1981 amendment of "or discoverable." See *infra* note 298.

b. *Smith v. Howard County*

The problem with the *Garrity* and *Gardner* provisions of the Maryland LEOBOR is demonstrated in the case of *Smith v. Howard County*.²⁴⁹ After an officer and his superior were engaged in a dispute, the superior scheduled a meeting with the officer. The officer requested to have a witness present during the meeting, but this request was denied. At the meeting, the officer took out a tape recorder in an unsuccessful attempt to record the conversation. The department alleged that the officer surreptitiously taped the conversation, which is a felony in Maryland.²⁵⁰ Inasmuch as the officer's conduct did not violate any departmental regulation, he was subject to investigation solely by virtue of the felony criminal statute.

The officer then was notified that he was under investigation and was ordered to answer questions. He informed his superiors that he would appear as required but would assert his fifth amendment privilege against compelled self-incrimination. The department's response was that he would be subjected only to departmental disciplinary action, that he would not be subjected to criminal charges, that any answers he was forced to provide would be inadmissible in any criminal proceeding against him pursuant to the LEOBOR, and that his failure to answer questions could result in the commencement of an action leading to punitive measures, including dismissal.²⁵¹ Nonetheless, the police depart-

249. No. 87-CA5262 (Cir. Ct. Howard County, Md., Mar. 2, 1987). The author served as co-counsel on behalf of Officer Smith, along with Clarke F. Ahlers, Esq., an adjunct professor at the University of Baltimore School of Law and a former Howard County police officer.

250. MD. CTS. & JUD. PROC. CODE ANN. § 10-402 (Supp. 1987). Subsection (a) prohibits the interception, disclosure, or use of certain wire or oral communication. Subsection (b) establishes that the offense is a felony, subject to five years imprisonment and a \$10,000 fine.

251. The police department relied on *Nichols v. Baltimore Police Dep't*, 53 Md. App. 623, 455 A.2d 446, *cert. denied*, 296 Md. 111 (1983), in which the court of special appeals addressed the limited issue of the meaning of subsection 728(b)(10) of the LEOBOR, determining the extent to which a police officer and his or her representative may consult in order to enter objections to questions asked by an interrogator.

The court stated that subsection 728(b)(10) was:

concerned solely with investigations or interrogations involving possible violations of non-criminal departmental policies. Otherwise, the full panoply of *Miranda* would be applicable, and subsection 728(b)(10) would be mere surplusage, since *Miranda* is founded on the supreme law of the land, the Constitution of the United States. Consequently, any attempt by State law to restrict *Miranda's* application would be futile.

Id. at 628, 455 A.2d at 449. Not only did the *Nichols* court hold that the lone subsection at issue addressed only "non-criminal departmental policies," it found that the complaint against the officer was that he "shirked . . . [his] responsibilities," *id.* at 624, 455 A.2d at 447, and thus the "interrogation is, in appellant's case, strictly non-criminal." *Id.* at 629, 455 A.2d at 450. It was in this context that the court wrote the language upon which the Department relied in *Smith v. Howard County*:

The commander may order the officer to answer the question, and if that order is refused, the officer in all likelihood faces a charge of disobeying

ment was unwilling to secure, and statutorily was incapable of securing, immunity for the officer.

The officer obtained a court order enjoining the police department from taking, or threatening to take, punitive personnel action in return for the exercise of his fifth amendment privilege against compelled self-incrimination or of his rights under the LEOBOR. In granting the injunction, the court rejected the police department's position that the officer's asserted rights were inapplicable because the department planned to treat the matter as purely noncriminal, departmental, and administrative. According to the court, the department's assertion was not controlling because any individual may refuse "to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers *might* incriminate him in future criminal proceedings."²⁵² As long as there is a potential for criminal charges arising from the conduct, the right to remain silent is absolute. Unless there has been a constitutionally sufficient grant of immunity, the person being interrogated for potentially criminal conduct has the constitutional right to remain silent.²⁵³

Further complications in the *Smith* case indicate the extent of the law enforcement officer's dilemma. First, the LEOBOR could not have provided the officer with the constitutional protection of immunity necessary to compel his testimony. Even if there were an applicable immunity statute under which immunity could be granted, it could be implemented only by the Office of the State's Attorney. Because the officer was charged departmentally, his adversary was the Howard County Police Department, represented by the Howard County Office of Law, its attorneys for civil and administrative matters.

Second, although the attorneys for Howard County's civil matters assured the officer, and proffered to the court, that this matter was and would remain purely civil, the attorneys for the people of Howard County in criminal matters, the Office of the State's Attorney, could and did pursue this matter criminally. The grand jury, however, refused to return an indictment against the officer.

the commander's direct order. Dismissal from the department is a possible, if not probable, product of the disobedience. In short, the officer, confronted by not answering a question or disobeying a direct order of his or her commander, is placed in the position of choosing between facing a tiger or facing a lion. Either choice might prove fatal to the officer's career in law-enforcement.

Id. at 628-29, 455 A.2d at 449-50. If the sole purpose of an investigation is an accounting of job performance, with no potential criminality because of immunity, then an order to answer questions, under threat of loss of employment, is constitutionally permissible.

252. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (emphasis added); see *Kastigar v. United States*, 406 U.S. 441, 444 (1972) (includes administrative and investigatory proceedings); *In re Criminal Investigation No. 1-162*, 307 Md. 674, 683, 516 A.2d 976, 981 (1986).

253. See *Hoffman v. United States*, 341 U.S. 479 (1951).

Third, even if the alleged conduct for which the officer was being disciplined did not violate a specific criminal statute, this would not automatically preclude the officer from asserting his privilege against compelled self-incrimination. The criminal law of Maryland includes the common law²⁵⁴ misdemeanor of misconduct in office,²⁵⁵ which includes malfeasance, misfeasance, and nonfeasance by a public officer while in the exercise of the duties of office or while acting under color of law. Although not all conduct unbecoming an officer or all neglect of duty constitutes misconduct in office, the crime of misconduct in office is broad, particularly in its nonfeasance mode, in which any failure to act, when resulting from corruption rather than discretion, may constitute misconduct. As to the affirmative conduct of malfeasance or misfeasance,²⁵⁶ "[t]his does not mean a mere error of judgment, but rather a wilful abuse of authority, or a grossly indecorous conduct during the performance of his duties. . . ."²⁵⁷

Fourth, this case demonstrates that police departments, as para-military organizations, have a tendency to abuse the constitutional rights of their officers. In *Smith*, after the officer obtained an injunction to enforce his constitutional rights, the department decided to punish him by seeking an indictment, which the grand jury refused to return. One year later, the administrative charge was refiled. A settlement was negotiated in which the department agreed to drop all charges and the officer agreed to accept a letter of "poor judgment." The next day, the officer was instructed to sign papers related to the settlement and was incorrectly told that his attorney had reviewed them. In fact, the officer was signing a confession. The present degree of regulation allows police departments to continue to chill the fifth amendment rights of officers through a myriad of punitive measures used in retaliation for the exercise of constitutional guarantees. By failing to regulate departmental treatment of police officers, courts and legislatures have unintentionally encouraged this tendency.

C. *Statutory Protections in Other States*

1. California

In 1976, California enacted the Public Safety Officers Procedural Bill of Rights Act.²⁵⁸ Section 3303 of the Act, which is somewhat analogous to section 728 of the Maryland statute, provides procedural safe-

254. Maryland adopted all of the common law of England as it existed on July 4, 1776, subject to change by the Maryland General Assembly. MD. CONST., DECL. RIGHTS art. 5. See *supra* note 37.

255. See *supra* notes 12-14 and accompanying text.

256. "[S]ince the reference is not to two different offenses, but merely to two different modes of committing the offenses, the courts have had little occasion to indulge in hairsplitting discussions of the problem. PERKINS, *supra* note 10, at 545.

257. GINSBERG, *supra* note 14, at 152.

258. Act of Aug. 16, 1976, ch. 465, 1976 Cal. Stat. 1202 (codified as amended at CAL. GOV'T CODE §§ 3300-11 (West 1980 & Supp. 1988)).

guards for public safety officers²⁵⁹ during interrogation and investigation.²⁶⁰ These protections include guaranteed investigation-related rights,²⁶¹ as well as rights prior to,²⁶² during,²⁶³ and as a conse-

259. *Civil Serv. Ass'n v. Civil Serv. Comm'n*, 139 Cal. App. 3d 449, 188 Cal. Rptr. 806 (1983) (a police department clerk-stenographer was subject to departmental regulations and thus could be terminated for insubordination; she was not, however, afforded the protections of the statute because the statute applies only to peace officers).
260. CAL. GOV'T CODE § 3303. The nine subsections of section 3303 are triggered whenever there is investigation and interrogation by a member of the officer's agency. *People v. Velez*, 144 Cal. App. 3d 558, 192 Cal. Rptr. 686 (1983) (section 3303 is not applicable when interrogated by another department). Moreover, section 3303 is limited to situations that could lead to punitive action, defined as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." CAL. GOV'T CODE § 3303. Unlike transfers, which may be punishment or may be advantageous to the officer, dismissal and the other four categories of personnel action are per se disciplinary and punitive. *White v. Sacramento*, 31 Cal. 3d 676, 646 P.2d 191, 183 Cal. Rptr. 520 (1982) (loss of rank and loss of five percent special pay allowance was per se punitive); *McManigal v. Seal Beach*, 166 Cal. App. 3d 975, 212 Cal. Rptr. 733 (1985) (same rank and base salary but loss of five percent skill pay was per se punitive); *Baggett v. Gates*, 32 Cal. 3d 128, 649 P.2d 874, 185 Cal. Rptr. 232 (1982) (assignment to lower pay grade was per se disciplinary). Compare *Turturici v. City of Redwood City*, 190 Cal. App. 3d 1447, 236 Cal. Rptr. 53 (1987) (a negative appraisal, with recommendation for discipline if performance did not improve, was an adverse personnel entry, providing the right to a written response under section 3306, but it was not a punitive action giving rise to an administrative appeal), with *Hopson v. Los Angeles*, 139 Cal. App. 3d 347, 188 Cal. Rptr. 689 (1983) (a commission report of departmental violations resulting from a police shooting, entered in a personnel file in lieu of disciplinary action because the chief of police had decided against discipline, was punitive).
261. CAL. GOV'T CODE § 3305 (no adverse entry in the officer's personnel file unless the officer has read and signed (or refused to sign) the adverse instrument); *id.* § 3306 (officer has 30 days to file a written response to the adverse entry in the personnel file).
262. *Id.* § 3303(b) (the right to be informed of the name of the officer in charge of the interrogation and all persons to be present during the interrogation); *id.* § 3303(c) (the right to be informed of the nature of the investigation prior to interrogation); *id.* § 3303(f) (the right to examine reports made by the investigating officer as they become available, including those already in existence prior to interrogation, except those pertaining to an ongoing investigation for which confidentiality has been supported by articulable reasons; see *Association for Los Angeles Deputy Sheriffs v. Los Angeles*, 236 Cal. Rptr. 495 (Cal. App. 1987)); *id.* § 3303(g) (the right to be informed of constitutional rights prior to interrogation if, at that time, deemed chargeable in a criminal proceeding).
263. *Id.* § 3303(a) (interrogation conducted at a reasonable time, preferably while on duty); *id.* § 3303(b) (interrogated by no more than two officers at a time); *id.* § 3303(d) (interrogation session to last only for a reasonable period of time); *id.* § 3303(f) (officer entitled to record the interrogation); *id.* § 3303(g) (informed of constitutional rights during interrogation if, at that time, the officer is deemed chargeable in a criminal proceeding); *id.* § 3303(h) (right to a chosen representative present at all times during the interrogation if punitive action is likely).

In *Lybarger v. Los Angeles*, 206 Cal. Rptr. 727, 732-33 (Cal. App. 1984), *rev'd on other grounds*, 40 Cal. 3d 822, 710 P.2d 329, 221 Cal. Rptr. 529 (1985), there was substantial compliance with the requirement of interrogation by no more than two officers. Although five officers were present, only two officers conducted the interrogation and a third officer merely asked questions to clarify whether the defendant

quence of interrogation.²⁶⁴ The statute on its face is inapplicable in certain situations in which its protections may be needed. Section 3303 does not apply "to any interrogation . . . in the normal course of duty, counseling, instruction, or informal verbal admonishment." Nor does it apply "to an investigation concerned solely and directly with alleged criminal activities."²⁶⁵

Although the goal of the legislation is laudable,²⁶⁶ the California statute is less effective than its Maryland counterpart in implementing the dictates of the Supreme Court. Much of the judicial misunderstanding surrounding the *Garrity* holding, the *Gardner* holding, and the immunity requirement is manifested in the California statute. The constitutional standards set forth in the cases are addressed by overlapping, and sometimes contradictory, statutory language. For example, subsection 3304(a) and subsection 3303(e) each begin with the *Gardner* holding: the former prohibits actual or threatened adverse personnel action in connection with the exercise of any of the protections afforded by the statute,²⁶⁷ and the latter prohibits threatened adverse personnel action during interrogation.²⁶⁸ However, despite the fact that no immunity is provided, both sections nullify the *Gardner* holding by authorizing punitive personnel action in return for asserting the fifth amendment privilege. Subsection 3304(a) permits a charge of insubordination against any officer who fails to comply with an order to cooperate with agencies involved in criminal investigations.²⁶⁹ Subsection 3303(e) provides that an officer may be punished for the failure to answer questions directly relating to the investigation or interrogation.²⁷⁰

As to the polygraph method of submitting to interrogation, the California statute is more generous than the statutes in the other three states.

appreciated the severity of the potential consequences. Cf. *Long Beach Police Officers Ass'n v. Long Beach*, 156 Cal. App. 3d 996, 1010-11, 203 Cal. Rptr. 494, 503-05 (1984) (officer entitled to have a representative present prior to filing a written report required for shooting incidents).

264. *Id.* § 3303(f) (access to a tape recording of the interrogation, if made); *id.* (officer entitled to a copy of the stenographer's transcribed notes and any non-confidential report made by the investigating officer).

265. *Id.* § 3303(h).

266. "The Legislature . . . declares that the rights and protections provided to peace officers under this chapter constitutes a matter of statewide concern." *Id.* § 3301.

267. "No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure." *Id.* § 3304(a).

268. "The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action" *Id.* § 3303(e).

269. "Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him with insubordination." *Id.* § 3304(a).

270. "[A]n officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action." *Id.* § 3303(e).

It prohibits nonconsensual polygraph examinations, prohibits disciplinary action for refusal to submit to a polygraph examination, and prohibits any adverse inference to be drawn from the refusal to submit.²⁷¹

Like the Maryland law, the California statute, in section 3309.5, prohibits the denial of any statutory protection and provides for injunctive relief in the superior court in the event of such a denial.²⁷² Additionally, section 3309.5 provides for "other extraordinary relief to remedy the violation,"²⁷³ which can include a writ of mandate to compel back pay.²⁷⁴ Moreover, courts have awarded attorney's fees under the private attorney general theory, holding that the public policy enforced through this statute is sufficient to permit compensating the cost of privately initiated actions.²⁷⁵

Only recently have the California courts provided the judicial gloss necessary to overcome the California legislature's confusion concerning the Supreme Court's fifth amendment case law. In *Lybarger v. City of Los Angeles*,²⁷⁶ the Supreme Court of California implicitly recognized that the statute is unnecessarily complex and that its treatment by the appellate courts had been artificially strained, sometimes for and sometimes against the officer. With a clear understanding of the problem, the court indicated that the statute is, or should be, the synthesis of the Supreme Court cases, supplemented by statutory protections. The court stated:

We must construe the act in such a manner as to encourage full cooperation with police department investigations of criminal offenses, so long as fundamental constitutional rights are protected in the process. Such a balancing of interests is achieved by holding that, although the officer under investigation is not compelled to respond to potentially

271. Nonconsensual polygraph examinations are controlled as follows:

No public safety officer shall be compelled to submit to a polygraph examination against his will. No disciplinary action or other recrimination shall be taken against a public safety officer refusing to submit to a polygraph examination, nor shall any comment be entered anywhere in the investigator's notes or anywhere else that the public safety officer refused to take a polygraph examination, nor shall any testimony or evidence be admissible at a subsequent hearing, trial, or proceeding, judicial or administrative, to the effect that the public safety officer refused to take a polygraph examination.

Id. § 3307; see *Estes v. Grover City*, 82 Cal. App. 3d 509, 516, 147 Cal. Rptr. 131, 135-36 (1978); see also *Long Beach City Employees Ass'n v. Long Beach*, 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986).

272. CAL. GOV'T CODE § 3309.5.

273. *Id.*

274. *Henneberque v. Culver City*, 172 Cal. App. 3d 837, 843, 218 Cal. Rptr. 704, 706 (1985).

275. See, e.g., *Baggett v. Gates*, 32 Cal. 3d 128, 649 P.2d 874, 185 Cal. Rptr. 232 (1982); *Mounger v. Gates*, 193 Cal. App. 3d 1248, 239 Cal. Rptr. 18, modified, 194 Cal. App. 3d 500 (1987); *Henneberque*, 172 Cal. App. 3d at 845-47, 218 Cal. Rptr. at 709-10 (1985); CAL. CIV. PROC. CODE § 1021.5 (West 1980).

276. 40 Cal. 3d 822, 710 P.2d 329, 221 Cal. Rptr. 529 (1985).

incriminating questions, and his refusal to speak cannot be used against him in a criminal proceeding, nevertheless such refusal may be deemed insubordination leading to punitive action by his employer. Seen in this light, the right to remain silent is not a "hollow" right. It may be exercised without fear of penal sanction.²⁷⁷

Taking the middle ground position on the immunity requirement, the court held that the officer's dismissal for insubordination for assertion of the privilege against compelled self-incrimination was invalid for two reasons. First, the officer was not advised, as required by the fifth amendment, that any statements he made could not be used against him in any subsequent criminal proceeding. Second, he was not advised, as required by subsection 3303(g) of the statute, of his constitutional rights once "it was deemed that he may be charged with a criminal offense"²⁷⁸ The court recognized that the question of when an officer may be charged with a criminal offense is a factual issue involving the objective facts of the investigation and the subjective understanding of the interrogating officer.²⁷⁹ As to which constitutional rights an officer is entitled to be informed as a result of subsection 3303(g), the court again demonstrated its understanding of the holdings and dicta of *Garrity* and its progeny, balancing constitutional protections and the need for departmental discipline. The court stated:

Given the context of an administrative inquiry into possible criminal misconduct, we think it likely the Legislature intended that interrogated officers be advised of their so-called "*Miranda* rights, as modified by the *Lefkowitz/Garrity* rule [A]ppellant should have been told, among other things, that although he had the right to remain silent and not incriminate himself, (1) his silence could be deemed insubordination, leading to administrative discipline, and (2) any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding. Although appellant was properly advised of the adverse effect of his silence, he was never told of the extent of the protection afforded to any statements he might make. That omission was critically important here.²⁸⁰

277. *Id.* at 828, 710 P.2d at 332, 221 Cal. Rptr. at 532 (emphasis in original).

278. CAL. GOV'T CODE § 3303(g).

279. *Lybarger*, 40 Cal. 3d at 829 n.1, 710 P.2d at 333 n.1, 221 Cal. Rptr. at 533 n.1. In *Lybarger*, a criminal investigation was pending, five investigating officers were present during the interrogation, and the officer's attorney made an unchallenged statement, in the presence of the investigating officers, that he was being charged with five felonies. *Id.* at 829, 710 P.2d at 333, 221 Cal. Rptr. at 533. The court also stated that this subsection is necessarily triggered by an assertion of the privilege against compelled self-incrimination. *Id.* at 828, 710 P.2d at 332, 221 Cal. Rptr. at 532.

280. *Id.* at 829, 710 P.2d at 333, 221 Cal. Rptr. at 533 (citations omitted); accord *Civil*

Chief Justice Bird, writing in concurrence, agreed with the middle ground position requiring the officer be advised of the immunity. "The logic underlying *Gardner* is that an officer under investigation is not required to speculate as to what his constitutional rights are."²⁸¹

2. Florida

In 1974, Florida enacted the Police Officers' Bill of Rights,²⁸²

Serv. Ass'n v. Civil Serv. Comm'n, 139 Cal. App. 3d 449, 460, 188 Cal. Rptr. 806, 814 (1983) ("before being ordered to take a polygraph, an employee must be notified: (1) that the questions will relate specifically and narrowly to the performance of his official duties; (2) that the answers cannot be used against him in any subsequent criminal prosecution; and (3) that the penalty for refusing is dismissal").

281. *Lybarger*, 40 Cal. 3d at 834, 710 P.2d at 336, 221 Cal. Rptr. at 536 (Bird, C.J., concurring). *Lybarger* resolved the problem created by two opinions, issued a month apart, from different districts of the California Court of Appeal. In *Kelly v. City of Fresno*, 205 Cal. Rptr. 416 (Cal. Ct. App. 1984), the court addressed the meaning of CAL. GOV'T CODE § 3303(g), which requires an officer to be informed immediately of his constitutional rights once it is deemed that he may be charged in a criminal proceeding. The court held that this requires *Miranda* warnings and also held that subsection 3303(g) is in pari materia with subsection 3304(a), which prohibits actual or threatened punitive action because of the exercise of any statutory right provided in the act. 205 Cal. Rptr. at 420. As a result, once subsection 3303(g) is applicable, the officer enjoys the right to remain silent in both a civil and criminal context. Employing the self-executing immunity theory, the court noted that the fifth amendment precludes the use in a criminal proceeding of any answer provided under threat of loss of employment. The court also held that any answer provided under threat of adverse personnel action could not be used in a civil administrative proceeding. *Id.* at 424. Thus, although the fifth amendment would permit discharge for insubordination for assertion of the right to remain silent, provided the officer has been granted immunity, the California statute goes further, forbidding such a discharge. In light of its holding in *Lybarger*, the Supreme Court of California remanded *Kelly* for reconsideration. 41 Cal. 3d 919, 719 P.2d 242, 226 Cal. Rptr. 868 (1986).

Taking an entirely different stance was the intermediate appellate court in *Lybarger*, 206 Cal. Rptr. 727 (Cal. App. 1984). Distinguishing *Kelly*, the court found that the officer suffered no harm from the failure to give *Miranda* warnings under subsection 3303(g) because the officer knew he had these rights and in fact invoked them. Rejecting *Kelly*'s expansive reading, *Lybarger* reverted to 1939, quoting heavily from *Christal v. Police Comm'r*, 33 Cal. App. 2d 564, 92 P.2d 416 (1939), to the effect that a police officer must disclose all evidence of criminality even if it means incriminating himself. *Lybarger*, 206 Cal. Rptr. at 736. Moreover, the *Lybarger* court noted that although the statute prohibits punitive action for exercising statutory rights and provides the right to be advised of constitutional rights, it does not prohibit punitive action for exercising constitutional rights, with the exception of forbidding punishment for a refusal to submit to a polygraph examination. *Id.* at 736-37. In affirming the officer's dismissal for insubordination for asserting the privilege against compelled self-incrimination, the court stated that California has long recognized that a public servant must be willing to forego constitutional privileges inconsistent with the duties of office. *Id.* at 737.

282. Act of Oct. 1, 1974, ch. 74-274, 1974 FLA. LAWS 728 (codified as amended at FLA. STAT. ANN. §§ 112.531-34 (West 1982 & Supp. 1987)).

The 1974 statute applied only to those law enforcement officers who were "employed full time by any municipality or this state or any political subdivision thereof" *Id.* § 112.531(1). Because the office of sheriff is constitutional, deputy sheriffs are appointed (not employed) by a sheriff (not a municipality, state, or political

which includes procedural safeguards during interrogation and investigation.²⁸³ These protections include rights guaranteed during²⁸⁴ and subsequent to investigation;²⁸⁵ rights prior to²⁸⁶ and during interrogation;²⁸⁷

subdivision) and thus are not within the protections of the statute. *Tanner v. McCall*, 441 F. Supp. 503, 508 (M.D. Fla. 1972); *Evans v. Hardcastle*, 339 So. 2d 1150, 1151 (Fla. Dist. Ct. App. 1976); *Johnson v. Wilson*, 336 So. 2d. 651, 652 (Fla. Dist. Ct. App. 1976).

Probationary police officers are not employed full time within the meaning of the statute. In *Smith v. Golden Beach*, 403 So. 2d 1346 (Fla. Dist. Ct. App. 1981), the court reasoned that "[i]n light of the past practice of excluding probationary policemen from procedural rights accorded permanent employees, we cannot conclude that the legislature intended to include probationers within the statute . . ." *Id.* at 1347-48. "Employed full time" requires an officer to be available for full employment. Consequently, regardless of the number and length of days he worked, a patrolman was not employed full time when he also worked a 40-hour week as a hospital security guard. *Thomason v. McDaniel*, 793 F.2d 1247, 1249 (11th Cir. 1986).

A law enforcement officer is one, other than a chief of police, "whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state." FLA. STAT. ANN. § 112.531(1). This definition excludes a community service officer who has no general arrest powers, is not authorized to carry weapons, does not enforce the law, and does not respond to emergency calls. *Hollywood v. Litteral*, 446 So. 2d 1152, 1154 (Fla. Dist. Ct. App. 1984) (of 12 task areas, two related tangentially to crime prevention or detection, three related to enforcement of traffic laws, and seven had no connection with law enforcement).

In 1982, correctional officers were added to the statute. Act of Oct. 1, 1982, ch. 82-156, 1982 FLA. LAWS 490. A correctional officer is one, other than a superintendent, "whose primary responsibility is the supervision, protection, care, custody, or control of inmates within a correctional institution . . ." but excludes secretarial, clerical, and professionally trained personnel. FLA. STAT. ANN. § 112.531(2).

283. FLA. STAT. ANN. § 112.532. Section 112.532 is only applicable when "a law enforcement officer or correctional officer is under investigation and subject to interrogation by members of his agency for any reason which could lead to disciplinary action, demotion, or dismissal . . ." *Id.* § 112.532(1). In *Waters v. Purdy*, 345 So. 2d 368 (Fla. Dist. Ct. App. 1977), the court found the statute inapplicable because the officer "was not under investigation, but rather was terminated for violation of the public safety department's personnel rules which he admitted violating."
284. *Id.* § 112.532(1)(c) (the right to be informed of the name of the officer in charge of the interrogation); *id.* § 112.532(1)(d) (the right to be informed of the name of all complainants); *id.* § 112.532(1)(h) (the right to be informed of all rights if arrested or likely to be arrested); *id.* § 112.533(3) (it is a misdemeanor to disclose any documents or information related to a complaint prior to its public status).
285. *Id.* § 112.532(4) (no adverse personnel action unless notified prior to its effective date); *id.* § 112.533(2)(b) (investigation presumed inactive if there is no finding made within 60 days after the complaint is filed).
286. *Id.* § 112.532(1)(c) (the right to be informed of the name of the interrogating officer and all persons who will be present during the interrogation); *id.* § 112.532(1)(d) (the right to be informed of the nature of the investigation).
287. *Id.* § 112.532(1)(a) (interrogation conducted at a reasonable time, preferably while on duty); *id.* § 112.532(1)(b) (interrogation conducted at the office of the investigating officer or police unit where the incident allegedly occurred); *id.* § 112.532(1)(c) (questions asked by one interrogator at a time); *id.* § 112.532(1)(e) (interrogation to continue for only a reasonable period of time); *id.* § 112.532(1)(f) (no offensive language, threats of adverse personnel action, or inducements during interrogation); *id.* § 112.532(1)(g) (interrogation recorded); *id.* § 112.532(1)(i) (the right to have counsel or other representative present at all times during interrogation).

and the right to file suit.²⁸⁸ The only Supreme Court doctrine echoed in the statute is the *Gardner* holding, prohibiting actual or threatened adverse personnel action in response to the exercise of rights guaranteed by the statute.²⁸⁹ Like the Maryland LEOBOR, the Florida statute provides injunctive relief in the circuit court for officers injured by a denial of any right guaranteed by the statute.²⁹⁰

3. Virginia

In 1978, Virginia enacted its Law-Enforcement Officers' Procedural Guarantees.²⁹¹ Compared to the Maryland LEOBOR, the Virginia statute provides only a few protections, including certain rights guaranteed during investigation,²⁹² rights prior to²⁹³ and during interrogation,²⁹⁴ and rights prior to²⁹⁵ and during hearings.²⁹⁶ To the extent that there is

288. *Id.* § 112.532(3) (right to sue any individual or group for pecuniary and other damages suffered during the performance of official duties or for abridgement of civil rights arising out of the performance of official duties). The statute provides no right to sue for defamation greater than the rights the officer has as a citizen. *Mesa v. Rodriguez*, 357 So. 2d 711, 712-13 (Fla. 1978). As a citizen, the officer is foreclosed from bringing an action in defamation against any individual who files a complaint with the police department, because the public has an absolute constitutional right for redress of grievances and has absolute immunity when filing a grievance in a judicial or quasi-judicial proceeding. *Gray v. Rodriguez*, 481 So. 2d 1298 (Fla. Dist. Ct. App. 1986). This provision may not be used to file suit for back pay. *Schrank v. Bliss*, 412 F. Supp. 28, 38 (M.D. Fla. 1976). *Cf. Bembanaste v. Hollywood*, 394 So. 2d 1054, 1054 (Fla. Dist. Ct. App. 1981) (summary final judgment affirmed for defendant municipality in suit for reinstatement, back pay, costs, and attorney's fees because officer's complaint failed to allege that termination resulted from an attempt to exercise any right provided by the statute).

289. *Id.* § 112.532(5). "No law enforcement officer shall be discharged; disciplined; demoted; denied promotion, transfer, or reassignment; or otherwise discriminated against in regard to his employment, or be threatened with any such treatment, by reason of his exercise of the rights granted by this part." *Id.* In *Sylvester v. Delray Beach*, 431 So. 2d 738 (Fla. Dist. Ct. App. 1983) (per curiam), a complaint alleging a threatened denial of promotion, transfer, and reassignment for exercising statutory rights and for refusing to abandon litigation created a genuine issue of fact sufficient to defeat the defendant's summary judgment motion.

290. FLA. STAT. ANN. § 112.534. Section 112.534 provides injunctive relief by restraining violations of police officer rights contained in sections 112.531 through .533. It does not, however, provide injunctive relief in the form of reinstatement. *Migliore v. Lauderhill*, 415 So. 2d 62, 65 (Fla. Dist. Ct. App. 1982), *aff'd*, 431 So. 2d 986 (Fla. 1983).

291. Act of Mar. 3, 1978, ch. 19, 1978 VA. LAWS 31 (codified as amended at VA. CODE ANN. §§ 2.1-1 to .9 (1987)).

292. *Id.* § 2.1-116.2.2. (informed of nature of investigation and name and rank of investigating officer).

293. *Id.* (informed of individuals to be present during interrogation).

294. *Id.* § 2.1-116.2.1. (interrogated at a reasonable time and place, preferably while on duty).

295. *Id.* § 2.1-116.4. (notified in writing of charges and action that may be taken; provided opportunity to respond to charges orally and in writing with assistance of counsel); *id.* § 2.1-116.5. (subpoena witnesses).

296. *Id.* § 2.1-116.5. (present evidence and cross-examine witnesses through counsel). Although there is a right to a hearing whenever a law enforcement officer is dismissed, demoted, suspended, or transferred for punitive reasons, such right accrues

any relation between the law's provisions and the Supreme Court doctrines of *Garrity* and its progeny,²⁹⁷ the law violates rather than vindicates those constitutional decisions. With no recognition of the fifth amendment protections of *Garrity* and *Gardner*, and with no reference to the granting of immunity, the statute provides that "[n]othing in this chapter shall . . . prevent the suspension of a law-enforcement officer for refusing to obey a direct order issued in conformance with the agency's written and disseminated rules and regulations."²⁹⁸ The only case addressing the relation between the Florida statute and the Supreme Court authority is *Kersey v. Shipley*,²⁹⁹ in which two police officers under investigation for sexual misconduct were dismissed for disobeying a direct order to undergo a polygraph examination. The Fourth Circuit, in affirming the dismissal of the officers' civil rights action, failed to recognize that the polygraph order created a self-incrimination issue and simply held that their discharge was not arbitrary and capricious.³⁰⁰

V. CONCLUSION

Historically, law enforcement officers have not enjoyed the constitutional privilege against compelled self-incrimination that is available to all other citizens. Police departments across the country continue to demand that law enforcement officers surrender the privilege as a condition of employment or face administrative sanctions, including dismissal.

The Supreme Court attempted to remedy this problem in 1967 by providing full protection for law enforcement officers.³⁰¹ Since then, four state legislatures have enacted a law enforcement officers' bill of rights, extending various procedural safeguards.³⁰² Unfortunately, neither courts nor legislatures have advanced significantly the rights of law enforcement officers in general or their fifth amendment protection in particular.

The protections of the United States Constitution apply to all citizens equally. In choosing their career, law enforcement officers should not be required to abandon rights enjoyed by the public at large. One solution to the problem is stronger state, or even federal, legislation. The appendix to this article provides a Model Law Enforcement Officers' Bill

only following the punitive personnel action because there is no right to a pre-termination hearing. *Kersey v. Shipley*, 673 F.2d 730, 732 (4th Cir.), cert. denied, 459 U.S. 836 (1982). Moreover, the hearing panel's recommendation, even if favorable, is only advisory to the police chief. VA. CODE ANN. § 2.1-116.7.

297. Ironically, the Firefighter's and Emergency Medical Technician's Procedural Guarantees, Act of Mar. 26, 1987, ch. 509, 1987 Va. Laws 740 (codified at VA. CODE ANN. §§ 2.1-116.9:1. to 9:5. (1987)), is broader in scope and prohibits the threatening of punitive action as retaliation for exercising constitutional or statutory protections. *Id.* §§ 2.1-116.9:2.8.,4.

298. *Id.* § 2.1-116.6.

299. 673 F.2d 730 (4th Cir.), cert. denied, 459 U.S. 836 (1982).

300. *Id.* at 733.

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

302. See *supra* parts IV.B., C.

of Rights. This comprehensive statute would secure for law enforcement officers the full range of constitutional protections, including the fifth amendment privilege against compelled self-incrimination, and would afford other related substantive and procedural rights as well. The legislative branch should move swiftly and decisively to redress the law enforcement officer's unconstitutional predicament.

APPENDIX
MODEL LAW ENFORCEMENT OFFICERS'
BILL OF RIGHTS

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Title 1. Preamble.

§ 1-101. Policy statement.

Law enforcement officers have a vital mission in society. The Law Enforcement Officers' Bill of Rights is enacted because:

(a) historically law enforcement officers have not been afforded the full complement of constitutional and other protections provided generally to members of society; and

(b) the unique nature of the responsibilities associated with being a law enforcement officer, combined with the legitimate needs of a law enforcement agency to maintain an efficient and effective organization, require that law enforcement officers be afforded certain substantive, procedural, and remedial protections not afforded to members of society generally.

§ 1-102. Statutory construction.

Any ambiguities within the Law Enforcement Officers' Bill of Rights shall be resolved by providing a liberal interpretation to effectuate the policy statement in § 1-101. Any conflict between this bill of rights and any other state legislation shall be resolved to give effect to this act, which supersedes all state law to the contrary. Similarly, this bill of rights preempts all local law. The Administrative Procedures Act is applicable to the extent that it does not conflict with this bill of rights. However, none of the remedies in title 5 require an exhaustion of administrative remedies.

§ 1-103. Administrative regulations.

A law enforcement agency may promulgate administrative rules, regulations, and procedures necessary to implement this bill of rights.

Title 2. Definitions.**§ 2-101. Agency.**

Agency means a law enforcement agency.

§ 2-102. Circuit court.

In an action related to an administrative hearing, circuit court means the circuit court of the county where the administrative hearing was conducted or is scheduled to be conducted. Otherwise, circuit court means the circuit court of the county where a law enforcement officer regularly serves.

§ 2-103. Declaratory advocate.

A declaratory advocate is an individual selected by a law enforcement agency to represent the interest of the agency in a declaratory hearing. A declaratory advocate may be an attorney or non-attorney and may be a member of the agency or from outside the agency.

§ 2-104. Declaratory hearing.

A declaratory hearing is an administrative hearing, initiated by a law enforcement officer, against a law enforcement agency, seeking a declaration that a proposed personnel action is punitive and thus invalid without a finding of guilt pursuant to a disciplinary hearing.

§ 2-105. Disciplinary advocate.

A disciplinary advocate is an individual selected by a law enforcement agency to represent the interest of the agency in a disciplinary hearing. A disciplinary advocate may be an attorney or non-attorney and may be a member of the agency or from outside the agency.

§ 2-106. Disciplinary hearing.

A disciplinary hearing is an administrative hearing, initiated by a law enforcement agency, against a law enforcement officer, based on probable cause to believe that the officer has violated or is violating a rule, regulation, or procedure related to service as an officer and is subject to punitive personnel action. Such hearing results in a finding of guilty or not guilty as to each administrative charge and, if guilty, a recommendation as to punishment.

§ 2-107. Hearing board.

A hearing board is a three-member body selected (a) to make a finding of fact on the issue of guilt in a disciplinary hearing, and (b) to recommend the appropriate punishment in the event of a finding of guilt. Subject to the exceptions in § 4-301(i) for small law enforcement agen-

cies, a hearing board shall be composed of three members of the agency, selected from a nine-member hearing board panel, drawn in a neutral (preferably computerized) manner from a hearing board pool composed of all members of the agency, excluding the police chief and the second highest ranking officer.

§ 2-108. Hearing officer.

A hearing officer is the judge of law presiding over disciplinary and declaratory hearings within a given law enforcement agency. A hearing officer may not be a member of the agency and shall be selected, either on a permanent, case-by-case, or other basis, by the civilian agency under which the law enforcement agency serves.

§ 2-109. Interrogation.

A law enforcement officer is subjected to interrogation whenever the officer is subjected to any of the following:

- (a) questioning under circumstances that may lead to punitive personnel action;
- (b) conduct or words designed to elicit a response or should be known to be reasonably likely to elicit a response, regardless of whether a response is forthcoming, under circumstances that may lead to punitive personnel action;
- (c) a polygraph examination;
- (d) chemical testing;
- (e) preparing, completing, or submitting a report, document, or questionnaire, whether routine or otherwise, if prepared, completed, or submitted, as a result of conduct for which the officer is under investigation or comes under investigation as a result of the content of such report, document, or questionnaire.

§ 2-110. Investigation.

A law enforcement officer is under investigation whenever the law enforcement agency for which the officer serves, acting alone or in cooperation with another agency, or a division or unit within the agency, or an individual officer of the agency who is superior in rank to, and in the direct chain of command of, the officer, takes any action with regard to the officer, including, but not limited to, asking questions of other officers or civilians, conducting observations, evaluating reports, records, or other documents, and examining physical evidence, if such action is based on reasonable suspicion that the officer will in the future, is at that time, or has in the past violated a criminal or civil statute or regulation or violated a rule, regulation, or procedure related to service as an officer.

§ 2-111. Law enforcement agency.

A law enforcement agency is any state, county, city, or other governmental agency that has as its primary responsibility the prevention and detection of criminal activity or the enforcement of criminal, traffic, or related laws, including but not limited to, all police departments and sheriff departments.

§ 2-112. Law enforcement officer.

A law enforcement officer is a member of a law enforcement agency, either full-time or part-time, cadet or officer, probationary or non-probationary, commissioned or non-commissioned, career or non-career, tenured or non-tenured, merit or non-merit, paid or unpaid, who is serving in a position for which the primary responsibilities are the prevention and detection of criminal activity or the enforcement of criminal, traffic, or related laws. A law enforcement officer position is usually indicated by formal training (regardless of whether the officer has yet completed or even been assigned to such training) and usually is accompanied by the power of arrest.

§ 2-113. Notice.

Notice means written notice mailed or hand-delivered. Notice shall be provided directly to a law enforcement officer who is either not represented or who has a non-attorney representative. If the officer is represented by an attorney, notice shall be provided to the attorney. Notice to a law enforcement agency shall be provided to the declaratory advocate or disciplinary advocate. If such advocate has not yet been appointed, notice shall be provided to the police chief or his or her named designee for such purpose.

§ 2-114. Officer.

Officer means a law enforcement officer.

§ 2-115. Police chief.

Police chief is the chief of police, the acting chief of police, or the highest ranking officer of a law enforcement agency, regardless of the designation of such position.

§ 2-116. Prosecutor.

A prosecutor is an elected local or state prosecutor, state's attorney, or district attorney, or a designee thereof, or a United States attorney or an assistant United States attorney.

§ 2-117. Punitive personnel action.

Punitive personnel action is punishment imposed as a result of a finding of guilt in a disciplinary hearing.

(a) *Per se punitive.* The following personnel actions are per se punitive and thus may not be taken unless there has been a finding of guilt in a disciplinary hearing:

(1) dismissal from a law enforcement agency; such action, however, is non-punitive if the law enforcement officer is a recruit in training and the dismissal is based solely on the failure to meet minimum academic and performance standards;

(2) suspension from a law enforcement agency;

(3) demotion in rank;

(4) loss of base pay, leave pay, or leave time; and

(5) placement of adverse material in a law enforcement officer's record, including any temporary or permanent file relating to personnel, performance, promotion, or retirement matters.

(b) *Case-by-case determination of punitive.* The following personnel actions may be punitive, depending upon whether instituted for the purpose of punishment or as sound, discretionary management decisions based on the legitimate needs of a law enforcement agency to maintain an efficient and effective organization:

(1) loss of sick leave, shift pay, bonus pay, or overtime pay;

(2) involuntary transfer or reassignment; such action, however, is non-punitive as applied to a law enforcement officer with less than two years service.

(c) *Per se non-punitive.* Involuntary transfer or reassignment, dismissal, or early retirement is non-punitive if based on the certification of two physicians that, because of a medical condition, the law enforcement officer lacks the ability to perform at a minimally acceptable level and that no less drastic personnel action can accommodate both the needs of the officer and the law enforcement agency.

Title 3. Rights.

§ 3-101. Generally.

A law enforcement officer shall enjoy all of the rights, privileges, and protections afforded to members of society generally, regardless of whether the source is constitutional, statutory, regulatory, or otherwise. In no manner shall an officer be deemed to have fewer rights, privileges, or protections solely by virtue of his or her status as an officer. This includes the right to exercise any privilege or protection without fear of threat, harassment, retaliation, or punitive personnel action. Even though this section shall be deemed to encompass all rights, privileges, and protections, §§ 3-102 through 3-106 address rights, privileges, and protections of particular concern to officers.

§ 3-102. Bill of rights.

Each law enforcement officer shall receive a copy of this bill of rights, as well as all subsequent amendments by the legislature. Each officer shall receive a copy of all administrative regulations promulgated pursuant to this bill of rights. Such regulations shall contain at a minimum all conduct subject to punitive personnel action, including the maximum punishment for each violation. An officer may waive any right provided by this bill of rights, provided such waiver is in writing and contains the following language:

**WAIVER OF THE LAW ENFORCEMENT OFFICERS'
BILL OF RIGHTS**

The Law Enforcement Officers' Bill of Rights is designed to provide the law enforcement officer with certain substantive, procedural, and remedial protections not afforded to members of society generally. You are strongly urged not to waive any protection afforded by this bill of rights unless an attorney or other knowledgeable individual representing your interest believes that a waiver of a given right is in your best interest. It is a violation of your rights for any individual to obtain or attempt to obtain a waiver from you by trickery, harassment, or threat.

I, _____, have read and considered the above paragraph concerning waiver of my rights under the law enforcement officers' bill of rights. I have indicated my decision concerning waiver, this _____ day of _____, 19____, as follows:

(a) I *refuse to waive any* of my rights under the Law Enforcement Officers' Bill of Rights.

Signature

(b) I *do not waive all* of my rights under the Law Enforcement Officers' Bill of Rights. However, I *do waive the following* rights, either designated by section or explained as follows: _____

Signature

(c) I *wave all* of my rights under the Law Enforcement Officers' Bill of Rights.

Signature

§ 3-103. Collective bargaining agreement.

A law enforcement officer is entitled to all substantive and procedural benefits contained in a collective bargaining agreement. Such negotiated rights may be used by an officer in lieu of, or in addition to, this bill of rights.

§ 3-104. Political activity and other first amendment interests.

A law enforcement officer, when off-duty and when not acting in an official capacity, shall enjoy the same right to engage in political activity and the same freedoms of speech, expression, and association afforded to members of society generally, subject to reasonable regulation by a law enforcement agency with regard to association with known felons.

§ 3-105. Right of non-disclosure.

A law enforcement officer shall not be required to disclose any personal, family, or financial information relating to himself or herself or any member of his or her family or household, subject to reasonable regulation by a law enforcement agency with regard to the mental and physical capabilities necessary to perform as an officer.

§ 3-106. Fourth, fifth, and sixth amendments.

A law enforcement officer shall enjoy the full complement of all constitutional protections afforded to members of society generally by the fourth, fifth, and sixth amendments to the United States Constitution, as made applicable to the states through the due process clause of the fourteenth amendment.

§ 3-107. Due process of law.

A law enforcement officer shall be afforded due process of law. In determining due process rights, an officer's position of employment shall be deemed a property interest, protected by the due process clause of the fourteenth amendment, at such time as the officer has successfully completed all training and probationary periods, but in no event later than two years after the commencement of service as an officer.

§ 3-108. Secondary employment.

A law enforcement officer is entitled to engage in secondary employment, subject to reasonable regulation by a law enforcement agency. An officer who is licensed to practice law may not be prohibited from providing legal representation to another officer, even in matters with or against the agency, solely because both the attorney and the client are members of the same agency.

Title 4. Procedures.**Subtitle 1. Investigation.****§ 4-101. Notice of investigation.**

A law enforcement officer under investigation shall be notified of the investigation within five days of the commencement of the investigation. Notice shall include the general nature and scope of the investigation and all criminal, civil, and departmental violations for which reasonable suspicion exists. No investigation based on a complaint from outside the law enforcement agency may commence unless the complainant provides a signed and notarized detailed statement. An investigation based on a complaint from outside the agency shall commence within 15 days of receipt of the complaint by the agency.

The notice requirement is continuing in nature in the event of a change in the nature or scope of an investigation or the possible crimes or violations arising therefrom. The notice requirement is waived if the agency is investigating a matter it considers criminal, and not administrative, in which event the agency is precluded from instituting administrative charges against the officer unless and until criminal charges are filed against the officer by the prosecutor.

Subtitle 2. Interrogation.**§ 4-201. Prior to interrogation.**

(a) *Notice of interrogation.* A law enforcement agency shall notify a law enforcement officer of its intent to subject the officer to interrogation at least 72 hours prior to interrogation. The notice shall include the name, rank, and command of the interrogating officer and one other person, if applicable, to be present during interrogation.

(b) *Notice of right to a representative.* A law enforcement agency shall notify the law enforcement officer at least 72 hours prior to the interrogation of the right to have a representative present during the entire interrogation and available at all times for consultation. The representative may be an attorney or non-attorney. The notice shall include the fact that the officer is entitled to 10 days to retain an attorney or five days to secure a non-attorney representative and is entitled to a postponement of interrogation, if necessary, to satisfy the time requirements.

(c) *Notice of administrative-criminal election.* A law enforcement agency shall notify the law enforcement officer of its administrative-criminal election at least 72 hours prior to interrogation. The three election options are as follows:

(1) *Notice of a grant of informal transactional immunity provided by the law enforcement agency.* A grant of informal transactional immunity provided by the law enforcement agency means that the agency is precluded from seeking any criminal charge for any crime arising from the named transaction. A copy of the grant of immunity shall

accompany the agency's notice of election. The notice shall include the legal consequences, which are (a) that the law enforcement officer must answer all questions specifically, narrowly, and directly related to his or her service as an officer; (b) that the answering of such questions bars the agency from seeking criminal charges for any crime arising from the named transaction; (c) that the failure to answer the questions permits the agency to seek criminal charges for any crime arising from the named transaction; and (d) that the content of the answers to such questions or the failure to provide answers, as the case may be, may result in a disciplinary hearing and punitive personnel action.

(2) *Notice of a grant of formal immunity provided by the prosecutor.* A formal grant of immunity provided by the prosecutor means that the prosecutor has formally conferred upon the law enforcement officer either (a) transactional immunity, meaning that the prosecutor is precluded from charging the law enforcement officer with any crime arising from the named transaction, or (b) use and derivative use immunity, meaning that no testimonial evidence, compelled pursuant to the grant of immunity, nor any fruits thereof, may be used against the officer in any criminal proceeding. A copy of the grant of immunity shall accompany the agency's notice of election. The notice shall include the legal consequences, which are (a) that the officer must answer all questions within the scope of the grant of immunity; (b) that the answering of such questions bars all prosecutors from using the testimonial evidence provided pursuant to the grant of immunity, and any other evidence derived therefrom, in any criminal proceeding against the defendant (in the event of a grant of transactional immunity, it bars the jurisdiction granting it from seeking criminal charges for any crime arising from the named transaction); (c) that the failure to answer such questions may result in criminal contempt proceedings and possible incarceration; and (d) that the content of the answers to such questions or the failure to provide answers, as the case may be, may result in a disciplinary hearing and punitive personnel action.

(3) *Notice of the election to provide no immunity.* The failure to provide immunity means that the law enforcement agency has preserved all options to proceed in an administrative proceeding, in a criminal proceeding, or both. This notice shall include the legal consequences, which are (a) that the matter under investigation may be pursued in an administrative proceeding, in a criminal proceeding, or both; (b) that the officer has the right to have an attorney present during questioning and that if the officer cannot afford an attorney, one will be provided for the officer; (c) that the officer has an absolute right to remain silent and will not be compelled to answer any questions; (d) that if the officer invokes the right to remain silent, no punitive personnel action can be taken, or threatened to be taken, against the officer and no adverse inference can be drawn against the officer in either a criminal or administrative proceeding; and (e) if the officer chooses to answer any question, such answer

may be used against the officer in a criminal proceeding, an administrative proceeding, or both.

(4) *Modification of election.* If a law enforcement agency elects either informal or formal immunity, it may not subsequently rescind that election. However, the agency, having elected either informal or formal immunity, may add a second immunity election, either unilaterally or after negotiation with the officer. If an agency makes no immunity election, subsequently it may replace its no immunity election with an election of informal immunity, formal immunity, or both.

§ 4-202. During interrogation.

(a) *Right to a representative.* The law enforcement officer has the right to retained counsel, appointed counsel, or a non-attorney representative, as applicable under § 4-201(b), (c)(3).

(b) *Conditions of interrogation.* Interrogation shall:

(1) be conducted at a reasonable time, preferably while the law enforcement officer is on duty;

(2) be conducted at a reasonable location, preferably at the office of the command of the investigating officer, at the office of the command of the law enforcement officer being interrogated, or at the office of the command nearest to where the conduct under investigation allegedly occurred;

(3) continue only for a reasonable period of time, permitting reasonable breaks for personal hygiene, meals, and rest;

(4) be conducted by one interrogator, with no more than one other person present (excluding a court reporter, if used) for the purpose of consultation with the interrogator; and

(5) be recorded by audio tape, video tape, or transcription and, upon request by the law enforcement officer, shall be provided, within 10 days after the interrogation.

Subtitle 3. Disciplinary hearing.

§ 4-301. Prior to disciplinary hearing.

(a) *Notice of disciplinary charges.* No disciplinary charges may be brought against a law enforcement officer unless filed within 90 days of the commencement of an investigation, except for good cause shown, in which case charges shall be filed within 120 days of the commencement of an investigation. The law enforcement agency shall notify the law enforcement officer of all disciplinary charges pending against the officer not later than five days after the decision to charge. Notice shall include (1) the right to be represented by an attorney or non-attorney representative at all stages of the administrative proceedings; (2) the administrative-criminal election (in the event that the officer was not previously interrogated and therefore not previously notified of the agency's election under § 4-201(c)); and (3) the right to have the issue of guilt decided either by a

hearing board or by a hearing officer and that such election must be made by the later of 30 days before the hearing or 10 days after notification of the hearing date.

(b) *Notice of disciplinary hearing.* The law enforcement agency shall notify the law enforcement officer, not later than 30 days after the notice of disciplinary charges, of the following:

(1) the date, time, and location of the disciplinary hearing; such hearing shall take place not sooner than 30 days and not later than 60 days subsequent to this notice;

(2) the name and mailing address of the hearing officer; and

(3) the name, rank, and command of the disciplinary advocate, if a law enforcement officer, or the name, position, and mailing address of the disciplinary advocate, if not a law enforcement officer.

Subsequent to this notice, the management of the administrative proceedings shall be under the exclusive control of the hearing officer and the agency's legal position shall be represented exclusively by the disciplinary advocate.

(c) *Change of venue.* If the law enforcement officer is subject to a punishment of dismissal from the law enforcement agency, the officer is automatically entitled to a change of venue. If the officer is not subject to dismissal or the law enforcement agency has waived, in writing, the use of dismissal as a possible punishment, the officer is entitled to a change of venue only upon a showing of a strong likelihood that the actions of the hearing board, the hearing officer, or the police chief, as to the issue of either guilt or punishment, would not be based solely on the evidence or would be based on improper motive or bias. Such motion for change of venue shall be made by the later of 30 days prior to the hearing or 10 days after receipt of the notice of hearing date. Such motion shall be ruled on by the hearing officer, unless the requested change of venue is based on alleged improper motive or bias of the hearing officer, in which case the motion for change of venue shall be ruled on by the police chief.

A change of venue, whether automatic or granted, shall be implemented by moving the disciplinary hearing to another law enforcement agency, using such other agency's police chief, hearing officer, and hearing board. The law enforcement officer entitled to or granted a change of venue may waive moving the disciplinary hearing, in which case the disciplinary hearing shall be conducted in the accused officer's agency, using his or her hearing officer and police chief, but using a hearing board selected from another agency.

(d) *Discovery.* The law enforcement agency and the law enforcement officer shall be entitled to whatever discovery, e.g., interrogatories, depositions, production of documents, would be available if the matter were in a circuit court.

(e) *Notice of witnesses.* The disciplinary advocate shall notify the law enforcement officer, not later than 15 days prior to the hearing, of the names and addresses of all witnesses for the law enforcement agency.

(f) *Production of investigation file.* The disciplinary advocate shall provide to the law enforcement officer not later than 15 days prior to the hearing, a copy of the investigation file, including all exculpatory and inculpatory information, but excluding confidential sources.

(g) *Examination of physical evidence.* The disciplinary advocate shall notify the law enforcement officer, not later than 15 days prior to the hearing, of all physical, non-documentary evidence, and provide a reasonable date, time, place, and manner for the officer to examine such evidence not later than 10 days prior to the hearing.

(h) *Negotiated plea.* The law enforcement officer and the disciplinary advocate may, at any time prior to a finding of guilt, negotiate a disposition of the charges, a maximum punishment, or both. Such negotiated disposition may include an admission of guilt, silence as to guilt, or an assertion of not guilty by the accused officer.

(i) *Election of disciplinary hearing finder of fact.* The law enforcement officer shall notify the hearing officer of his or her election to have the issue of guilt decided by a hearing board or by the hearing officer. Such election shall be made by the later of 30 days prior to the hearing or 10 days after receipt of the notice of hearing date. Such election shall include whether the officer demands at least one member of the hearing board to be equal in rank to the accused officer. If no timely election is made, a hearing board shall be deemed waived and the officer shall have the issue of guilt decided by the hearing officer. If an election of a hearing board is made, the hearing officer shall provide to the law enforcement officer and the disciplinary advocate, not later than 20 days prior to the hearing, a written list of the nine-member hearing board panel. Each party may exercise three peremptory strikes by notifying the hearing officer of the names struck, not later than 10 days prior to the hearing. If the accused officer demanded at least one member of the hearing board to be equal in rank to the accused officer, the disciplinary advocate may not exercise peremptory strikes to strike all members equal in rank to the accused, if any, on the hearing board panel. No additional strikes of any kind may be exercised. In the event that less than six members of the hearing board panel are struck, the hearing officer shall appoint as the hearing board the three highest ranking officers not struck from the hearing board panel list. If the accused officer demanded at least one member of the hearing board to be equal in rank to the accused officer, but no member of the hearing board panel is equal in rank to the accused officer, the hearing officer shall draw, from the hearing board pool, the next officer equal in rank to the accused officer. This officer shall be named to the hearing board in lieu of the lowest ranking officer then on the hearing board.

A law enforcement agency composed of less than 100 law enforcement officers may use a seven-member hearing board panel, with two peremptory strikes for each party. An agency composed of less than 50

officers may use a five-member hearing board panel, with one peremptory strike for each party.

§ 4-302. During a disciplinary hearing.

(a) *Compel testimony and documentary evidence.* The hearing officer shall have the power to issue summonses to compel testimony of witnesses and to compel the production of documentary evidence. If confronted with a failure to comply with a summons, the hearing officer may petition the circuit court to issue an order, with failure to comply being subject to contempt of court.

(b) *Pre-hearing motions.* Each party may file pre-hearing motions. Such motions shall be filed not later than 10 days prior to the hearing. The hearing officer may rule on any motion in writing prior to the hearing or may rule on the record at the start of the hearing.

(c) *Access to hearing.* All disciplinary hearings shall be open to the public unless the accused law enforcement officer requests a closed hearing, in which case the hearing shall be open only to those invited by the accused officer.

(d) *Record of hearing.* All aspects of the hearing, including pre-hearing motions, shall be recorded by audio tape, video tape, or transcription.

(e) *Sequestration of witnesses.* Either party may move for sequestration of witnesses.

(f) *Oath or affirmation.* The hearing officer shall administer an oath or affirmation to each witness, who shall testify subject to the applicable laws of perjury.

(g) *Opening statement.* Each party is entitled to make an opening statement.

(h) *Evidentiary rulings and legal adviser.* The laws and rules of evidence for administrative hearings shall apply, and all rulings shall be made by the hearing officer, either in response to a motion or objection or sua sponte. The hearing officer may have present, or on call, an attorney adviser, who may not be (1) a member of the law enforcement agency, (2) on a legal staff that represents the law enforcement agency, or (3) selected by, or subject to the approval of, the law enforcement agency.

§ 4-303. Disposition of disciplinary hearing by hearing board.

(a) *Ruling on burden of production.* At the conclusion of the hearing, outside the presence of the hearing board, the hearing officer shall rule, and may permit argument on, whether the disciplinary advocate has met his or her burden of production by establishing a prima facie case as to each charge. The hearing officer shall enter a verdict of not guilty for any charge for which a prima facie case was not established.

(b) *Written instructions to the hearing board.* Any charge for which a prima facie case has been established shall be submitted to the hearing

board for a finding of fact. Prior to such submission, each party is entitled to make one closing argument without rebuttal. The hearing officer shall provide the following items, in writing, to the hearing board for its deliberations:

- (1) a verdict sheet listing each charge;
- (2) a list containing each element that must be established to constitute each charge;
- (3) instructions that the hearing board should not consider punishment when determining the issue of guilt;
- (4) instructions that a finding of guilt requires a majority vote of the hearing board;
- (5) instructions that no member of the hearing board may vote for guilt as to any charge unless that member finds that the disciplinary advocate has established by clear and convincing evidence each element of the charge and that the conduct was committed by the accused law enforcement officer, either as the actual perpetrator or as an accomplice.

(c) *Findings by the hearing board.* The hearing board shall submit its finding of guilty or not guilty for each charge on the verdict sheet provided, which shall be made a part of the record.

(d) *Recommendation of punishment by the hearing board.* Each charge for which the hearing board finds guilt shall be resubmitted to the hearing board for a recommendation of punishment. Prior to such resubmission, each party is entitled to present evidence relevant to the accused officer's degree of culpability, his or her record as a law enforcement officer, and any other information relevant to the appropriate punishment. Each party is entitled to make one closing argument without rebuttal. For its deliberations, the hearing board shall be provided with a written list of all possible punishments for each charge for which guilt was found. Additionally, the disciplinary advocate may submit his or her recommended punishment for each charge. If guilt was found on more than one charge, the disciplinary advocate may submit, in addition, his or her recommended overall punishment, which may be different than the sum of the individual punishments. The hearing board shall be instructed to make a recommendation as to the appropriate punishment for each guilty charge, as well as an appropriate overall punishment, which may be different than the sum of the individual punishments.

(e) *Recommendations and report of the hearing officer.* The hearing officer shall submit a written report, with a copy to each party, not later than 15 days after the conclusion of the hearing, to the police chief, which shall contain the following:

- (1) the hearing board's finding of guilty or not guilty for each charge;
- (2) the hearing board's recommendation as to the appropriate punishment for each charge for which guilt was found, as well as the board's recommendation for the appropriate overall punishment;
- (3) whether the hearing officer believes that each finding of guilt

is correct or whether the finding of guilt goes against the weight of the evidence; for each charge for which the hearing board entered a finding of guilt, there shall be an appropriate discussion of the law and the facts; and

(4) the hearing officer's recommendation as to the appropriate punishment for each charge for which guilt was found, as well as the hearing officer's recommendation for the appropriate overall punishment.

(f) *Order and report of the police chief.* The police chief shall file a written order, with a copy to each party, not later than 30 days after receipt of the hearing officer's report. The police chief is bound by each not guilty finding of the hearing board and by each guilty finding of the hearing board in which the hearing officer concurred. As to any guilty finding of the hearing board in which the hearing officer did not concur, the police chief may make a finding of guilty or not guilty. The police chief shall determine the punishment for each charge of guilty, as well as the overall punishment. The punishment for any charge may be no more severe than the greater of the two recommended punishments for that charge. Similarly, the overall punishment may be no more severe than the greater of the two recommended overall punishments.

§ 4-304. Disposition of disciplinary hearing by hearing officer.

(a) *Findings by the hearing officer.* At the conclusion of the hearing, each party is entitled to make one closing argument without rebuttal. The hearing officer shall make his or her finding of guilty or not guilty for each charge, with a finding of guilt requiring clear and convincing evidence.

(b) *Recommendation of punishment by the hearing officer.* As to each charge for which the hearing officer found guilt, each party is entitled to present evidence relevant to the accused officer's degree of culpability, his or her record as a law enforcement officer, and any other information relevant to the appropriate punishment. Each party is entitled to make one closing argument without rebuttal.

(c) *Recommendations and report of the hearing officer.* The hearing officer shall submit a written report, with a copy to each party, not later than 15 days after the conclusion of the hearing, to the police chief, which shall contain the following:

(1) the hearing officer's finding of guilty or not guilty for each charge; for each finding of guilt, there shall be an appropriate discussion of the law and the facts; and

(2) the hearing officer's recommendation as to the appropriate punishment for each charge for which guilt was found, as well as the hearing officer's recommendation for the appropriate overall punishment, if guilt was found on more than one charge.

(d) *Order and report of the police chief.* The police chief shall file a

written order, with a copy to each party, not later than 30 days after receipt of the hearing officer's report. The police chief is bound by each finding of guilty and not guilty. The police chief shall determine the punishment for each charge of guilt, as well as the overall punishment. The punishment on any charge, as well as the overall punishment, may be no more severe than that recommended by the hearing officer.

Subtitle 4. Declaratory hearings.

§ 4-401. Prior to declaratory hearing.

(a) All personnel actions under § 2-117(a) are per se punitive, and the law enforcement agency may not take such action unless there has been a finding of guilt under § 4-303 or § 4-304; consequently, personnel actions under § 2-117(a) cannot be the subject of a declaratory hearing.

(b) The law enforcement agency shall notify the law enforcement officer of any personnel action under § 2-117(b), not later than five days after the decision to take such personnel action. Notice shall include the effective date of such action, which may be no sooner than 20 days subsequent to this notice. The officer shall also be notified that he or she has the right to demand a declaratory hearing to determine whether such action is punitive or non-punitive. Additionally, the officer shall be notified that he or she has a right to be represented by an attorney or non-attorney representative at all stages of the administrative proceedings.

(c) If the law enforcement officer requests a hearing within 15 days of receipt of notice of the proposed personnel action, such personnel action shall be stayed pending the outcome of the hearing.

(d) The law enforcement agency shall notify the officer, not later than 30 days after the notice of demand for hearing, of the following:

(1) the date, time, and location of the hearing; such hearing shall take place not sooner than 15 days and not later than 45 days subsequent to this notice;

(2) the name and mailing address of the hearing officer; and

(3) the name, rank, and command of the declaratory advocate.

Subsequent to this notice, the management of the administrative proceedings shall be under the exclusive control of the hearing officer and the agency's legal position shall be represented exclusively by the declaratory advocate.

§ 4-402. During declaratory hearing.

A declaratory hearing shall be conducted in the manner required for a disciplinary hearing under § 4-302.

§ 4-403. Disposition of declaratory hearing.

(a) At the conclusion of the hearing, each party is entitled to make one closing argument without rebuttal. The hearing officer shall deter-

mine whether the personnel action at issue is punitive or non-punitive, with the burden of persuasion on the declaratory advocate to establish, by a preponderance of the evidence, that the action is non-punitive.

(b) The hearing officer shall submit a written report, with a copy to each party, not later than 15 days after the conclusion of hearing, to the police chief, explaining the reasons for the finding. The police chief is bound by the hearing officer's finding. If the personnel action is found to be non-punitive, it may take effect immediately. If the personnel action is found to be punitive, it is null and void.

Subtitle 5. Temporary extraordinary procedures.

§ 4-501. Temporary extraordinary procedures.

The police chief may order suspension with pay or an involuntary reassignment for a law enforcement officer for whom there is probable cause to believe that the officer (a) has committed a felony, (b) has committed a crime of violence, (c) has committed a crime of moral turpitude, (d) poses immediate threat to the safety of self or others, or (e) poses immediate threat to the property of others. The officer shall be provided, not later than 48 hours after such suspension or reassignment, a written order setting forth which one or more of the five reasons above support such action in the officer's case.

(a) *Criminal charges.* If, within 15 days after the written order, the law enforcement officer is formally charged, by grand jury indictment or criminal information, with a felony, crime of violence, or crime of moral turpitude, the police chief may continue suspension with pay or involuntary reassignment or may order suspension without pay. If the officer is subsequently found guilty of, and sentenced for, a felony, crime of violence, or crime of moral turpitude, the officer is subject to any punitive personnel action without a hearing. If the officer is subsequently found not guilty of all charges of a felony, crime of violence, or crime of moral turpitude, the officer shall be returned to duty in the status that existed prior to the extraordinary procedure, including back pay and benefits for any time suspended without pay. However, the law enforcement agency may institute regular disciplinary proceedings against the officer while criminal charges are pending or after a finding of not guilty, even though the administrative charges arise out of the same conduct involved in the criminal charges.

(b) *Civil commitment.* If, within 15 days after the written order, the law enforcement officer is civilly committed as posing immediate threat to the safety of self or others or posing immediate threat to the property of others, the police chief may continue suspension with pay or involuntary reassignment or may order suspension without pay or placement on sick leave, as appropriate. If the officer is subsequently released from civil commitment, the officer shall be returned to duty in the status that existed prior to the extraordinary procedure, including back pay and

benefits for any time suspended without pay. However, the law enforcement agency may institute regular disciplinary proceedings against the officer once returned to duty, even though the administrative charges arise out of the same conduct for which the officer was civilly committed.

(c) *Neither criminal charges nor civil commitment.* If, within 15 days after the written order, the law enforcement officer is neither formally charged with a felony, crime of violence, or crime of moral turpitude, nor civilly committed as posing immediate threat to the safety of self or others or posing immediate threat to the property of others, the officer shall be returned to duty in the status that existed prior to the extraordinary procedure. However, the law enforcement agency may institute regular disciplinary proceedings against the officer, even though the administrative charges arise out of the same conduct for which extraordinary procedures were used.

Title 5. Remedies

§ 5-101. Grievance.

A state agency outside the law enforcement agency shall establish a law enforcement officer grievance procedure, which may utilize grievance procedures already in effect for other public employees. A law enforcement officer may file a grievance against any other law enforcement officer for past, present, or threatened denial of any right provided by constitution, statute, regulation, or otherwise, provided such denial is related to the aggrieved officer's service as an officer. An officer may use the grievance procedure in addition to, or in lieu of, any other remedy in this title. However, no other remedy is foreclosed because of the failure to pursue a remedy through the grievance procedure.

§ 5-102. Injunction.

(a) *To the hearing officer.* A law enforcement officer, charged under § 4-301, who is being denied, by a law enforcement agency, any right provided by constitution, statute, regulation, or otherwise, may petition the hearing officer for an injunction, prohibiting the law enforcement agency from violating the law. Such petition for injunctive relief must be filed not later than 10 days prior to the hearing or 48 hours subsequent to the alleged denial of the right, whichever comes later. The filing of a petition stays the hearing until the hearing officer rules upon the petition.

(b) *To the circuit court.* A law enforcement officer, charged under § 4-301, whose petition for injunctive relief under § 5-102(a) is denied, or who is otherwise still being denied any right afforded by constitution, statute, regulation, or otherwise, may petition the circuit court for an injunction, prohibiting the law enforcement agency from violating the law. Such petition shall be filed not later than 10 days prior to the hearing or 48 hours subsequent to the notice of denial of injunctive relief by

the hearing officer, whichever comes later. The filing of a petition stays the hearing until the circuit court rules upon the petition.

(c) *To the intermediate appellate court.* A ruling by the circuit court under § 5-102(b) is immediately appealable to the intermediate appellate court by either the law enforcement officer or the law enforcement agency. Notice of appeal shall be filed not later than 10 days prior to the hearing or 48 hours subsequent to the notice of the denial or grant of injunctive relief by the circuit court, whichever comes later. The filing of a notice of appeal stays the hearing until the intermediate appellate court rules upon the petition.

§ 5-103. Declaratory relief.

(a) *To the circuit court.* A law enforcement officer, not charged under § 4-301 and not eligible for a declaratory hearing under § 4-401, who is being denied, by the law enforcement agency, any right provided by constitution, statute, regulation, or otherwise, may file an action for declaratory relief in the circuit court, provided the officer submitted to the police chief a notice of demand of such right and such right was not afforded within 15 days.

(b) *To the intermediate appellate court.* A ruling by the circuit court under § 5-103(a) may be appealed to the intermediate appellate court by either the law enforcement officer or the law enforcement agency. Notice of appeal shall be filed with the circuit court not later than 30 days subsequent to the order of the circuit court.

§ 5-104. Appeal from disciplinary or declaratory hearing.

(a) *To the circuit court from a disciplinary hearing.* A law enforcement officer may appeal from a decision of guilt rendered under § 4-303 or § 4-304. Notice of appeal shall be filed with the circuit court not later than 30 days after the order and report of the police chief. Such appeals shall be argued on the record from the administrative agency, unless the punishment is dismissal. If the punishment is dismissal, the appeal shall be in the form of a trial de novo. A law enforcement agency may not appeal a decision rendered under § 4-303 or § 4-304.

(b) *To the circuit court from a declaratory hearing.* Either a law enforcement officer or a law enforcement agency may appeal a decision rendered under § 4-403. Notice of appeal shall be filed with the circuit court not later than 30 days after the report of the hearing officer.

(c) *To the intermediate appellate court.* A ruling by the circuit court under § 5-104(a) or § 5-104(b) may be appealed to the intermediate appellate court by the law enforcement officer or the law enforcement agency. Notice of appeal shall be filed with the circuit court not later than 30 days after the order of the circuit court.

§ 5-105. Civil suit.

A law enforcement officer who has been harmed by any individual may file suit against such individual seeking money damages. No law may limit a cause of action solely because the plaintiff is a law enforcement officer.

§ 5-106. Legal defense.

A law enforcement officer, against whom a civil suit is filed, shall be entitled to legal representation from the law enforcement agency, provided that the cause of action arose in the scope of the officer's service as a law enforcement officer. If legal representation is denied, the officer may seek declaratory relief under § 5-103.

§ 5-107. Attorney's fees.

(a) *Right to attorney's fees.* A law enforcement officer shall be entitled to reasonable attorney's fees if he or she prevails in any of the following actions, and may be entitled to reasonable attorney's fees if he or she prevails in part:

- (1) a disciplinary hearing under § 4-303 or § 4-304;
- (2) a declaratory hearing under § 4-403;
- (3) a grievance under § 5-101;
- (4) an injunction under § 5-102;
- (5) declaratory relief under § 5-103;
- (6) an appeal under § 5-104; and
- (7) a petition for attorney's fees under § 5-107(b).

(b) *Petition to the circuit court.* A law enforcement officer entitled to attorney's fees under § 5-107(a) may petition the circuit court for an order establishing the right to, and the amount of, attorney's fees.