Washington and Lee Law Review

Volume 44 | Issue 1 Article 13

Winter 1-1-1987

Use Immunity Advisements And The Public Employee'S Assertion Of The Fifth Amendment Privilege Against Self-Incrimination

USE IMMUNITY ADVISEMENTS AND THE PUBLIC EMPLOYEE'S ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Over the past two decades, United States federal and state courts have struggled to reconcile the conflict between a public employee's right against compelled self-incrimination[1] and a government employer's right to question

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1. *See* U.S. CONST. amend. V. The fifth amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself". *Id.* The fifth amendment's guarantee against compelled self-incrimination applies to state actions through the fourteenth amendment. *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964) (protection of fifth amendment applies to state action through fourteenth amendment due process clause); U.S. CONST. amend. XIV. (no state shall deprive a person of life, liberty, or property without due process of law). Historically, the United States Supreme Court has construed the fifth amendment liberally to serve the purposes of the amendment. *See, e.g.*, Ullman v. United States, 350 U.S. 422, 426 (1956) (hostile and niggardly interpretation of fifth amendment is improper); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) (fifth amendment must have broad construction); Boyd v. United States, 116 U.S. 616, 635 (1886) (strict and literal construction of fifth amendment privilege leads to unacceptable deterioration of right).

The Supreme Court has articulated several central purposes which guide the Court's interpretation of the fifth amendment. First, the Supreme Court has noted that accusatorial criminal justice systems are favored over inquisitorial systems. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Second, confronting a subject of questioning with the choice between self-incrimination, perjury, or contempt is offensive. Brown v. Walker, 161 U.S. 591, 637 (1896) (Field, J., dissenting). Third, authorities might use improper practices to coerce testimony in the absence of the fifth amendment privilege. *Murphy*, 378 U.S. at 55. Finally, the Supreme Court has noted that coerced statements generally are unreliable sources of evidence. Michigan v. Tucker, 417 U.S. 433, 448-49 (1974).

The underlying policies and the liberal construction of the fifth amendment have produced non-literal definitions for key phrases within the text of the fifth amendment. For fifth amendment purposes, "persons" include all natural individuals. United States v. White, 322 U.S. 694, 698 (1944); *see* Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (fifth amendment protection applies to all individuals, including public employees); *see also* Bellis v. United States, 417 U.S. 85, 95 (1974) (partnership cannot claim fifth amendment privilege); George Campbell Painting Corp. v. Reid, 392 U.S. 286, 289 (1968) (corporation cannot claim fifth amendment privilege); United States v. White, 322 U.S. 694, 701 (1944) (labor union cannot claim fifth amendment privilege). Compulsion entails any official coercion to respond to questions after invoking the fifth amendment privilege. United States v. Washington, 431 U.S. 181, 187 (1977); *see* Blackburn v. Alabama, 361 U.S. 199, 206 (1960) (physical and mental coercion may constitute compulsion for fifth amendment purposes). A "criminal case" under the fifth amendment involves any proceeding in which answers to questions might tend to incriminate the witness in a subsequent criminal proceeding. Hoffman v. United States, 341 U.S. 479, 486-87 (1951). Being a witness against oneself encompasses giving testimony or evidence of a testimonial or communicative nature. *See* Schmerber v. California, 384 U.S. 757, 761 (1966) (evidence pertaining to physical characteristics of witness obtained by blood test not testimonial or communicative in nature). *See generally* Arenella, Shmerber *and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31 (1982) (discussing

employees on matters related to the employee's official duties.[2] Several United States Supreme Court decisions have established the concept of use immunity[3] and have created guidelines that preserve the rights of a public

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impact of modern Supreme Court decisions on scope of fifth amendment); Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change*, 37 U. CIN. L. REV. 679 (1968) (reexamining purposes and policies of fifth amendment); McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193 (discussing problems in fifth amendment law arising from modern interpretations of privilege against self-incrimination).

2. *See* Lefkowitz v. Turley, 414 U.S. 70, 84 (1973) (state may force employee or public contractor to answer questions when state offers immunity sufficient to supplant fifth amendment privilege); Navy Pub. Works Center v. FLRA, 678 F.2d 97, 102 (9th Cir. 1982) (employer has right to require employee to account for performance of employee's duties); Clifford v. Shoultz, 413 F.2d 868, 876 (9th Cir.) (employer has right to demand answers from employee on matters of national security), *cert. denied*, 396 U.S. 962 (1969).

3. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972) (use immunity is coextensive with scope of fifth amendment privilege); Murphy v. Waterfront Comm'n., 378 U.S. 52, 79 (1964) (use immunity necessary when government compels testimony); Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892) (federal statute must supply immunity from use of evidence that is fruit of compelled testimony). Immunity provisions and the fifth amendment privilege against compelled self-incrimination have had a long and intimate relationship. The United States Supreme Court's first encounter with a federal immunity statute enacted to supplant the fifth amendment privilege came in *Counselman v. Hitchcock. Counselman*, 142 U.S. 547 (1892). In *Counselman*, a federal district court found a witness in contempt because the witness refused to answer questions before a grand jury. *Id.* at 552. The witness claimed the fifth amendment privilege and challenged a federal immunity statute on the ground that the statute did not provide the witness with protection sufficient to satisfy the fifth amendment. *Id.* The Supreme Court invalidated the federal immunity statute because the statute did not provide the witness protection from the subsequent use of evidence derived from the testimony that the witness gave under the compulsion of the federal immunity statute. *Id.* at 586.

The Supreme Court confronted a revised immunity statute in *Brown v. Walker. Brown*, 161 U.S. 591 (1896). In *Brown*, a federal district court found a witness in contempt because the witness refused to answer questions before a grand jury. *Id.* at 593. The witness asserted the fifth amendment privilege and challenged the federal immunity statute. *Id.* The witness claimed that the fifth amendment prohibited the use of any immunity provision to compel testimony over a valid assertion of the fifth amendment privilege. *Id.* at 595. The Supreme Court, however, upheld the use of the federal immunity statute that provided complete amnesty from prosecution related to the acts about which the witness testified and that provided derivative-use immunity to the compelled testimony. *Id.* at 608. The Supreme Court, therefore, confined the protection of the fifth amendment strictly to criminal prosecution consequences. *Id.* The federal immunity statute in *Brown* provided the witness with "transactional immunity". Until the Supreme Court's decision in *Murphy v. Waterfront Commission*, courts held that transactional immunity was required to supplant the fifth amendment privilege. Murphy v. Waterfront Commission, 378 U.S. 52 (1964). In *Murphy*, the Supreme Court found that the fifth amendment demanded protection from only the use of a witness' testimony and the use of any evidence derived from the witness' testimony. *Id.* at 79. Use immunity, therefore, became the standard of immunity to displace a claim of the fifth amendment privilege, and transactional immunity became defunct. *Id.* Since the decision in *Murphy*, the Supreme Court firmly has upheld federal and state use immunity statutes. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972) (upholding federal use immunity statute); Zicarelli v. New Jersey, 406 U.S. 472, 475 (1972) (upholding state use immunity statute). The Supreme Court appears resolute in demanding only use immunity because use immunity essentially gives the witness the same status with respect to future criminal proceedings as if the witness had remained

employer and a government employee without significant damage to either right.[4] When government authorities question a public employee, the employee has the right to claim the fifth amendment privilege against self-incrimination.[5] An employee's assertion of the fifth amendment privilege is valid without regard to the circumstances in which government officials question the public employee.[6] An employee, however, must assert his fifth amendment right affirmatively.[7] Furthermore, to assert the privilege properly, the employee must have a reasonable belief that his answers to the employer's questions might incriminate the employee in a subsequent criminal proceeding.[8] An employer may not take disciplinary action against a

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silent. *See Kastigar*, 406 U.S. at 453 (use immunity gives witness who testifies under compulsion identical status with respect to future criminal prosecution as witness who remains silent and, therefore, is sufficent to supplant fifth amendment privilege).

4. *See infra* notes 5-14 and accompanying text (discussing legal guidelines for public employers conducting investigative interview with public employee).

5. *See* Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 284-85 (1968) (public employee may claim fifth amendment privilege in employment disciplinary proceeding); Gardner v. Broderick, 392 U.S. 273, 276 (1968) (public employee's assertion of fifth amendment privilege is proper in employment disciplinary proceeding); Spevack v. Klein, 385 U.S. 511, 516 (1967) (state cannot extend fifth amendment privilege to some individuals and not to others).

6. *See* Maness v. Myers, 419 U.S. 449, 464 (1975) (fifth amendment applies to any proceeding); Kastigar v. United States, 406 U.S. 441, 444 (1972) (fifth amendment privilege applies to any proceeding); *In re* Gault, 387 U.S. 1, 49 (1967) (propriety of asserting fifth amendment privilege does not depend upon nature of proceedings but upon nature of questions and risk of self-incrimination); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (fifth amendment applies whenever answer might subject witness to appreciable risk of criminal responsibility).

7. *See* Roberts v. United States, 445 U.S. 552, 559 (1980) (individual must invoke fifth amendment privilege to enjoy protection from self-incrimination); United States v. Mandujano, 425 U.S. 564, 574-75 (1976) (fifth amendment protection does not exist unless witness affirmatively asserts privilege); Garner v. United States, 424 U.S. 648, 653-55 (1976) (providing information without asserting fifth amendment privilege relinquishes right to claim fifth amendment protection from use of that information as evidence in subsequent criminal proceedings); Maness v. Myers, 419 U.S. 449, 466 (1975) (fifth amendment privilege does not operate unless witness claims privilege); Rogers v. United States, 340 U.S. 367, 373 (1951) (answering incriminatory question without invoking of fifth amendment privilege bars later assertion of fifth amendment as to that answer). *See generally*, Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752 (1979) (discussing consequences of failing to invoke fifth amendment privilege properly before offering answers to incriminating questions).

8. *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478 (1972) (fifth amendment does not permit witness to remain silent when dangers of incrimination are remote and speculative); Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (asserting fifth amendment privilege is reasonable when setting and implications of question indicate that answer is potentially injurious); Brown v. Walker, 161 U.S. 591, 608 (1896) (fifth amendment does not help witness avoid remote dangers of self-incrimination); Johnston v. Herschler, 669 F.2d 617, 619 (10th Cir. 1982) (danger of discharge from employment alone is not basis for reasonable assertion of fifth amendment privilege); Childs v. McCord, 420 F. Supp. 428, 434 (D. Md. 1976) (fifth amendment does not apply to disciplinary proceedings when no risk of subsequent criminal prosecution exists), *aff'd sub nom.* Childs v. Schlitz, 556 F.2d 1178 (4th Cir. 1977).

public employee for claiming the privilege against self-incrimination.[9] A public employer also may not discipline an employee for refusing to waive immunity from the use of the employee's compelled statements, or evidence derived from the employee's statements, in a criminal prosecution of the employee.[10]

If an employer succeeds in compelling an employee to speak, the employee's statements, and any evidence derived from the employee's statements, are not admissable as evidence against the employee in a subsequent criminal proceeding.[11] In non-criminal disciplinary hearings, however, a public employer may use evidence that the government obtains from an employee's coerced testimony.[12] If an employer is unable to compel an employee to answer questions, an employee might frustrate the employer's efforts to obtain information from the employee on employment-related matters. The Supreme Court has sought to remedy this situation by allowing a public employer to dismiss a public employee for failing to answer questions "specifically, directly, and narrowly" related to an employee's official duties, provided the employer does not coerce the employee to waive use immunity.[13] An employer, however, may not discipline an employee for refusing to answer non-duty-related questions.[14]

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9. *See* Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956) (discharge of public employee for asserting privilege against self-incrimination violates fifth amendment).

10. *See* Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 284 (1968) (city could not fire sanitation men for refusing to sign waiver of immunity from use of testimony in criminal proceeding when city attempted to compel testimony from sanitation men over fifth amendment objections); Gardner v. Broderick, 392 U.S. 273, 279 (1968) (city could not discharge police officers for refusing to sign waiver of immunity with respect to testimony before grand jury investigating bribery and corruption); Spevack v. Klein, 385 U.S. 511, 514 (1967) (ruling that state cannot disbar attorney for asserting fifth amendment right at disciplinary proceeding); *infra* text accompanying notes 56-61 (discussing Supreme Court's decision in *Uniformed Sanitation Men*); *infra* text accompanying notes 31-38 (discussing *Gardner*).

11. *See* Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (state could not use testimony as evidence in subsequent criminal proceeding when testimony obtained through threat of dismissal); *infra* text accompanying notes 21-30 (discussing *Garrity*).

12. *See* Confederation of Police v. Conlisk, 489 F.2d 891, 894 (7th Cir. 1973) (public employer may dismiss employee on basis of information gained from compelled answers to duty-related questions), *cert. denied*, 416 U.S. 956 (1974); Napolitano v. Ward, 457 F.2d 279, 284 (7th Cir.) (removal of Illinois state circuit court judge based on immunized testimony given before grand jury did not violate fifth amendment), *cert. denied*, 409 U.S. 1037 (1972); Childs v. McCord, 420 F. Supp. 428, 436 (1976) (state licensing board's use of immunized testimony in disciplinary proceeding does not violate fifth amendment), *aff'd sub nom.* Childs v. Schlitz, 556 F.2d 1178 (4th Cir. 1977); Bowes v. Comm'n to Investigate Allegations of Police Corruption, 330 F. Supp. 262, 264 (S.D.N.Y. 1971) (public employer may use testimony compelled by use immunity as basis for dismissing police officer).

13. *See* Gardner v. Broderick, 392 U.S. 273, 278 (1968) (employer may discharge public employee who refuses to answer duty-related questions if employer does not compel waiver of immunity); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 284 (1968) (employer may discharge public employee who refuses to answer duty-related questions if employer does not compel waiver of immunity); Spevack v. Klein, 385 U.S. 511, 519 (1967)

Federal and state courts have established basic guidelines governing an investigative interview of a public employee in an attempt to balance the competing rights of the public employer and the public employee.[15] In a further effort to balance the competing rights of an employer and an employee, several federal and state courts have demanded that a public employer advise a public employee regarding the status of the employee's use immunity before the employer may discipline the employee for refusing to answer duty-related questions.[16] Other state and federal courts, however, expressly have rejected the advisement requirement.[17] Although the Supreme Court has not addressed the advisement requirement,[18] the Supreme Court

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(Fortas, J., concurring) (employer may discharge public employee who refuses to account for his public trust if employer does not compel waiver of immunity). *Compare* Gulden v. McCorkle, 680 F.2d 1070, 1076 (5th Cir. 1982) (questions about employee's role in bomb threat directed at employer's offices are duty-related questions); Obrien v. DiGrazia, 544 F.2d 543, 546 (1st Cir. 1976) (questions about policeman's finances are duty-related questions), *cert. denied*, 431 U.S. 914 (1977); Clifford v. Shoultz, 413 F.2d 868, 876 (9th Cir.) (when government requires security clearance for employment, questions about affiliation with Cuban Communists are duty-related questions), *cert. denied*, 396 U.S. 962 (1969); McLean v. Rochford, 404 F. Supp. 191, 198 (N.D. Ill. 1975) (questions about whether employee observed another employee engaged in sexual intercourse with minor while on duty are duty-related questions); Marks v. Schlesinger, 384 F. Supp. 1373, 1377-78 (C.D. Cal. 1974) (when government requires security clearance for employment, questions about whether employee engaged in homosexual conduct are duty-related questions); *and* Marsh v. Civil Serv. Comm'n, 64 Ohio App. 2d 151, 157, 411 N.E.2d 803, 808 (1977) (questions about fireman's role in false alarm are duty-related questions); *with* Confederation of Police v. Conlisk, 489 F.2d 891, 895 (7th Cir. 1973) (questions about whether policeman invoked fifth amendment privilege at grand jury hearing are not duty-related questions), *cert. denied*, 416 U.S. 956 (1974); *and* Slevin v. City of New York, 551 F. Supp. 917, 926 (S.D.N.Y. 1982) (questions about policeman's personal finances are not duty-related questions).

14. *See* Slevin v. City of New York, 551 F. Supp. 917, 926 (S.D.N.Y. 1982) (government may not discipline public employee for refusing to answer questions unrelated to employee's official duties); *cf.* Spevack v. Klein, 385 U.S. 511, 517 (1967) (government investigatory body cannot compel production of documents in disbarment proceeding that are unrelated to performance of attorney's official duties).

15. *See supra* notes 5-14 and accompanying text (discussing legal guidelines for public employer conducting investigative interview with employee).

16. *See infra* text accompanying notes 55-77 (discussing cases holding that fifth amendment demands use immunity advisement before employer may discipline public employee for refusing to answer duty-related questions).

17. *See infra* text accompanying notes 78-109 (discussing cases holding fifth amendment does not require use immunity advisement before public employer may discipline employee for refusing to answer duty-related questions).

18. *See* Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 426 F.2d 619, 627 (2d Cir. 1970) (confirming that Supreme Court has not addressed use immunity advisement issue), *cert. denied*, 406 U.S. 961 (1972). Although the United States Supreme Court has not answered directly the question of whether a public employer must give grants or advisements of use immunity, Supreme Court decisions contain language suggesting that employers should satisfy a use immunity advisement requirement before disciplining an employee. *See* Maness v. Myers, 419 U.S. 449, 461-62 (1975). In *Maness v. Myers*, the United States Supreme Court overturned a lawyer's contempt conviction for advising his client not to produce documents subsequent to a subpoena duces tecum which the attorney believed would incriminate his client.

in *Garrity v. New Jersey*[19] and *Gardner v. Broderick*[20] has developed fifth

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Id. at 470. The Supreme Court stated in dicta that if the client produced the documents, the client would receive use immunity, and in any criminal proceeding the client could move to suppress the evidence on fifth amendment grounds. *Id.* at 461-62. The Supreme Court in *Maness*, however, noted that the client's subsequent ability to suppress the evidence was insufficient to satisfy the scope of the fifth amendment protection against compelled self-incrimination. *Id.* at 461-62. The Court noted that the fifth amendment demanded additional protection in the form of a grant of use immunity. *Id.* at 462 n. 10. Thus, the mere existence of immunity from the use, or derivative use, of testimony compelled over fifth amendment objections also might be insufficient to satisfy the witness' fifth amendment rights. The additional protection that the Supreme Court in *Maness* Court implied was necessary may be the use immunity advisement when a public employee asserts his fifth amendment privilege, despite the fact that the employee automatically has use immunity as a result of any sanction the employer may threaten for the employee's refusal to answer duty-related questions. *See* Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (use immunity automatically arises from coercion inherent in policy of dismissal from employment for refusing to answer duty-related questions).

The Supreme Court's statement in dicta in *Maness* that laymen may not be cognizant of the exact scope of the fifth amendment privilege further supports the proposition that the fifth amendment requires a use immunity advisement. *Maness*, 419 U.S. at 466. The Court implied that a public employer must give some advisement to an employee concerning the employee's fifth amendment rights because an employee presumably does not have, nor should an employer expect him to have, a full knowledge of the consequences of his acts or his employer's acts. *Id.* The Court also noted that the fifth amendment is not "self executing" because a witness affirmatively must assert the fifth amendment privilege to enjoy the amendment's protection. *Id.* Because an employee has the duty to make an affirmative assertion of his fifth amendment right against self-incrimination, an employer might have the similar duty affirmatively to advise the employee of the attachment of use immunity to the employee's compelled statements before the employer may discipline the employee for refusing to answer duty-related questions.

On several occasions, the Supreme Court has cautioned the government that the government must grant or offer immunity before the government may compel a witness' testimony over a claim of the fifth amendment privilege. *See, e.g.*, Lefkowitz v. Cunningham, 431 U.S. 801, 809 (1977) (once state grants use immunity, state may compel testimony); United States v. Mandujano, 425 U.S. 564, 576 (1976) (witness has duty to testify when state grants immunity); Baxter v. Palmigiano, 425 U.S. 308, 316 (1975) (if state compells testimony, state must offer immunity to witness); Lefkowitz v. Turley, 414 U.S. 70, 79, 85 (1973) (state must grant or offer immunity to witness before state can compel testimony); Kastigar v. United States, 406 U.S. 441, 453 (1972) (grant of use immunity is coextensive with fifth amendment protection); Ullmann v. United States, 350 U.S. 422, 431 (1956) (state may compel testimony if state grants immunity sufficient to remove witness' reasonable fear of criminal prosecution). The Supreme Court's references to grants and offers of immunity suggest that state and federal officials affirmatively must act to provide immunity to a witness. The Supreme Court, therefore, implies that an employer must give an employee an advisement concerning use immunity. The government should not rely on the fact that use immunity automatically arises from compulsion to speak over fifth amendment objections.

Supreme Court opinions also contain language which supports rejection of the use immunity advisement requirement. In *Brown v. Walker*, one of the Supreme Court's earliest fifth amendment controversies, the Court asserted that the fifth amendment does not protect witnesses who claim the fifth amendment privilege on the basis of naked and remote chances that the government might use the witness' compelled testimony in subsequent criminal proceedings. *Brown v. Walker*, 161 U.S. 591, 608 (1896). Because no chance that an employer may use an employee's compelled statements in a later criminal proceeding exists, a public employee, therefore, may not complain that the lack of a use immunity advisement causes the

amendment law governing public employers' interrogation of public employees.

In *Garrity v. New Jersey*, the State of New Jersey convicted two police officers of conspiring to obstruct justice.[21] At trial, the State had used testimony that the police officers gave in a previous investigation by the Attorney General of New Jersey.[22] Before questioning the police officers, representatives of the Attorney General had advised the officers that the State could use an employee's statements against the employee in a criminal proceeding.[23] The State also had informed the officers that an employee could remain silent by asserting the fifth amendment privilege, but that the State would discharge the employee from employment if the employee refused to answer questions.[24] The officers answered questions, but objected to the State's use of the answers in criminal proceedings against the officers.[25]

In reversing the conviction of the officers, the Supreme Court concluded that the officers' statements were not voluntary.[26] The Supreme Court, therefore, held that the officers' statements were inadmissable as evidence against the officers in a subsequent criminal proceeding.[27] The Supreme Court reasoned that the officer's statements were not voluntary because the State's requirement that the employees answer questions or face dismissal

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fifth amendment to prohibit discipline of the employee for refusing to respond to duty-related questions. *See* Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (state may not use compelled testimony against witness in subsequent criminal proceedings).

The interpretation applied to the Supreme Court's statements in *Brown* also applies to statements made in other Supreme Court decisions. In *Hale v. Henkel*, the Supreme Court asserted that once the risk of criminal sanction ceases to exist, the fifth amendment does not offer protection to a witness. *Hale*, 201 U.S. 43, 67 (1906). Because the Supreme Court in *Garrity v. New Jersey* held that the fifth amendment automatically confers use immunity when an employer compels an employee to speak, the risk of criminal sanction becomes null with respect to the compelled testimony. *See Garrity*, 385 U.S. 493, 500 (1967) (state may not use compelled testimony against witness in subsequent criminal proceedings). Thus, according to *Hale*, an employee could not claim that the fifth amendment demands a use immunity advisement because the fifth amendment ceases to offer protection when no risk of criminal prosecution exists. *Hale*, 201 U.S. at 67. Furthermore, in *Adams v. Maryland* the Supreme Court noted that a statute conferring immunity protection was unnecessary because the fifth amendment automatically protects a witness' compelled testimony from use in subsequent criminal procedings. *Adams*, 347 U.S. 179, 181 (1954). Again, the Supreme Court implied that the use immunity advisement is unnecessary to satisfy the fifth amendment privilege because the fifth amendment automatically provides use immunity to the public employee's compelled statements. *See infra* notes 89-90 and accompanying text (use immunity advisement is not necessary because coercive acts activate use immunity, making use immunity advisement superfluous protection).

19. 385 U.S. 493 (1967).
20. 392 U.S. 273 (1968).
21. *Garrity*, 385 U.S. at 494.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 495.
26. *Id.* at 497-98.
27. *Id.* at 497-500.

from employment for refusing to answer questions was inherently coercive.[28] Thus, the *Garrity* Court implied that the coercion inherent in a policy that an employee may forfeit his employment if the employee refuses to answer the employer's questions automatically will activate use immunity for any statements the employee makes when questioned under the duress of such a policy.[29] A state, consequently, cannot use an employee's statements, or evidence derived from the employee's statements, in a criminal proceeeding against a public employee when the employer has forced the employee to testify under the threat of dismissal from employment.[30]

Building upon its decision in *Garrity*, the Supreme Court addressed the question of compelled waiver of immunity in *Gardner v. Broderick*.[31] In *Gardner*, a grand jury investigating police corruption in New York City subpoenaed a policeman to testify.[32] The Assistant District Attorney informed the officer of the privilege against self-incrimination but also warned the employee that if the employee declined to sign a use immunity waiver form, the City would discharge the employee from the police department.[33] The officer refused to sign the waiver, and the City removed the officer from the police force.[34]

In reinstating the officer, the Supreme Court held that a public employer may not dismiss an employee for refusing to waive use immunity from compelled testimony.[35] The *Gardner* Court reasoned that when an employer insists that an employee surrender use immunity, the employer's desire for information may not thwart the fifth amendment privilege conferring use immunity upon compelled testimony.[36] Thus, the Supreme Court's decision in *Gardner* adhered to the principle enunciated in *Garrity* that employers may not use threats of dismissal to compel an employee to testify without also conferring use immunity to the employee's statements.[37] The *Gardner* Court, however, noted that if the employee refused to answer duty-related questions and the employer did not demand a surrender of use immunity protection, the employer could discharge the employee.[38]

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28. *Id.* at 497-98.

29. *Id.* at 500.

30. *Id.* at 500.

31. *See Gardner*, 392 U.S. 273, 279 (1968) (employer may not dismiss employee for refusing to waive use immunity from compelled testimony).

32. *Id.* at 274.

33. *Id.*

34. *Id.* at 275.

35. *Id.* at 279.

36. *Id.* at 279.

37. *See id.* Like its decision in *Garrity v. New Jersey*, the Supreme Court in *Gardner v. Broderick* found that a public employer's threat of dismissal directed at a public employee could not impair the employee's fifth amendment privilege. *Gardner*, 392 U.S. at 279; *see Garrity*, 385 U.S. 493, 500 (1967) (state may not use employee's testimony against employee when public employer has used threat of dismissal to compel employee to give testimony).

38. *Gardner*, 392 U.S. at 278; *see* Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 285 (1968) (employer may discipline public employee who refuses to answer duty-related questions if employer does not attempt to compel employee to waive use immunity); *infra* text accompanying notes 56-61 (discussing *Uniformed Sanitation Men I*).

By noting that an employer may discipline an employee who has use immunity for failing to answer duty-related questions, the Supreme Court set the stage for the controversy over use immunity advisements. Inevitably, even though an employee has use immunity because his employer has threatened him with disciplinary action for refusing to answer duty-related questions,[39] and his employer has not attempted to coerce the employee to waive immunity protection, a stubborn employee nonetheless will refuse to answer questions. The hypothetical stubborn employee who refuses to answer questions will insist that an employee's fifth amendment privilege gives an employee the right to refuse to answer incriminating questions until the employer advises the employee that the employee's statements will have use immunity. Furthermore, the employee will claim that the employer may not discipline the employee for refusing to answer duty-related questions unless the employer has given the employee a use immunity advisement.

The inevitable case of the stubborn employee who refuses to answer questions, despite having use immunity and despite the absence of compulsion to waive immunity, arose in *Benjamin v. City of Montgomery*[40]. In *Benjamin*, two police officers investigated a shooting of a third police officer.[41] The State of Alabama indicted several persons as a result of the shooting incident, and the indictees desired to obtain the testimony of the two investigating officers.[42] The indictees wanted to show that the police officers had acted improperly at the time of the shooting incident and during the subsequent investigation.[43] The indictees, therefore, subpoenaed the two officers.[44] At the indictees' preliminary hearing, however, both officers invoked the fifth amendment and refused to answer questions.[45] The Mayor of Montgomery then ordered the officers to report to the district attorney and to fully disclose their knowledge about the shooting.[46] The district attorney, however, refused to take the statements of the officers because the statements would enjoy use immunity.[47] The shooting case proceeded to trial, and the defense once again subpoenaed the officers.[48] The officers refused to answer questions, and the Mayor informed the officers that if the officers continued to refuse to answer questions, the Mayor would fire the officers.[49] Upon recall to the stand, the officers

39. *See* Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (coercion inherent in threat of dismissal for refusing to answer public employer's questions creates use immunity protection for employee's answers); *supra* text accompanying notes 21-30 (discussing *Garrity*).

40. 785 F.2d 959 (11th Cir.), *cert. denied*, 107 S. Ct. 571 (1986).

41. *Id.* at 960.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

indicated that they would answer questions on the condition that their statements receive use immunity.[50] The trial court refused to extend immunity to the officers' statements, and the Mayor subsequently discharged the officers.[51]

On appeal, the United States Court of Appeals for the Eleventh Circuit found that the Mayor had discharged the officers for refusing to waive the fifth amendment protection of use immunity.[52] The *Benjamin* court declared that when the officers refused to testify unless they received an assurance that their testimony would enjoy use immunity, the employees merely were refusing to waive immunity.[53] Finding that the employees had refused to waive immunity, the Eleventh Circuit relied on the Supreme Court's holding in *Gardner* and invalidated the discharge of the officers.[54] Thus, the *Benjamin* court avoided holding expressly that the fifth amendment requires a public employer to give a public employee a use immunity advisement before disciplining the employee for refusing to answer duty-related questions.

Several federal appellate courts, however, require a public employer to give an employee a use immunity advisement before disciplining the employee. The United States Court of Appeals for the Second Circuit pioneered the advisement requirement in *Uniformed Sanitation Men Association v. Commissioner of Sanitation* (*Uniformed Sanitation II*)[55]. The case came to the Second Circuit on the remand from the Supreme Court's decision in *Uniformed Sanitation Men Association v. Commissioner of Sanitation* (*Uniformed Sanitation I*)[56]. The controversy in *Uniformed Sanitation I* began when twelve New York City sanitation men refused to testify and to sign waivers of immunity before an administrative hearing investigating corruption.[57] Three other sanitation men refused to testify and to sign waivers of immunity at grand jury hearings also investigating corruption.[58] The City of New York (City) dismissed all fifteen men solely because they refused to sign waivers of immunity.[59] The Supreme Court held that the City's dismissal of the sanitation men violated the fifth amendment because the City had disciplined the men merely for asserting and refusing to waive their fifth amendment rights.[60] The Supreme Court noted, however, that a

50. *Id.* at 962.

51. *Id.* at 960.

52. *Id.* at 963.

53. *Id.* at 962.

54. *See id.* at 963. A public employer may not dismiss an employee from employment for refusing to waive the protection of the fifth amendment. Gardner v. Broderick, 392 U.S. 273, 278 (1968); *see supra* text accompanying notes 31-38 (discussing *Gardner*).

55. 426 F.2d 619 (2d. Cir. 1970), *cert. denied*, 406 U.S. 961 (1972).

56. 392 U.S. 280 (1968). *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation (Uniformed Sanitation I)* was a companion case to *Gardner v. Broderick*. Gardner v. Broderick, 392 U.S. 273 (1968); *see supra* text accompanying notes 31-38 (discussing *Gardner*).

57. *Uniformed Sanitation I*, 392 U.S. at 281-82.

58. *Id.*

59. *Id.*

60. *Id.* at 284.

public employer may dismiss a public employee who refuses to answer questions concerning the performance of the employee's public trust if the employer conducts proper proceedings in which an employer does not coerce an employee to waive the protection of use immunity.[61]

After the Supreme Court remanded *Uniformed Sanitation I*, the City reinstated the employees and again brought the employees before administrative hearings for questioning.[62] On this occasion, the City fully advised the employees of their rights and advised the employees that the employees would not surrender their use immunity by answering questions.[63] Once again, the employees refused to answer questions and the City dismissed the employees from employment.[64] Upholding the district court's decision, the Second Circuit found that the dismissal of the sanitation men was proper.[65] In reaching its decision, the Second Circuit interpreted the Supreme Court's opinion in *Uniformed Sanitation I*.[66] In *Uniformed Sanitation I*, the Supreme Court had noted that in addition to requiring an employer to restrict his questions to duty-related matters and to refrain from coercing waiver of use immunity, the employer must conduct proper proceedings before disciplining an employee.[67] The Second Circuit found that the proper proceedings that an employer must provide to an employee involve advising the employee of the status of the employee's use immunity before disciplining the employee.[68] The Second Circuit, therefore, held that the City could fire the sanitation men because the employer properly had advised the employees before disciplining them.[69]

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61. *Id.* at 285.

62. Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 426 F.2d 619, 621 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972).

63. *See Id.* In *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation (Uniformed Sanitation II)*, the City of New York gave its employees the following advisement before city officials questioned the employees:

> I want to advise you, Mr. . . ., that you have all the rights and privileges guaranteed by the Laws of the State of New York and the Constitution of this State and of the United States, including the right to be represented by counsel at this inquiry, the right to remain silent, although you may be subject to disciplinary action by the Department of Sanitation for the failure to answer material and relevant 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 answers, may not be used against you in a criminal proceeding except that you may be subject to criminal prosecution for any false answer that you may give under any applicable law, including Section 1121 of the New York City Charter.

Id.

64. *Id.*

65. *Id.* at 626.

66. *Id.* at 627.

67. *Uniformed Sanitation I*, 392 U.S. 280, 285 (1968).

68. *Uniformed Sanitation II*, 426 F.2d at 627.

69. *Id.*; *see* Weston v. United States Dep't of Hous. and Urban Dev., 724 F.2d 943,

The use immunity advisement also has become part of fifth amendment law governing employer-employee relations in the Seventh Circuit as a result of the decision in *Confederation of Police v. Conlisk*.[70] In *Conlisk*, six Chicago police officers invoked the protection of the fifth amendment privilege against self-incrimination at federal grand jury hearings investigating police corruption.[71] The Internal Affairs Department of the Chicago Police Department (Department) subsequently questioned each officer, asking only whether the officer had invoked the fifth amendment privilege against compelled self-incrimination at the grand jury hearings.[72] The City of Chicago subsequently dismissed the officers from employment because the officers had exercised the fifth amendment right to remain silent at the grand jury proceeding.[73]

The United States Court of Appeals for the Seventh Circuit reasoned that the spirit of the Supreme Court's holdings in *Gardner* and *Uniformed Sanitation I* indicated that an employer may dismiss an employee for refusing to respond to an employer's questions only when the employer has asked duty-related questions and has advised the employee that the employee's answers will have use immunity.[74] The *Conlisk* court found that the De-

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948 (Fed. Cir. 1983). In *Weston v. United States Department of Housing and Urban Development*, the United States Court of Appeals for the Federal Circuit upheld the discharge of a public employee for refusing to answer duty-related questions. *Id.* at 948. The Federal Circuit considered significant the fact that the employer sufficiently had advised the employee that the employee's statements would enjoy use immunity and noted that the fifth amendment demanded an use immunity advisement before disciplining the employee. *Id.*; *see* Lemoine v. Department of Police, 301 So.2d 396, 400 (La. Ct. App. 1974) (because police department gave officers use immunity advisement, state could fire officers for refusing to answer questions about bribery); Seattle Police Officers' Guild v. City of Seattle, 80 Wash.2d 307, 494 P.2d 485, 491 (1972) (police department could discharge officer for failing to answer duty-related questions when department gave officer use immunity advisement).

70. 489 F.2d 891 (7th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974).

71. *Id.* at 892.

72. *Id.*

73. *Id.*

74. *Id.* at 894; *see* United States v. Devitt, 499 F.2d 135, 141 (7th Cir. 1974) (citing *Conlisk* with approval, but holding that lack of advisement is not defense against use of compelled statements when employee committed perjury), *cert. denied*, 421 U.S. 975 (1975); D'Acquisto v. Washington, 640 F. Supp. 594, 624 (N.D. Ill. 1986) (fifth amendment demands use immunity statement before employer can take disciplinary action for employee's failure to answer duty-related questions); Wilson v. Swing, 463 F. Supp. 555, 560 (M.D.N.C. 1978) (police department must give use immunity advisement before disciplining employee for refusing to answer questions, but fifth amendment will not protect employee who commits perjury to avoid self-incrimination); McLean v. Rochford, 404 F. Supp. 191, 198 (N.D. Ill. 1975) (employee must have affirmative assurance of use immunity before employer may demand answers to duty-related questions); Peden v. United States, 512 F.2d 1099, 1102 (Ct. Cl. 1975) (government employer can coerce answers to duty-related questions if employer gives adequate assurances to employee that responses have use immunity); Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973). In *Kalkines v. United States*, the United States Court of Claims directly addressed the issue of the advisement requirement and decided in favor of the requirement.

partment had complied with neither the duty-related question requirement nor the use immunity advisement requirement.[75] The Department had failed to comply with these requirements because the Department had given no use immunity advisement and because the Department's inquiry concerning

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Kalkines, 473 F.2d at 1393. An employee of the Bureau of Customs of the Treasury (Bureau) was under investigation for taking cash from an importer desiring favorable customs treatment. *Id.* at 1392. On four different occasions, the employee refused to answer questions posed by investigators for the Bureau regarding a deposit of cash that the employee had made, his finances, and the performance of his customs duties. *Id.* In addition to the Bureau's investigation, the employee also was the subject of an United States Attorney's Office inquiry into the same matter. *Id.* At each of the first three Bureau inquiries, the Bureau agents did not advise the employee of the operation of use immunity upon the employee's compelled statements, and at the last session the Customs agents told the employee that the state would not use the employee's statements against him in subsequent criminal proceedings. *Id.* at 1395-96. The United States Attorney's Office never indicted the employee. *Id.* at 1392. The Bureau, however, discharged the employee from employment for refusing to answer questions relating to the performance of his official duties. *Id.*

The Court of Claims interpreted the Supreme Court's holdings in *Gardner v. Broderick* and *Uniformed Sanitation I* to require an employer to advise a public employee that the employer might remove the employee from office for failing to answer duty-related questions and to inform the employee that his compelled statements had use immunity. *Id.* at 1393; *see Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (employer may not discipline employee for refusing to waive use immunity protection); *Uniformed Sanitation I*, 392 U.S. 280, 284 (1968) (same). The absense or inadequacy of the advisements that the Bureau agents gave to the employee was the sole basis for the Court of Claims' ruling that the employee's dismissal was invalid. *Kalkines*, 473 F.2d at 1394. The *Kalkines* court reasoned that the employee was justified in the fear that, absent a proper advisement, the employer might use the employee's statements in subsequent criminal proceedings. *Id.* Because the employee's fear was reasonable, the employee's refusal to answer questions on fifth amendment grounds also was justified. *Id.* The Court of Claims also considered unreasonable any expectation that the employee would be knowledgeable concerning the Supreme Court's holdings in *Garrity v. New Jersey*, *Gardner v. Broderick*, and *Uniformed Sanitation I*. *Id.* at 1394. *See Garrity*,385 U.S. 493, 500 (1967) (public employee's compelled testimony is inadmissable against employee in subsequent criminal proceeding); *Gardner*, 392 U.S. 273, 279 (1968) (public employer may not discipline employee for refusing to waive use immunity protection); *Uniformed Sanitation I*, 392 U.S. 280, 284 (1968) (same); *supra* text accompanying notes 21-30 (discussing *Garrity*); *supra* text accompanying notes 31-38 (discussing *Gardner*); *supra* text accompanying notes 56-61 (discussing *Uniformed Sanitation I*). The *Kalkines* court noted that because the employer could not expect the employee to know that the employee's compelled statements would enjoy use immunity, the employee was justified in refusing to answer questions. *Kalkines*, 473 F.2d at 1362.

In *Banca v. Town of Phillipsburg*, the Superior Court of New Jersey offered a rationale for requiring the use immunity advisement similar to the Court of Claims' rationale in *Kalkines*. *See* Banca v. Town of Phillipsburg, 181 N.J. Super. 109, 115-16, 436 A.2d 944, 948 (1981). The *Banca* court declared that satisfaction of the fifth amendment privilege could not depend upon the questionable assumption that the employee knew or should have known that his compelled statements had use immunity. *Id.* The *Banca* court noted that in light of the evolving nature of fifth amendment law, charging a public employee with knowledge of the detailed interpretations of an employee's right against compelled self-incrimination was unreasonable. *Id*; *see* Marsh v. Civil Serv. Comm'n, 64 Ohio App. 2d 151, 157, 411 N.E.2d 803, 807 (1977) (failure to give immunity advisement to firemen discharged for refusing to answer questions about false alarm incident is sole ground for invalidating dismissals).

75. *Conlisk*, 489 F.2d at 895.

whether the officers had invoked the fifth amendment privilege at the grand jury hearings did not constitute duty-related questioning.[76] The Seventh Circuit, therefore, invalidated the officers' dismissals.[77]

The United States Court of Appeals for the Fifth Circuit, however, examined the use immunity advisement requirement in *Gulden v. McCorkle*[78] and refused to impose upon employers the duty to give the use immunity advisement. In *Gulden*, the Dallas Public Works Department (Department) suspected two Department employees of telephoning a bomb threat into the Department.[79] Two days after the threat, the Department directed all employees to submit to a polygraph examination and to sign waivers consenting to the administration of the polygraph examination.[80] The Department informed the employees that the polygraph examination was for the sole purpose of investigating the bomb threat.[81] The two supected employees refused to sign the waivers and refused to submit to the polygraph examination on the ground that the waivers would indicate that the the employees voluntarily had submitted to the polygraph examination when the suspected employees' participation clearly would not be voluntary.[82] The employees argued that the Department's use of the waivers violated the employees' fifth amendment right against self-incrimination.[83] The Department placed the employees on administrative leave and ordered the employees to report to the Dallas Police Department for polygraph examinations.[84] The Police Department investigators demanded that the employees sign waivers stating

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76. *See id.* at 895. In *Confederation of Police v. Conlisk*, the United States Court of Appeals for the Seventh Circuit held that the Chicago Police Department (Department) failed to satisfy the duty-related question requirement because the Department had asked the policemen only whether they had invoked their fifth amendment privilege at the grand jury proceeding. *Id.* The Seventh Circuit's decision, however, is mistaken because the court failed to consider the nature of the questions that the Department asked at the grand jury hearing. The grand jury questions dealt with police corruption. *Id.* at 892. The grand jury questions, therefore, clearly were duty-related.

The Department also failed to satisfy the advisement requirement because the Department had not informed the officers that the officer's compelled testimony would have the benefit of use immunity. *Id.* at 895. The *Conlisk* court held that the Department did not satisfy the advisement requirement despite the assertion by the Department that the Department and its agents did not have the authority to grant immunity to the officers. *Id.* The *Conlisk* court responded that the Department need not have formal authority to grant immunity. *Id.* The immunity automatically arose because the Department asked officers to testify on threat of dismissal. *Id.* at 895; *see Garrity*, 385 U.S. 493, 499 (1967) (holding use immunity applies to any testimony that public employee gives under threat of dismissal); *supra* text accompanying notes 21-30 (discussing *Garrity*).

77. *Conlisk*, 489 F.2d at 895.

78. Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983).

79. *Id.* at 1071.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1072.

84. *Id.*

that the employees voluntarily submitted to the polygraph, and once again the employees refused to sign the waivers or submit to the examination.[85] Five days later, the Department discharged the employees, while in the interim the district court had denied the employee's request for injunctive relief from threatened discharge by the Department.[86]

In *Gulden*, the Fifth Circuit focused on the fact that the Department had not demanded that the employees relinquish fifth amendment rights on threat of dismissal.[87] The *Gulden* court refused to accept the employees' contention that by failing to tender a use immunity advisement to the employees, the Department compelled the employees to waive immunity.[88] The Fifth Circuit rejected the employees' assertion that *Gardner* and *Uniformed Sanitation I* supported a use immunity advisement.[89] The Fifth Circuit reasoned that the Department had not forced the employees to waive the immunity that, under *Garrity*, automatically attached to their compelled testimony.[90]

In addition to finding that the use immunity advisement was unnecessary because the absence of the advisement did not force the employees to surrender use immunity protection, the *Gulden* court noted that the Department had no obligation to offer the employees a use immunity advisement because the Department had not yet asked the employees any questions.[91] Thus, the Fifth Circuit distinquished *Gulden* from prior cases in which the Seventh Circuit upheld the necessity of a use immunity advisement.[92] The

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85. *Id.*

86. *Id.*

87. *Id.* at 1074.

88. *Id.* at 1075.

89. *Id.*; *see Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (employer may not discipline employee for refusing to waive use immunity protection); *Uniformed Sanitation I*, 392 U.S. 280, 284 (1968) (same); *supra* text accompanying notes 31-38 (discussing *Gardner*); *supra* text accompanying notes 56-61 (discussing *Uniformed Sanitation I*).

90. *Gulden*, 680 F.2d at 1075. Several federal and state courts expressly have rejected the use immunity advisement requirement. *See* Erwin v. Price, 778 F.2d 668, 670 (11th Cir. 1985) (use immunity advisements are superfluous and unnecessary because use immunity attaches to compelled testimony as a matter of law); Hester v. City of Milledgeville, 777 F.2d 1492, 1496 (11th Cir. 1985) (use immunity advisement is not necessary before discharging employee for refusing to answer duty-related questions because use immunity automatically attaches to compelled testimony); Womer v. Hampton 496 F.2d 99, 108 (5th Cir. 1974) (lack of immunity advisement was not prejudicial to employee's interests in administrative hearing investigating public contractor kickbacks); DeWalt v. Barger, 490 F. Supp. 1262, 1272 (M.D. Pa. 1980) (dismissal of employee for refusing to answer duty-related questions was proper despite lack of use immunity advisement); Pinkney v. District of Columbia, 439 F. Supp. 519, 534 (D.D.C. 1977) (discharge of employee for failing to answer questions concerning pending criminal charges was proper, even absent use immunity advisement).

91. *Gulden*, 680 F.2d at 1075-76.

92. *See id.* at 1075. In *Gulden v. McCorkle*, the United States Court of Appeals for the Seventh Circuit noted that *United States v. Devitt* and *Confederation of Police v. Conlisk* involved investigations in which the employer had asked the employee questions, and the employee had refused to answer on fifth amendment grounds. *Id.* In *Gulden*, however, the Dallas Public Works Department had not asked the employees any direct questions because

Gulden court reasoned that because the Department had not asked any questions before the employees asserted their fifth amendment privilege, the employees' claim of their fifth amendment right was premature.[93] The Fifth Circuit, however, narrowed its holding by expressly declining to state whether at some stage in the investigation a use immunity advisement might be constitutionally necessary.[94] The *Gulden* court, nevertheless, firmly stated that before an employer demands answers to specific questions, the advisement is not necessary.[95] The Fifth Circuit found that the Department's discharge of the employees did not violate the fifth amendment.[96] Thus, the

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the employees had refused to appear for the polygraph examination. *Id.* at 1075-76. The Seventh Circuit thus distinguished *Gulden* from *Devitt* and *Conlisk*. *Id.* at 1075; *see* United States v. Devitt, 499 F.2d 135, 141 (7th Cir. 1974) (requiring use immunity advisement, but holding that lack of advisement is not defense against use of compelled statements when employee committed perjury); Confederation of Police v. Conlisk, 489 F.2d 891, 894 (7th Cir. 1973) (requiring use immunity advisement before disciplining public employee for refusing to answer duty-related questions), *cert. denied*, 416 U.S. 956 (1974); *supra* text accompanying notes 70-77 (discussing *Conlisk*).

93. *Gulden*, 680 F.2d at 1075.

94. *Id.*

95. *Id.* at 1076.

96. *Id.* at 1076. Several federal appellate courts have refused to allow a public employee to avoid or postpone an investigative interview by asserting the fifth amendment privilege. *See* Hoover v. Knight, 678 F.2d 578, 582 (5th Cir. 1982) (police officer could not obtain postponement of administrative hearing while criminal charges against him were pending, despite asserting his fifth amendment privilege); Diebold v. Civil Serv. Comm'n, 611 F.2d 697, 801 (8th Cir. 1979) (employee could not postpone administrative proceeding while criminal charges against him were pending, despite asserting his fifth amendment privilege and despite employee's fear that according to Civil Service Commission regulation, employer might discharge employee for refusing to answer questions); De Vita v. Sills, 422 F.2d 1172, 1177-78 (3d Cir. 1970) (state's refusal to stay judicial inquiry into attorney misconduct pending outcome of criminal proceeding did not violate fifth amendment, but no policy of disbarment for refusing to answer questions existed); Luman v. Tanzler, 411 F.2d 164, 167 (5th Cir.), *cert. denied*, 396 U.S. 929 (1969) (policeman denied continuance of administrative inquiry pending outcome of criminal proceedings despite assertion of fifth amendment privilege and despite police department rule that police department may dismiss employee for refusing to answer duty-related questions). In *Diebold v. Civil Service Comm'n*, the United States Court of Appeals for the Eighth Circuit implied that no use immunity advisement is necessary before disciplining an employee for refusing to answer duty-related questions. *Diebold*, 611 F.2d at 701. In *Luman v. Tanzler*, the United States Court of Appeals for the Fifth Circuit also implied that no use immunity advisement is necessary before disciplining an employee for refusing to answer duty-related questions. *Luman*, 411 F.2d at 167. Both the *Luman* and *Diebold* courts suggest that the fifth amendment does not require a use immunity advisement because essentially no difference exists between an employee who asserts the fifth amendment privilege and refuses to answer questions and an employee who asserts the fifth amendment and refuses to appear for an investigative interview. When, as in both *Diebold* and *Luman*, the employer has a policy of dismissing employees for refusing to answer questions, the employee who refuses to answer questions is in the same position with respect to use immunity and the risk of discharge as an employee who refuses to appear at the investigative interview. *See* Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (coercion inherent in dismissal policy for refusal to answer questions activates use immunity for employee's testimony); *Diebold*, 611 F.2d at 701 (employer had policy of dismissing employees for refusing to answer duty-related

Gulden court implied that an employer may discipline an employee who refuses to answer duty-related questions despite the employer's failure to inform the employee that, because of the coercion inherent in the employer's threat of dismissal, the employee's statements would enjoy use immunity.[97]

In *Hester v. City of Milledgeville*,[98] the United States Court of Appeals for the Eleventh Circuit closely paralleled the reasoning of the Fifth Circuit in *Gulden*. In *Hester*, the City of Milledgeville (City) required all city firemen to take polygraph examinations because city officials suspected that firemen were involved in illegal drug activity.[99] Prior to testing, the City demanded that all employees sign one of four waivers, two of which indicated that the employee gave up his fifth amendment protection from the use of compelled statements against the employee in a criminal proceeding.[100] The City never conducted the polygraph examinations because the employees obtained an injunction from the United States District Court for the Middle District of Georgia enjoining the City from proceeding with the examinations.[101] The district court held that the City could not compel the employees to submit to a polygraph examination without affirmatively extending use immunity to the firemen's statements.[102]

The Eleventh Circuit found that the City violated the fifth amendment when the City insisted that the firemen sign one of four waiver forms, two of which relinquished the fifth amendment immunity from the use of compelled statements.[103] The *Hester* court declared that using waiver forms subtly would coerce the employee to sign the forms most generous to the employer's desire for information.[104] Thus, the employer would coerce the employees to sign forms waiving the attachment of use immunity to the employees' compelled testimony.[105] Consequently, the Eleventh Circuit found that the use of the waivers violated the fifth amendment.[106]

The *Hester* court, however, reversed the district court's decision that the fifth amendment required that the City provide a use immunity advisement.[107] The Eleventh Circuit found that any grant of use immunity by the

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questions); *Luman*, 411 F.2d at 167 (same); *supra* text accompanying notes 21-30 (discussing *Garrity*). Therefore, when an employer has a policy that the employer may dismiss an employee who refuses to answer duty-related questions, if a court allows the employer to dismiss an employee who asserts the fifth amendment privilege and refuses to attend an investigative interview, the court's decision implies that the use immunity advisement is not necessary before the employer disciplines the employee.

97. *Gulden*, 680 F.2d at 1075-76.
98. 777 F.2d 1492 (11th Cir. 1985).
99. *Id.* at 1494.
100. *Id.*
101. *Id.*
102. Hester v. City of Milledgeville, 598 F. Supp. 1456 (M.D. Ga. 1984).
103. *Hester*, 777 F.2d at 1495.
104. *Id.* at 1495-96.
105. *Id.*
106. *Id.* at 1496.
107. *Id.*

City was superfluous because, under *Garrity*, the fifth amendment automatically extends use immunity to any compelled incriminating testimony.[108] The *Hester* court concluded that the use immunity advisement was unnecessary because the advisement would have no legal effect on the existence of use immunity.[109]

The Eleventh Circuit in *Hester* and other federal and state courts that have addressed the use immunity advisement based their opinions on weak rationales with little precedential support.[110] Examination of the use immunity advisement issue from a fresh perspective, however, leads to the conclusion that the use immunity advisement is necessary. Unfortunately, the opinions of federal appellate courts that hold in favor of the use immunity advisement do not provide persuasive reasoning. The Second Circuit in *Uniformed Sanitation II* and the Seventh Circuit in *Conlisk* base their findings in favor of the use immunity advisement upon liberal interpretations of the Supreme Court's holdings in *Garrity*, *Gardner*, and *Uniformed Sanitation I*.[111] The circuit court holdings that require the advisement are unsupported extensions of Supreme Court doctrine.[112] The Second Circuit and the Seventh Circuit have created the advisement requirement to remedy problems in implementing the provision that an employer may discipline public employees who have use immunity protection for failing to answer duty-related questions.[113] A basic sense of fairness apparently is the only rationale behind the opinions in favor of the use immunity advisement. The rationale behind the Court of Claims' decision in *Kalkines v. United States*[114] provides the most persuasive basis for approving the use immunity advisement. The Court of Claims in *Kalkines* reasoned that an employee justifiably may remain silent in the face of duty-related questions and threats of

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108. *Id.*; *see supra* text accompanying notes 21-30 (discussing *Garrity*).

109. *Hester*, 777 F.2d at 1496.

110. *See supra* text accompanying notes 55-77 (discussing cases holding in favor of use immunity advisement); *supra* text accompanying notes 78-109 (discussing cases rejecting use immunity advisement).

111. *See* Confederation of Police v. Conlisk, 489 F.2d 891, 894 (7th Cir. 1973) (holding in favor of use immunity advisement based upon interpretation of *Gardner* and *Uniformed Sanitation I*), *cert. denied*, 416 U.S. 956 (1974); *Uniformed Sanitation II*, 426 F.2d 619, 627 (2d Cir. 1970) (holding in favor of use immunity advisement based upon interpretation of *Uniformed Sanitation I*), *cert. denied*, 406 U.S. 961 (1972); *supra* text accompanying notes 70-77 (discussing *Conlisk*); *supra* text accompanying notes 56-61 (discussing *Uniformed Sanitation I*).

112. *See* Jones, *The Privilege Against Self-Incrimination of the Public Employee in an Investigative Interview*, ARMY LAW., Nov. 1985 at 6, 10 (use immunity advisement requirement based on spirit of Supreme Court decisions in *Garrity*, *Gardner* and *Uniformed Sanitation I* is arbitrary and speculative).

113. *See supra* text accompanying notes 55-77 (discussing Seventh Circuit and Second Circuit holdings in favor of use immunity advisement).

114. *See* Kalkines v. United States, 473 F.2d 1391, 1395 (Ct. Cl. 1973) (holding in favor of use immunity advisement requirement); Banca v. Town of Phillipsburg, 181 N.J. Super. 109, 115-16, 436 A.2d 944, 948 (1981) (same); *supra* note 74 (discussing *Kalkines* and *Banca*).

dismissal.[115] An employee justifiably may refuse to answer questions because he most likely does not know, nor should the employer expect the employee to know, that the employer's threats of dismissal are coercive and, therefore, that the employee has use immunity protection.[116] The federal and state courts that endorse the advisement appear to be searching for a forceful rationale for the requirement of a use immunity advisement.

In contrast to the pro-advisement courts, the federal and state courts that do not require a use immunity advisement requirement are not searching for a rationale to support their decisions. These federal and state courts continually recite that, because use immunity automatically arises when an employer threatens to discipline an employee for refusing to answer questions, an employer has no duty to advise an employee that the employee has use immunity protection.[117] Federal appellate court opinions that do not require the use immunity advisement, however, are flawed and do not provide a compelling justification for rejecting the advisement. The Eleventh Circuit's position on the advisement requirement in *Hester* is incongruous with the *Hester* court's stance on the City's use of waiver forms.[118] In *Hester*, the Eleventh Circuit held that the employer's use of waiver forms to help clarify the employee's position regarding an assertion of the fifth amendment privilege was not proper.[119] The *Hester* court also found that an employee was not entitled to a use immunity advisement before the employer disciplines the employee for refusing to answer duty-related questions.[120] The Eleventh Circuit prefers that both the public employer and the employee enter an investigative interview with neither the employer nor the employee informed about their options or obligations. To illustrate, under *Hester*, an employer will not have an opportunity to discover which employees truly wish to submit to questioning on a voluntary basis because any attempt to identify volunteers via consent forms is improper.[121] Fur-

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115. *See* Kalkines v. United States, 473 F.2d 1391, 1395 (Ct. Cl. 1973) (holding in favor of use immunity advisement requirement); Banca v. Town of Phillipsburg, 181 N.J. Super. 109, 115-16, 436 A.2d 944, 948 (1981) (same); *supra* note 74 (discussing *Kalkines* and *Banca*).

116. *Id.*; *see* Banca v. Town of Phillipsburg, 181 N.J. Super. 109, 115-16, 436 A.2d 944, 948 (1981) (requiring use immunity advisement because employer should not expect employee to know that use immunity automatically attaches to compelled testimony); *supra* note 74 (discussing *Banca*).

117. *See supra* text accompanying notes 78-109 (discussing cases finding use immunity advisement unnecessary).

118. *See* Hester v. City of Milledgeville, 777 F.2d 1492, 1495-96 (11th Cir. 1985) (use of waiver forms by employer subtly coerces employee to waive immunity and, therefore, is improper); *supra* text accompanying notes 103-06 (discussing *Hester* court findings regarding employer's use of waiver forms).

119. *See Hester*, 777 F.2d at 1495-96 (use of waiver forms by employer subtly coerces employee to waive immunity and, therefore, is improper); *supra* text accompanying notes 103-06 (discussing *Hester* court findings regarding employer's use of waiver forms).

120. *See Hester*, 777 F.2d at 1496 (use immunity advisement not necessary before disciplining public employee for refusing to answer duty-related questions); *supra* text accompanying notes 103-09 (discussing *Hester*).

121. *See Hester*, 777 F.2d at 1495-96 (use of waiver forms by employer subtly coerces

thermore, an employee enters the interview, in which the employee may be under the obligation to answer incriminatory questions, knowing only that the employer has ordered the employee to answer questions. The employee knows nothing about the consequences of the employer's order. The *Hester* court, therefore, unwittingly endorsed an investigative interview in which both the employer and the employee are ignorant of each other's intentions and the consequences of each other's options.[122] The *Hester* court's reasoning, therefore, leads to an unsatisfactory conclusion.

The Fifth Circuit's opinion in *Gulden v. McCorkle* also is flawed.[123] The *Gulden* court ruled that the employees prematurely asserted their fifth amendment rights because the employees claimed the privilege against self-incrimination before the Department had asked any specific questions.[124] The Fifth Circuit's contention that the Department's announcement that the Department would administer a polygraph examination for the sole purpose of investigating a bomb threat did not frame the questions to which the Department sought answers is untenable. In essence, the Department posed the crucial questions to the employees when the Department announced that the polygraph examination was part of a Department investigation of a bomb threat.[125] The employees, therefore, justifiably asserted their fifth amendment rights at the time the Department requested that the employees submit to the polygraph examination.[126]

The *Gulden* court also found that the Department had not asked the employees to waive any fifth amendment protection when the Department ordered the employees to sign waivers indicating that the employee voluntarily submitted to the polygraph examination.[127] The *Gulden* court's holding concerning the employer's use of waiver forms also is unacceptable. An employer cannot expect an employee to sign a statement indicating that the employee voluntarily submitted to a polygraph examination when the Supreme Court firmly has established that the fifth amendment does not extend immunity to voluntary statements.[128] An employer cannot compel an

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employee to waive immunity and, therefore, is improper); *supra* text accompanying notes 103-06 (discussing *Hester* court findings regarding employer's use of waiver forms).

122. *See Hester*, 777 F.2d at 1495-96 (employer's use of waiver forms is improper and use immunity advisement is unnecessary); *supra* text accompanying notes 103-09 (discussing *Hester*).

123. *See Gulden v. McCorkle*, 680 F.2d 1070, 1075 (5th Cir. 1982) (rejecting use immunity advisement requirement), *cert. denied*, 459 U.S. 1206 (1983); *supra* text accompanying notes 78-97 (discussing *Gulden*).

124. *Gulden*, 680 F.2d at 1076.

125. *Id.* at 1071.

126. *See Uniformed Sanitation I*, 392 U.S. 280, 284-85 (1968). Once an employer poses incriminating questions, an employee has a right to make a valid assertion of the fifth amendment privilege with respect to that subject. *Id.*

127. *Gulden*, 680 F.2d at 1074.

128. *See* Garrity v. New Jersey, 385 U.S. 493, 499 (1967) (fifth amendment immunity does not extend to voluntary testimony). Voluntary testimony is not compelled testimony and is not subject to the protection of the fifth amendment privilege. *See* Garner v. United States, 424 U.S. 648, 654 (1976) (fifth amendment does not preclude use of voluntary testimony against witness in subsequent criminal proceeding).

employee to make an assertion by signing a waiver when the assertion is not the employee's true position.[129]

The unpersuasive opinions in favor of the use immunity advisement[130], and the flawed and inconsistent opinions against the use immunity advisement[131] have created confusion in fifth amendment law.[132] Courts should support the use immunity advisement with a rationale that is not based exclusively on subjective notions of fairness but also upon logical analysis of factual situations. An analysis of the facts of *Benjamin v. City of Montgomery*[133] logically leads to the conclusion that an employer always should give an employee a use immunity advisement before the employer may discipline the employee for refusing to answer duty-related questions.

In *Benjamin*, when the defense called the officers to the witness stand for the second time, the Mayor of Montgomery had warned the officers that if the officers did not testify about the investigation of the shooting incident, the Mayor would fire the officers.[134] At this point, the Mayor had attempted to secure the officers' testimony through coercion.[135] Thus, under *Garrity*, if the officers had answered questions, their answers would have enjoyed use immunity.[136] Furthermore, the questions about the officers' investigation of the shooting incident undoubtedly were duty-related questions.[137] Consequently, according to the rationale of federal and state courts holding that the use immunity advisement is unnecessary, the Mayor of Montgomery properly could have discharged the officers for refusing to answer questions relating to the employees' official duties.[138] The officers in *Benjamin*, however, created a dilemma for courts interpreting fifth amendment law governing the public employee's assertion of the privilege against self-incrimination. The employees in *Benjamin* asserted their fifth

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129. *See* Gardner v. Broderick, 392 U.S. 273, 279 (1968). In *Gardner v. Broderick*, the Supreme Court asserted that an employee could not assume, and an employer should not expect an employee to assume, that signing a waiver form is an idle act of no legal effect. *Id.* The *Gardner* Court also noted that the privilege against self-incrimination does not allow any effort, whether effective or ineffective, to coerce a waiver of immunity. *Id.*

130. *See supra* text accompanying notes 111-16 (discussing weakness of rationale for decisions in favor of use immunity advisement).

131. *See supra* text accompanying notes 117-129 (discussing flaws in decisions against use immunity advisement).

132. *See* Jones, *supra* note 112, at 15 (urging Supreme Court to resolve question of whether employer must give use immunity advisement before disciplining employee for refusing to answer duty-related questions).

133. 785 F.2d 959 (11th Cir. 1986).

134. *Benjamin*, 785 F.2d at 960, 962; *see supra* text accompanying notes 40-51 (discussing *Benjamin* factual background).

135. *Benjamin*, 785 F.2d at 962.

136. *See Garrity*, 385 U.S. at 500 (1967) (employee's compelled testimony, and fruits of compelled testimony, are not admissable as evidence in criminal proceeding against employee).

137. *See supra* note 13 (discussing definition of "duty-related" questions).

138. *See supra* text accompanying notes 78-109 (discussing cases holding that when use immunity automatically arises from coercion, use immunity advisements are unnecessary because advisements do not offer additional immunity protection to witness).

amendment rights by declaring that they refused to testify unless their statements had use immunity protection.[139] The employees' demand for use immunity protection for their compelled statements was a converse, but nonetheless valid, assertion of the fifth amendment privilege.[140] Furthermore, demanding use immunity is substantively the same as refusing to answer questions on the ground that the answers may be self-incriminating.[141] Both the demand for use immunity and the general assertion that the employee refuses to answer questions on fifth amendment grounds are invocations of the fifth amendment right.[142] If, after the Mayor's threat of dismissal, the officers had refused to answer questions on a general claim of the fifth amendment right against compelled self-incrimination, the Eleventh Circuit, based upon its prior opinion in *Hester* holding against the use immunity advisement[143], logically would have concluded that the Mayor properly could discharge the officers.[144]

The employees' demand that their compelled testimony receive use immunity presented the employer with a dilemma. In light of existing fifth amendment law, the employer had two options. The employer could inform the employees that the employees' answers to questions would receive use immunity,[145] or the employer could permit the employees to remain silent without the employee risking disciplinary action. The employer, therefore, could not compel the testimony of the employees on duty-related matters unless the employer gave the employee a use immunity advisement.

An analysis of the facts of *Benjamin* ultimately leads to the conclusion that an employer always should give a use immunity advisement before disciplining an employee for failing to answer duty-related questions. In asserting their fifth amendment rights by refusing to testify unless their compelled testimony received use immunity, the employees in *Benjamin*

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139. *Benjamin*, 785 F.2d at 962.

140. *See* Hester v. City of Milledgeville, 777 F.2d 1492, 1496 (11th Cir. 1985). To assert that the government cannot compel a witness to give testimony that the government can use against the witness in a criminal proceeding is to assert that the government cannot use any testimony that government compels a witness to give against a witness in a criminal proceeding. *Id*; *see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964) (fifth amendment privilege against compelled self-incrimination naturally encompasses rule that government cannot use witness' compelled testimony against witness in subsequent criminal proceeding).

141. *See supra* note 140 and accompanying text (employee's demand for use immunity before answering questions has identical legal effect as refusing to answer questions on general assertion of fifth amendment privilege).

142. *See supra* note 140 and accompanying text (witness may invoke fifth amendment privilege by demanding immunity before answering incriminating questions).

143. *See* Hester v. City of Milledgeville, 777 F.2d 1492, 1496 (11th Cir. 1985).

144. *See supra* notes 89-90 and accompanying text (discussing cases holding that when use immunity automatically arises from coercion, employer may dismiss employee for refusing to answer duty-related questions despite employee's assertion of fifth amendment privilege).

145. *See Garrity*, 385 U.S. 493, at 500. Under the Supreme Court's holding in *Garrity v. New Jersey*, compelled testimony receives use immunity whether or not an employer gives an employee a use immunity advisement. *Id.*

avoided discharge from employment.[146] If the employees had asserted their fifth amendment rights by refusing to testify on the ground that the fifth amendment protected them from compelled self-incrimination, the employees would not have avoided dismissal from their employment.[147] A general assertion of the fifth amendment privilege would not have protected the employees from discharge in the same way that an assertion of the fifth amendment via a demand for use immunity protection would have. Whether a public employer may fire an employee for refusing to answer questions relating to the performance of the employee's official duties should not depend on the words and manner the employee uses to invoke the fifth amendment privilege. Courts, therefore, should require that an employer give an employee a use immunity advisement similar to the advisement that the employer gave to the employees in *Uniformed Sanitation II*[148] before an employer may discipline an employee for refusing to answer duty-related questions.

The use immunity advisement will treat equally all employees who assert the fifth amendment privilege without regard to the manner in which an employee chooses to assert the privilege. The use immunity advisement will have no effect on an employer's ability to obtain information on duty-related matters and will protect an employee with very little inconvenience to the employer. Furthermore, a use immunity advisement requirement will promote the efficiency of the investigative interview of the employee because the employee will understand the consequences of his decision to answer questions or remain silent.

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146. *Benjamin*, 785 F.2d at 963.

147. *See supra* notes 89-90 and accompanying text (discussing cases holding that, when use immunity automatically arises from coercion, employer may dismiss employee for refusing to answer duty-related questions, despite employee's assertion of fifth amendment privilege).

148. *See supra* note 63 (text of use immunity advisement given to public employees in *Uniformed Sanitation II*).