2007

Should Public Employers Be Forced to Warn Their Employees of Their Immunity and Duty to Answer Questions before Demanding Answers and Taking Adverse Action?

Matthew Bernt
SHOULD PUBLIC EMPLOYERS BE FORCED TO WARN THEIR EMPLOYEES OF THEIR IMMUNITY AND DUTY TO ANSWER QUESTIONS BEFORE DEMANDING ANSWERS AND TAKING ADVERSE ACTION?

Matthew Bernt

On November 7, 1997, Edward Franklin was arrested in Evanston, Illinois for possession of marijuana. Franklin, a public employee, worked for the Evanston Public Works Department. He was suspended by the city, and later called in to discuss the arrest at a pre-disciplinary meeting. At the meeting, Franklin was asked about the incident without being informed that any answers he gave could not be used against him in any future criminal prosecution. Franklin refused to answer, citing his Fifth

+ J.D. Candidate, May 2008, The Catholic University of America, Columbus School of Law. The author would like to thank Richard Ruda for his help and expertise, the staff of the Catholic University Law Review for all their hard work, and Elizabeth Margeton for her love, support, and encouragement.

1. Franklin v. City of Evanston, 384 F.3d 838, 841 (7th Cir. 2004).
3. Franklin, 384 F.3d at 841-42. Franklin was charged with misdemeanor possession. Franklin, 2002 WL 31572137, at *1. News of Franklin's arrest was reported in the police blotter section of the city's newspaper, and a coworker showed the article to Franklin's boss. Id. In general, disciplinary proceedings, such as the one facing Franklin, have been described as quasi-criminal. Helen Chun Parker, Note, Attorneys Who Plead the Fifth: How the Self-Incrimination Provision Applies to New Jersey Attorney Disciplinary Proceedings, 27 RUTGERS L.J. 493, 512 (1996).
4. See Franklin, 384 F.3d at 842. The situation Franklin and his employer faced is not unique. See Peter Geier, Trumping 'the Fifth' Requires a Direct Order, DAILY REC., Feb. 1, 2002, at 1B. Geier reported on a Maryland state appellate court decision regarding a state correctional officer's five-day suspension for refusing to answer questions regarding his off-duty behavior, including potential drug use. The Maryland Court of Special Appeals ruled that when employees are ordered to answer job-related questions, they can be fired for refusing to answer by invoking their Fifth Amendment rights against compulsory self-incrimination. Id. However, if an employee is not directly ordered to answer, he can-
Amendment right against compulsory self-incrimination; he also asked to have the administrative proceedings delayed until resolution of any criminal matter. Franklin was subsequently fired by the city, in part for his refusal to cooperate at the meeting.

not be fired because any termination would not be for failing to answer, but for invoking his right to remain silent under the Fifth Amendment. For a similar situation, see James G. Sotos, Fired Deputy Loses on 5th Amendment Claim, CHI. DAILY L. BULL., Feb. 26, 1998, at 6 (describing a situation where a police officer was fired for refusing to give a statement to an internal affairs investigator who was investigating the disappearance of evidence from the evidence room). The officer was not warned that his statements could not be used against him, but was told that he could remain silent. Sotos, supra, at 6. The court ruled that the Garrity v. New Jersey line of cases did not apply because the statement was not compelled or coerced. Id.; see also James G. Sotos, Prosecutor Not Liable for Forcing Officer To Take Polygraph, CHI. DAILY L. BULL., Apr. 7, 1994, at 6 (describing a situation where four Baltimore City Police officers were involved in a shooting). In the latter situation the officers were called to testify in front of a grand jury and warned that they may have to take polygraph examinations, and were threatened with the loss of their jobs if they refused to take the examinations. Id. The officers ultimately consented to the examination, but later filed a civil rights action against the city citing the coercive nature of the polygraph examination. Id. The Fourth Circuit ruled against the officers, saying there was no Fifth Amendment concern because the results of the polygraph examination were not used against the officers and the officers were not required to waive their Fifth Amendment rights. See Wiley v. Mayor of Balt., 48 F.3d 773, 777 (4th Cir. 1995).

5. Franklin, 384 F.3d at 842. Franklin also refused to answer at a previous meeting with city officials, also without being warned. See id. at 841. The Fifth Amendment states: “No person...shall be compelled in any criminal case to be a witness against himself...” U.S. CONST. amend. V. The Fifth Amendment was made applicable to the states by the Supreme Court in Malloy v. Hogan. See Malloy v. Hogan, 378 U.S. 1, 6 (1964) (“We hold today that the Fifth Amendment’s exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States.”). The result of Malloy is that “identical standards determine whether an individual’s silence in either a federal or state proceeding is justified.” Marvin F. Hill, Jr. & James A. Wright, Employee Refusals to Cooperate in Internal Investigations: “Into the Woods” with Employers, Courts, and Labor Arbitrators, 56 MO. L. REV. 869, 873 (1991). The Fifth Amendment’s protections also have been made applicable to administrative proceedings. See Kastigar v. United States, 406 U.S. 441, 444 (1972) (“[The privilege against compulsory self-incrimination] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.”); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (“The privilege [against self-incrimination] is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought...[i]t applies alike to civil and criminal proceedings...”). However, Hill and Wright note that the language of the Amendment limits the application of Fifth Amendment rights to cases of criminal concern. Hill & Wright, supra, at 873. Application to public employment situations is, according to Hill and Wright, an “attenuated application.” Id.

6. Franklin, 384 F.3d at 842.

7. See id. Franklin faced a situation where he was forced to choose between two rights—the right to employment or the right against compulsory self-incrimination. Donald Wm. Driscoll, Note, Garrity v. New Jersey and its Progeny: How Lower Courts Are Weakening the Strong Constitutional Protections Afforded Police Officers, 22 BUFF. PUB. INT. L.J. 101, 138 (2003-2004). The choice made at the administrative proceeding to invoke the Fifth Amendment right or retain employment also affects the employee's rights in the subsequent criminal proceeding. Id. Answering at the administrative level could
Franklin brought a civil rights action against the city.\textsuperscript{8} He alleged that the city erred in failing to warn him that he could not invoke his Fifth Amendment rights at the disciplinary meeting because his statements would be immunized from use in any subsequent criminal prosecution.\textsuperscript{9} The district court found that Franklin was not adequately warned that he had to answer because of the immunity attached to his answers.\textsuperscript{10} The Seventh Circuit reversed summary judgment for the city, finding that "Franklin was . . . effectively forced to choose between his job and his Fifth Amendment rights, and this was an impermissible violation."\textsuperscript{11} The court held that Franklin's firing was unconstitutional because the city failed to warn Franklin.\textsuperscript{12}

The city petitioned for certiorari to decide the issue whether a warning is required in a situation such as the one Franklin faced, asking that the Supreme Court resolve a circuit split over this question.\textsuperscript{13} The city noted that the Fifth, Eighth, and Eleventh Circuits do not require a warning, and the Seventh Circuit is the only circuit requiring an affirmative warning.\textsuperscript{14} However, the Court denied certiorari and left this split

\textsuperscript{8} Franklin, 384 F.3d at 842.
\textsuperscript{9} Franklin v. City of Evanston, No. 99 C 8252, 2002 WL 31572137, at *5 (N.D. Ill. Nov. 19, 2002), rev'd in part, 2003 WL 1720006 (N.D. Ill. Mar. 31, 2003), rev'd, 384 F.3d 838 (7th Cir. 2004). It is interesting to note that the work rule prohibiting possession and use of alcohol and drugs by city employees does not mandate an automatic removal from employment if the rule is violated. See id. at *2. At a due cause hearing on November 13, 1997, the due cause board found that Franklin violated the relevant work rule and "could be terminated." Id. (emphasis added). In its decision, the district court noted that three other employees were arrested for driving under the influence but were not fired. Id. Franklin also noted that other employees "tested positive for drugs while at work, committed assault, and shot people and have retained their employment with Evanston." Id.
\textsuperscript{10} Id. at *5-6.
\textsuperscript{11} Id. at 844.
\textsuperscript{12} Id. The warning that Franklin sought, and that the Seventh Circuit ruled was missing, would have warned Franklin "that statements made during an investigation cannot be used to incriminate [employees] in a later criminal proceeding when the employee must choose between cooperation and termination." Kathleen A. Kedigh, Employee Misconduct Investigations: Getting to the Truth Without Getting into Trouble, 61 J. Mo. B. 82, 83 (2005).
\textsuperscript{13} Petition for Writ of Certiorari at *i, City of Evanston v. Franklin, 544 U.S. 956 (2005) (No. 04-856), 2004 WL 2982819, *8. The question presented to the Supreme Court by the city was: "Does the Fifth or Fourteenth Amendment require a government employer to warn employees that they cannot refuse to answer questions during a disciplinary proceeding relating to a criminal proceeding because the answers would be immunized?" Id.
\textsuperscript{14} Id. at *9-10. The Seventh Circuit takes the approach that employees must be warned explicitly of Fifth Amendment rights. Id. at *8. The Fifth, Eighth, and Eleventh Circuits do not require an explicit warning. Id. at *10.
This Comment analyzes whether public employers have an affirmative duty to warn public employees subject to administrative investigation that they cannot refuse to answer narrow job-related questions when under threat of removal because immunity from criminal prosecution exists. This Comment first discusses the Supreme Court’s development of the law of coercion and coercive interrogation under the Fifth Amendment. Next, this Comment discusses the Supreme Court’s development of the Fifth Amendment right against compulsory self-incrimination as it applies to public employees by examining Garrity v. New Jersey and its progeny. This Comment then addresses the question of whether employers must inform their employees of a grant of use immunity by looking at how the courts of appeals have addressed the question.

This Comment then analyzes the benefits and detriments of the two different positions that the courts of appeals have adopted. Finally, this Comment will propose a rule mandating that an employer must provide a warning of an employee’s Fifth Amendment rights to an employee under...
Should Public Employers Be Forced To Warn investigation. This rule is workable and protective of employee rights, while still allowing an employer to take necessary adverse employment actions against an uncooperative employee.

I. FROM GARRITY TO ATWELL AND GULDEN: DEVELOPING THE DOCTRINE OF USE IMMUNITY AND DETERMINING WHETHER EMPLOYEES MUST BE MADE AWARE OF THAT IMMUNITY

A. Building a Foundation for Garrity: Pre-Garrity Decisions by the Supreme Court Establishing the Parameters of the Fifth Amendment

The Supreme Court established the parameters of "coercion" under the Fifth Amendment in a series of cases decided before 1967. Under Supreme Court jurisprudence, the ultimate question regarding coercion was "whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer'" questions put to him or her. Free choice to answer can be abridged by both mental and physical coercion. Thus, when individuals are under any coercive pressure they are unable to make a free choice and the Fifth Amendment's protections should apply. The Court has said that the policy behind the Fifth Amendment is

16. See Miranda v. Arizona, 384 U.S. 436, 478-79 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); Blackburn v. Alabama, 361 U.S. 199, 206 (1960); Lisenba v. California, 314 U.S. 219, 240 (1941). Hill and Wright note "that the privilege against self-incrimination is related to the question of what safeguards are necessary to assure that admissions or confessions are relatively trustworthy" and that confessions "are not the product or fruits of fear or coercion, but are reliable expressions of the truth." Hill & Wright, supra note 5, at 884-85.

17. Garrity v. New Jersey, 385 U.S. 493, 496 (1967) (quoting Lisenba, 314 U.S. at 241). In general, confessions must be given freely and voluntarily, and not be the product of coercive behavior on the part of an investigator. See, e.g., Bram v. United States, 168 U.S. 532, 542-43 (1897). The idea of voluntariness "encompasses all . . . practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice." Miranda, 384 U.S. at 464-65. Courts must examine the circumstances surrounding a confession to ensure the voluntariness of that confession and prevent false confessions, thus preventing a criminal defendant from being convicted on the basis of false evidence. See Lisenba, 314 U.S. at 236 ("The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false."). Rationales for the general voluntariness test include deterring police from: browbeating false confessions from suspects, engaging in conduct unbecoming of a civilized society, engaging in general misconduct, engaging in tactics more suited to the inquisitorial system, and maintaining the will of a suspect. Lawrence Herman, The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation, 48 OHIO ST. L.J. 733, 749-50 (1987). While the voluntariness test remains good law, its use as the sole method of testing the voluntariness of confessions was inadequate. See id. at 754-55.


19. See Garrity, 385 U.S. at 497-98. This idea of requiring a free and rational choice comes from the Court's opinion in Miranda, where the Court announced the famous Miranda warnings to protect criminal defendants. Id.
to prevent criminal suspects from having to choose between testifying against their interests, lying and perjuring, or refusing to answer questions and being held in contempt of court.\textsuperscript{20}

Additionally, the \textit{Miranda} Court rested its decision on the principle that individuals must be allowed to invoke their rights under the Fifth Amendment effectively for those rights to have any meaning or effect.\textsuperscript{21} \textit{Miranda} ultimately held that when criminal suspects are taken into custody and questioned, their right against compulsory self-incrimination is placed in jeopardy.\textsuperscript{22} As a result, the Court found it necessary to institute procedural safeguards in the form of a specific warning.\textsuperscript{23} The \textit{Miranda} warning assures that suspects are aware of their rights and opportunities to remain silent.\textsuperscript{24} The decision whether to talk rests solely with the suspect, regardless of the social costs of such a rule.\textsuperscript{25}

\textbf{B. Garrity and the Fifth Amendment's Application to Public Employees: Applying the Court's Idea of Coercion in a Non-Criminal Setting}

In a line of cases decided between 1967 and 1977, the Supreme Court specifically defined the Fifth Amendment rights of public employees in

\begin{itemize}
\item \textsuperscript{20} \textit{Murphy}, 378 U.S. at 55. The Court in \textit{Murphy} noted that the policy underlying the Fifth Amendment requires a balance between the interests of both the state and the individual. \textit{Id.} By forcing individuals to give up their Fifth Amendment rights by incriminating themselves, the government defeats the purposes and policy supporting the Fifth Amendment. \textit{See id.}
\item \textsuperscript{21} \textit{Miranda}, 384 U.S. at 444. The \textit{Garrity} Court ultimately fashioned its rule on the similar rationale of protecting public employees and preserving their ability to make "a free and rational choice." \textit{See Garrity}, 385 U.S. at 497.
\item \textsuperscript{22} \textit{Miranda}, 384 U.S. at 478.
\item \textsuperscript{23} \textit{Id.} at 478-79. The Court mandated that criminal suspects be given specific warnings:
\begin{quote}
We hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.
\end{quote}
\textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{See id.} The Court noted that confessions by criminal suspects remain a valid investigatory tool, but the decision to confess should be left to the suspect, and not as a result of any coercive measures taken by the police. \textit{Id.} at 478. Statements given by criminal suspects, if they choose to confess, must be given freely and voluntarily after the appropriate warnings have been given. \textit{Id.} at 478-79. If these procedures are not followed, any statement given by criminal suspects, no matter how valuable to an investigation, cannot be used against suspects at their criminal trial. \textit{Id.} at 479.
\end{itemize}
the context of employer investigations. When public employers seek to compel answers from employees by threatening their jobs or asking for waivers of their rights, employees have automatic immunity from the use of those answers in subsequent criminal prosecutions. Coercion is implicit in such threats. Employee statements can be compelled only when there is immunity and the questions are narrowly tailored to the employee's duties; immunity can be expressly granted or implied when questioning is coercive.

1. Garrity v. New Jersey: Establishing a Public Employee's Rights Under the Fifth Amendment

Garrity v. New Jersey is the landmark case that established a public employee's Fifth Amendment rights in the context of employer investigations of possible employee criminal conduct. Garrity involved police officers who were under investigation for fixing traffic tickets. They were brought in for questioning and informed that, pursuant to New Jersey law, any statement they made could be used against them in a criminal proceeding, and that any refusal to answer questions would subject them to removal. Because they did not want to be fired, Garrity and the


27. Cunningham, 431 U.S. at 805-06.

28. Garrity, 385 U.S. at 500 (holding that the threat of termination for refusal to answer questions constitutes coercion, resulting in immunity from prosecution for any answer given); see also Gardner, 392 U.S. at 278 (holding that an employer cannot fire an employee solely for refusing to waive his Fifth Amendment rights).

29. Gardner, 392 U.S. at 278 ("If appellant . . . had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity . . . the privilege against self-incrimination would not have been a bar to his dismissal." (footnote omitted)).


32. Id. The New Jersey statute in question in Garrity states:

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
other officers answered their employer’s questions. Subsequently, the officers’ answers were used against them in their criminal trials. They were found guilty and appealed the conviction on the grounds that their statements given in the administrative interview were coerced because they forced the officers to choose between their jobs and self-incrimination.

The Court first found that the threat of removal for failure to answer questions was coercive, comparing the choice the officers faced to being “‘between the rock and the whirlpool.” As to the admissibility of the statements, the Court held that “the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office.” The result of Garrity was the exclusion from any tenure or pension granted to him by any law of this state provided the inquiry relates 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.

Id. at 494 n.1 (internal quotation marks omitted) (quoting N.J. REV. STAT. § 2A:81-17.1 (Supp. 1965)).
33. Id. at 495.
34. Id.
35. Id.
36. Id. at 497-98. In a companion case, the Court said that the Fifth Amendment protects against any penalty or sanction that forces the party asserting the right to make a costly decision. Spevack v. Klein, 385 U.S. 511, 515 (1967) (citing Griffin v. California, 380 U.S. 609, 614 (1965)). In Spevack, the Court specifically held that threatening a lawyer with disbarment constitutes coercion. Id. at 516. Justice Harlan, dissenting in Garrity, noted that a statement or confession is coerced when the suspect's will has been overcome either by “threats of imminent danger, physical deprivations, repeated or extended interrogation, limits on access to counsel or friends, length and illegality of detention under state law, individual weakness or incapacity, [or] the adequacy of warnings of constitutional rights.” Garrity, 385 U.S. at 505-06 (Harlan, J., dissenting) (citations omitted); see also Eleanor Heard, Are New York Police Officers Safely Playing or Playing it Safe? Eliminating the Forty-Eight Hour Rule, 57 N.Y.U. ANN. SURV. AM. L. 133, 136 (2000) (noting that a police officer being questioned by a fellow officer after an incident faces an inherently coercive situation that an average defendant would not necessarily find coercive).
37. Garrity, 385 U.S. at 500. Administrative interrogations where an employee is forced to choose between answering questions or being fired creates a conflict between the employee’s Fifth Amendment right against compulsory self-incrimination, his property right in continued employment with the government, and his due process right not to have coerced statements used against him in a criminal proceeding. Driscoll, supra note 7, at 134. But see Gandy v. State ex rel Div. of Investigation & Narcotics, 607 P.2d 581, 583 (Nev. 1980) (showing the rule from Garrity does not mean those statements can never be compelled, but may be obtained so long as immunity is given to those statements in both federal and state criminal proceedings).
subsequent prosecution of statements given when a public employee is forced to choose between his job and his Fifth Amendment rights.\(^{38}\)


The year after Garrity was decided, the Supreme Court issued two opinions clarifying Garrity.\(^{39}\) In Gardner v. Broderick, Robert Gardner, a police officer, was called before a grand jury to answer questions regarding unlawful gambling.\(^{40}\) Gardner was asked to waive his Fifth Amendment rights before the grand jury, and was told that his failure to do so would lead to his dismissal.\(^{41}\) Gardner refused to waive his rights and was subsequently fired.\(^{42}\)

The Court found that Gardner’s termination was a violation of his rights under Garrity.\(^{43}\) However, the Court noted in dicta that answers may be compelled if the employee is given immunity.\(^{44}\) Specifically, the

---

38. Garrity, 385 U.S. at 500. Precluding the use of statements made to one’s employer in a subsequent criminal proceeding is what protects the employee’s Fifth Amendment rights. Lybarger v. City of Los Angeles, 710 P.2d 329, 331 (Cal. 1985) (en banc). The dissent in Garrity argued that the majority went too far by extending the privileges of the Fifth Amendment beyond its purposes. Garrity, 385 U.S. at 508 (Harlan, J., dissenting). Justice Harlan argued that the majority’s determination that the statements made by the officers were both involuntary and inadmissible was incorrect. Id. at 501. Justice Harlan reviewed the Court’s past decisions regarding situations where the voluntariness of statements were called into question, and determined that the officers’ statements were not involuntary. Id. at 505-06. Justice Harlan argued that the public policy considerations were greater than any potential hazards to the officer’s constitutional privileges, and therefore the statements given should be admissible. Id. at 506-09. Some scholars critical of Garrity argue that the threat of termination should not trigger immunity. See Steven D. Clymer, Compelled Statements from Police Officers and Garrity Immunity, 76 N.Y.U. L. REV. 1309, 1363 (2001). Professor Clymer, however, argues for immunity, stating that the contrary view “overstates both the impediments to the government as an employer and the advantages that government employees enjoy.” Id. Significantly modifying or overturning Garrity would allow public employers to “impose unique restrictions on public employees’ ability to exercise their Fifth Amendment rights.” Id. at 1364.


40. Gardner, 392 U.S. at 274.

41. Id.

42. Id. at 274-75.

43. Id. at 278-79.

44. Id. at 276; see Counselman v. Hitchcock, 142 U.S. 547, 585 (1892) (“We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.”); see also Murphy v. Waterfront Comm’n, 378 U.S. 52, 79 (1964) (holding that the constitutional rule is that no witness in a state trial may be compelled to give incriminating testimony for use in a federal proceeding unless the appropriate immunity attaches to that statement, such that neither the statement nor its fruits can be used in a later criminal proceeding).
Court said when an employee is asked questions that are narrowly and specifically tailored to the scope of his employment, the employee can be fired for failing to answer as long as his employer does not request a waiver of an employee’s immunity.\textsuperscript{45}

In Uniformed Sanitation Men Ass’n v. Commissioner of Sanitation, the Court was faced with the case of twelve New York Sanitation Department employees who had been fired for invoking their Fifth Amendment rights and refusing to answer questions about their conduct before the sanitation commissioner; three other employees were fired for refusing to waive immunity before a grand jury.\textsuperscript{46} The Court again noted that it was not the questions, but the demand to waive the employees’ Fifth Amendment rights, that ran afoul of the Constitution and of \textit{Garrity}.\textsuperscript{47} Repeating the limiting dicta from \textit{Gardner}, the Court explained that pub-

\begin{itemize}
\item \textit{Gardner}, 392 U.S. at 278. The privilege can be waived when the waiver is knowing and voluntary. \textit{Id.} at 276. Professor Byron Warnken argues that it is a misunderstanding to read \textit{Garrity} and \textit{Gardner} as standing for the proposition that a law enforcement officer “may be forced to choose between the constitutional privilege against compelled self-incrimination and a career if the” employer only asks questions that are narrowly related to the employee’s performance while on the job. Byron L. Warnken, \textit{The Law Enforcement Officers’ Privilege Against Compelled Self-Incrimination}, 16 U. BALT. L. REV. 452, 480 (1987). Professor Warnken reads the \textit{Gardner} dicta as “stand[ing] 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.” \textit{Id.} Professor Warnken argues that in order to properly fire an employee under \textit{Garrity} and \textit{Gardner}, public employers must provide immunity in exchange for forcing an employee to answer questions related to their duty. \textit{Id.}
\item Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation, 392 U.S. 280, 282-83 (1968). The statute invalidated by the Court provided:

If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized 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. \textit{Id.} at 282 n.3 (internal quotation marks omitted) (quoting N.Y. CITY, N.Y. CHARTER § 1123 (1966)).
\item \textit{Id.} at 283-84. The Court in Uniformed Sanitation held that public employees had been wrongfully fired because they had refused to waive their immunity. \textit{Id.} at 283. Had the city only required that the employees “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.” \textit{Id.} at 284. If this had been the case, the compulsion of testimony would not affect the employees’ immunity. \textit{Id.}
\end{itemize}
Should Public Employers Be Forced To Warn

Public employees who are not forced to abdicate their rights may be forced to answer questions to account to the public for their behavior. The Court has allowed public employees to be fired for failing to account for their behavior because of their unique position in serving the public and the need to keep public trust in the government high.

3. Clarifying and Establishing the Rule of Garrity

In reviewing Garrity, Gardner, and Uniformed Sanitation, the Court stated that a public employee may "refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." In other words, because immunity is automatically granted to coerced public employees, they can be compelled to answer and be fired for refusing to answer narrow questions related to their official duties. Statements given as a result of a threat are inadmissible and automatically immunized. Answers may be compelled if immunity has attached via Garrity, there has been no attempt to coerce a public employee into giving an answer, immunity has been waived, or Fifth Amendment rights have been waived.

48. Id. at 285.
49. Id. The Court noted that public employees "are subject . . . to dismissal if they refuse to account for their performance of the public trust." Id. at 285. However, this rationale does not apply if the employer attempts to force their employee to give up their Fifth Amendment rights. Gandy v. State ex rel. Div. of Investigation & Narcotics, 607 P.2d 581,583-84 (Nev. 1980).
50. Lefkowitz v. Turley, 414 U.S. 70, 78 (1973); see also Kastigar v. United States, 406 U.S. 441, 442 (1972) (involving public employees who were called before a grand jury and refused to answer the questions put to them). The Court in Kastigar ruled that the Fifth Amendment only created immunity as to the statements, and not full immunity from criminal prosecution for the actions described in the compelled testimony. Kastigar, 406 U.S. at 461-62. In other words, the Court favors investigating wrongdoing on the part of public employees, but only to the point where their constitutional rights are not infringed. See Driscoll, supra note 7, at 119.
51. Turley, 414 U.S. at 79. In Turley, two architects licensed to work for the state refused to waive their immunity before a grand jury and were disqualified from public contracts. Id. at 75-76. The Court ruled that their dismissal violated their Fifth Amendment rights under Garrity. See id. at 82-83.
52. Id. at 79.
53. See id. at 84-85. The Second Circuit offered an explanation as to why immunity eliminated the protection against compulsory self-incrimination. It said:
To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning his official conduct, although assured of protection against use of his answers or their fruits in any criminal prosecution, would push the constitutional protection beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights.

Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 426 F.2d 619, 626 (2d Cir. 1970). Professor Warnken argues that dicta from Turley, Uniformed Sanitation, and Gardner allows for a better understanding of three different levels of Fifth Amendment protec-
In *Cunningham*, the Court further clarified the rule established in *Garrity*.54 The Court first noted that it is not only the threat of imprisonment or economic sanction that triggers *Garrity* immunity.55 Rather, coercion can take any number of forms because it is compulsion that underlies the protections of the Fifth Amendment.56 The Court once again acknowledged the tension between the need to maintain honest police officers and civil servants,57 and the need to respect the rights of public employees.58

C. Lack of Consensus Regarding Affirmative Warnings: The Circuit Split

*Garrity* and its progeny left unanswered the question of whether public employers must warn employees that they must answer questions put to them by their employer when immunity is either expressly granted or attaches due to the coercive nature of the questioning.59 The Seventh and
Federal Circuits require a warning, while the Fifth, Eighth, and Eleventh Circuits do not require such a warning.60

1. Affirmative Duty to Advise: The Position of the Seventh and Federal Circuits

The Seventh Circuit has interpreted Garrity and its progeny a number of times.61 In a recent case, the Seventh Circuit was presented with Sarah Atwell, the director of development for the Lisle Park District, an Illinois public entity.62 Atwell was under investigation for the misuse of park district funds.63 Atwell's employer did not warn her of her duty to answer its questions.64 Atwell invoked her Fifth Amendment right against compulsory self-incrimination and refused to answer.65

The Seventh Circuit, as it has in each case in which it has dealt with Garrity,66 ruled that the park district was required to warn Atwell of her attached immunity and requirement to answer when threatened with removal.67 While acknowledging that the Fifth Amendment does not apply

60. See Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002); Modrowski v. Dep't of Veterans Affairs, 252 F.3d 1344, 1351 (Fed. Cir. 2001); Hester v. City of Milledgeville, 777 F.2d 1492, 1496 (11th Cir. 1984). The Third, Fourth, and Tenth Circuits have explicitly left the question open. See Wiley v. Mayor of Balt., 48 F.3d 773, 777 n.7 (4th Cir. 1995) ("In an appropriate case, it might be necessary to inform an employee about [the immunity's] nature and scope. Here, however, the need for an explanation did not ripen because no officer attempted to invoke his Fifth Amendment rights . . . .") (citation omitted); In re Grand Jury Subpoenas Dated December 7 and 8 v. United States, 40 F.3d 1096, 1102 n.5 (10th Cir. 1994) ("[T]his case does not require us to decide whether the government must affirmatively advise a police officer who is undergoing an internal affairs interview that the officer is not being forced to waive his or her Fifth Amendment rights . . . ."); Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 859 F.2d 276, 282 (3d Cir. 1988) ("[W]e find it unnecessary to decide whether a public employer must inform employees that use immunity attaches to questions relating to official duties, when the employee is required, on pain of dismissal, to answer the questions.").

61. See Franklin v. City of Evanston, 384 F.3d 838, 844-45 (7th Cir. 2004); Atwell, 286 F.3d at 990; Riggins v. Walter, 279 F.3d 422, 430 (7th Cir. 1995); United States v. Devitt, 499 F.2d 135, 141 (7th Cir. 1974); Confederation of Police v. Conlisk, 489 F.2d 891, 893-94 (7th Cir. 1973).

62. Atwell, 286 F.3d at 989.

63. Id.

64. An investigator from the park district "told [Atwell] that a grand jury was being convened to investigate the allegations and that, in light of the grand jury's involvement, Atwell's lawyer would probably advise her that it would be prudent for her to exercise her constitutional right to remain silent." Id.

65. Id.

66. See Riggins, 279 F.3d at 430; Devitt, 499 F.2d at 141; Conlisk, 489 F.2d at 893-94.

67. Atwell, 286 F.3d at 990. The court in Atwell said, "because of the immunity to which the cases [like Garrity] entitle him, [a public employee] may not refuse to answer the questions on the ground that the answers may incriminate him." Id.; see also Riggins, 279 F.3d at 431 ("[T]his circuit requires that before taking disciplinary action, a public employer must inform the employee that any compelled statements could not be used in
outside the criminal context, the court described its rule as an "anti-mousetrapping" rule. It reasoned that employees are more likely to have heard of their Fifth Amendment right than their rights under \textit{Garrity} and the immunity that attaches to their answers. As a result, employees subject to an investigation with their job on the line "may instinctively 'take the Fifth' and" thus lose their jobs due to a lack of legal knowledge.

The Federal Circuit has also addressed this question, agreeing with the Seventh Circuit. On one occasion, the Federal Circuit was presented with a United States Housing and Urban Development (HUD) employee, Ruby Weston, who was under investigation for purchasing and collecting insurance proceeds on a house that was sold by HUD. After the United States attorney declined prosecution, a HUD investigator attempted to question Weston. Before beginning the questioning, the investigator informed Weston that there would be no criminal prosecution, that any information given was immune from use in any subsequent criminal proceeding, and that a failure to answer could lead to her dismissal.

\begin{itemize}
  \item \textit{Devitt}, 499 F.2d at 141 (stating that a witness may not be disciplined for failing to testify until he is told that his answers are immune from subsequent use in a criminal trial); \textit{Conlisk}, 489 F.2d at 895 (holding the discharge of police officers unconstitutional because the officers were not told that their answers to administrative questions could not be used against them). This rule is premised on the granting of immunity either through an express grant or coercive questioning as described and developed in the \textit{Garrity} line of cases. \textit{Atwell}, 286 F.3d at 990.
  \item \textit{Atwell}, 286 F.3d at 990.
  \item \textit{Atwell}, 286 F.3d at 990.
  \item \textit{Atwell}, 286 F.3d at 990.
  \item \textit{Weston} v. U.S. Dep't of Hous. & Urban Dev., 724 F.2d 943, 948 (Fed. Cir. 1983); see also \textit{Kalkines} v. United States, 473 F.2d 1391, 1393-94 (Ct. Cl. 1973). Supervisors in the federal government often find themselves in a position where they must investigate minor wrongdoing on the part of their employees. William N. Rudman, \textit{On the Hot Seat}, \textit{GOV'T EXECUTIVE}, Jan. 1996, at 35, 35. In those situations, supervisors run a risk of interfering with a criminal investigation if they do not first inquire as to the status of any criminal investigation regarding that employee. \textit{Id.} Managers need to make sure they respect the Fifth Amendment rights of the employees they investigate. \textit{Id.} at 35-36. The best way to protect the rights of federal employees is to provide appropriate warnings. \textit{Id.} at 36-38. A failure to warn could lead to a reversal of any adverse action against the employee. \textit{Id.} at 38. Finally, in the case where employees decide to cooperate with the investigation, managers need to make sure that they preserve any answers for use in a future criminal prosecution. \textit{See id.} at 36.
  \item \textit{Weston}, 724 F.2d at 945.
  \item \textit{Id.} at 945-46.
  \item By relying on the \textit{Garrity} doctrine, the court quickly determined Weston's Fifth Amendment claim, stating, "there is no question that Ms. Weston's refusal [at a meeting with a HUD investigator] and subsequently to participate in the proposed investigation was not justifiable out of any valid [F]ifth [A]mendment considerations." \textit{Id.} at 948.
\end{itemize}
After citing *Garrity* and its progeny approvingly, the court stated that under the Fifth Amendment, an employee must be “duly advised of his options to answer under the immunity granted or remain silent and face dismissal” in order for a dismissal of an employee to be valid. In Weston’s case, the court found the statement read to Weston was sufficient to duly advise her of her rights and consequences under the Fifth Amendment.

The Federal Circuit refined its understanding of the affirmative duty to warn rule in *Modrowski v. Department of Veterans Affairs*. In *Modrowski*, the Department of Veteran’s Affairs (VA) investigated Modrowski for stealing items from two government-owned houses. During

75. Id. at 948 (citing *Kalkines*, 473 F.2d at 1393). In *Kalkines*, the Bureau of Customs suspended and ultimately discharged an employee for failure to answer questions pertaining to an administrative investigation. *Kalkines*, 473 F.2d at 1391-92. The court, relying on *Garrity* and *Uniformed Sanitation*, ruled the discharge invalid. *Kalkines*, 473 F.2d at 1396, 1398 (holding that Kalkines had not been adequately told of his duty to answer and of the consequences of not answering the questions put to him).

76. Weston, 724 F.2d at 948.

77. Modrowski v. Dep’t of Veterans Affairs, 252 F.3d 1344 (Fed. Cir. 2001). The Federal Circuit’s position has been adopted by the Merit Systems Protection Board in *Sher v. Dep’t of Veterans Affairs*, 97 M.S.P.R. (West) 232, 237-38 (Merit Sys. Prot. Bd. 2004). In *Sher*, the Merit Systems Protection Board was faced with a federal employee suspected of taking an unauthorized gift. *Id.* at 234. Prior to an administrative interview, the employee was notified that the United States attorney had declined prosecution, that the matter was solely administrative, and that he was required to answer. *Id.* at 236-37. Despite an additional letter granting immunity from the United States attorney, the employee refused to answer questions. *Id.* at 237. The board discussed both Weston and Modrowski, adopted the general test, and found the case to be more like Weston than Modrowski. *Id.* at 237-39. The issue was also discussed by a member of the Merit Systems Protection Board in *Bucknor v. U.S. Postal Service*, 93 M.S.P.R. (West) 271, 275-76 (Merit Sys. Prot. Bd. 2003) (Slavet, Member, separate opinion). In *Bucknor*, Bucknor damaged a Postal Service vehicle while using it for personal use. *Id.* at 274. When questioned about the incident, Bucknor refused to answer without an attorney present. *Id.* After obtaining counsel, Bucknor answered the agency’s questions. *Id.* Upon completion of their investigation, the agency “proposed removal for the unauthorized use of a government vehicle and impeding the subsequent Postal Service investigation by refusing to answer the agency officials’ questions.” *Id.* The penalty was later reduced to a suspension. *Id.* Bucknor appealed and the board affirmed the punishment. *Id.* at 271-72 (board decision). In a separate opinion, Board Member Slavet discussed Fifth Amendment concerns noting that an employee has a Fifth Amendment right to refuse to make statements he reasonably believes may be used against him in a criminal trial. *Id.* at 275 (Slavet, Member, separate opinion). However, if the employer has warned the employee that refusing to answer could lead to removal and that any statement given can not be used because of the immunity that attaches under *Garrity*, then the employee must answer any questions posed. *Id.* Member Slavet noted that if there is no overt threat of removal, then *Garrity* does not apply and an employee may invoke his Fifth Amendment right. *Id.* at 275-76. In Bucknor’s case, he was never informed that he could be fired for refusing to answer, thus *Garrity* should not have applied and Bucknor was entitled to remain silent so long as he reasonably believed his answers could later be used against him. *Id.* at 276.

78. *Modrowski*, 252 F.3d at 1346-47.
the course of its investigation, the VA discovered that Modrowski sold two VA-owned houses in violation of VA regulations.79 A VA officer questioned Modrowski, who refused to answer.80 The VA notified the United States attorney's office of the investigation, but the United States attorney declined to press charges related to the sale of the houses.81 The VA notified Modrowski that he had been granted immunity for the sale of the houses, that there would be no prosecution forthcoming, and that he was required to answer administrative questions.82 Modrowski continued to refuse to answer questions and was subsequently terminated.83

The court distinguished the case from Weston by noting that the letter of immunity was ambiguous in both scope and in the VA's ability to speak for the United States attorney, unlike the grant of immunity in Weston.84 The court found that Modrowski was reasonable in his apprehension that his responses could be used against him in a later criminal proceeding for the theft from VA-owned houses.85 Based on Weston and Modrowski, the Federal Circuit agrees with the Seventh Circuit, but adds the stipulation that the grant of immunity cannot lead to unreasonable apprehension regarding its scope.86

Finally, the Second Circuit has implied in dictum that based on the Supreme Court's rulings in Garrity and Uniformed Sanitation, warnings are required before adverse employment action can be taken.87 After the Supreme Court's decision in Uniformed Sanitation, an Environmental Protection Agency deputy administrator questioned the fifteen New York Sanitation Department employees who were the subject of the case.88 They were warned that they had a right to remain silent, that fail-

79. Id. at 1347.
80. Id.
81. Id.
82. Id. The grant of immunity and letter from the VA said nothing about the thefts. Id.
83. Id. at 1348.
84. Id. at 1352-53. Unlike in Weston, the grant of immunity in Modrowski did not state whether it covered one or both of the crimes, and the grant of immunity was written on VA letterhead rather than letterhead from the United States Attorney's Office. Id. at 1351. Thus, the court found that Modrowski could not be certain whether the immunity covered him for one or both of the crimes for which he was under investigation, and he could not be certain as to the trustworthiness of the grant of immunity. Id. at 1352.
85. Id. at 1351-52.
86. See Weston v. U.S. Dep't of Hous. & Urban Dev., 724 F.2d 943, 947-48 (Fed. Cir. 1983) ("[The privilege] protect[s] against any disclosure[s] that an individual reasonably believes could be used in his own criminal prosecution . . .").
87. Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002). For the original facts of the case, see Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 282-83 (1968).
ure to answer could lead to adverse action, and that answers could not be used in criminal proceedings. The employees refused to answer and were subsequently fired from their jobs for a second time.

The Second Circuit found that the city had adequately followed the rule laid down in Gardner v. Broderick, and held that the removal of the sanitation employees was valid. In dicta, the court implied that proper proceedings were required before adverse action could be taken. It defined proper proceedings as those "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."

2. No Duty to Warn: The Position of the Fifth, Eighth, and Eleventh Circuits

The Fifth Circuit has held that employers need not warn their employees of their duty to answer questions. In Gulden v. McCorkle, the Dallas Public Works Department asked employees Charles Gulden and Richard Sage to take polygraph examinations. Gulden and Sage refused on the grounds that the department was illegally attempting to obtain a waiver of their rights by threatening their jobs. Based on their refusal, Gulden and Sage were discharged from their positions with the department.

The court first discussed the Garrity line of cases. It summarized the Garrity line as follows:

[T]hese cases emphasize [that] it is the compelled answer in combination with the compelled waiver of immunity that creates the Hobson's choice for the employee. It is a discharge predicated on the employee's refusal to waive immunity which is forbidden by [Garrity and its progeny], not a discharge based on refusal to an-

---

89. Id.
90. Id. at 621-22.
91. See id. at 627.
92. Id.
93. Id. The court found that the statement read by the Sanitation Department, essentially copying language from Garrity, Uniformed Sanitation, and Gardner, was sufficient to advise the employees of their rights. Cf. id. at 621, 627.
94. See Gulden v. McCorkle, 680 F.2d 1070, 1076 (5th Cir. 1982). It is important to note that although the Fifth and Seventh Circuits disagree as to the warning requirement, they are in agreement "that there can be no duty to warn until the employee is" presented with questions narrowly related to his duties. See Atwell v. Lisle Park Dist., 286 F.3d 987, 991 (7th Cir. 2002) (stating that there is no duty to warn until the employee is asked questions that are narrowly and specifically directed to his duties).
95. Gulden, 680 F.2d at 1071.
96. Id. at 1071-72.
97. Id. at 1071.
98. Id. at 1073-74.
The court declined to accept the argument that Garrity and its progeny require "an affirmative tender of immunity." The court reiterated that it is the compulsion of testimony, not the failure to require the employee give an affirmative waiver, that creates the constitutional violation. Consequently, the court found that the department did not require Gulden and Sage to waive their immunity. The court reasoned that forcing an employer to offer an affirmative tender of immunity or a warning prior to any questioning would allow an employee to exercise a right when the need to do so had not yet ripened. The court noted that a duty to warn could only exist after an employee was forced to answer narrow, direct questions about his or her employment, though the court doubted such a duty was required by Garrity. Requiring a warning would frustrate investigations by public employers who had not yet committed a constitutional violation. The court implied that warning an employee prior to any questioning would not give the employer an opportunity to ask necessary questions of the employee, thus impermissibly tilting the balance in favor of the employee over the need to preserve the public trust.

In Arrington v. County of Dallas, the Fifth Circuit reaffirmed that the Fifth Amendment protection against compulsory self-incrimination does not apply until an employer requests relinquishment of an employee's rights. Only compelling an answer to incriminating questions and com-

99. Id. at 1074 (emphasis omitted).
100. Id. at 1075.
101. Id. The court found that failure to give immunity is not the same as compelling a waiver of Garrity immunity. Id.; see also Harrison v. Wille, 132 F.3d 679, 683 (11th Cir. 1998) (finding, similarly to the Fifth Circuit, that an employee must show that his employer compelled him to give up his Fifth Amendment rights before he can be granted relief for his firing). Thus, an employee who could not show that he was fired solely for remaining silent in the face of questioning by his employer was not granted relief for his firing. Harrison, 132 F.3d at 683.
102. Gulden, 680 F.2d at 1076.
103. Id. The Fifth Circuit noted that Gulden and Sage had not yet been required to answer narrow and specific questions about their duties, only that they were required to take polygraph examinations. Id.
104. Id.
105. Id. Recall that the Fifth Circuit read Garrity to hold that the constitutional violation does not occur until illegitimate questions or a coerced waiver of rights have been asked of the employee, not before any questioning has been initiated by the employer. Id. at 1075-76.
106. Id. at 1076; see also Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 426 F.2d 619, 625 (2d Cir. 1970) (noting that public employees should account for the public trust placed in them as public employees).
107. Arrington v. County of Dallas, 970 F.2d 1441, 1446 (5th Cir. 1992). In Arrington, Constable Jack Richardson approached two deputy officers, Floyd Arrington and Timothy
pelling a waiver of Garrity immunity places an employee's rights in jeopardy. According to the Fifth Circuit, simply refusing to tender immunity affirmatively or to warn an employee of the consequences of the encounter is not sufficient to constitute a Fifth Amendment violation.

The Eleventh Circuit proposed another reason for adopting the same rule in *Hester v. City of Milledgeville*. There, the Eleventh Circuit found that a public employer's failure to tender a timely offer of immunity is irrelevant in a coercive situation. The court reasoned that Garrity immunity attached when a statement has been compelled in any way. Thus, the court found that any affirmative tender of immunity would be "duplicative" because the employees were already granted use immunity under Garrity and its progeny. The Eleventh Circuit thus adopted the rule that Garrity immunity attaches when the employees are subjected to improper coercive questioning. An explicit warning is therefore unnecessary.

The Eighth Circuit has agreed with the Fifth and Eleventh Circuits. In *Hill v. Johnson*, a sheriff's department terminated an employee, Hill, who refused to answer questions and take a polygraph examination regarding missing evidence. The court found that the Fifth Amendment

Hammond, to assist in his reelection bid. *Id.* at 1443. Both Arrington and Hammond declined the offer. *Id.* After Richardson had been reelected, Arrington and Hammond claimed "they were treated less favorably than were the [other officers] who had supported the [Richardson election bid]." *Id.* Arrington and Hammond also discovered records that Richardson had improperly used official files for political purposes, and that Richardson was actively spying on Hammond. *Id.* Arrington and Hammond kept the files, and Richardson later accused them of stealing the files. *Id.* Richardson fired Arrington for allegedly refusing to cooperate with an investigation into the stolen files. *Id.* Hammond was also fired for possession of the stolen files. *Id.*

108. *Id.* at 1446.
109. *Id.*
110. *See id.* at 1496. In *Hester*, the city of Milledgeville was concerned with drug use among the city's firefighters. *Id.* at 1494. The city authorized mandatory polygraph testing that was narrowly tailored to protect employees' Fifth Amendment rights. *Id.* Before questioning, each employee signed a waiver that provided the employees with the choice to authorize their answers for later use, waive their rights, retain their rights, or refuse to submit to the polygraph (and face dismissal). *Id.* The firefighters filed suit, claiming that the waiver policy violated their Fifth Amendment rights. *Id.*
112. *Id.* at 1496.
113. *Id.*
114. *Id.*
115. *See Benjamin v. City of Montgomery*, 785 F.2d 959, 962 (11th Cir. 1986) (stating that public employees should not be forced to speculate as to whether their statements are covered by the immunity offered in Garrity); *see also* Debnam v. N.C. Dep't of Corr., 432 S.E.2d 324, 330-31 (N.C. 1993) (adopting the rationale of the Fifth and Eleventh Circuits in analyzing the issue of affirmative warnings).
117. *Id.* at 470.
was not violated because Hill was not required to waive his Fifth Amendment rights to answer questions related to his job.118 According to the court, the failure to offer immunity differs from an “attempt to compel a waiver of immunity.”119 The court based this rule on the premise that a compelled waiver does not follow from a mere failure to adequately warn or offer immunity, even if the employee is otherwise unaware that his answers are immune from further use.120

The dissent in Hill found fault in the rule that no affirmative warning or grant of immunity is required.121 The dissent argued that without an affirmative warning, “a public employer could discharge an employee for refusing to answer a question as long as there was no explicit request for a waiver [of immunity], irrespective of whether the employee knew of the nature of the proceeding.”122 According to the dissent, the majority’s rule is a result of reading Uniformed Sanitation and Gardner too narrowly.123 This could allow employers to incompletely describe the nature of the investigatory interview to employees.124 The assertion by employers that the interview was only administrative in nature could surprise employees who feared that the questioning would turn into a criminal investigation.125

II. AN ANALYSIS OF THE DUTY TO WARN AND THE NO DUTY TO WARN RULES

Courts requiring a warning cite the need to inform an employee of his rights against anything being used in a subsequent criminal proceeding, the need to protect employees from making decisions not in their best interests, and the need to keep employers honest during administrative investigations.126 Courts that reject a warning requirement note the duplicative nature of such a warning, the need to hold public employees accountable to the public trust, and the need to allow employers to investigate employees in violation of the law or regulations.127 The rule requir-
Should Public Employers Be Forced To Warn

A warning and the rule not requiring a warning have benefits and disadvantages that will be discussed below.

A. Benefits of the Seventh and Federal Circuits’ Rule Requiring a Warning

First, the rule requiring a warning is clear in principle and is clear procedurally. The rule simply is “that the [public] employer who wants to ask an employee potentially incriminating questions must first warn him that because of the immunity to which the cases entitle him, he may not refuse to answer the questions.”

Although the court in Atwell characterizes it as a bright-line rule, the cases from the Second and Federal Circuits show that the rule can be applied using a variety of methods. In Uniformed Sanitation, the Second Circuit stated in dicta that employees must be informed of their rights and the consequences of invoking those rights. While the court found it important that the employee be given warnings, it did not dictate the specific language of those warnings. Instead, Atwell afforded protection against unknowingly waiving Fifth Amendment protections by requiring that warnings be given before questions are asked. The requirement to warn is balanced by the implicit latitude given to employers in their method of conveying the warning.

Additionally, the requirement that employers must give affirmative warnings does not preclude their ability to take appropriate administrative action, including termination if the proper safeguards are in place.

---

128. See Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002).
129. Id. The requirement for these warnings was affirmed in Franklin v. City of Evanston, 384 F.3d 838, 843-44, 848 (7th Cir. 2004), which noted that Franklin’s firing “was a violation of Franklin’s rights...skirted the need for Atwell warnings.”
130. See Weston v. U.S. Dep’t of Hous. & Urban Dev., 724 F.2d 943, 948 (Fed. Cir. 1983) (allowing a statement read by a HUD investigator to serve as sufficient warning); Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation, 426 F.2d 619, 625, 627 (2d Cir. 1970) (stating that an employee must be duly advised of his choice).
131. Uniformed Sanitation, 426 F.2d at 627.
132. See id. (noting that employees must only be warned of their option to answer narrow and direct questions and the consequences of that choice); see also Atwell, 286 F.3d at 990 (requiring only that warnings be given, and not requiring any specific language); Weston, 724 F.2d at 948 (requiring the same procedure described in Uniformed Sanitation); Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973) (requiring only that the employee be duly advised of his rights and the consequences thereof).
133. Atwell, 286 F.3d at 990.
134. See Weston, 724 F.2d at 948 (allowing a statement read by a HUD investigator describing Weston’s rights to serve as sufficient warning). But see Modrowski v. Dep’t of Veterans Affairs, 252 F.3d 1344, 1351 (Fed. Cir. 2001) (finding a letter written on department letterhead claiming authorities had decided not to prosecute and conferring immunity served as inadequate warning when the scope and validity of the grant was reasonably suspicious to the employee).
135. Gandy v. State ex rel Div. of Investigation & Narcotics, 607 P.2d 581, 583 (Nev. 1980); see also Atwell, 286 F.3d at 991 (stating that only when employees are properly
The warning requirement thus strikes a balance between the employee's need for protection and the employer's desire to obtain information and take adverse action when necessary.\textsuperscript{136}

The need for warnings is made clear by the fact that lower courts have eroded away the protections afforded under the \textit{Garrity} rule.\textsuperscript{137} This places public employees precisely in the situation the Court in \textit{Garrity} found objectionable by forcing employees to choose between their rights and their jobs.\textsuperscript{138} Requiring affirmative warnings prevents employees from answering questions against their interest and helps to uphold the rule established in \textit{Garrity}.\textsuperscript{139} The result is that an employee will not be forced to speculate what their rights are because they will be properly informed and fully protected by \textit{Garrity}.\textsuperscript{140}

\textbf{B. Disadvantages of the Seventh and Federal Circuits' Rule}

The first disadvantage of the warning requirement is that warning employees of their rights may lead to their refusal to talk and subsequent termination.\textsuperscript{141} Although employers will be able to fire offending employees, their investigations will be incomplete.\textsuperscript{142} The employer will be able to punish an offending employee, but will not be able to determine

\begin{itemize}
  \item advised of their rights can an employer take action}; \textit{Weston}, 724 F.2d at 948 (holding that the dismissal of a federal employee for refusing to answer questions when she had properly been advised of her rights and duties was valid).
  \item \textsuperscript{136} \textit{See Atwell}, 286 F.3d at 990-91 (noting that public employers have a right to dismiss employees who break the law or do not answer narrowly asked questions, but that right must be balanced by warning employees that immunity attaches to their statements).
  \item \textsuperscript{137} Driscoll, \textit{supra} note 7, at 119 ("Federal and state courts have continued to allow statements made by accused officers to be 'used' tangentially, to spur investigations, prepare for prosecution, and plan trial strategy.").
  \item \textsuperscript{138} \textit{Garrity} v. New Jersey, 385 U.S. 493, 497-98 (1967); \textit{see also} Driscoll, \textit{supra} note 7, at 140 (arguing that a police officer questioned by his employer faces one of the most stressful situations of his life, and may be forced to choose between his rights and his job).
  \item \textsuperscript{139} \textit{Lybarger} v. City of Los Angeles, 710 P.2d 329, 334 (Cal. 1985) (en banc) (Bird, C.J., concurring); Driscoll, \textit{supra} note 7, at 140.
  \item \textsuperscript{140} \textit{Hill} v. \textit{Johnson}, 160 F.3d 469, 473 (8th Cir. 1998) (Heaney, J., dissenting) (arguing in favor of the Seventh Circuit's rule because it does not force employees to guess their rights); \textit{Lybarger}, 710 P.2d at 336 (Bird, C.J., concurring) (arguing that police officers under investigation should not be required to speculate as to the status of their constitutional rights).
  \item \textsuperscript{141} \textit{See Modrowski} v. \textit{Dep't of Veterans Affairs}, 252 F.3d 1344, 1348 (Fed. Cir. 2001); \textit{Sher} v. \textit{Dep't of Veterans Affairs}, 97 M.S.P.R. (West) 232, 236-37 (Merit Sys. Prot. Bd. 2004). Both Modrowski and Sher were informed of their rights and refused to talk, leading to adverse actions against them. \textit{See Modrowski}, 252 F.3d at 1347-48; \textit{Sher}, 97 M.S.P.R. (West) at 234, 236-37.
  \item \textsuperscript{142} \textit{Gulden} v. \textit{McCorkle}, 680 F.2d 1070, 1076 (5th Cir. 1982).\
\end{itemize}
the cause of that behavior due to a lack of information.\textsuperscript{143} Requiring a warning could stunt a criminal investigation before it begins.\textsuperscript{144} Once an employee is warned that he has immunity and must answer questions or be fired, an employee can either talk and protect his job or remain silent and be fired.\textsuperscript{145} All answers given are immunized from further use in the criminal process.\textsuperscript{146} Any prosecutor wishing to take further action against the employee must then act without the use of those statements.\textsuperscript{147} All information given during the administrative interview will be off limits in any future criminal prosecution.\textsuperscript{148}

The chilling of administrative or criminal investigations weakens public trust in municipal agencies.\textsuperscript{149} Citizens expect transparent public institutions and government,\textsuperscript{150} when public employees are given warnings and


\textsuperscript{144} Gulden, 680 F.2d at 1076; see also Robert M. Myers, \textit{Code of Silence: Police Shootings and the Right To Remain Silent}, 26 GOLDEN GATE U. L. REV. 497, 517 (1996) ("When these compelled statements are taken at the beginning of the administrative investigation, any potential criminal prosecution will likely be very difficult to pursue."); Heard, supra note 36, at 144 (arguing that administrative and criminal investigations of police conduct overlap because: the conduct could be both against department regulations and criminal, the first investigators on the scene are police officers whose questions about criminal conduct could also be part of an administrative investigation, and the information gained would be automatically deemed coercive and unavailable in any criminal proceeding).

\textsuperscript{145} Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002). The implication of the Seventh Circuit's position is that employees should answer rather than remain silent against their interests. \textit{See id.}

\textsuperscript{146} See Hester v. City of Milledgeville, 777 F.2d 1492, 1496 (11th Cir. 1985); see also Kate E. Bloch, \textit{Police Officers Accused of Crime: Prosecutorial and Fifth Amendment Risks Posed by Police-Elicited "Use Immunized" Statements}, 1992 U. ILL. L. REV. 625, 629 (1992) (noting that when a police department's internal investigation unit questions an officer regarding his duties, any statements made are immunized before the prosecutor even hears of the incident because the internal "investigation may transpire behind closed doors").

\textsuperscript{147} Clymer, supra note 38, at 1312. Prosecutors are at a disadvantage in incidents involving police misconduct because only internal police investigators will ask questions of those involved. \textit{Id.} Officers are made aware that there are significant penalties, including termination, for refusing to cooperate. \textit{Id.} Officers will more readily cooperate with the internal investigation, rendering their statements inaccessible to prosecutors. \textit{See id.} The restriction on the use of immunized statements is "more troublesome in prosecutions of police officers" because internal police investigators are more likely to take a compelled statement than other public employees. \textit{Id.} at 1328.

\textsuperscript{148} \textit{Id.} at 1320-21. As Professor Clymer points out, "[i]f investigators, prosecutors, or witnesses have learned the contents of a compelled statement, that burden can create difficult or even insurmountable impediments to criminal prosecution." \textit{Id.} at 1312. The burden is high because there are greater restrictions placed on the use of compelled statements taken from police officers in non-custodial situations than coerced statements taken from criminal suspects in custodial situations. \textit{Id.} at 1313.

\textsuperscript{149} See Myers, supra note 144, at 518-21 (discussing the need for police investigations to be open in order to preserve the ideal of open government and trust in public officials).

\textsuperscript{150} \textit{See id.} at 519-20.
subsequent immunity, public accountability is reduced in the interest of protecting individual employees. The result is that courts must uphold the rights of a few individual employees by reducing the deterrent of criminal prosecution for any malfeasance.

C. Advantages of the Fifth Circuit's Rule

The Fifth Circuit's position eliminates the need to choose individual rights over public trust by not requiring a warning. This rule supports employers who seek to retain the public's trust by never requiring an employer to affirmatively warn an employee of his rights before answering questions. The Fifth Circuit has held that a constitutional violation does not occur until an employee is forced to answer questions and is forced to waive his immunity regarding those statements. A forced waiver of immunity is independent of the requirement that employees answer questions or be fired. This position allows employers to ask questions and remove employees for refusing to answer when they have not yet violated an employee's constitutional rights. The result is that both public trust and employee's rights are preserved while giving the employer maximum latitude to operate.

151. Id. at 518-19; see Hill v. Johnson, 160 F.3d 469, 471 (8th Cir. 1998) (arguing that there is great public interest in securing the public trust by having public employees account for their performance by allowing termination for refusal to answer narrow and direct questions put to them by their employer); see also Heard, supra note 36, at 148-49 (arguing that the New York City "forty-eight hour rule" creates the negative impression with the public that the police are actively seeking to cover-up police misconduct and "receive special treatment under the law").

152. See Hill, 160 F.3d at 471; Myers, supra note 144, at 521. Professor Clymer looks at relevant appellate court decisions and notes "that Garrity immunity can, and does, result in dismissals, lost convictions, and suppression of critical evidence." Clymer, supra note 38, at 1338-39. Immunity may prevent prosecutors from charging individuals whose statements have been immunized. Id. at 1339. Finally, Garrity immunity can prevent prosecutors from calling relevant and important witnesses. Id.

153. See Arrington v. County of Dallas, 970 F.2d 1441, 1446 (5th Cir. 1992). Professor Clymer makes apparent the need to maintain public trust, noting that police officers, investigators, and witnesses could use the system created by Garrity to sabotage and undermine any criminal investigation. Clymer, supra note 38, at 1360.

154. See Hill, 160 F.3d at 471.

155. Arrington, 970 F.2d at 1446.

156. Id.

157. Id.; see also Hill, 160 F.3d at 471 ("As long as a public employer does not demand that the public employee relinquish the employee's constitutional immunity from prosecution . . . the employee can be required to either testify about performance of official duties or to forfeit employment.").

158. See Hill, 160 F.3d at 471; Lybarger v. City of Los Angeles, 710 P.2d 329, 332 (Cal. 1985) (en banc). There is a strong public policy argument in protecting the public, in making sure public institutions are not corrupt, and in making sure any damaging behavior is not repeated. See Parker, supra note 3, at 519 (noting that the system for disciplining attorneys in New Jersey relies on similar Fifth Amendment arguments as those in the realm
D. Disadvantages of the Fifth Circuit's Rule

The Fifth Circuit's position places public employees at a disadvantage to their employers. As a result, because there is no violation until a waiver of immunity is requested, problems arise when it is unclear whether there has been such a request. The dual needs of keeping an employee certain of his rights and preventing him from making an ill-advised choice are reasons to require a warning; the Court's intent in *Garrity* was not to leave an employee in such a position.

Additionally, the Fifth Circuit's rule does not preserve future criminal prosecutions any more than the Seventh Circuit's rule. *Garrity* immunity attaches whenever an employee is forced to answer questions under threat of dismissal, regardless of whether he is informed of his rights or not. Because the immunity attaches when answers are forced, the information is useless to prosecutors whether or not warnings are given. The burden on the prosecution if it wishes to use the information is the same in either case. There is little advantage to the prosecutor, and thus the public, in failing to give warnings. Even if more statements of public employees and therefore helps to protect the public, purifies the bar, and prevents repetitious action.

159. See *Hill*, 160 F.3d at 473 (Heaney, J., dissenting); see also *Clymer*, supra note 38, at 1362 (noting that while there is a need to effectively prosecute offending public employees, that rationale alone should not be the basis for diluting their Fifth Amendment rights).

160. *Hill*, 160 F.3d at 473 (Heaney, J., dissenting); see also *Lybarger*, 710 P.2d at 336 (Bird, C.J., concurring) (claiming that the logic of *Gardner v. Broderick* is that employees should not be left guessing what their rights are during an investigation or interrogation).

161. Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002); *Hill*, 160 F.3d at 473 (Heaney, J., dissenting).

162. *Hill*, 160 F.3d at 473 (Heaney, J., dissenting). The *Hill* dissent claims that such a rule reads *Garrity* and its progeny too narrowly. Id. at 472. Professor Warnken agrees with the *Hill* dissent's position with respect to law enforcement officers, stating:

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 . . . . [t]hus, instead of applying *Garrity* [and its] progeny to vindicate the fifth amendment rights of law enforcement officers, courts have applied those cases to sanction yet another generation of constitutional infringement.

Warnken, supra note 45, at 488.

163. Cf. *Clymer*, supra note 38, at 1312 (noting that any compelled statement, whether the employee is warned or not, cannot be used by a district attorney without overcoming substantial hurdles).

164. See *Atwell*, 286 F.3d at 990.

165. *Clymer*, supra note 38, at 1312 (noting that when an internal affairs unit questions police officers, the officers' statements are immunized as soon as those statements have been compelled).

166. See id. at 1326. "The prosecution can satisfy its burden by showing that witnesses, investigators, and prosecutors have not been exposed to the immunized testimony, either directly by reading it, or indirectly by otherwise learning of it." Id.

167. See id. at 1312. To successfully prosecute an officer who has given an immunized statement, prosecutors must show that they have made no use, either directly or indirectly,
could be used by the prosecutor under the Fifth Circuit’s rule, routine admittance may deter cooperation by an employee under investigation.\textsuperscript{168} Not only will prosecutors be harmed by the Fifth Circuit’s rule, but failure to give warnings also will have a negative impact on internal investigations.\textsuperscript{169} There is a strong public interest in maintaining the integrity of public institutions and punishing those employees responsible for malfeasance.\textsuperscript{170} When an employer questions an employee about job-related duties, the employer is seeking information to discover and resolve existing problems.\textsuperscript{171} A failure to warn may lead employees to invoke the Fifth Amendment, thus depriving their employer of any valuable information that would help in an internal investigation.\textsuperscript{172}

Finally, even in circuits in which there is no requirement that warnings be given, precedent requires courts to examine whether there was a constitutional violation.\textsuperscript{173} The Fifth Circuit rule requires a factual examination by the court to determine whether a violation occurred, while the Seventh Circuit’s rule requires only a determination of whether a warning was given.\textsuperscript{174}

---

\textsuperscript{168} Herzig, supra note 143, at 440 ("If \textit{Garrity} statements are routinely admitted into grand jury hearings ... officers would stop giving statements as a matter of course.").

\textsuperscript{169} See generally id. at 440-41.

\textsuperscript{170} See Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation, 392 U.S. 280, 284-85 (1968) (noting that public employees should be subject to dismissal for violations of the public trust); Herzig, supra note 143, at 441.

\textsuperscript{171} See Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation, 426 F.2d 619, 628 (2d Cir. 1970).

\textsuperscript{172} See Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002); \textit{Uniformed Sanitation}, 426 F.2d at 628.

\textsuperscript{173} See Arrington v. County of Dallas, 970 F.2d 1441, 1446 (5th Cir. 1992). \textit{Arrington} states that a constitutional violation occurs when an employee is compelled to answer incriminating questions and is compelled to waive the immunity that attaches to his answers. \textit{Id}.

\textsuperscript{174} See Atwell, 286 F.3d at 990 (including Seventh Circuit recognition of the Fifth Circuit rule). The Fifth Circuit’s opinion of when immunity attaches has been criticized. One commentator argues that immunity attaches as soon as an employee is faced with the choice of answering, lying, or remaining silent. Bloch, supra note 146, at 669.
III. THE DUTY TO WARN RULE BEST ACCOMPLISHES THE TWIN AIMS OF PROTECTING PUBLIC EMPLOYEES AND ALLOWING PUBLIC EMPLOYERS TO TAKE ADVERSE ACTION AGAINST EMPLOYEES

A. The Rule Requiring an Affirmative Duty To Warn in Light of Miranda and Garrity

The Supreme Court of California offers guidance on the protections afforded by the Fifth Amendment by analyzing *Garrity* in light of *Miranda*.\(^{175}\) The purpose of the Fifth Amendment privilege against compulsory self-incrimination is to allow a suspect in any proceeding to remain silent in the face of hostile questioning, without penalty.\(^{176}\) The *Miranda* Court was concerned that without adequate protection criminal suspects would give statements that were not the product of free choice.\(^{177}\) The Court's focus was finding the proper balance between the rights of the individual and the need for the state to obtain information for criminal prosecution.\(^{178}\) Of paramount concern to the Court was protection of the individual.\(^{179}\)

The Court in *Garrity* acknowledged that the basic principle upon which *Miranda* rests is applicable to the questioning of public employees.\(^{180}\) However, in its post-*Garrity* decisions, the Supreme Court established that the protection afforded public employees is not as strong as that afforded in *Miranda*.\(^{181}\) The exception that employees must answer narrow, specific, and direct questions is based on the need to maintain public trust in public employees and institutions, a concern not present in *Miranda*.\(^{182}\) While *Miranda* provides a solid base for analysis, the unique policy con-

---

175. See Lybarger v. City of Los Angeles, 710 P.2d 329, 333 (Cal. 1985) (en banc). In *Lybarger*, the Supreme Court of California recognized the similar purpose and effect of *Miranda* and *Garrity* in effectively making a suspect/employee aware of his or her rights under the Fifth Amendment. *Id.*


178. *See id.* at 460.

179. *Id.; see also* Murphy v. Waterfront Comm’n, 378 U.S. 52, 55 (1964) (describing the purposes and goals of the Self-Incrimination Clause of the Fifth Amendment).


181. *See, e.g.*, Gardner v. Broderick, 392 U.S. 273, 276 (1968). *But see* Heard, *supra* note 36, at 146 (commenting that the New York rule prohibiting anyone from interrogating an officer suspected of wrongdoing on the job within forty-eight hours of the incident extends protections to the officers greater than those offered by the Supreme Court in *Miranda*).

182. *See* Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation, 392 U.S. 280, 284 (1968). Of course, those answers are immune from later use in criminal prosecutions. *Id.* at 284-85.
siderations regarding public employment must be taken into account when public employees are being questioned.\textsuperscript{183}

B. The Seventh and Federal Circuit's Rule Best Balances the Need To Protect Employees' Rights and Employers' Concerns

The Seventh Circuit's requirement that public employees be warned most effectively balances the goals of \textit{Miranda} while acknowledging the unique role of public employees in society.\textsuperscript{184} The court in \textit{Atwell} articulated the protections and prohibitions the rule affords both employees and employers.\textsuperscript{185} The Seventh Circuit agreed with the Fifth Circuit that the employee does not have to be warned of his rights and duty to answer until specifically questioned.\textsuperscript{186} The court noted that an employee cannot refuse to meet with his employer based on the fear that he may have to give answers that may incriminate him.\textsuperscript{187} Additionally, the Seventh Circuit allows employers to compel answers under the proper circum-

\begin{footnotesize}
\item 183. See \textit{Lefkowitz v. Cunningham}, 431 U.S. 801, 806-08 (1977); see also Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 426 F.2d 619, 625 (2d Cir. 1970) ("[P]ublic employees, subject themselves to dismissal if they refuse to account for their performance of their public trust . . . .")
\item 184. See \textit{Atwell v. Lisle Park Dist.}, 286 F.3d 987, 990-91 (7th Cir. 2002). Put another way, the three issues that need to be balanced in these situations are: the Fifth Amendment rights of the public employee, the need for the public employer to effectively investigate and take remedial action against an offending employee, and the need to keep criminal prosecutions open and effective. Clymer, \textsuperscript{supra} note 38, at 1369-70.
\item 185. See \textit{Atwell}, 286 F.3d at 990-91. Another consideration in formulating a rule is to examine the potential statements given by a public employee that could be used for investigations and in trial preparation, but not in the trial itself. Driscoll, \textsuperscript{supra} note 7, at 141 (noting that some circuits allow use of coerced statements in trial preparation and in other non-evidentiary situations, but not at a trial itself). Driscoll argues that if courts do not address the question of non-evidentiary use, public employers and prosecutors have an interest in preserving their use by ensuring that the statement does not come near a criminal prosecution. \textit{See id.} at 142. Driscoll offers three suggestions to get around this problem. The first is to have one investigator focus on any pre-trial investigatory matters while a second investigator or prosecutor focuses solely on the trial. \textit{Id.} at 141. The first investigator could withhold any statements that may have the taint of coercion attached, thus preserving the integrity of the trial. \textit{Id.} A second option is to allow the internal investigators employed by the public employer to invoke the public employee's Fifth Amendment rights when the statement is subpoenaed. \textit{Id.} at 141-42. Finally, Driscoll argues that public employers could simply forego their investigation until any criminal prosecution of the public employee has been resolved. \textit{Id.} at 142. This would preserve any statements or other evidence that could be obtained by interviewing the public employee. \textit{Id.} This option would also preserve both the criminal and administrative processes, protecting the rights of the employee while assuring the public that everything has been done to root out any offending employees. \textit{Id.}
\item 186. \textit{Atwell}, 286 F.3d at 991. This follows because \textit{Garrity} immunity does not attach until a public employee is threatened with removal for failure to answer questions put to him by his employer. \textit{See id.} at 990-91.
\item 187. \textit{Id.} at 991.
\end{footnotesize}
Allowing an employee to refuse to answer questions could frustrate an employer's attempt to enforce relevant policies and rules. Finally, an employer is permitted to ask non-incriminating questions while investigating agency-wide malfeasance.

Although these safeguards protect an employer's ability to investigate any employee malfeasance, the warning requirement serves as a safeguard for employees. Without it, employees will be unnecessarily left uncertain with regard to their rights, just as criminal suspects would be irreparably harmed if they were not informed of their right to remain silent and the consequences of invoking or waiving that right. With this rule in place, employees will know their rights and be able to make an informed decision when asked incriminating questions.

C. Applying the Duty To Warn Rule to Franklin: What the City of Evanston Should Have Done

Edward Franklin was not advised of his rights and was subsequently fired for refusing to answer questions posed to him by his employer. Had the city followed the Seventh Circuit's rule, it would have had to either warn Franklin of his immunity and duty to answer or continue the

---

188. Id. at 990. The Supreme Court has stated that there is "nothing unconstitutional about forcing a state employee to answer questions relating to the performance of official duties even if such questioning would result in job loss or other administrative sanctions." Heard, supra note 36, at 141.
189. See Heard, supra note 36, at 137 (noting that a New York rule prohibiting interrogation of officers suspected in any on-duty incidents within forty-eight hours of the incident does not allow the department to protect the public effectively or investigate any potential crime as thoroughly as possible).
190. See Atwell, 286 F.3d at 990-91. However, the Seventh and Fifth Circuits agree on the need to give employers latitude to act and react. See id. at 991. It is this additional safeguard that distinguishes the rule laid out by the Seventh Circuit from the rule laid out by the Fifth Circuit. Compare id. at 990-91 (noting that there is no duty to warn until the employer asks specific and narrow questions), with Gulden v. McCorkle, 680 F.2d 1070, 1076 (5th Cir. 1982) (arguing that the warning rule "would allow an employee, before he or she is required to respond to any questions, to circumvent an investigatory proceeding by claiming generalized fifth amendment concerns" before those concerns have fully developed, thus preventing the employer from obtaining any relevant information from its employee).
191. See Atwell, 286 F.3d at 990.
192. See Miranda v. Arizona, 384 U.S. 436, 467 (1966); Atwell, 286 F.3d at 990.
193. Atwell, 286 F.3d at 990-91. Professor Clymer argues that in order to balance the tension inherent in encounters between employers and employees, legislators should attempt to dictate and control situations where compelled statements might be taken, control the flow of and access to any compelled statement given, and attempt to formulate less coercive measures to obtain information from public employees during administrative interrogations. Clymer, supra note 38, at 1370.
194. Franklin v. City of Evanston, 384 F.3d 838, 842 (7th Cir. 2004).
administrative process after the resolution of any criminal action. Given Franklin's concern about self-incrimination, he likely would have chosen to answer with the knowledge that his statements would be immunized. In Franklin's case, the result would have been very different than what actually occurred. Criminal charges would likely not have been filed, and Franklin's cooperation during the administrative proceeding would have aided the internal investigation and given him a better chance to retain his job. As it was, Franklin needlessly lost his job because he was not given adequate warning of his options and duty to answer. Franklin is precisely the type of employee the court in Atwell envisioned when it justified its rule on the need to protect employees from themselves.

IV. CONCLUSION

When presented with the choice of whether to require public employers to warn their employees of their rights and duties during administrative investigations, courts should adopt the warning requirement of the Seventh and Federal Circuits. This rule is meant to protect employees from making a detrimental choice regarding their employment. The rule also allows employers to provide this warning in a variety of ways that are valid if the employee is warned of his duties and the conse-

195. Franklin v. City of Evanston, No. 99 C 8252, 2002 WL 31572137, at *5 (N.D. Ill. Nov. 19, 2002), rev'd in part, 2003 WL 1720006 (N.D. Ill. Mar. 31, 2003), rev'd, 384 F.3d 838 (7th Cir. 2004). The city's failure to either continue the administrative discipline process at a later date or warn Franklin of his rights meant that Franklin was not adequately given an opportunity to defend himself against the allegations against him in both the criminal and administrative proceedings. Id.

196. See Franklin, 384 F.3d at 842. But it is important to remember that what Franklin might have said under a grant of immunity could be used against him in an administrative investigation or administrative hearing. Heard, supra note 36, at 141 (noting that immunized statements given during an administrative investigation can still be used in internal disciplinary proceedings).

197. Cf. Atwell, 286 F.3d at 990 (noting that employees who have been made aware of their rights are less likely to choose against their interests by invoking their Fifth Amendment right to silence).

198. See Franklin, 384 F.3d at 842 (noting that the criminal charges against Franklin were subsequently dropped). Franklin was the first employee to be fired under the city's rule prohibiting possession of illegal drugs, despite the fact that other city employees had run afoul of the law for driving under the influence. Id.

199. See id. (noting that Franklin was discharged mainly because he refused to answer questions during a pre-disciplinary meeting because he was worried about his answers being used in a potential criminal proceeding—something he should not have had to worry about).

200. See Atwell, 286 F.3d at 990 (stating that the warning requirement is meant to protect employees from unknowingly acting against their interest).

201. Id. at 990-91.
quences of refusing to answer narrowly directed questions. Finally, the rule to warn follows better the rules of *Garrity* and *Miranda* and addresses the concerns stemming from those cases. Both *Garrity* and *Miranda* read the Fifth Amendment as requiring the subject of an interrogation to have a free and informed choice about whether he wants to speak or remain silent. The Court has recognized that in both criminal and administrative situations, there is a societal need for either the state or an employer to obtain information, and the rule to warn protects that principle while simultaneously informing an employee of his rights so that he may make an informed decision regarding those rights.

---

202. *See* Weston v. U.S. Dep't of Hous. & Urban Dev., 724 F.2d 943, 948 (Fed. Cir. 1983) (requiring the same standard as in *Kalkines*, and allowing the employer latitude in its conveyance of the warning); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 426 F.2d 619, 627 (2d Cir. 1970) (requiring proper proceedings, namely, those where the employee is advised of his choices and consequences); Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973) (requiring that an employee be duly advised according to the standard in *Uniformed Sanitation*). *But see* Modrowski v. Dep't of Veterans Affairs, 252 F.3d 1344, 1350-51 (Fed. Cir. 2001) (adopting the rule from *Kalkines* and *Weston*, but placing limits on the method of warnings so as to more fully protect employees).


205. Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation, 392 U.S. 280, 284-85 (1968); *Miranda*, 384 U.S. at 460. Because of the decreased individual interest in an administrative setting (due to the difference in penalty between suspect employees and criminals and the subject of the interrogation), Fifth Amendment concerns are lessened in the administrative setting. *See* Lefkowitz v. Cunningham, 431 U.S. 801, 807-08 (1977). The result is that the protections afforded the employee are not as strong as those afforded the criminal suspect. *See* id. at 806-07.