

January 1996

## Code of Silence: Police Shootings and the Right to Remain Silent

Robert M. Myers

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Robert M. Myers, *Code of Silence: Police Shootings and the Right to Remain Silent*, 26 Golden Gate U. L. Rev. (1996).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol26/iss3/3>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

## ARTICLE

# CODE OF SILENCE: POLICE SHOOTINGS AND THE RIGHT TO REMAIN SILENT

ROBERT M. MYERS\*

### I. INTRODUCTION

*Scene:* A gritty urban alley. A man lies dead from gunshot wounds. Standing a few feet away is the shooter.

*Enter:* Two Homicide detectives emerge from an unmarked police car.

Detective 1 [to shooter]: You're the one that fired the shots?

Shooter: Yeah.

Detective 1: What happened?

Shooter: I want to talk to my lawyer.

Detective 2: So you won't talk to us?

Shooter: No. I claim my Fifth Amendment privilege.

Detective 1: Then get out of here.

The notion of police detectives allowing a killer to walk away without providing an explanation is so foreign to the public consciousness that this scene smacks of a Twilight Zone episode. Yet, when the shooter is another police officer, scenar-

---

\* Civil rights lawyer, Los Angeles, California. From 1981-1992, the author served as City Attorney of the City of Santa Monica and was involved in investigating officer-involved shootings. I am grateful to Ronald K.L. Collins and Karl Manheim for their thoughtful advice and comments and to Joseph W. Doherty for his research assistance.

ios like this are acted out on the streets of American cities. Too often, this is the real-life world of officer-involved shootings.

Two events in September 1995 gave the public a brief glimpse of law enforcement officers asserting the Fifth Amendment privilege. In the "trial of the century," Los Angeles Police Department Detective Mark Fuhrman asserted the privilege during the O.J. Simpson murder trial in response to questions concerning whether he planted evidence or provided truthful testimony.<sup>1</sup> A week later, an FBI agent asserted the privilege in response to a Senate committee's inquiry concerning the shootout at Ruby Ridge, Idaho.<sup>2</sup> These highly publicized exercises of the privilege are rare. For the most part, invocations of the privilege by the police are a regular occurrence outside the scope of public scrutiny.

At this real-world crossing, two basic tenets of constitutional democracy intersect – control of government and preservation of liberty. On the one hand, the people need to regulate the state, especially when it is empowered to take human life. On the other hand, civil liberties must be safeguarded, even when those who claim them stand in the shoes of the state. At this juncture, however, we seem to return to the Twilight Zone. For, it may be asked, how can we *both* control the state and, at the same time, grant its agents constitutional protection?

Before we get to this question, it is necessary to first understand just how much and what kind of official latitude we allow the state when it comes to the sanctioned use of deadly force by police officials. Having done that, we can then consider the character and scope of certain constitutional claims sometimes invoked by police officers in this context. This latter consideration – the central focus of this article – points to a peculiar phenomenon, namely, the specter of government acting as a powerful deputy authorized to use lethal force *and* as a powerless individual in need of constitutional safeguards. Typically, we do not think of the government wearing both

---

1. See Stephanie Simon et al., *Fuhrman Invokes 5th Amendment, Refuses to Testify*, L.A. TIMES, Sept. 7, 1995, at A1.

2. See Ronald J. Ostrow, *FBI Agent Declines to Testify About Siege*, L.A. TIMES, Sept. 13, 1995, at A12.

hats. Yet, when it does, the result is often perplexing. Having thus introduced this perplexity, it is now appropriate to return to a preliminary but nevertheless significant matter – official use of deadly force in America.

#### A. DEADLY FORCE: ITS USE AND CONTROL

In the United States “police are more heavily armed and shoot more often than police in any other Western democracy.”<sup>3</sup> According to the FBI Law Enforcement Bulletin, “[t]he most tangible expression of governmental authority is the power to deprive an individual of ‘life, liberty, or property.’”<sup>4</sup> When police exercise this awesome power through firing a gun, “the immediate consequences of their decisions are realized at the rate of 1,500 feet per second and are beyond reversal by any level of official review.”<sup>5</sup>

Controlling the use of deadly force by law enforcement has been the focus of police administrators, academicians, civil rights lawyers and community groups.<sup>6</sup> Because law enforcement holds a “virtual monopoly on the legitimate use of force,”<sup>7</sup> managing its exercise represents a key issue “concerning social control in contemporary society.”<sup>8</sup> Therefore, police

3. James Lindgren, *Organization and Other Constraints on Controlling the Use of Deadly Force by Police*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1981, at 110, 111.

4. John C. Hall, *Constitutional Constraints on the Use of Force*, FBI Law Enforcement Bull., Feb. 1992, at 22.

5. Ed McErlain, *Deadly Force: An Age-Old Problem, A Future Solution*, CAL. PEACE OFFICER, Mar. 1992, at 24.

6. Indeed, because the right to use deadly force is sanctioned, “[a]ccountability of law enforcement officers is of special importance. . . .” Robert Berkley Harper, *Accountability of Law Enforcement in the Use of Deadly Force*, 26 HOW. L. J. 119 (1983). One law enforcement group noted, “[m]anaging the use of force by officers is one of the most difficult challenges facing law enforcement agencies today.” International Association of Chiefs of Police National Law Enforcement Policy Center, *Use of Force 1* (1989).

7. William B. Waegel, *The Use of Lethal Force by Police: The Effect of Statutory Change*, 30 CRIME & DELINQ. 121, 135 (1984). The availability of deadly force is the central characteristic that distinguishes police from other civilian agencies. G. Larry Mays & William A. Taggart, *Deadly Force as a Police Problem in Local Law Enforcement: Do Administrative Practices Make a Difference?*, 5 POL’Y STUD. REV. 309 (1985).

8. William B. Waegel, *The Use of Lethal Force by Police: The Effect of Statutory Change*, 30 CRIME & DELINQ. 121, 135 (1984).

shooting policies squarely raise the complex moral question of when it is appropriate to take human life.<sup>9</sup>

No hard-and-fast rules have been crafted to constrain the use of deadly force by police officers.<sup>10</sup> Instead, an elastic con-

---

9. See Arnold Binder & Peter Scharf, *Deadly Force in Law Enforcement*, 28 CRIME & DELINQ. 1, 5 (1982). The regulatory value placed on human life varies among police agencies. For example, the City of New York Police Department has adopted the following policy on use of deadly force:

The New York City Police Department recognizes the value of all human life and is committed to respecting the dignity of every individual. The *primary* duty of all members of the service is to *preserve* human life.

The most serious act in which a police officer can engage is the use of deadly force. The power to carry and use firearms in the course of public service is an awesome responsibility. Respect for human life requires that, in all cases, firearms be used as a last resort, and then only to protect life. Only the minimal amount of force necessary to protect human life should be used by uniformed members of the service. Where feasible, and consistent with personal safety, some warning, such as "POLICE - DON'T MOVE," should be given. Deadly force is never justified in the defense of property. Above all, the safety of the public and uniformed members of the service must be the overriding concern whenever the use of firearms is considered.

New York City Police Department, *Patrol Guide*, Procedure No. 104-01, July 8, 1993, at 9 (emphasis in original).

By sharp contrast the Seattle Police Department policy provides:

Use of Force - Generally: The public has vested in police officers the lawful authority to use force to protect themselves and others and perform their official duties when no reasonably effective alternative to the use of force appears to exist and the amount of force used is reasonable to effect the lawful purpose intended.

The Department's use of force policy implements state law. To the extent that Department policy may contain additional provisions not addressed in state law, such provisions are not intended, nor may they be construed or applied, to create a higher standard of care or a duty toward any person or to provide a basis for criminal or civil liability against the City, its officials or individual police officers. However, violation of such additional provisions may form the basis for Department disciplinary or other action.

Seattle Police Department, *Policy and Procedure Manual* 197.

10. Bright line rules can be developed in some areas of police shootings such as when to shoot at fleeing suspects. However, so long as deadly force is a law enforcement option, the individual judgment of police officers will continue to come into play because "[n]o regulation or directives, however carefully thought out, are

cept of reasonableness guides the trigger finger.<sup>11</sup> The most significant judicial limitation of deadly force occurred with the Supreme Court's 1985 decision holding that deadly force cannot be used to prevent the escape of an unarmed fleeing felon.<sup>12</sup> Concluding that "[i]t is not better that all felony suspects die than that they escape,"<sup>13</sup> Justice White's majority ruling noted that it was constitutionally unreasonable to shoot a fleeing suspect "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."<sup>14</sup> Although this decision produced a pointed dissent<sup>15</sup> and was criticized by some,<sup>16</sup> its impact on the

---

completely adequate in potentially dangerous situations where critical information is often incomplete or lacking." R. James Holzworth & Catherine B. Pipping, *Drawing a Weapon: An Analysis of Police Judgments*, 13 J. POLICE SCI. & ADMIN. 185 (1985). Hence, it is essential that police officers be appropriately trained in the use of deadly force. John C. Hall, *Firearms Training and Liability*, FBI Law Enforcement Bull., Jan. 1993, at 27.

11. In *Graham v. Connor*, 490 U.S. 386 (1989), the United States Supreme Court established that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.* at 395. The *Graham* Court stated that the reasonableness of any use of force involves a balancing of the rights of the individual against interests of the government, requiring "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Importantly the Court noted that "reasonableness" of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

12. See *Tennessee v. Garner*, 471 U.S. 1 (1985). *Garner* rejected the old English common law rule under which deadly force could be used to apprehend fleeing felons. At the time of the decision, Tennessee and 22 other states followed this rule. *Id.* at 16-17.

13. *Id.* at 11.

14. *Id.*

15. See *id.* at 22-23 (O'Connor, J., dissenting).

16. See James J. Kilpatrick, *A Time to Shoot*, WASHINGTON POST, Apr. 8, 1985, at A11. Some have suggested that there must be significant costs to deter individuals from fleeing the police. "Murderers, armed robbers, and other violent criminals facing long prison sentences must face the deterrent of deadly force in deciding on whether to flee." Ian C. Weiner, *Running Rampant: The Imposition of Sanctions and the Use of Force Against Fleeing Criminal Suspects*, 80 GEO. L. J. 2175, 2194 (1992).

Many law enforcement agencies joined as amici curiae in support of Cleamtee Garner, the father of the minor killed by the Memphis Police Department. See *Police Groups Ask Supreme Court to Modify Fleeing Felon Law*, Criminal Justice Newsletter, Sept. 4, 1984, at 4. Their brief observed "that laws permit-

number of police shootings is questionable.<sup>17</sup> In fact, a significant drop in police shootings had already occurred during the 1970s as a result of administrative rulemaking by many police departments to manage the exercise of deadly force.<sup>18</sup>

In this decade, American police officers have killed over 350 persons annually<sup>19</sup> and wounded numerous others.<sup>20</sup> Many shootings were controversial<sup>21</sup> and some were inevitably

ting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies." Brief for Police Foundation et al. as Amici Curiae at 11, *Tennessee v. Garner*, 471 U.S. 1 (1985).

17. It did, however, result in greater liability exposure for police agencies. For example, the City of Santa Monica "agreed to pay almost \$1.1 million to the family of a recreation leader shot to death by a police officer while running from the scene of a robbery." Marilyn Martinez, *SM to Pay \$1.3 Million to Man's Kin*, THE OUTLOOK, Aug. 19, 1993, at A1.

18. See Paul G. Chevigny, *Police Deadly Force as Social Control: Jamaica, Argentina, and Brazil*, 1 CRIM. L.F. 389, 391 (1990). See also Anthony V. Bouza, *Myths and Hard Truths About Police Shootings*, 13 U. TOL. L. REV. 337, 345 (1981).

19. U.S. Department of Justice, *Crime in the United States 1994: Uniform Crime Reports 22* (1995). For the period 1990-1994, the following justifiable homicides were committed by law enforcement officers:

1990	385
1991	367
1992	418
1993	455
1994	463

*Id.* See WILLIAM A. GELLER & MICHAEL SCOTT, *DEADLY FORCE: WHAT WE KNOW* 503 (1992). Comparing police fatalities across time may not paint an accurate picture of trends because a variety of factors account for fatality rates and these factors may change over time. Factors include "officer marksmanship, type of ammunition, location and number of wounds, and the availability of prompt, high quality emergency medical care." *Id.* at 99.

20. There are no national figures on the number of shooting incidents by police officers or the number of persons who received non-fatal wounds. However, "[t]he numbers of wounded and slain criminal suspects in the United States pale by comparison to the numbers shot at but missed by police." WILLIAM A. GELLER & MICHAEL SCOTT, *DEADLY FORCE: WHAT WE KNOW* 100 (1992). The following chart provides information from major police departments for the period from 1980-91:

	Shot Fatally	Shot Non-fatally	Missed
New York	309	771	2513
Los Angeles	267	435	638
Houston	117	259	502
Atlanta	54	107	390

*Id.* at 516, 519, 523-24.

21. See, e.g., Tony Perry, *Police Killing Outrages Poor Side of Town*, L.A.

unlawful.<sup>22</sup> Studies have demonstrated that the rate of police shootings vary greatly from city to city.<sup>23</sup> In 1992, for exam-

---

TIMES, Apr. 20, 1993, at A3; *Report Says Suspect Killed by Police Was Shot in Back*, N.Y. TIMES, Mar. 23, 1993 (National), at A3; Daryl Kelley, *Ventura D.A. Says Fatal Raid Was Unjustified*, L.A. TIMES, Mar. 30, 1993, at A1; *Jury Absolves New Jersey Officer in Killing that Ignited Protests*, N.Y. TIMES, Feb. 7, 1993, § 1 (National), at 19; Patrick J. McDonnell, *Officer's Acquittal in Border Slaying Sparks Protests*, L.A. TIMES, Dec. 18, 1992, at A3; *Was This Shooting Necessary?*, L.A. TIMES, Nov. 13, 1992, at B6; Evelyn Nieves, *Newark Police Shootings Revive Calls for Oversight*, N.Y. TIMES, Sept. 11, 1992 (National), at A14; Robert F. Howe, *NAACP is Probing VA. Shooting*, WASHINGTON POST, Aug. 28, 1992, at D3; Roberto Suro, *Quiet City in Texas Hears Anger of Blacks Over Woman's Death*, N.Y. TIMES, Aug. 10, 1992 (National), at A8; Charles Strum, *An Officer Admits Lies in Shooting*, N.Y. TIMES, Aug. 7, 1992 (National), at A12; Andrea Ford & Richard A. Serrano, *Questions Raised About Fatal Shooting by Police*, L.A. TIMES, July 3, 1992, at A1; Steven Lee Myers, *A Fatal Shooting By Police Ignites Protest in Bushwick*, N.Y. TIMES, May 25, 1992 (Local), at A23; *Police Shooting Ignites Disturbance in Mobile*, N.Y. TIMES, May 7, 1992 (National), at A11; Robert Hanley, *Students March to Protest Handling of Teaneck Shooting*, N.Y. TIMES, Apr. 4, 1992 (Local), at 29; George Ramos & Rich Connell, *100 Protestors Gather at Scene After Watts Man is Slain by Police*, L.A. TIMES, Nov. 30, 1991, at A28; George James, *Protest Against Police in Flatbush Shooting Death*, N.Y. TIMES, Aug. 28, 1991 (Local), at B3; Dean E. Murhpy, *Melee Erupts in East L.A. After Deputy Kills Man*, L.A. TIMES, Aug. 4, 1991, at A1. It should be noted that "[f]or most mainstream papers, police reporting means relying mainly on police sources—a practice that contributes to the undercoverage of police brutality." Kim Deterline, *Alternative Media: Going Beyond Police Sources to Uncover Police Abuse*, EXTRA!, July-Aug. 1993, at 23.

22. Consider the following audiotape of a fatal shooting by a Los Angeles County Sheriff deputy that raises significant questions about the decision to use deadly force:

Officer One: He's got my foot! He's got my foot!  
Shoot him! Shoot him! Get off him! Get off, I'm going to  
shoot him! [unintelligible] Shoot him! He's got my foot!

Officer Two: No! No! No! No! Wait, wait, wait wait.  
Wait. Wait.

[gunshots]

Officer Two: Damn it!  
[more gunshots]

Special Counsel James G. Kolts & Staff, *The Los Angeles County Sheriff's Department 137* (1992).

23. See James Lindgren, *Organization and Other Constraints on Controlling the Use of Deadly Force by Police*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1981, at 110; Lawrence W. Sherman & Robert H. Langworthy, *Measuring Homicide by Police Officers*, 70 J. CRIM. L. & CRIMINOLOGY 546 (1979). A comprehensive study of shooting policies in the County of Los Angeles revealed that "[a]s long as police policy is in large part simply a reflection of the personal philosophy of the police chief who administers an individual police department, it is inescapable that fifty police departments administered by fifty different chiefs will have substantial differences in policy." Gerald F. Uelman, *Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 LOY. L.A. L. REV. 1, 59 (1973).

ple, Los Angeles police shot ten people per every 1,000 officers whereas New York police shot three people per every 1,000 officers.<sup>24</sup> Another study found that the frequency of police shootings varied from 0.5 to 2.5 persons killed per every 100,000 people.<sup>25</sup> Variations in shooting rates may well be the result of differing organizational policies concerning the use of force.<sup>26</sup>

Although police shootings sometimes produce demands for public accountability, police officers understandably tend to be skeptical of outside scrutiny. As one police chief candidly observed:

The police know they are involved in a violent business, and seek protection that flexible language will allow. Tragic, but honest, mistakes do occur in the split-second environment of the streets, and the police want their flanks protected, especially from the demands of insistent groups. Police have learned that survivalist politicians will be tempted to throw them to the wolves.<sup>27</sup>

Police officers may not always believe that the public can fully appreciate the dangers of police work.<sup>28</sup> Life and death decisions have to be made on the spot and the view among many officers is that they would rather be "judged by twelve rather than carried out by six."<sup>29</sup> For some officers, a shooting is the

24. See John L. Mitchell, *Officer-Involved Shootings at 10-Year High*, L.A. TIMES, Jan. 28, 1993, at B1.

25. See Lawrence W. Sherman & Robert H. Langworthy, *Measuring Homicide by Police Officers*, 70 J. CRIM. L. & CRIMINOLOGY 546, 556 (1979). A more recent study of 35 cities found that the discharge rate per 100 officers varied from .34 to 7.15 shots. Lorie Fridell, *Justifiable Use of Measures in Research on Deadly Force*, 17 J. CRIM. JUST. 157, 160 (1989).

26. See James Lindgren, *Organization and Other Constraints on Controlling the Use of Deadly Force by Police*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1981, at 110, 112.

27. Anthony V. Bouza, *Myths and Hard Truths About Police Shootings*, 13 U. TOL. L. REV. 337, 338 (1981) (author was the chief of police of Minneapolis, Minnesota Police Department).

28. One commentator noted: "Police officers patrol the streets of America's cities today with more fear, despair, doubt and loneliness than ever before." Lee P. Brown, *A Finger in the Dike as Cities Decay*, L.A. TIMES, Apr. 8, 1993, at B7.

29. William B. Waegel, *How Police Justify the Use of Deadly Force*, 32 SOCIAL PROBLEMS 144, 147 (Dec. 1984).

“ultimate clash of good against evil.”<sup>30</sup> The perception that the public supports tough measures against criminals<sup>31</sup> can reinforce some officers’ perception that a shooting means instant justice.<sup>32</sup> When department management does not articulate and enforce clear restrictions on shootings, “subcultural values defining certain uses of violence as serving positive ends appear to take precedence over legal responsibilities in guiding the behavior of some officers.”<sup>33</sup>

Police fears of public accountability may well prove unfounded since public scrutiny of police shootings typically tends to be deferential.<sup>34</sup> Internal review is designed in part to buttress public confidence and trust in a police department.<sup>35</sup> Ironically, the specter of civil liability can cause some departments to temper thorough investigation and documentation of internal reviews.<sup>36</sup> Moreover, it is widely recognized that prosecutors are reluctant to bring charges against police officers.

---

30. *See id.* at 150.

31. One expert concluded that “a good part of the public wants the police to be brutal.” *Police Brutality*, 1 CQ RESEARCHER 635, 639 (1991) (quoting Professor James Fyfe).

32. *See* William B. Waegel, *How Police Justify the Use of Deadly Force*, 32 SOCIAL PROBLEMS 144, 149-50 (Dec. 1984).

33. William B. Waegel, *The Use of Lethal Force by Police: The Effect of Statutory Change*, 30 CRIME & DELINQ. 121, 137 (1984).

34. *See* William B. Waegel, *How Police Justify the Use of Deadly Force*, 32 SOCIAL PROBLEMS 144, 146 (Dec. 1984).

35. *See* James Lindgren, *Organization and Other Constraints on Controlling the Use of Deadly Force by Police*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1981, at 110, 115.

36. The legal consequences of police shootings preclude documenting improper police conduct. For example, an article appearing in a law enforcement journal warned of the legal liability arising from information obtained in internal investigations:

Departmental chiefs and superior officers should be sensitive to material contained in reports of internal investigations of excessive force complaints and be aware that the findings and conclusions arising from such investigations will probably find their way into any subsequent civil litigation against the officers and the municipal entity. Further, statements and documents given to outside investigatory agencies are just as likely to be offered against S.1983 defendants. A cautious, common-sense approach to post-excessive force investigations, internal or external, would appear to be the best course.

Milton Thurm, *The Post-Excessive Force Investigation: Its Effect on Your Agency’s Civil Liability*, THE POLICE CHIEF, Feb. 1992, at 8, 9.

Prosecutors depend upon the cooperation of police officers, often share the same law enforcement values and "generally are elected politicians sensitive to the law-and-order sentiments of their constituency."<sup>37</sup>

Notwithstanding deferential review, police officers are occasionally disciplined<sup>38</sup> or prosecuted<sup>39</sup> following their use of deadly force. Predictably, police officers have sought to protect themselves from such consequences. As discussed in the

---

37. William B. Waegel, *The Use of Lethal Force by Police: The Effect of Statutory Change*, 30 CRIME & DELINQ. 121, 135 (1984) (citation omitted). "The police then are in fact an arm of the prosecutor's officer; all are an intimate part of the law enforcement apparatus of the state. In such a setting, it is almost impossible for the prosecutor to be free and unbiased." Arthur L. Kobler, *Police Homicide in Democracy*, 31 J. SOC. ISSUES 163, 174 (1975).

38. See Victor Merina & Richard A. Serrano, *2 Deputies Fired for Killing of Disturbed Man*, L.A. TIMES, Jan. 22, 1992, at A1. The Kolts Commission found:

The LASD rarely sustains civilian complaints of excessive force. Of those complaints it does sustain, many result in discipline which appears to far too lenient. . . . [M]ost citizen complaints of excessive force sustained in the last three years result in suspensions of 5 days or less. Given that the standard punishment for denting a patrol car bumper is a 2-day suspension, it is clear that the LASD does not adequately punish its officers who use excessive force.

Special Counsel James G. Kolts & Staff, *The Los Angeles County Sheriff's Department 119* (1992). A similar conclusion was reached by the Christopher Commission. INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, REPORT OF THE INDEPENDENT COMMISSION OF THE LOS ANGELES POLICE DEPARTMENT xix (1991) ("[o]f the 2,152 citizen allegations of excessive force from 1986 through 1990, only 42 were sustained").

39. See William Booth, *Law Officer is Acquitted in Florida*, WASHINGTON POST, May 29, 1993, at A1; Charles Strum, *Grand Jury Indicts 3 Newark Officers*, N.Y. TIMES, Sept. 30, 1992 (National), at A1; Kevin Sullivan & Veronica T. Jennings, *MD. Officer Gets 1 Year in Fatal Shooting*, WASHINGTON POST, July 18, 1992, at A1; James Barron, *2 Officers Are Indicted in Shootings of Civilians*, N.Y. TIMES, July 3, 1992 (Local), at B3; *New York Police Union Blasts D.A. Over Indictment of Officer*, Crim. Just. Newsl., Feb. 15, 1985, at 1. However, these prosecutions are the exception. For example, from 1980 through early 1991, the Los Angeles District Attorney "investigated 678 shootings by LAPD officers . . . and prosecuted officers in none of them." Ted Rohrlich, *Officer Shooting Probes Held Flawed*, L.A. TIMES, July 11, 1991, at A23. However, in June, 1993, "a white Los Angeles police officer who shot a black tow truck driver has become the county's first law enforcement officer in more than a decade to be charged with murder for a killing while on duty." Martin Berg, *D.A. Charges Police Officer with Murder*, L.A. DAILY JO., June 29, 1993, at 1. These charges were dropped in 1995 after two trial resulted in hung juries. John L. Mitchell, *Third Trial Ruled Out in Slaying by Officer*, L.A. TIMES, Feb. 4, 1995, at B1.

next part of this Article, police officers have found this protection in the Fifth Amendment privilege.

## B. DEADLY FORCE RECONSTITUTED: POLICE AND THE PRIVILEGE

Some police officers have invoked the Fifth Amendment<sup>40</sup> privilege against self-incrimination to minimize their exposure to criminal prosecution following on-duty shootings.<sup>41</sup> As the head of its officer-involved shooting unit noted, Los Angeles Police Department officers will not give voluntary statements following on-duty shootings.<sup>42</sup> Such attitudes, however problematic, are increasingly becoming part of police culture, a culture grounded in governmental power and constitutional privilege.

These practices place in bold relief the point alluded to in the Introduction — the specter of government acting as a powerful deputy authorized to use lethal force *and* as a powerless individual in need of constitutional safeguards. For who could have imagined that the same right once courageously invoked

---

40. The Fifth Amendment provides that “[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend V. The “constitutions of all but two states include language relating specifically to self-incrimination.” 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2252 (John T. McNaughton ed. 1961).

The privilege against self-incrimination “protects a person . . . against being incriminated by his own compelled, testimonial communications.” *Fisher v. United States*, 425 U.S. 391, 409 (1976). The privilege is not limited to criminal proceedings, but also privileges a person “not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984). See generally LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).

41. See, e.g., Dawn Weber, *Probes of Police Shootings Get Scrutiny*, L.A. DAILY NEWS, Apr. 12, 1993, at 4.

42. Lt. William Hall is reported to have said: “[The District Attorney] would like a statement from the officers that isn’t compelled,” Hall said. ‘But I don’t believe the officers would give a statement unless compelled.’ Dawn Weber, *Probes of Police Shootings Get Scrutiny*, L.A. DAILY NEWS, Apr. 12, 1993, at 4. According to Lt. Hall, “[t]aking compelled statements is necessary . . . in order for the department to get a truthful account from its officers.” Sheryl Stolberg, *Investigator of Officers Faces the Glare of Scrutiny*, L.A. TIMES, Apr. 7, 1992, at A1. However, he also conceded: “We kind of protect the officers’ rights during investigation,” Hall said. ‘It’s important that when we talk to the officers they know that we’re not there trying to put them in jail.’ *Id.*

against the state by John Lilburne (the 17th-century hero of the Great Privilege<sup>43</sup>) would later be cowardly invoked by the state. It is as if the king, having granted the right to his subjects, thereafter realized the need to claim it for himself. However incredible, police now claim the privilege in modern America. The Warren Court's revolution in criminal justice found its way into the station house not only to protect criminal suspects but also their interrogators.

This exercise of the Fifth Amendment privilege is ironic given police skepticism about the strong safeguards protecting the constitutional rights of suspected criminals.<sup>44</sup> Indeed, several of the scenarios outlined above have prompted police agencies to accord themselves safeguards that they would probably deny to criminal suspects. For example, California's Public Safety Officers' Procedural Bill of Rights<sup>45</sup> requires that police officers be given *Miranda*-type warnings in certain non-custodial settings.<sup>46</sup>

This Article explores the clash between the public's need for accountability in police shootings and a police officer's constitutional right to remain silent.<sup>47</sup> Part II charts the legal

43. See LEONARD W. LEVY, *CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS*, 14-39 (1986).

44. See, e.g., Lawrence Baum, *Police Response to Appellate Court Decisions: Mapp and Miranda*, 7 POLY STUD. J. 425, 427 (1978) ("[m]ost police officers apparently perceive that full compliance with the Supreme Court's restrictions on search and interrogation practices would impose substantial costs on them"); Peter W. Lewis & Harry E. Allen, "Participating *Miranda*": An Attempt to Subvert Certain Constitutional Safeguards, *CRIME & DELINQ.*, Jan. 1977, at 75, 77 ("it is not uncommon for many law enforcement authorities to complain that *Miranda* serves only to 'handcuff' effective law enforcement activities and ultimately allows 'dangerous criminals to be set free on the streets'"). To some extent, this police criticism is based upon a lack of understanding of the legal rules. As one commentator noted, "[t]he policeman is supposed to protect your life, rights, and property in that order; in fact, he protects life and property, and doesn't know your rights." Stephen L. Wasby, *Police Training About Criminal Procedure: Infrequent and Inadequate*, 7 POLY STUD. J. 461 (1978) (quoting unidentified police training officer).

45. CAL. GOV'T. CODE § 3300 *et seq.* (West 1980).

46. CAL. GOV'T. CODE § 3303(g) (West 1980). See *Lybarger v. City of Los Angeles*, 40 Cal. 3d 822, 828, 710 P.2d 329, 221 Cal. Rptr. 529 (1985) ("[p]rior to the act . . . no such advice or admonition was required by law").

47. This Article will examine this issue under the federal Constitution. Because state constitutions often provide more significant protections, it does not necessarily follow that the conclusions of this Article would apply in every state. See Jennifer Frisen, *State Constitutional Law: Litigation Individual Rights, Claims*

precedents allowing police officers to invoke Fifth Amendment rights following on-duty shootings. Part III assesses the problems flowing from this invocation. Finally, Part IV explores the issue of whether police officers can be required to provide an account of their on-duty shootings useable in a criminal proceeding.

## II. CONSTITUTIONAL ORIGINS OF POLICE OFFICER'S RIGHT TO REMAIN SILENT

For much of this nation's history, the constitutional rights of public employees were suspended when they clocked-in for work.<sup>48</sup> Justice Oliver Wendell Holmes made the point well in his often-quoted adage that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>49</sup> Thus, when an employee was suspected of criminal activity, many jurisdictions required the employee to surrender the privilege against self-incrimination as a condition of continued employment.<sup>50</sup> The choice faced by officers

---

& Defenses (1992); Ronald K. L. Collins, Peter J. Galie & John Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599 (1986).

48. "For almost the first century of our national existence, federal employment was regarded as item of patronage, which could be granted, withheld, or withdrawn for whatever reasons might appeal to the responsible executive hiring officer." *Arnett v. Kennedy*, 416 U.S. 134, 148 (1974). See *Crenshaw v. United States*, 134 U.S. 99 (1890) (Navy officer could be removed from office at will); *Parsons v. United States*, 167 U.S. 324 (1897) (President can discharge district attorney at his pleasure); *Keim v. United States*, 177 U.S. 290 (1900) (post office clerks may be removed at pleasure). In 1947, the United States Supreme Court upheld the discharge of a federal employee for engaging in political activity in violation of the Hatch Act. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Although the legal rights of public employees expanded during the 1950s and 1960s (*Slochower v. Board of Education*, 350 U.S. 551 (1956); *Board of Regents v. Roth*, 408 U.S. 564 (1972)), the rights of public employees have been more recently scaled-back in a variety of contexts. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug testing of public employees permitted without reasonable suspicion); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (reasonableness standards used for searches of public employees work areas); *Connick v. Myers*, 461 U.S. 138 (1983) (questionnaire distributed to co-workers in prosecutor's office determined not a matter of public concern protected by the First Amendment).

49. *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892). The United States Supreme Court, over a half century later, reached a similar conclusion. See *Adler v. Board of Education*, 342 U.S. 485, 492 (1952).

50. See Note, *Mandatory Dismissal of Public Personnel and the Privilege Against Self-Incrimination*, 101 U. PA. L. REV. 1190 (1953). The purpose of these

confronted with interrogation was succinctly framed by one court:

Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them.<sup>51</sup>

Speak or be fired requirements came under increasing scrutiny following the United States Supreme Court's 1964 decision that the privilege against self-incrimination was applicable to the states.<sup>52</sup> Later, in *Garrity v. New Jersey*,<sup>53</sup> the

---

statutes was straight-forward:

The avowed purpose of the statutes is to remove from office those who would obstruct investigation into the affairs of government by claiming their right against self-incrimination. The statutes make no distinctions as to the type of office holder, the nature of the questions asked, or the duties performed by the person under question.

*Id.* at 1191 (footnotes omitted). It appears that many of these statutes were enacted as tools in the legislative investigation of subversive activity. *Id.* at 1190. In fact, many of the cases delineating the constitutional rights of public employees arose in the context of the ill-fated efforts of the post-World War II period to stamp out activities deemed subversive. *See, e.g.,* *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (public employment may not be conditioned on surrender of associational rights); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Alder v. Board of Education*, 342 U.S. 485 (1952) (upholding law authorizing membership in certain organizations as prima facie evidence of unfitness for teaching position); *Garner v. Board of Public Works*, 341 U.S. 716 (1951) (dismissal of public employee for refusal to disclose Communist Party affiliation upheld).

51. *Christal v. Police Commission*, 33 Cal. App. 2d 564, 567-68, 92 P.2d 416, 419 (1939). The court based its conclusion upon the role police officers play in society:

When police officers acquire knowledge of the facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors. . . . It is for the performance of these duties that police officers are commissioned and paid by the community, and it is a violation of said duties for any police officer to refuse to disclose pertinent facts within his knowledge even though such disclosure may show, or tend to show, that he himself has engaged in criminal activities.

*Id.* at 568, 92 P.2d at 419.

52. *See Malloy v. Hogan*, 378 U.S. 1 (1964).

Supreme Court held that Fifth Amendment values were compromised by efforts to force police officers to choose between their jobs and self-incrimination.<sup>54</sup> In an investigation by the state attorney general, officers suspected of ticket-fixing<sup>55</sup> were informed that state law mandated their termination if they invoked the Fifth Amendment privilege.<sup>56</sup> Each officer elected to answer questions and some of their answers were later used against them in obtaining convictions for conspiracy to obstruct the administration of traffic laws.<sup>57</sup> Noting that police officers “are not relegated to a watered-down version of constitutional rights,”<sup>58</sup> the Court held that their compelled testimony violated the Fifth Amendment. The dilemma of choosing between one’s job and self-incrimination was “the antithesis of free choice to speak out or to remain silent.”<sup>59</sup> The Justices thus concluded that the privilege provides a shield against the use of “statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.”<sup>60</sup>

A year later, in *Gardner v. Broderick*,<sup>61</sup> the Court considered the flip-side of the dilemma faced by the officers in *Garrity*.<sup>62</sup> In *Gardner*, a police officer was summoned before a

53. 385 U.S. 493 (1967).

54. Along with *Garrity*, the Court decided *Spevack v. Klein*, 385 U.S. 511 (1967). The Court held that a lawyer facing disciplinary proceedings could not be disciplined for failing to waive the privilege against self-incrimination. The Court noted that “[t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege.” *Id.* at 516.

55. The police officers were accused of falsification of court records, alteration of traffic tickets, and diversion of monies derived from bail and fines. *New Jersey v. Naglee*, 44 N.J. 209, 214, 207 A.2d 689, 691 (1965).

56. *Garrity*, 385 U.S. at 494. New Jersey’s forfeiture provision applied to any public officer or employee who refused “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.” *Id.* at 494 n.1 (quoting N.J. REV. STAT. § 2A:81-71.1 (Supp. 1965)).

57. *See Garrity*, 385 U.S. at 495. The trial court admitted the statements only after conducting a hearing to determine if the officers’ statements were voluntary. *Id.* at 495 n.2.

58. *Id.* at 500.

59. *Id.* at 497.

60. *Id.* at 500.

61. 392 U.S. 273 (1968).

62. *Gardner* arose in the context of an employee seeking reinstatement after being terminated for refusing to waive the privilege against self-incrimination. *Id.*

grand jury in connection with a criminal investigation. The officer was requested to sign a waiver of his Fifth Amendment privilege and was informed that job loss would be the consequence of invoking the Fifth Amendment privilege.<sup>63</sup> Declining to waive the privilege, the officer was discharged.<sup>64</sup> Finding that the officer was fired solely for refusing to relinquish the privilege against self-incrimination,<sup>65</sup> Justice Fortas concluded that “the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its effectiveness, to coerce a waiver of the immunity it confers on penalty of loss of employment.”<sup>66</sup>

Although the *Gardner* Court held that a police officer could not be fired for asserting the Fifth Amendment privilege,<sup>67</sup> the Court indicated that the police officer could be fired

at 274.

63. *Id.* The New York Constitution continues to contain a provision that a public officer shall be removed from office for failure to sign a waiver of immunity to answer relevant questions before a grand jury. N.Y. Const. art I, § 6 (McKinney 1982).

64. *Id.* at 275.

65. *Id.* at 278.

66. *Gardner*, 392 U.S. at 279. The Court relied on *Griffin v. California*, 380 U.S. 609 (1965), where it found that commenting on a defendant's silence at trial was a penalty on the exercise of the fifth amendment privilege. Justice Douglas observed in *Griffin*: “For comment on the refusal to testify is a remnant of the ‘inquisitorial system of criminal justice,’ which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.” *Id.* at 614 (citation and footnote omitted).

The Fifth Amendment principle applied in *Gardner* is similar to the doctrine of unconstitutional conditions. The doctrine of unconstitutional conditions provides that the government may not grant a benefit—which it has the right to withhold altogether—on the condition that the recipient of the benefit surrender a constitutional right. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989). Since government employment is considered a privilege (*Stephenson v. Binford*, 287 U.S. 251 (1932); *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd* (by an equally divided court) 341 U.S. 918 (1951)), *Gardner* could have been decided on unconstitutional condition principles. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (denial of unemployment benefits overturned because claimant required to choose between free exercise of religious beliefs and forfeiting benefits). However, the Fifth Amendment prohibition against penalties applies in contexts where the unconstitutional condition doctrine would not apply. For example, in *Griffin* the Court held that prosecutors could not comment on a criminal defendant's silence at trial because it would constitute an inappropriate penalty for exercise of the privilege. No privilege or benefit was involved in *Griffin* and the doctrine of unconstitutional conditions could not have been invoked.

67. A companion case decided the same day, *Uniformed Sanitation Men Associ-*

for failing to answer questions relating to job performance so long as the answers were not used in a criminal proceeding.<sup>68</sup> Thus, if the officer's responses were immunized from use in criminal proceedings, the officer's employer could compel answers to questions about job performance and those answers could be used against the officer in an administrative or civil proceeding to terminate the officer's employment.<sup>69</sup>

Following *Gardner*,<sup>70</sup> lower federal courts and state courts have applied *Garrity* and *Gardner* on a number of occasions.<sup>71</sup>

---

ation v. Commissioner, 392 U.S. 280 (1968), held that sanitation workers could not be terminated for failing to waive immunity. They would be entitled to assert the privilege because their governmental employer was seeking "testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally." *Id.* at 283.

68. See *Gardner*, 392 U.S. at 278.

69. The Fifth Amendment only prohibits compelled testimony in criminal proceedings. Accordingly, the compelled testimony can be used in civil or administrative proceedings. Theoretically, the consequence of job loss may be more severe than sanctions flowing from criminal prosecution. However, the consequences of lying are usually greater in a criminal investigation than lying to a superior in an administrative investigation.

70. The United States Supreme Court has extended its holding to public works contractors (*Lefkowitz v. Turley*, 414 U.S. 70 (1973)) and high level political officeholders (*Lefkowitz v. Cunningham*, 431 U.S. 801 (1977)).

71. ALA: *Benjamin v. City of Montgomery*, 785 F.2d 959 (11th Cir.), *cert. denied*, 479 U.S. 984 (1986) (police officers could not be terminated for invoking privilege; "at the time they first were called to the stand, appellants were not the subject of any disciplinary proceeding, and had not been directed to answer questions on pain of dismissal"); ARZ: *William v. Pima County*, 791 P.2d 1053 (Ct. Apps. Ariz. 1989), *cert. denied*, 498 U.S. 972 (1990) (police officer fired for refusing to answer questions; "grant of immunity by a proper judicial officer was not a prerequisite to his employer's right to require that he answer the employer's questions during the investigation"); CAL: *Lybarger v. City of Los Angeles*, 40 Cal. 3d 822, 710 P.2d 329, 221 Cal. Rptr. 529 (Cal. 1985) (police officer reinstated after being fired for failure to answer questions since he was not advised that statement could not be used against him in criminal proceeding); *Williams v. City of Los Angeles*, 47 Cal. 3d 195, 763 P.2d 480, 252 Cal.Rptr. 817 (Cal. 1988) (officer was not entitled to reinstatement for failure to be properly advised that answers could not be used against him criminally since he answered questions); FLA: *Farmer v. City of Fort Lauderdale*, 427 So.2d 187 (Fla.), *cert. denied*, 464 U.S. 816 (1983) (although employee can be ordered to answer questions, employee could not be ordered to answer same questions by means of polygraph examination); GA: *Erwin v. Price*, 778 F.2d 668 (11th Cir. 1985) (police officer who was not required to waive privilege could be terminated for refusing to answer questions relating to job); MASS: *Patch v. Mayor of Revere*, 492 N.E.2d 77 (Mass. 1986) (a public employee may be compelled to answer questions relating to the job and the answer may not be used against the employee in a criminal proceeding); MISS: *Knebel v. City of Biloxi*, 453 So.2d 1037 (Miss. 1984) ("[s]ince *Garrity* holds that a statement, given by a police officer about his official conduct under questioning from

Although *Gardner* was silent on the procedures necessary to compel job-related information from employees for non-criminal purposes, courts across the country have authorized local government agencies to grant use immunity without any statutory authorization.<sup>72</sup> Generally, use immunity is conferred pursuant to statute and requires application to a court by an authorized officer.<sup>73</sup> However, courts have held that use im-

---

state authorities under threat that if he does not answer he will be fired, is inadmissible into evidence in a criminal proceeding against the officer, it follows that a statement given under the promise that it will not be used against him in a criminal proceeding is likewise inadmissible"); *NJ*: *Banca v. Town of Phillipsburg*, 436 A.2d 944 (Sup. Ct. App. Div. N.J. 1981) (police officer may not be disciplined for failure to cooperate in investigation where he is the target and has not been offered immunity); *NY*: *Matt v. Larocca*, 71 N.Y.2d 154, 524 N.Y.S.2d 180, 518 N.E.2d 1172 (N.Y. 1987), *cert. denied*, 486 U.S. 1007 (1988) (public employees may be compelled to answer questions so long as answers cannot be used in criminal proceeding); *OHIO*: *City of Warrensville Heights v. Jennings*, 569 N.E.2d 489 (Ohio 1991) (refusal of police dispatcher to take polygraph examination justified termination); *Jones v. Franklin County Sheriff*, 555 N.E.2d 940 (Ohio 1990) ("public employees can be required to answer potentially incriminating questions, so long as they are not asked to surrender their constitutional privilege against self-incrimination"); *PA*: *DiCiaccio v. Civil Service Commission*, 389 A.2d 703 (Com. Ct. Pa. 1978) (employees can be ordered to answer questions if the employee is not told that "so as long as they have not indicated to the employee that assertion of his constitutional right to remain silent or a refusal to waive immunity from prosecution will constitute grounds for discharge"); *TX*: *Firemen's & Policemen's Civil Service Commission v. Burnham*, 715 S.W.2d 809 (Ct. Apps. Tex. 1986), *cert. denied*, 488 U.S. 842 (1988) (officer could be terminated for failure to take polygraph examination concerning alleged rape); *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983) (police officers properly fired for refusing to answer question even though they were not advised that answers could not be used against them in criminal proceeding).

72. See *Erwin v. Price*, 778 F.2d 668, 670 (11th Cir. 1985) (no statutory grant of use immunity required); *Hester v. City of Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985) ("privilege against self-incrimination affords a form of use immunity which, absent waiver, automatically attaches to compelled incriminating statements as a matter of law. Given this, any grant of use immunity to the plaintiffs would have been duplicative"); *Knebel v. City of Biloxi*, 453 So. 2d 1037, 1040 (Miss. 1984) (immunity flows "not from the authority of the interrogator to make such a promise, but the very nature of the Fifth Amendment"); *Jones v. Franklin County Sheriff*, 555 N.E.2d 940, 945 (Ohio 1990) ("[t]he privilege against self-incrimination is preserved because a statement by investigators that nothing said at the hearing can be used at a subsequent criminal proceeding effectively immunizes that testimony from later use by a prosecutor").

73. See 12 U.S.C.A. § 1784(c) (West 1989) (National Credit Union Administration Board may apply to any court of the United States for order compelling person to give testimony or produce documents); 15 U.S.C.A. § 57b-1(c)(12)(D)(iii) (West Supp. 1993) (Federal Trade Commission may apply to district court for order compelling testimony in certain civil investigative proceedings); 15 U.S.C.A. § 1312(i)(7)(B) (West 1982) (Attorney General may apply to district court for order

munity flows directly from the Constitution when a public employee is ordered to answer questions by a superior under threat of termination.<sup>74</sup>

In light of this history, it is not surprising that some police officers invoke the Fifth Amendment privilege following a shooting.<sup>75</sup> Lawyers defending the police quite understandably

---

compelling testimony in certain anti-trust civil investigations); 18 U.S.C.A. § 6003 (West Supp. 1993) (United States Attorney may apply to district court for order compelling testimony before court or grand jury); 18 U.S.C.A. § 6004 (West 1985) (agencies, with the approval of Attorney General, may issue order compelling testimony in proceeding before agency); 18 U.S.C.A. § 6005 (West 1985) (authorized congressional officer may apply to district court for order compelling testimony before congressional proceedings); 21 U.S.C.A. § 884 (West 1981) (United States Attorney may apply to district court for order compelling testimony before court or grand jury in connection with violation of drug laws); 28 U.S.C.A. § 594(a)(7) (West Supp. 1993) (Independent Counsel may exercise power of Attorney General or United States Attorney and apply to district court for immunity under certain federal statutes). *Cf.* 28 U.S.C.A. § 1782 (West 1966) (district court cannot compel testimony in aid of proceeding before foreign or international tribunal "in violation of any legally applicable privilege").

In *United States v. Doe*, 465 U.S. 605 (1984), the Court declined the government's request for the court to provide immunity for the act of producing certain documents. It expressly "decline[d] to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the statute requires." *Id.* at 616 (footnote omitted).

74. *See supra* note 70 and cases cited therein.

75. One officer, who invoked the privilege against self-incrimination in a criminal proceeding against a suspect he shot, explained his reasons for not testifying as follows:

Q. Officer you said you felt it was not in your best interest to testify. What did you mean by that?

A. Meaning that their investigation isn't concluded and basically until that's concluded, it wouldn't be wise for me to make any statements about that night. It would be similar to us bringing the defendants up here and asking them to give details about the victims's house.

Q. Let me ask you this: When you say it wouldn't be wise, do you think it would subject you to some kind of civil liability?

A. It may.

Q. And how is that?

A. I don't know, anything's possible. Until the investigation's concluded, I don't know what may come of it.

Q. Okay. And do you think it would subject you to some criminal liability if you testified in this case?

A. The way things are nowadays in regards to scrutiny on police, who knows?

Q. All right. So, you're basing your answer not on some-

recommend this tactic. A newsletter of a law firm representing California law enforcement officers concluded that “[s]ubmission to an investigator’s pressure for a voluntary statement, which can be used against the officer for any purpose, is not to the officer’s legal benefit.” Instead, it advised:

An officer who has just been involved in a shooting has no legal obligation to give an oral or written statement to any agency, unless required to do so by a superior officer. This is another way of saying that a law enforcement officer has Fifth Amendment rights not to give a voluntary statement just like any citizen does.<sup>76</sup>

The number of officers refusing to provide voluntary statements following on duty shootings is unknown, although one big metropolitan area sheriff has detected “an alarming increase in the number of these officers who refuse to be inter-

---

thing specific in your case but just because anything’s possible these days, is that a fair statement?

A. In essence.

Partial Transcript of Preliminary Examination, Nov. 23, 1992, at 15-16, *People v. Robbins*, Case No. SA 011711 (Mun. Ct. Santa Monica Jud. Dist.).

76. Silver, Goldwasser & Shaeffer, *Client Newsletter*, Jan.-Mar. 1990, at 3. Following this newsletter, Los Angeles County Sheriff Sherman Block notified police chiefs that its homicide investigators were facing difficulty because of “confusion” caused by articles such as the *Client Newsletter*. Letter from Sherman Block to Russell K. Siverling, Police Chief of Alhambra, California, dated June 20, 1990, at 2. In response, the firm noted:

In a letter to police chiefs in Los Angeles County, Sheriff Sherman Block has criticized this office’s policy of advising clients not to give a voluntary statement in a shooting investigation.

. . . [W]hat is in the best interest of the officer involved in the shooting? Clearly, if there is an irrevocable, unconditional guarantee that the officer will not be prosecuted, then there is no fear that what he says might be used in a criminal prosecution. He could make a voluntary statement.

. . . We are concerned; we want you to make a statement only if you are ordered to do so. Why? Because then your statement is a coerced one and it cannot be used against you in a criminal matter.

Silver, Goldwasser, Shaeffer & Hadden, *Client Newsletter*, Fall 1991, at 1. Thus far, the regular practice of invoking the privilege is limited to officer involved shootings. However, the legal principles that permit the invocation of the privilege would apply to other situations. Conceivably, an officer could invoke the Fifth Amendment privilege and decline to prepare a report any time he or she has a physical encounter with a suspect.

viewed.”<sup>77</sup> Like other individuals, the decision whether to speak or remain silent is a personal one. Of course, some officers ignore the advice of their attorneys simply in belief that they have nothing to hide. On the other hand, invoking the privilege may not be looked upon favorably by the command structure in some departments, and officers may conclude that remaining silent will hinder career advancement. Other officers exercise their rights to remain silent out of fear of being second-guessed by prosecutors.

### III. THE CONSEQUENCES OF REMAINING SILENT

Obviously, an officer’s refusal to provide information can seriously impair the investigation of the shooting. This point was echoed by an independent police commission which found:

When the LAPD does interview the involved officer, the officer’s statement is usually “compelled” under the statutory Police Officers’ Bill of Rights. Legally, no “compelled” statement can be used in any criminal prosecution of that officer. Similarly, any information or discoveries obtained directly or indirectly from that statement cannot be used against the compelled officer in a criminal proceeding. When these compelled statements are taken at the beginning of the administrative investigation, any potential criminal prosecution will likely be very difficult to pursue.<sup>78</sup>

---

77. Letter from Sherman Block to Russell K. Siverling, Police Chief of Alhambra, California, dated June 20, 1990, at 1.

78. INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, REPORT OF THE INDEPENDENT COMMISSION OF THE LOS ANGELES POLICE DEPARTMENT 161-62 (1991). The report found the process of investigating officer-involved shootings was seriously flawed. Other problems included:

Officers at the scene are frequently gathered together and interviewed as a group, which many have appropriately criticized as an opportunity for witnesses to “get their stories straight.”

Officer statements are often not recorded until completion of a “pre-interview,” which is attended only by LAPD officers. Only when the “pre-interview” is concluded is a recorded statement taken.

*Id.* at 161.

Prosecution of persons upon whom immunity has been conferred can be

Equally problematic, a police officer invoking the privilege against self-incrimination following an on-duty shooting does not inspire public confidence about the propriety of the officer's conduct.<sup>79</sup> The police are understandably regarded as the "thin blue line" protecting the public from criminal conduct. The public perception of the Fifth Amendment privilege does not coincide with the eloquent prose of Supreme Court decisions. Although the Court has called the privilege "the hallmark of our democracy,"<sup>80</sup> the average person on the street is likely to regard it "as safe harbor for those who break society's rules."<sup>81</sup>

The exercise of privilege is far more than a "public relations" problem. Both criminal and civil proceedings arising out of the police shootings can be adversely affected by an officer's claim to silence. In a criminal proceeding, the invocation of

---

complicated. See *United States v. North*, 910 F.2d 843, *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991). Although a prosecutor is not barred from having access to immunized testimony (*Gwillim v. City of San Jose*, 929 F.2d 465 (9th Cir. 1991); *People v. Gwillim*, 223 Cal. App. 3d 1254, 274 Cal. Rptr. 415 (Cal. Ct. App. 1990)), prosecution may be foreclosed if a court cannot "escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." *United States v. McDaniel*, 482 F.2d 305, 312 (8th Cir. 1973). As the United States Supreme Court observed, "[t]estimony obtained pursuant to a grant of statutory use immunity may be used neither directly nor derivatively." *Braswell v. United States*, 487 U.S. 99, 117 (1988). See *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972).

In the Rodney King beating case, the convicted police officers asserted on appeal that certain witnesses had been exposed to their immunized statements. *United States v. Koon*, 34 F.3d 1416, 1431 (9th Cir. 1994). The court rejecting this argument, employing a test that requires a showing that "the substance of the exposed witness's testimony is based upon on a legitimate source that is independent of the immunized testimony." *Id.* at 1432. The D.C. Circuit requires an additional showing that the exposed witness has not shaped or altered his or her testimony in any way as a result of the exposure. *United States v. Poindexter*, 951 F.2d 369, 373 (D.C. Cir. 1991), *cert. denied*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 656 (1992).

79. Moreover, the refusal of police officers to explain their actions creates the appearance of unequal application of the law. If an individual kills someone and declines to provide any facts establishing justification, the police would virtually always make an arrest and take the person to jail. However, in the case of the officer who shoots someone, it is accepted practice that officer can assert the Fifth Amendment privilege without adverse consequences.

80. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (Warren, C.J.) (quoting *United States v. Grunewald*, 233 F.2d 556, 582 (2d Cir. 1956) (Frank, J., dissenting)).

81. Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 8 (1986). See Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 679 (1968).

privilege by an arresting police officer can result in the dismissal of the charges against the suspect.<sup>82</sup> In a civil proceeding, adverse inferences can be drawn from the invocation of privilege.<sup>83</sup> Either way, the point remains: police invocation of privilege exacts high societal costs.

Moreover, the public scrutiny essential to democratic control of police agencies is diminished significantly in the absence of public documents describing the facts surrounding a shooting. Police reports prepared in the normal course of business are generally public records at some stage.<sup>84</sup> However, immunized statements taken during the course of administrative investigations are usually considered internal or personnel documents unavailable for public inspection.<sup>85</sup> Hence, police

---

82. The following exchange occurred in the preliminary hearing of a armed-robbery suspect who was shot by a police officer:

Q. Officer Suarez, how are you currently employed?

A. By the City of Santa Monica as a police officer.

Q. And were you so employed on the evening of September 23rd, 1992?

A. Regarding the events of that night, based on the advice of my attorney and the Fifth Amendment of the Constitution of the United States, I'm going to decline to answer your questions.

Partial Transcript of Preliminary Examination, Nov. 23, 1992, at 2, *People v. Robbins*, Case No. SA 011711 (Mun. Ct. Santa Monica Jud. Dist.).

83. See *Baxter v. Palmigiano*, 425 U.S. 308 (1976) ("Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"). See *United States v. Taylor*, 975 F.2d 402, 404 (7th Cir. 1992) ("[a] party who asserts the privilege against self-incrimination must bear the consequence of lack of evidence"); Robert Heidt, *The Conjurer's Circle — The Fifth Amendment Privilege in Civil Cases*, 91 *YALE L.J.* 1062 (1982).

In *Shepherd v. Superior Court*, 17 Cal. 3d 107, 550 P.2d 161, 130 Cal. Rptr. 257 (1976), plaintiff in a wrongful death action arising from a police shooting sought an order precluding the defendant police officers from asserting the privilege against self-incrimination at their depositions. Although the court concluded that there was no basis for overriding the privilege, it did note that "[i]f such assertions continue to be made at trial the question of 'appropriate juristic consequences' may well arise at that time." *Id.* at 117, 550 P.2d at 166, 130 Cal. Rptr. at 262.

84. For example, the California Public Records Act, CAL. GOV'T. CODE §§ 6250-6268 (West 1980 & Supp. 1994), requires that law enforcement agencies make available to the public certain information concerning arrests "except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or related investigation." *Id.* § 6254(f) (West Supp. 1994).

85. In *Moffett v. City of Portland*, 400 A.2d 340 (Me. 1979), the Maine Su-

invocation of the privilege places certain constitutional principles in conflict with the democratic ideal of open government.

The secrecy surrounding police shootings encourages a police agency to provide the press with the most favorable aspects of a shooting while concealing certain damaging facts. In some departments, it is not uncommon that shooting accounts are given a favorable "spin" so they "become reinterpreted and refashioned to fit common public understandings of when and why police must shoot."<sup>86</sup>

Finally, the practice of police officers conferring use immunity on their colleagues in the same department can only further the unwritten code of silence<sup>87</sup> that is prevalent in many police agencies.<sup>88</sup> The code of silence "mandates that no officer report another for misconduct, that supervisors not discipline officers for abuse, that wrongdoing be covered up, and that any investigation or legal action into police misconduct be deflected and discouraged."<sup>89</sup>

Both the exercise of the privilege and the conferring of use immunity advance the objectives of the code of silence. The practice of police officers conferring immunity on other police officers "sanctions official lawlessness."<sup>90</sup> Equally troubling is

preme Judicial Court concluded that the State's Freedom of Access Act's exemption of "privileged" records applied to involuntary statements taken from police officers in administrative investigations. *Id.* at 348.

86. William B. Waegel, *How Police Justify the Use of Deadly Force*, 32 SOCIAL PROBLEMS 144, 153 (Dec. 1984). Not surprisingly, "[s]ecrecy and lack of procedural safeguards inevitably foster suspicion about the fairness of internal review." National Commission on Causes and Prevention of Violence 385 (1969).

87. The code of silence "is an unwritten rule and custom that police will not testify against a fellow officer and that police are expected to help in any cover-up of illegal action." David Rudovsky, *Police Abuse: Can the Violence be Contained?* 1992 HARV. C.R.-C.L. L. REV. 465, 481 n.60 (1992).

88. See Athelia Knight & Benjamin Weiser, *D.C. Police Chief Praises Officer Who Broke Police Code of Silence*, WASHINGTON POST, Dec. 16, 1983, at B1; Tim Weiner, *Ex-Officer Who Broke Code of Silence Given Probation*, PHILA. INQUIRER, Feb. 13, 1985, at 1.

89. David Rudovsky, *Police Abuse: Can the Violence be Contained?* 1992 HARV. C.R.-C.L. L. REV. 465, 487 (1992).

90. *Jones v. Franklin County Sheriff*, 555 N.E.2d 940 (Ohio 1990) (Douglas, J., dissenting). He stated: "The majority's result sanctions official lawlessness—lawlessness of the worst sort since the very people engaging in it are those whom we depend upon to enforce the law. If we permit this, who will watch the

the fact that "police investigators, investigating another police officer for suspected criminal activity, can in effect accord the suspected officer (a public employee) absolution for whatever criminal activity has occurred and has been admitted to investigators."<sup>91</sup> The problem, of course, is the real potential of conflict of interest, favoritism, and unchecked discretionary justice.

By itself, the troublesome reality of the exercise of the privilege presents no justification for police officers scuttling its use. Society has a general interest in uncovering information about criminal activities, yet the availability of the privilege curtails governmental information gathering. Indeed, since private citizens have full protection of the privilege following shootings, it is not unreasonable to suggest that police officers should be afforded similar safeguards.

Immunity is the general price that society pays when it desires to compel information, reflecting "a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify."<sup>92</sup> Some of the problems caused by allowing police officers immunity could be ameliorated through measures prohibiting immunity except in accordance with the statutory procedures providing for third party review.<sup>93</sup> Although this reform would halt the questionable practice of police officers conferring immunity on their own, less information would be disclosed since neither timely voluntary nor compelled statements would be available.<sup>94</sup>

Yet, immunity does not fully address the special account-

---

watchman?" *Id.* at 950.

91. *Id.*

92. *Kastigar v. United States*, 406 U.S. 441, 446 (1972).

93. Other reforms might include making the immunized statements public records, thereby removing the cloak of secrecy that surrounds officer involved shootings. Although these responses merit consideration, they do not raise significant constitutional issues and will not be the focus of the article.

94. "Accurate and timely reporting of use of force incidents is the essential first step in the process of monitoring and controlling such responses." International Association of Chiefs of Police National Law Enforcement Police Center, *Use of Force* 6 (1989). It is unlikely that prosecutors would seek to confer immunity until after other avenues of investigation had been exhausted.

ability required when police shoot. When a private citizen shoots, he or she is, by definition, not doing so on behalf of the state. By contrast, police officers "have at their disposal the capacity to act as judge, jury, and executioner."<sup>95</sup> The wrong decision can needlessly take human life and expose the police officer's governmental employer to major financial liability.<sup>96</sup> Legitimate concerns may exist about continuing to confer such authority on an individual who declines to remain fully accountable. Instead, personal concerns are elevated above the interests of the agency which conferred the power to use deadly force.

Public confidence in the life and death decisions of police agencies can best be advanced by requiring that police officers comply with post-shooting reporting procedures mandated by most police departments. The Atlanta Police Department's policy is illustrative of these requirements:

- a. An employee discharging a firearm shall, as soon as possible, take the necessary steps to report the discharge.
- b. An employee on or off duty shall notify his/her immediate superior officer as well as the officer in command of the zone facility or district in which the discharge took place. The employee shall submit all necessary reports without undue delay.<sup>97</sup>

The rule further provides for far more detailed information concerning the use of deadly force, including:

whether [the] firearm and ammunition were department issued or approved; the number of shots fired; the reason for the discharge; the distance between the employee and the person fired at when first shot was fired; who fired first shot; if employee was being fired on, how many

---

95. G. Larry Mays & William A. Taggart, *Deadly Force as a Police Problem in Local Law Enforcement: Do Administrative Practices Make a Difference?*, 5 POL'Y STUD. Rev. 309 (1985).

96. In one month, the City of Santa Monica paid \$1.3 million to settle one police shooting case and \$1.1 million to settle another. Marilyn Martinez, *SM to Pay \$1.3 Million to Man's Kin*, THE OUTLOOK, Aug. 19, 1993, at A1.

97. Atlanta Police Department, Firearms Policy, Rule 6.10.

shots were fired at the employee. All the above information shall be included in the narrative and supplement portion of the incident report.<sup>98</sup>

It seems clear that such policies cannot be enforced when an officer invokes the privilege against self-incrimination. In what follows, this Article tests whether this assumption is correct.

#### IV. SILENCING THE PRIVILEGE IN OFFICER-INVOLVED SHOOTINGS

Few would deny that requiring police officers to provide reports of their official actions is essential to the proper administration of our criminal justice system. Likewise, sanctioning police officers for failing to honor reporting requirements for some illegitimate reason, or for no reason, would not raise bona fide Fifth Amendment concerns. However, when the officer declines to prepare the report by asserting the privilege against self-incrimination, public duty and individual rights clash.

*Garrity* and *Gardner* form the foundation on which police officers claim they cannot be compelled to provide an accounting of an on-duty shooting without first receiving immunity. Still, this foundation all too readily turns to quicksand when one recognizes the *limited* scope of the Supreme Court's holdings, and when one considers the rule and role of the required records doctrine. Consistent with these constitutional doctrines, at least one conclusion is clear: A police officer *can* be required to provide an unimmunized account of an on-duty shooting or face job loss.

---

98. *Id.* A model policy on the use of force developed by the International Association of Chiefs of Police National Law Enforcement Policy Center provides that a written report should be prepared whenever a "firearm is discharged outside of the firing range." International Association of Chief of Police National Law Enforcement Policy Center, Use of Force—Model Policy 1 (1989).

A. THE SCOPE OF *GARRITY-GARDNER*

*Garrity* and *Gardner* were decided during the halcyon days of the Warren Court's revolution in criminal procedure. For better or worse, the doctrinal principles which provided their foundation have not been generally expanded. Instead, the Burger and Rehnquist Courts have significantly curtailed Fifth Amendment jurisprudence.<sup>99</sup>

Similarly, public employees have not fared well in seeking safe harbor under other constitutional provisions.<sup>100</sup> Given

---

99. See, e.g., *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991) (court held that harmless error rule applies to admission of coerced confession); *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990) (compelled production of child not protected by Fifth Amendment); *Braswell v. United States*, 487 U.S. 99 (1988) (sole shareholder could be compelled to produce records even though production might incriminate him); *Colorado v. Connelly*, 479 U.S. 157 (1986) (volunteered statement by mentally ill person not the product of police coercion notwithstanding the fact that statement may not have been "voluntary"); *New York v. Quarles*, 467 U.S. 649 (1984) (the court created a public safety exception to the giving of *Miranda* warnings); *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) (no 5th Amendment violation in conditioning student aid on draft registration); *Minnesota v. Murphy*, 465 U.S. 420 (1984) (admissions made by probationer to his probation officer without prior warning admissible even though probationer compelled to be honest with such officer); *South Dakota v. Neville*, 459 U.S. 553 (1983) (Court held that admission into evidence of refusal to take a blood-alcohol test following arrest for drunk driving did not violate Fifth Amendment); *United States v. Ward*, 448 U.S. 242 (1980) (environmental reporting requirement did not violate Fifth Amendment); *Fisher v. United States*, 425 U.S. 391 (1976) (individual can be compelled to produce tax records prepared by accountant; act of production not sufficiently testimonial); *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (failure to testify for Fifth Amendment reasons can be commented on in civil proceeding); *Garner v. United States*, 424 U.S. 648 (1976) (defendant failed to assert Fifth Amendment and his response on tax form could be used against him); *Kastigar v. United States*, 406 U.S. 441 (1972) (use immunity is constitutional; prosecutor bears burden of proving independent source of evidence in subsequent prosecution); *California v. Byers*, 402 U.S. 424 (1971) (required records doctrine applicable to California requirement that drivers give identity following accident). See generally Leonard W. Levy, *Against the Law: The Nixon Court and Criminal Justice* 165-73, 181-87, 428 (1974).

100. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (court applies balancing test to uphold warrantless drug testing of public employees without reasonable suspicion); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (court applies balancing test to arrive at reasonableness standard for searches of public employee work areas); *Connick v. Myers*, 461 U.S. 138 (1983) (questionnaire to other prosecutors not matter of public concern and not protected by First Amendment); *Snapp v. United States*, 444 U.S. 507 (1980) (Court enforces agreement for confidentiality signed by former CIA employee). But see *Rankin v. McPherson*, 483

the decisional law in this area, an oracle might safely predict that the current Court might well jettison *Garrity* and *Gardner* if given the opportunity.<sup>101</sup> Even the often liberal Justice John Paul Stevens appears prepared to cast off *Garrity-Gardner*. In a dissenting opinion in *Lefkowitz v. Cunningham*,<sup>102</sup> he concluded that the state's compelling interest in avoiding an appearance of corruption by policymakers justified the loss of office for invoking the Fifth Amendment privilege.<sup>103</sup> In light of the power and public trust accorded to police, Justice Stevens questioned whether he would have joined in the *Garrity* and *Gardner* decisions.<sup>104</sup>

Yet, casting *Garrity* and *Gardner* far adrift is unnecessary. Instead, anchoring these cases to their factual setting of criminal investigations and not everyday reporting requirements could provide an appropriate accommodation of the competing interests at stake. A survey of post *Garrity* decisions lends ample support to this narrowing construction.

Police officers have unsuccessfully attempted to exclude reports prepared in the normal course of their duties from criminal trials.<sup>105</sup> Arguing that preparation of the reports

---

U.S. 378 (1987) (employee's comment following attempt to assassinate the President held matter of public concern).

101. The *Garrity-Gardner* cases have not escaped criticism. See, e.g., Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 679, 707 (1968). The United States Supreme Court, in a Fourth Amendment context, made a similar observation in finding that "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987).

102. 431 U.S. 801 (1977). *Cunningham* struck down a statute that required a state political party officeholder to choose between holding office and self-incrimination. Under the New York Election Law, a political party officer could be required to testify about the conduct of his or her party office; the refusal to answer questions or waive immunity resulted in the forfeiture of office. *Id.* at 802-03.

103. See *id.* at 813-14. He believed that the "claim of privilege can only erode the public's confidence in its government." *Id.* at 815.

104. See *id.* at 814 n.12.

105. See *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 578, 66 L.Ed.2d 476 (1980) ("[w]e do not think that the subjective fears of defendant as to what might happen if he refused to answer his superior officers are sufficient to bring him within *Garrity's* cloak of protection); *United States v. Ruiz*, 579 F.2d 670 (1st Cir. 1978) (use of arrest report made by officer did not violate privilege since "fifth amendment proscribes compelled self-in-

were mandated by department regulations,<sup>106</sup> officers have claimed that the reports are “compelled” for Fifth Amendment purposes.<sup>107</sup> This argument has been consistently rejected.<sup>108</sup> Likewise, the failure to write a report has been subject to disciplinary action when there was no evidence that the employee believed that writing the report would form the basis of criminal prosecution.<sup>109</sup> Such precedents reveal the

crimination, not incriminating statements”); *Commonwealth v. Harvey*, 491 N.E.2d 607 (Mass. 1986) (use of statement obtained in administrative investigation following shooting); *Commonwealth v. Ziegler*, 470 A.2d 56 (Pa. 1983) (use of statement obtained in administrative investigation of citizen complaint).

In *Commonwealth v. Ziegler*, 470 A.2d 56 (Pa. 1983), the court held that an officer’s statements made during an administrative investigation of a shooting could be used against him in a criminal trial charging the officer with murder and involuntary manslaughter.

In the instant case the questioning of appellee was mandated by departmental regulation, and represented standard procedure operative whenever a policeman discharges a firearm resulting in injury or death. The shooting occurred while appellee was engaged in the performance of his duty, pursuing a suspected felon who offered resistance, and there was nothing in the information then available to suggest that appellee’s conduct was unlawful. It was not until five days later, after the post-mortem examination indicated that blows to the decedent’s head may themselves have been a sufficient cause of death, that a complaint was issued for appellee’s arrest. Thus, the post-shooting debriefing and questioning of appellee were conducted pursuant to routine administrative procedure, and appellee was neither being held as a criminal suspect, nor had he reason to believe that such was the case.

*Id.* at 560-61.

A similar result was reached in *Commonwealth v. Harvey*, 491 N.E.2d 607 (Mass. 1986). In a prosecution for larceny and civil rights violations, a police officer attempted to exclude his statements made in an administrative investigation following a citizen complaint of misconduct. Acknowledging that all police officers were required by department rules to answer questions relating to official duties, the court nevertheless concluded that “[t]he fact that there existed the possibility of adverse consequences from the defendant’s failure to cooperate does not demonstrate that the defendant was ‘compelled’ to incriminate himself.” *Id.* at 611.

106. See *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980), *cert. denied*, 449 U.S. 1016, 101 S. Ct. 578 (1980); *Commonwealth v. Harvey*, 491 N.E.2d 607 (Mass. 1986); *Commonwealth v. Ziegler*, 470 A.2d 56 (Pa. 1983).

107. *Id.*

108. *Id.* This conclusion is consistent with the general requirement that the Fifth Amendment privilege is waived if not affirmatively asserted. See *Garner v. United States*, 424 U.S. 648 (1976) (failure to assert privilege on income tax return waived privilege).

109. See *Devine v. Goodstein*, 680 F.2d 243 (D.C. Cir. 1982). In *Devine*, an

appellate courts' willingness to curtail *Garrity* and *Gardner's* broad application in order to curb the potential for police abuse.

In a number of cases, public employees have argued that disciplinary proceedings should be postponed when criminal investigations are pending against them.<sup>110</sup> They assert that

---

immigration inspector was suspended for failing to write a report responding to a complaint of inappropriate behavior. An arbitrator hearing the employee's grievance reversed a suspension on the basis the privilege against self-incrimination barred punishment for failing to write the report. The court reversed, finding that the privilege against self-incrimination did not excuse the refusal to prepare the report since "the employee did not believe and could not have reasonably believed that his written report could be used in a criminal prosecution." *Id.* at 247 (footnote omitted). The court noted that if the employee had a reasonable fear of criminal prosecution, "[i]n order to compel a written report, the government would have to have guaranteed that his answers could not be used against him in a criminal case." *Id.* at 247 n.23.

110. *See* *Hoover v. Knight*, 678 F.2d 578 (5th Cir. 1982) (failure to postpone administrative hearing pending resolution of related criminal charges, with officer refusing to testify, did not violate the privilege); *Peiffer v. Lebanon School District*, 848 F.2d 44 (3d Cir. 1988) ("rather than being a case in which a public employee or contractor has been penalized for asserting his Fifth Amendment privileges, the situation here is simply that Peiffer did not rebut evidence constituting grounds for his dismissal"); *Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986), *cert. denied*, 481 U.S. 1050, 107 S.Ct. 2183, 95 L.Ed.2d 839 (1987) ("fact that appellants had to choose whether to talk or to remain silent offends neither the fifth nor the fourteenth amendment"); *Diebold v. Civil Service Commission*, 611 F.2d 697 (8th Cir. 1979) (injunction to prevent administrative hearing pending outcome of criminal trial denied since no requirement that employee waive privilege); *Buckner v. City of Highland Park*, 901 F.2d 491 (1990) (Michigan), *cert. denied*, 111 S.Ct. 137, 112 L.Ed.2d 104 (1990) (officer not entitled to grant of immunity so that he can respond to charges against him). *See* *Williams v. Florida*, 399 U.S. 78, 84, 90 S.Ct. 1893, 1897, 26 L.Ed.2d 446 (1970) ("That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.").

In *United States v. White*, 589 F.2d 1283 (5th Cir. 1979), the court stated:

Keno contends that being forced to go to trial in a civil case while criminal charges arising out of the same conduct were pending forced him to choose between preserving his fifth amendment privilege and losing the civil suit. It appears to us, however, that Keno overstates his dilemma. He was not forced to surrender his privilege against self-incrimination in order to prevent a judgment against him; although he may have been denied his most effective defense by remaining silent, there is no indication that invocation of the fifth amendment would have necessarily resulted in an adverse judgment.

*Id.* at 1286 (footnote omitted).

an adequate defense cannot be mounted in the face of their right to assert the privilege against self-incrimination.<sup>111</sup> These arguments have also been rejected,<sup>112</sup> even though the fact-finder may draw adverse inferences from the public employee's failure to testify.<sup>113</sup> Here again, courts are tailoring *Garrity* and *Gardner* to the realities of the criminal justice system.

True to such trends, the New Jersey Supreme Court has confined *Garrity* and *Gardner* to their facts.<sup>114</sup> Recognizing that they dealt with police officers subject to interrogation for prior misconduct and not with the failure to perform specific duties expected of all police officers, the unanimous court (per Chief Justice Weintraub) refused to exclude from evidence in a police officer's criminal trial a report an officer was required to prepare.<sup>115</sup> The New Jersey high court found nothing in *Garrity* or *Gardner* that excused a police detective's failure to file a required report or his later submission of a false report.<sup>116</sup> Duly mindful of existing case law, the New Jersey court reasonably opined that the Supreme Court would not extend Fifth Amendment doctrine to permit the assertion of the privilege as a bar to the preparation of a report required of a public officer.<sup>117</sup>

---

111. *Id.*

112. *Id.*

113. *See Hoover v. Knight*, 678 F.2d 578 (5th Cir. 1982) ("[w]e note that the hearing examiner would not be constitutionally forbidden from drawing adverse inferences from an invocation of the privilege against self-incrimination").

114. *See State v. Falco*, 60 N.J. 570, 292 A.2d 13 (1972). The officer was charged with failure to report an incident and filing a false report. *Id.* at 574, 292 A.2d at 15.

115. *Id.* at 584, 292 A.2d at 20.

116. *Id.*

117. *See id.* In an analogous situation, military courts have reached the opposite conclusion. In *United States v. Lee*, 25 M.J. 457 (C.M.A. 1988), the Court of Military Appeals reversed the conviction by general court material of a serviceman for violating a regulation requiring production of documentation showing continued possession or lawful disposition of duty-free goods. The dissenting opinion would have found the required records doctrine applicable. *Id.* at 469-70.

Article 31 of the UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 831, prohibits compulsory self-incrimination and in a requirement predating *Miranda* prohibits interrogating any person suspected of a crime without a warning statement. Capt. Fredric L. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1 (1976). The purpose of this requirement was stated by the Court of Military Appeals: "Because of a subordinate military person's obligation to respond to the command of his superior, Congress enacted Article 31 to serve as a protection

Obviously, the Court in *Garrity* and *Gardner* could have framed the issue in terms of the officer's obligation to meet his or her job duties. In each case, the officers had statutory duties to cooperate with the criminal investigations. However, the duty in those cases was to cooperate in criminal investigations by submitting to interrogation. The investigations had many of the earmarks of the inquisitional questioning that the Fifth Amendment privilege was designed to prohibit.<sup>118</sup> Within that constitutional realm, *Garrity* and *Gardner* are firmly grounded in legal principle.

Notably, the Supreme Court has never confronted the situation of an officer declining to prepare routine reports based upon assertion of the privilege. In such a situation, the officer is not required to choose between the privilege and loss of employment. Rather, the officer is required to choose between exercising the privilege and doing his or her job. Faithful to the *Garrity* and *Gardner* decisions, a court could conclude that the loss of employment comes not from exercise of the privilege but from failing to discharge the duties of the job.<sup>119</sup> Absent such a salutary gloss on *Garrity* and *Gardner*,

---

against the inherent tendency of that relationship, either directly or subtly, to induce an accused to respond to a question by the superior." *United States v. Lewis*, 12 M.J. 205, 206 (C.M.A. 1982).

118. See LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 331 (1968).

119. One might argue that a public employee, accepting employment in the face of requirements dictating waiver of the privilege, has consented to the waiver. However, it is questionable that an individual can affirmatively renounce the protection of the privilege from governmental questioning at a time when he or she has no occasion to invoke it. Compare *United States v. Field*, 193 F.2d 92 (2d Cir. 1951), cert. dismissed, 342 U.S. 908 (1952) (bail sureties, by entering into surety contracts, had waived the Fifth Amendment privilege with respect to subsequent questioning when some of the defendants jumped bail), with *Morgan v. Thomas*, 448 F.2d 1356, 1363 (5th Cir. 1971), cert. denied, 405 U.S. 920 (1972) (surety agreement did not waive privilege because "it is difficult to understand how a person can be punished by the sanction of contempt for asserting the privilege in contravention to a prior contractual undertaking in no way contemplating circumstances which might make assertion of the privilege appropriate"). See *Johnson v. Zerbst*, 304 U.S. 458 (1938) (test for waiver of constitutional right. *But see* *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (upholding agreement waiving civil claims in exchange for dismissal of prosecution).

The Supreme Court has implicitly rejected a contractual waiver in this very context. In *Lefkowitz v. Turley*, 414 U.S. 70 (1973), the Court held that contractors with the State of New York could not lose public works contracts by reason of the failure to waive the privilege in criminal investigations. Applying *Garrity* and *Gardner*, the Court held that contract termination, like job loss, violated the

it would be difficult or impossible to control many forms of potential or real police misconduct. Whatever else its purpose, the privilege was not intended to turn public servants into private bosses. True, locating the fault line that divides required duty from impermissible interrogation requires careful searching. However, no matter how difficult this task, it nevertheless represents a necessary distinction to ensure that public duty does not become subordinate to personal privilege.

An appropriate demarcation may to be found in the institutional policies of an agency. Reports required of all employees in circumstances when no evidence of wrongdoing exists must be completed notwithstanding any personal claim of privilege. For example, many public officers are required to provide annual reports of their activities. An officer who fails to provide such a report based upon assertion of the privilege can be sanctioned not for asserting the privilege, but for failing to meet the requirements of the job. Plainly, such requirements are essential if responsible police rule is to be the norm.

Likewise, an officer who declines to provide reports required of every officer following a shooting should not be able to seek refuge in *Garrity* and *Gardner*. Thus, the failure of an officer to follow department procedures and submit a report (such as that required by the Atlanta Police Department<sup>120</sup>), to participate in a routine de-briefing or to testify in court in any prosecution of the person shot could well be grounds for discharge even if the reason for the refusal is invocation of the privilege against self-incrimination. If an officer were to become the target of an actual criminal investigation,<sup>121</sup> howev-

---

Fifth Amendment. *Id.* at 84-85. The statutory scheme struck down in *Lefkowitz* included inserting contractual provisions in each public works contract providing for the waiver of the Fifth Amendment privilege. *Id.* at 71 n.1. The Court did not address whether these contractual provisions had any independent significance. See *Braswell v. United States*, 487 U.S. 99, 130 (1988) (Kennedy, J., dissenting) ("nothing in Fifth Amendment jurisprudence indicates that the acceptance of employment should be deemed a waiver of a specific protection that is as basic a part of our constitutional heritage as is the privilege against self-incrimination").

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

121. It must be conceded that it is not always easy to ascertain when the officer is a target of criminal investigation. Thus a bright-line rule might be established that any criminal interrogation that is outside the routine reporting that all police officers are expected to participate in on a daily basis is subject to *Gardner*-

er, *Garrity-Gardner* should permit exercise of the privilege to block interrogation in furtherance of such investigation without fear of job loss.<sup>122</sup>

From the officer's vantage point, he or she may well view this distinction as simply an attempt to end-run *Garrity* and *Gardner*. For some officers, the consequences of fulfilling one's duties may be self-incrimination. Viewed from this standpoint, it may appear that the officer is being required to choose between his or her job and the exercise of privilege. Yet courts in other contexts have held people to the duties they have freely assumed. Consider in this regard the logic of the Eleventh Circuit Court of Appeals in holding that assertion of privilege did not excuse compliance with the disclosure obligations of an insurance policy:

Pervis seeks to recover proceeds based on the insurance contract to which he is a party; he must be held to the express terms of the agreement. He is not compelled to incriminate himself. He is, however, bound by the provisions to which he stipulated when he signed the insurance agreement and cannot expect State Farm to perform its obligations under the contract, by being subject to suit for payment of proceeds, without compliance on his part.<sup>123</sup>

Likewise, police officers should not expect to have continued employment if they refuse to discharge their duties.<sup>124</sup> Concomitant with the officer's willingness to exercise the state's power of deadly force must be a willingness to account for this public exercise of power. Any assertion of a private

---

*Garrity.*

122. It should be recognized that limiting the reach of *Garrity* and *Gardner* would not be limited to police officers. Instead, it would have applicability to all public employees who fail to perform specific job duties.

123. *Pervis v. State Farm Fire & Casualty Co.*, 901 F.2d 944, 947 (11th Cir. 1990).

124. Police officers generally expect that their public agency employer will pay for any damages arising from an on-duty shooting. Under California law, a public employee is entitled to indemnification for liability arising out of the course of employment if the public employee provides "reasonable good-faith cooperation" with the defense of the action. CAL. GOV'T. CODE § 825 (West. Supp. 1994). In addition to or as an alternative to job loss, indemnification could be denied in situations in which the officer asserts the privilege.

privilege is simply inconsistent with the nature of the power that the officer voluntarily exercised. Indeed, it would be more than puzzling if the Constitution allowed a public official wide powers to take human life and thereafter accorded an equally broad immunity from public accountability. To borrow from Justice Jackson, the Constitution is not a suicide pact.<sup>125</sup>

## B. REQUIRED RECORDS DOCTRINE

Independent of the *Garrity-Gardner* analysis, disclosure might be secured under another doctrine. Courts have carved an exception to general Fifth Amendment principles, an exception known as the "required records doctrine."<sup>126</sup> First recognized in *Shapiro v. United States*,<sup>127</sup> the required records doctrine provides "that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."<sup>128</sup> The required records doctrine applies to a variety of self-reporting scenarios.<sup>129</sup>

In *Shapiro*, the United State Supreme Court considered a reporting scheme required by the Emergency Price Control Act.<sup>130</sup> The Act required that businesses keep and disclose sales records "customarily kept" by the business. Rejecting the assertion of a Fifth Amendment privilege, the Court stated that the privilege "cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects

---

125. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

126. See Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6 (1986).

127. 335 U.S. 1 (1948).

128. *Baltimore City Department of Social Service v. Bouknight*, 493 U.S. 549 (1990).

129. See *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 178-79 (1990) ("Court has established an exception . . . prohibiting invocation of the privilege when a defendant is required to disclose information as part of a civil regulatory scheme"); Jeremy Temkin, "Hollow Ritual[s]": *The Fifth Amendment and Self-Reporting*, 34 UCLA L. REV. 467 (1986) ("there is a recognition that, in some situations, self-reporting may be relied upon for the production of information").

130. *Shapiro*, 335 U.S. at 3-4.

of governmental regulation and the enforcement of restrictions validly established."<sup>131</sup> Writing for the 5-4 majority, the Chief Justice emphasized:

It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgivings that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records. . . .<sup>132</sup>

In a sharp dissent, Justice Frankfurter criticized the majority for "hardly find[ing] a problem in disposing of an issue far-reaching in its implications, involving as they do a drastic change in the relations between the individual and the Government as hitherto conceived."<sup>133</sup> While the full scope of *Shapiro* is somewhat ambiguous, certain matters have become more settled over time.

Following *Shapiro*, the Court initially defined the scope of the required records doctrine in the context of laws designed to assist law enforcement efforts. Concluding that the doctrine does not apply where the regulatory scheme is principally aimed at criminal activity, the Court found unconstitutional regulatory schemes requiring disclosures by gamblers,<sup>134</sup> wagers,<sup>135</sup> communists,<sup>136</sup> illegal weapons possessors<sup>137</sup> and transferrers of marijuana.<sup>138</sup> However, "[i]n all of these cases the disclosures condemned were only those extracted from a

---

131. *Id.* at 33 (quoting *Wilson v. United States*, 221 U.S. 361, 380 (1911)).

132. *Shapiro*, 335 U.S. at 32.

133. *Id.* at 50.

134. *Marchetti v. United States*, 390 U.S. 39 (1968).

135. *Grosso v. United States*, 390 U.S. 62 (1968).

136. *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

137. *Haynes v. United States*, 390 U.S. 85 (1968).

138. *Leary v. United States*, 395 U.S. 6 (1969).

'highly selective group inherently suspect of criminal activities' and the privilege was applied only in 'an area permeated with criminal statutes' – not in 'an essentially noncriminal and regulatory area of inquiry.'<sup>139</sup>

The required records doctrine was subsequently expanded in *California v. Byers*.<sup>140</sup> In *Byers*, the United States Supreme Court upheld provisions of the California Vehicle Code requiring drivers to exchange certain information following a traffic accident.<sup>141</sup> Reversing the California Supreme Court's decision that immunity was required in order to compel such information,<sup>142</sup> the Court's plurality opinion upheld the reporting requirement. Although noting the tension between the privilege and the information needs of the State, the *Byers* Court observed that any resolution required "balancing the public need on the one hand, and the individual claim to constitutional protections on the other."<sup>143</sup> Under such a regulatory scheme, the Court concluded that "the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here."<sup>144</sup>

The most recent Supreme Court application of the required records doctrine is found in *Baltimore City Department of Social Services v. Bouknight*.<sup>145</sup> In *Bouknight*, the mother of an abused child was given the choice of producing her child

139. *California v. Byers*, 402 U.S. 424, 430 (1971).

140. 402 U.S. 424 (1971).

141. See 1967 CAL. STAT. 2009 (current version in CAL. VEH. CODE § 20002 (West Supp. 1994)).

142. *Byers v. Justice Court*, 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969). Justice Peters, speaking for the California Supreme Court, stated the conflict created by such reporting statutes:

[T]he present case exemplifies a conflict much discussed by commentators in recent years, the conflict between the individual's right to protection under the Fifth Amendment privilege against self-incrimination and the government's substantial interest in having citizens report or otherwise divulge information to effectuate various regulatory measures designed to promote the public welfare.

*Id.* at 1049 (citations omitted).

143. *Byers*, 402 U.S. at 427.

144. *Id.* at 428.

145. 493 U.S. 549 (1990).

or remaining incarcerated.<sup>146</sup> Although recognizing that the act of production may be both testimonial and incriminating, Justice O'Connor's majority opinion concluded that "Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory scheme."<sup>147</sup> Invoking the required records doctrine, the Court found that the obligation to permit inspection of the child is "part of a broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders."<sup>148</sup> Noting the absence of the general exceptions to the *Shapiro* doctrine, the Court concluded that persons who care for children pursuant to custody orders are not a "selective group" or "inherently suspect of criminal activities"<sup>149</sup> and that efforts to gain access to children are not aimed principally at criminal conduct,<sup>150</sup> but "for reasons related entirely to the child's well-being."<sup>151</sup>

Although *Bouknight* is believed to have "dramatically expanded" the required records doctrine,<sup>152</sup> the Court did create some doctrinal confusion by suggesting that the fruits of any disclosures might *not* be used in a criminal prosecu-

146. *Id.* at 553.

147. *Id.* at 555-56.

148. *Id.* at 559 (quoting *Wilson v. United States*, 221 U.S. 361, 382 (1911)) (citations omitted).

149. *Id.* at 559.

150. *Id.* at 560.

151. *Bouknight*, 493 U.S. at 560.

152. See *The Supreme Court, 1989 Term - Leading Cases*, 104 HARV. L. REV. 129, 179 (1990). One commentator has observed:

Thus, *Bouknight* can be viewed as the latest in a line of cases in which the Court gives states the greatest leeway when they act with dual purposes, no matter how close the relationship between the regulatory purpose and the criminal law objective. The danger to civil liberties cannot be underestimated. As long as there is any component of a civil regulatory scheme ostensibly beyond the needs of law enforcement, government presumably will be free from constraints imposed by the criminal guarantees in the Bill of Rights.

Irene Merker Rosenberg, *Bouknight: Of Abused Children and the Parental Privilege Against Self-Incrimination*, 76 IOWA L. REV. 535 (1991). Of course, "the ostensibly beyond the needs of law enforcement" qualification is the crux of the constitutional question. Hence, even *Bouknight* critics apparently concede the limited reach of the privilege.

tion.<sup>153</sup> If immunity were required in order to obtain information from Ms. Bouknight, the Court took the wrong path in reaching its decision. Information obtained under the required records doctrine may be used in criminal proceedings. Indeed, in *Byers* the Court reversed the state court holding that immunity was required to compel disclosure of information by drivers involved in automobile accidents.<sup>154</sup>

Notwithstanding the *Bouknight* wrinkle, the required records doctrine is firmly established as part of today's Fifth Amendment jurisprudence. Following the Supreme Court's lead, lower courts have applied the required records doctrine in a variety of contexts.<sup>155</sup> And if the Court is troubled by such

153. See *Bouknight*, 493 U.S. at 561-62. The Court emphasized:

We are not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings." But we note that imposition of such limitations is not foreclosed. . . . In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled.

*Id.*

154. See *Supra* note 141 and accompanying text.

155. See *United States v. Nickens*, 955 F.2d 112 (1st Cir.), *cert. denied*, 113 S. Ct. 108 (1992) (affirming conviction for possession of controlled substance on aircraft without reporting it for entry on cargo manifest); *United States v. Lehman*, 887 F.2d 1328 (7th Cir. 1989) (affirming conviction for failure to comply with laws requiring livestock sales transaction records); *United States v. Alkhafaji*, 754 F.2d 641 (6th Cir. 1985) (affirming conviction for failure to make disclosures required by the Gun Control Act of 1968); *United States v. Dichne*, 612 F.2d 632 (2d Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (affirming conviction for failing to make certain reports required by the Bank Secrecy Act); *United States v. Stirling*, 571 F.2d 708 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978) (affirming conviction for fraud arising out of failure to make disclosures required by securities laws); *In re Fairbanks*, 135 B.R. 717 (Bankr. D.N.H. 1991) ("disclosure is required as part of a noncriminal statutory scheme for administration of bankruptcy estates which requires such disclosures for liquidation of the same and in no sense is aimed particularly at prospective criminal defendants"); *cf. Commodity Futures Trading Comm'n v. Collins*, 997 U.S. 1230 (7th Cir. 1993) (required records doctrine inapplicable to income tax return in taxpayer's possession since no law required taxpayer to keep copy); *United States v. Dean*, 989 F.2d 1205 (D.C. Cir. 1993) (appointment calendar not subject to required records doctrine because there was no duty to create such document); *United States v. Wujkowski*, 929 F.2d 981 (4th Cir. 1991) (*Bouknight* not controlling because "the government does not contend that appellants were required to maintain the documents it seeks or to submit them for inspection as conditions of doing business with the government").

One district court has concluded that, even though the required records doctrine applied to the records themselves, the act of producing the records would constitute compelled, testimonial, and incriminating communication. *In re Grand*

applications, it certainly has not so indicated by way of its certiorari policy in this area.

Today, the required records doctrine is most likely to arise in the context of an individual resisting compliance with government reporting laws. In circumstances in which documentary information has already been generated, other Fifth Amendment principles usually allow the government to gain access to it. Thus, under the collective entity rule<sup>156</sup> the books and re-

---

Jury Subpoena, 144 F.R.D. 357, 365-66 (D. Minn. 1992). Although the Supreme Court has applied this doctrine in other contexts (*Doe v. United States*, 487 U.S. 201 (1988); *Braswell v. United States*, 487 U.S. 99 (1988); *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976)), it has never been invoked to shield required records. In fact, in *Bouknight* the Court stated:

The possibility that a production order will compel testimonial assertions that may prove incriminating does not, in all contexts, justify invoking the privilege to resist production. Even assuming that this limited testimonial assertion is sufficiently incriminating and "sufficiently testimonial for purposes of the privilege," *Bouknight* may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime.

*Bouknight*, 110 S. Ct. at 905. See *In re Grand Jury Subpoena Duces Tecum*, 781 F.2d 64 (6th Cir. 1986) (act of production doctrine inapplicable to required records).

The California Supreme Court has applied the required records doctrine, finding it consistent with the state constitutional privilege. In *Craib v. Bulmash*, 49 Cal. 3d 475, 777 P.2d 1120, 261 Cal. Rptr. 686 (1989), the court considered whether the privilege barred the Division of Labor Standards Enforcement from compelling production of an employer's time and wage records. The court rejected the claim of privilege on the basis of the required records doctrine. Surveying the history of the required records doctrine, the court noted: "The lower federal courts continue to apply the 'required records doctrine' of *Shapiro*, while distinguishing *Marchetti* and its progeny. And, following the lead of *Byers*, several cases have allowed the mandatory disclosure of information which, on its face, could implicate the reporter in criminal conduct." 49 Cal. 3d at 489 (citations omitted).

156. The collective entity rule was first recognized in *Hale v. Henkel*, 201 U.S. 43 (1906), in which the Supreme Court held that a corporation has no privilege under the Fifth Amendment. Five years later, the Court held that a corporate officer had no personal privilege to resist production of corporate records. *Wilson v. United States*, 221 U.S. 361 (1911). The collective entity rule has been extended to both unincorporated associations (*United States v. White*, 322 U.S. 694 (1944)) and partnerships (*Bellis v. United States*, 417 U.S. 85 (1974)). These decisions squarely hold that:

The plain mandate of these decisions is that without regard to whether the subpoena is addressed to the corporation, or as here, to the individual in his capacity as a custodian, a corporate custodian . . . may not resist a

cords of corporations, partnerships, and unincorporated associations are not privileged because such entities have no Fifth Amendment privilege. Likewise, there is no privilege in documents which have been voluntarily created by an individual.<sup>157</sup> In some circumstances, however, an individual may have a Fifth Amendment privilege not to be compelled to produce the document if the act of production might be incriminating.<sup>158</sup>

---

subpoena for corporate records on Fifth Amendment grounds.

*Braswell v. United States*, 487 U.S. 99, 108-09 (1988) (citations omitted).

157. See *United States v. Doe*, 465 U.S. 605 (1984). In *Doe*, the government sought production of business records of a sole proprietorship. The Court concluded that the records were not privileged:

Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled.

*Id.* at 611-12 (footnote omitted).

158. In *Fisher v. United States*, 425 U.S. 391 (1976), the Court stated:

The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment.

*Id.* at 410 (citation omitted).

Although the *Fisher* Court found that the production of records of an accountant by the taxpayer would not involve testimonial self-incrimination, the Court in *United States v. Doe*, 465 U.S. 605 (1984), held that the production of certain records by a sole proprietor would. *Id.* at 613-14.

In *Braswell v. United States*, 487 U.S. 99 (1988), the Court refused to extend *Fisher* and *Doe* to the act of production by the sole shareholder of a corporation, finding the collective entity rule precluded any assertion of privilege. However, the Court held that the act of production itself could not be used against the individual:

Although a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating, we do think certain consequences flow from the fact that the custodian's act of production is one in his representative rather than personal capacity. Therefore, the Government concedes, as it must, that it may make no evidentiary use of the "individual act" against the individual.

Given its current scope, the required records doctrine can be used to require police officers to provide accounts of on-duty shootings. A reporting requirement (again similar to that of the Atlanta Police Department<sup>159</sup>) would likely prevail over the assertion of the Fifth Amendment privilege. The reporting requirement is part of a civil regulatory system governing public employees. The requirement is not aimed at a group inherently suspect of criminal activity, and is the type of record customarily expected of police officers. So long as the requirement operates in this way, it is not likely to be set aside on Fifth Amendment privilege grounds.

Application of the required records doctrine has broader implications than simply limiting the scope of *Garrity* and *Gardner*. If *Garrity* and *Gardner* do not apply, the police officer still has the availability of the privilege, but its exercise may result in job loss. If, however, the required records doctrine can be invoked, the officer would face not only job loss, but also some form of compulsion to force revelation of the required information.<sup>160</sup> Compelling an individual to reveal information that in some jurisdictions would constitute a capital crime highlights the dangers inherent in expansive application of the required records doctrine.

For a variety of reasons, the required records doctrine is probably *not* the appropriate vehicle to secure unimmunized statements from police officers. From a practical standpoint, police agencies are unlikely to seek the judicial intervention that would ultimately be necessary to compel an officer to give a statement. Police administrators prefer remedies that they control; they do not want to rely upon outsiders to keep their house in order. Moreover, most police administrators would view job loss as an appropriate sanction for failure to provide a required report.

---

*Id.* at 117-18.

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

160. Some statutory authorization would be required to compel a police officer to complete the report. Although police departments possess the authority to suspend or terminate police officers for violation of departmental policies, specific enforcement is generally not available.

The availability of the required records doctrine, however, may be important in securing a narrowing construction of *Garrity* and *Gardner*. If application of the required records doctrine would result in the an officer being obligated to provide the required report, *Garrity* and *Gardner* should not block a police agency from firing an officer who fails to do so.

## V. CONCLUSION

The code of silence following on-duty shootings raises an important constitutional question concerning the conflict between public duty and individual rights. Some argue that the current practice of conferring use immunity strikes an appropriate balance between the government's need for information and the police officer's constitutional rights. In using deadly force, however, the police officer was not exercising an individual constitutional right but was instead acting as an instrumentality of the state. Accordingly, those officers who choose to exercise this immense power should be publicly accountable for the use of force. Such accountability is consistent with current law (constitutional, statutory, and administrative) and likewise accords with sound public policy principles. To deny the wisdom of such practices and principles would lead inevitably to a parade of horrors, one in which police misconduct of all kinds – from coverups to unlawful killings – would be tolerated and even encouraged. A code of silence would thus become synonymous with a code of tyranny.

Justice Scalia once observed that “[n]o law enforcement agency is required by the First Amendment to permit one of its employees to ‘ride with the cops and cheer for the robbers.’”<sup>161</sup> No law enforcement agency is required by the Fifth Amendment to permit one of its employees to shoot like a cop and remain silent like a murderer. Admittedly, as phrased, this assertion seems brazen. Still, it is defensible if only because it calls much needed attention to a basic lesson of life and law: To remain oblivious to the obvious is both unsound and unsafe.

---

161. *Rankin v. McPherson*, 483 U.S. 378, 394 (1987) (quoting App. 94).