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The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by attorneys experienced in the subject matter covered.



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When the Cop Becomes the Suspect: A Primer on *Garrity*

“If a man be interrogated by the Sovereign, or his Authority, concerning a crime done by himself, he is not bound (without assurance of pardon) to confess it; because no man...can be obliged by Covenant to accuse himself.”

Thomas Hobbes, *Leviathan*, Part II, Chap 21 (1651)

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The covenant cited by Thomas Hobbes was between the populace and its sovereign; yet it also foretold the basic premise of *Garrity v New Jersey*.¹ The Sovereign, through its Executives, must occasionally investigate its own Authorities—its police officers. But when it does, the Sovereign must abide by its own rules—in this case, the 5th Amendment of the U.S. Constitution.

Since *Garrity* and its companion cases were issued in the late 1960s, it’s become something of a Holy Grail to police officers—and a Gordian knot to its detractors. I’m struck by conversation and by research that **everyone** in law enforcement claims to have the true understanding of *Garrity*. Yet, as evidenced by this primer, such is far from the case.

Likewise, many legal practitioners—even those who specialize in criminal law—voice assumptions that are often inaccurate. Most troubling, the courts have on occasion created legal fictions which turn the examination of “voluntary statements” upside down in order to side-step *Garrity*. These fictions trouble me for two reasons.

First the efforts to dilute or totally abandon *Garrity* usually come about in extremely high profile cases alleging police misconduct.² Yet I wonder—were not the Constitutional amendments created specifically to withstand such pressure?

There is a second reason why these legal fictions are so troubling. Since *Garrity* was released by the U.S. Supreme Court in 1967 (when Michigan’s Public Employment Relations Act [“PERA”] was only 2-years old),³ *Garrity* has undergone an amazing transformation in its importance to police departments and their officers. In the last 35 years numerous Michigan police departments have acquired contractually-negotiated provisions instilling *Garrity* as an express guideline for both Management and Officers’ Rights. *Garrity* has evolved from a criminal law case sounding in the 5th Amendment to a cornerstone of police labor relations.

As police departments have moved away from the informal and undocumented screening of citizen complaints, internal investigations have mushroomed into a myriad of inquiries that often involve areas of the officers’ on-duty **and** off-duty lives—based upon the perception of public trust. Officers are routinely ordered to answer allegations of domestic abuse related to divorce and child custody proceedings; off-duty vehicle accidents; and the “traditional” inquiries such as the force used to subdue unruly persons. One local metro Detroit police department recently disciplined off-duty officers who were alleged to have been fighting with one another following a union meeting.⁴

Regardless of whether these investigations involve on-duty or off-duty incidents, all of these examples, in theory, could be elevated to a level of criminal investigation. In a vast majority of cases, Departments have learned to rely upon *Garrity* to investigate allegations; determine culpability (if any); and if required, issue discipline in a timely manner apart and aside from the criminal justice system.

In addition, police executives are concerned about the public release of many of these investigational files under the Freedom of Information Act. The Act currently provides an exemption for police departments to withhold certain files relating to personnel matters—and those files often include *Garrity* investigations.⁵ The concern of hyper-ventilated publicity surrounding *Garrity* issues is not new, nor is it unfounded—as acknowledged by our State Supreme Court:

Respondent’s application came here almost simultaneously with [the] advent of a critical onslaught...stimulated if not prodded by a sensation-bent. Detroit daily newspaper.⁶

Fortunately, *Garrity* is not a frequent visitor in the State’s courts. A vast majority of internal investigations remain—“internal.” For the sake of brevity and clarity, this article will address only allegations of **on-duty**, job-related allegations which may **or may not** be criminal in nature.

Complaints alleging excessive force during arrests, mishandling of property coming into a department's possession; or on-duty vehicular accidents during pursuits all invoke debates over the use and limits of *Garrity*. Considering that police work is a "hands on" occupation, for instance, when do "routine" citizen allegations of excessive force to affect a lawful arrest become criminal in nature? Who determines which way an internal investigation should proceed?

Garrity is premised upon an aleatory promise by the command structure of a police department. In response to a direct order, given under the **clear and direct** threat of discipline, an officer can be compelled to give a statement related to official conduct and duty. The goal of the statement is to ascertain if departmental rules and regulations have been broken by the officer, and if that officer should be taken out of service; disciplined, or both. The police supervisors know, however, that some statements may disclose parallel violations of criminal law that may have been committed by the officer. There is also no doubt that the order deliberately breaches the protections of the 5th Amendment.⁷

The *aleatory* promise by the command officer giving the order is this: because the 5th Amendment has been deliberately breached, any statement made by the officer cannot, and **will not** be subsequently used against that officer if criminal charges are brought by the Prosecutor, Attorney General, or Federal District Attorney. They may only be used for internal discipline. Think of *Garrity* as a *Miranda*⁸ warning in reverse.

It is an *aleatory* promise in that: if no criminal charges are forthcoming and any discipline remains internal, the promise remains unexecuted by the police department command. This article questions whether police departments are seeing the power to uphold the aleatory promise erode; and if, due to the vigorous attempts by some prosecutors and courts, the "promise" has become illusory.

The actual facts of *Garrity* seem straight from Hollywood scripts. In the late 1950s, Chief Edward Garrity presided over the New Jersey borough of Bellmawr. And Lo, it came to pass that Garrity did send Officer Edward Virtue out into the land to issue great numbers of moving traffic tickets to all who traveled Bellmawr's streets. Trouble was: the tickets were being routinely "reduced" by Chief Garrity to non-moving citations, and the fines actually collected were not showing up in the borough's books. In due course the state sent out an Assistant Attorney General, by name of Rigg, to adduce Garrity and his Virtue.

Rigg had a direct manner of obtaining the facts: he informed Chief Garrity and Officer Virtue that, although their statements must be "free and voluntary," New Jersey statutes imposed a penalty of discharge, should they refuse to answer any and all of his questions. Garrity and Virtue thereupon answered; were charged; and convicted of ob-

struction of justice. They appealed, claiming that their interrogations were—well—"rigged." But they got short shrifted at the New Jersey Supreme Court, which opined that there are "situations" where a public official's right to office "may properly depend upon a willingness to forego a constitutional right." Besides:

Surely, a police officer who refuses to cooperate in a proper investigation of his official conduct is acting inconsistently with his police duties. He is therefore properly subject to subsequent dismissal proceedings.⁹

Garrity appealed to the U.S. Supreme Court, which paraphrased our mentor, Thomas Hobbes: an officer interrogated during an internal investigation should not be placed in a "Hobson's choice" of being "between the rock and the whirlpool." The Court declared:

We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.¹⁰

The New Jersey Supreme Court was not impressed. When a case similar to *Garrity* next landed on its doorstep in 1972, it stated: "We thought the 5th Amendment left the option to the officer to talk or to quit."¹¹

Given that the U.S. Supreme Court at that time was known as "the Warren Court" after Chief Justice Earl Warren—and that it was intensely disliked by large numbers of the nation's police officers because of the Court's decisions in cases such as *Escobedo* and *Miranda*,¹² it's ironic that *Garrity* and its progeny have become bulwarks in police department labor relations.

What police command staffs and their officers now refer to as "Garrity Rights" are actually comprised of an amalgam of U.S. Supreme Court decisions from the late 1960s. Of specific note is *Gardner v Broderick*, which defined the parameters of the administrative questioning which could be pursued by command officers. The Court declared that an officer could be legitimately ordered under pain of discipline:

to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers of the fruits thereof in a criminal prosecution of himself....¹³

Many police labor contracts in Michigan now paraphrase this language when addressing contractual management and due process rights. It should be noted that Michigan police departments, in a vast number of cases where "criminal" allegations may be contemplated, wait until **after** a warrant review by the local prosecutor to obtain *Garrity*

interviews. Nonetheless, *Garrity* still has importance in those occasions when “closed” files are “reopened,” or are turned over to federal agencies, as detailed below.

Though *Garrity* came about because of a criminal investigation by New Jersey’s Attorney General, the U.S. Supreme Court has used language that reserves its immediate use to police command staff and executives. Once administered, *Garrity* cannot be used by officers defending against departmental discipline; they must testify at departmental hearings, if ordered to do to.¹⁴

In that light, the U.S. Supreme Court has referred to *Garrity* cases as “penalty” cases, since the Employer uses its right as Management to order the Employee to divulge information upon pain of economic punishment. In *Minnesota –v- Murphy* it wrote:

the Court [has] held that an individual threatened with discharge from employment for exercising the [5th Amendment] privilege had not waived it by responding to questions rather than standing on his right to remain silent.

The Court also noted that a **threat of punishment** distinguishes *Garrity* cases from other types of 5th Amendment challenges. Whether the threat is a certain reality is irrelevant.¹⁵

It is also apparent from this analysis that **only the employing** police agency can administer *Garrity* and its aleatory promise to its own officers. An outside police agency, which does not have “the power of the paycheck,” obviously cannot give the *Garrity* promise to any officer—in fact, such a claim would be duplicitous.

The Michigan Supreme Court and the newly-created Court of Appeals quickly received a flurry of appeals following the release of *Garrity* in 1967. A lawyer appealed his disbarment, and a restaurant owner claimed that *Garrity* insulated his grand jury testimony—because the state had issued a liquor license to his business. Even school teachers who went on strike claimed that *Garrity* rendered the predecessor statute to PERA unconstitutional.¹⁶ For awhile it began to look like “**Everybody** wanted to get in to da act!” But the Courts rejected all of these claims.

Then in 1968, the Michigan Court Appeals addressed *Garrity* head-on in a case involving Detroit Police Officers who were ordered to testify before a Wayne County judge acting as a “1-man grand jury.” Officer Danial Allen, among others, was to testify under pain of **suspension**, not **discharge**. Following their testimony in 1966 (before *Garrity* was released) they were arrested for perjury and were bound over for trial despite defense protests of 5th and 14th amendment violations.

The release of *Garrity* in January, 1967, changed the course of events for Officer Allen and his cohorts. The Appeals Court issued a ringing endorsement of *Garrity*.¹⁷

The prosecution attempted to claim that *Garrity* didn’t apply because the Officers allegedly perjured themselves in

their statements—statements which were given under threats of discipline. The Court responded that a perjury charge would require the coerced statements to be admitted at trial, and remove all presumptions of innocence.

The prosecution then claimed that *Garrity* didn’t apply because the **substantive** charges—those of police corruption—were not laid against the police officers. But, the Court countered:

Under our system the prosecuting authority is not authorized to nullify a constitutional right by drawing such a gossamer [flimsy] distinction.

Finally, and most important for any *Garrity* inquiry, the Court declared that “...one cannot justify a violation or invasion of a constitutional right by what the invasion reveals.”¹⁸

The Court stated that *Garrity* was based upon the law of waiver: when can a person waive the 5th Amendment right against self-incrimination? Its answer—never under coercion.

Police officers in the late 1960s and 1970s thought that the Courts’ decisions of *Garrity* and *Allen* had settled the conflict between discipline and criminal charges. And indeed, some Federal decisions, such as one written by then-Justice Kenneth Starr on the District of Columbia Circuit, strongly endorsed *Garrity* and the “penalty” cases.¹⁹ But in other Federal Circuits, it has proven an illusory promise. Various federal circuits, with some states in tow, have set about to remove *Garrity* through legal fictions.

In the highly-publicized Federal trial of Los Angeles police officers involved in the arrest of Rodney King, the 9th Circuit ruled that if a prosecution witness possessed “independent” knowledge of the information contained in an officer’s *Garrity* statement, that witness could testify—even if the witness had examined the *Garrity* statement. The Court also opined that police officials using *Garrity* “do not necessarily act with the care and precision of a prosecutor,” and that police officials “may” circulate *Garrity* statements to taint the testimony of other officers and thereby “protect one’s colleagues.” No grounding was provided for these speculations.²⁰

A recent federal case from the 11th Circuit broke apart *Garrity* in order that the Federal prosecutors could charge several Miami, Florida police officers with perjury. The “perjury,” however consisted of statements that were obtained by the officers’ own department supervisors after *Garrity* warnings. The Miami Police Department, without the consent of the officers, then turned the statements over to the FBI, which in turn prosecuted the officers for “false and misleading information” to the **federal** officers. As was the *Koon* case, *Veal* involved high-profile allegations against the officers that they had murdered a drug informant.²¹

The Federal case most often cited as leading the way in the dilution of *Garrity* is *US v Indorato*.²² The FBI and Massachusetts State Police had suspected that State Police

Lieutenant Mario Indorato, was diverting and stealing loaded semi trailers along the Massachusetts Turnpike. During a series of criminal, non-custodial interrogations at the Weston Barracks, an MSP Captain demanded information “this minute.” The Lieutenant answered, and was subsequently charged and convicted of interstate theft.

But the facts as described by the Appeals Court show that Lt. Indorato never truly was given *Garrity* warnings—though an order may **imply** penalty, as is the case in all so-called “semi-military” organizations. Nonetheless, the Court went much farther in its opinion. Rather than simply stating that a true *Garrity* warning had not been given, the 1st Circuit opined that a **statutorily mandated firing** must accompany the order to talk. No “subjective fears” of the defendant for any discipline **less** than statutory discharge qualified for *Garrity*. The Court serenely concluded:

Defendant here was not, as in *Garrity*, put “between the rock and whirlpool.”

He was standing safely on the bank of the shore.²³

Various Federal Circuits and State Courts have jumped on the *Indorato* fictional bandwagon in the last 20-years. And a recent Michigan Court of Appeals case, *People v Coutu*, attempted to adopt *Indorato*, while carefully side-stepping *Allen*.²⁴

The facts of the officers’ interviews *Coutu* are vague in description by the Court—it merely states that the defendant sheriff deputies “voluntarily made statements.” And it says that when one defendant wished to stop talking, the interview was terminated.

Nonetheless, the Court again asserted that unless Departmental rules and regulations **automatically** terminated officers for failing to answer, *Garrity* did not apply, and the statement was deemed “voluntary.”

Let’s stop for a minute and contrast labor relations with criminal procedure: labor relations practitioners (both management and labor) fully understand that termination is “economic capital punishment.” They also understand that police department regulations, by their very nature, must give **discretion** to command officers to question, evaluate, and impose discipline as may be deemed appropriate. In addition, regardless of the penalty, all discipline—even in those few departments with no labor agreements—is subject to appeal and reversal. The *Indorato* and *Coutu* Courts, to a labor relations practitioner, are translated thusly:

We can’t penalize your silence with economic execution, because *Garrity* won’t allow it. But we **can** break your economic legs for a few months, and if that compels you to talk, then your statement is “voluntary.”

Either we have a 5th Amendment—or we don’t. The *Garrity* statements sought after by prosecutors would not exist “but for” the direct orders by police supervisors to breach the 5th Amendment upon penalty of discipline. Our Federal 6th Circuit Court has noted that the coercion that

vitiates a confession can be mental, as well as physical. Subtle pressures may be as telling as coarse and vulgar ones.²⁵

We in the labor relations field are not interested in “distinctions without a difference.” The Constitutions of the United States and Michigan do not exclude any person or occupation from their protections. And a police officer does not “hang up” the 5th Amendment at the door of the police department. As noted by our Federal 6th Circuit in a *Garrity* case, “fairness and simple justice need not always be measured by a constitutional yardstick.”²⁶

In the view of many labor practitioners, therefore, some prosecutors, criminal defense attorneys, and courts are “giving us a lot of help that we don’t need.” Let me explain why, from both a management and labor organization perspective.

First, from *Management*: *Garrity* clearly and unambiguously gives police department command officers the exclusive prerogative to use its power—after all, the Employer is the only entity which can truly exact a penalty of the paycheck.

But decisions such as *Indorato* and *Coutu* make the Employer’s order, at best, a second tier consideration. Bear in mind, we talk about **any** investigation which theoretically **could** result in criminal charges—not just those “sensation-bent,” high-publicity cases referenced by the *Block* court.

Police work is a “hands on” occupation, resulting in a multitude of complaints each year across the state. The Police Chief or Sheriff must receive timely, accurate information from the officers in the department. But if the officers are fully aware that the *Garrity* promise is meaningless without **automatic** termination, will answers be forthcoming? The stark question becomes: “Should I risk being tried by 12, or fired by 1?” Who holds the higher penalty?

In addition, the right of departments to withhold certain documents from the Freedom of Information requests is nugatory once the files are turned over to an outside agency. The Courts, in sum, strip the police executives of critical and essential control of their internal investigations.

Now, from the *Labor Organization*: The police labor counsel—and most often the sworn police officers who are stewards and elected officials—are the practitioners who use and depend upon *Garrity* in the workday world. A police supervisor, a union steward, and an officer to be questioned are sitting in a small room during the wee hours of the night. The internal investigation interview then begins with a specific warning and an order to give a statement—that is “classic *Garrity*.”

But *Garrity* is **not** a mere question of “Hey, what happened on that arrest last night?” Nor does it usually apply to routine questions about entries on reports submitted in the normal course of business, such as police activity logs.²⁷ Nor does *Garrity* apply when officers refuse to answer

strictly internal investigations, and are suspended.²⁸ Questions routinely asked through a chain of command are clearly not accompanied by an explicit threat to remove officer from service. If the officer answers, without more, the statement is voluntary.

Criminal attorneys try the *Garrity* defense on cases such as *Indorato*, *Jobson*, and *Coutu*, as a “Hail Mary” attempt to keep an incriminating statement from the jury. But bad cases make disastrous law. The result, in the workday world, is that labor practitioners see the *Garrity* covenant being attacked and weakened to the point where it may become meaningless. The task of representation becomes just as daunting as is the quest for information by the police supervisors.

Ironically, the second area of law where *Garrity* has been applied by the Michigan Courts is in the State’s prison system: when prisoners go through parole board and disciplinary hearings, and are faced with the possibility of self-incrimination.

Here a recent Michigan Supreme Court decision shows that hope remains for the *Garrity* covenant. In *People v Wyngaard*,²⁹ the Court examined a written agreement that corrections officials had given to a prisoner, promising that his compelled statement would not be used in criminal proceedings. He was later charged with possession of controlled substances, and the statement used against him.

Our State Supreme Court adopted the U.S. Supreme Court case of *Minnesota v Murphy*, cited above, and restated that the “penalty” cases involve “a compulsion repugnant to the Constitution;” and that *Garrity* is not only termination, but rather a “substantial penalty” for the exercise of the 5th Amendment.³⁰

And the Court, perhaps, gave a guidepost for future cases involving police officers. The question addressed by the Court in *Wyngaard* was:

What remedy must be afforded under due process principles when a defendant surrenders a constitutional right in reliance on an authorized agreement?

It would seem logical that if police officers must face increasing numbers of criminal—as opposed to internal—investigations, they should at least have the same due process protections as do the State’s convicted prisoners. *Garrity* created the aleatory promise for the discretion and use of the police departments—so that they may investigate complaints in a timely way and protect the integrity of the profession. The Supreme Court, I suggest, has reconciled *Garrity* with the covenant of Thomas Hobbes.

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Endnotes

- 1 385 US 493; 87 S Ct 1616; 17 L Ed 2d (1967)
- 2 See, for instance: *U S –v- Koon*, 34 F3d 1416, 1431 (9th Circ 1994); *U S –v- Veal et al.*, 153 F3d 1233, 1240 (11th Circ 1998)
- 3 MCL 423.301 *et seq*
- 4 Detroit News article, June 25, 2002, “Sterling Heights Disciplines 12 Officers”
- 5 FOIA MCL 15.243(1)(t)
- 6 *State Bar of Michigan –v- Block*, 383 Mich 384, 387; 175 NW2d 769 (1970)
- 7 The researched cases show that *Garrity* has remained a Federal rule, through the 5th Amendment, via the 14th Amendment of the U.S. Constitution. To date, States have not addressed similar issues through their respective State Constitutions.
- 8 *Miranda –v- Arizona*, 384 US 486; 86 S Ct 1602; 16 L Ed 2d 694 (1966)
- 9 *State v Naglee*, 44 NJ 200; A2d 680, 697, 695 (1965)
- 10 *Garrity, supra*, at 385 US at 498, 500
- 11 *State –v- Falco*, 60 NJ 570; 202 A2d 13 (1972)
- 12 *Escobedo –v- Illinois*, 378 US 478; 84 S Ct 1758; 12 L Ed 2d 997 (1964); *Miranda –v- Arizona*, 384 US 486; 86 S Ct 1602; 16 L Ed 2d 694 (1966)
- 13 392 US 273, 278; 88 S Ct 1913; 20 L Ed2d 1082 (1968)w
- 14 *Spolnick –v- Detroit Police Dept.*, 49 Mich App 162; 211 NW2d 674 (1973); also *National Union of Police Officers, Local 502-M –v- Lucas*, 79 Mich App 445; 263 NW2d 7 (1978)w
- 15 465 US 420, 435; 104 S Ct 1136; 79 L Ed 2d 409 (1984)
- 16 *State Bar of Michigan –v- Block*, 383 Mich 384; 175 NW2d 769 (1970); *In re Colacasides*, 6 Mich App 298; 148 NW2d 898 (1967); *School District for the City of Holland et al –v- Holland Education Ass’n*, 380 Mich 314; 157 NW2d 206 (1968).
- 17 *People –v- Allen*, 15 Mich App 387; 166 NW2d 664 (1968)
- 18 *Id*, at 393
- 19 *US –v- Friedrick*, 842 F2d 382, 395 (DC Circ 1988)
- 20 *US –v- Koon*, 34 F3d 1416, 1433-1435 (9th Circ 1994)
- 21 18 USC §1512(b)(3), *US –v- Veal et al*, 153 F3d 1233 (11th Circ 1998)
- 22 628 F2d 711 (1st Circ 1980)
- 23 *Id*, at 717 (citation omitted)
- 24 235 Mich App 695; 599 NW2d 556 (1998)
- 25 *Townsend –v- Henderson*, 405 F2d 324, 328 (1968)
- 26 *US –v- Calhoun*, 544 F2d 291, 297 (6th Circ 1976)
- 27 *People –v- Jobson*, 205 Mich 708; 518 NW2d 526 (1994)
- 28 *Buckner –v- Highland Park*, 901 F2d 491 (6th Circ 1990)
- 29 462 Mich 659; 614 NW2d 143 (2000)
- 30 *Id*, at 673

Notes