

The Right to Remain Silent: A New Answer to an Old Question

BY JAMES J. DUANE

Consider the following question that comes up rather frequently for lawyers who practice criminal and civil litigation. Suppose in representing clients who are scheduled to be questioned—perhaps at police headquarters, or at a hearing, trial, or deposition—you have advised them to assert the Fifth Amendment right to refuse to be a witness against themselves. Just what words should they speak when the moment comes and it is time to invoke the right to remain silent?

As every experienced lawyer knows, this question has a standard answer that has been almost universally observed for more than a century. As this article shall demonstrate, it is time for the legal profession to consider a new and very different answer to that question. But first we need to understand why it makes a difference.

What Difference Does It Make?

There is no official language that a witness is required to employ when invoking the privilege against self-incrimination. As one federal circuit court recently observed, “A witness’s answer could range from ‘I refuse to answer on the ground that my answer may tend to incriminate me’ to the more mundane ‘On the advice of counsel, I decline to answer.’” (*Evans v. City of Chicago*, 513 F.3d 735, 740 n.4 (7th Cir. 2008).)

But witnesses have to say *something*, at least if they wish to bring any police interrogation to an end. Merely sitting in silence, even for three hours, is not enough to make an effective invocation of the right to remain silent or to cut off



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further questioning. (*Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).)

Some answers sound more suspicious than others, of course. Does it matter which version you use? Not always. To take perhaps the easiest case: If you remain silent after receiving *Miranda* warnings, that silence is not admissible at your criminal trial either as substantive evidence of guilt, *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966), or for impeachment if you choose to testify. (*Doyle v. Ohio*, 426 U.S. 610 (1976).) So the jury will not even learn that you invoked the Fifth, much less how it was done.

But *Doyle* does not always require the exclusion of evidence that a witness exercised the right to remain silent. At least in those cases where your invocation of the Fifth Amendment was recorded by video or in a transcript, there are many situations where a jury may be allowed to learn the precise words that you spoke when announcing the decision to invoke your constitutional privilege. Let us list just a few.

To begin, there is some doubt whether the holding in *Doyle* is long for this world. The last time the U.S. Supreme Court was asked to follow that case, it went out of its way to indicate a willingness to overrule that case altogether, gratuitously declaring: “Although there might be reason to reconsider *Doyle*, we need not do so here.” (*Portuondo v. Agard*, 529 U.S. 61, 74 (2000).) And that was before the Court was joined by Chief Justice Roberts and Justice Alito, both of whom are less impressed by *stare decisis* than the justices they replaced. If the Court ever elects to go that route, nothing will be left to protect witnesses from the risk that juries at their criminal trial will learn what they said when they explained to police why they refused to answer the officers’ questions.

And even if *Doyle* is never overruled, your silence, even in the face of police questioning, is admissible against you at a criminal trial if the police can prove (or are at least willing to claim) that they never read your rights to you before you communicated your insistence on remaining silent. (*Fletcher v. Weir*, 455 U.S. 603 (1982).)

Moreover, regardless of whether your silence was arguably induced by the fact that you were read your *Miranda* rights by the police, your assertion of the Fifth Amendment privilege is admissible and can always be used against you in any *civil* action or proceeding. (*Mitchell v. United States*, 526 U.S. 314, 328 (1999).)

And of course there are many civil trials (and criminal trials, as long as you are not the accused) at which you may be compelled, in the discretion of the court, to take the witness stand and assert the Fifth Amendment privilege in the presence of the jury, which will then be invited to draw an adverse inference from that refusal. (*E.g.*, *Hinojosa v. Butler*, 547 F.3d 285 (5th Cir. 2008) (granting a partial new trial because the district court refused to allow the plaintiff to cross-examine the defendant and to force him to assert the Fifth Amendment in the presence of the jury).)

So there are a number of fairly common situations in which your invocation of the Fifth Amendment privilege, either before or during a trial, may be used against you and revealed to the jurors, who will be allowed to decide what sort of adverse inference, if any, to draw from that decision. It therefore may make a great difference just *what* witnesses say and how they explain themselves when they refuse to answer a question on the basis of that privilege.

What a Client Should Say When Taking the Fifth

The law does not prescribe or command any specific formula for invocation of the Fifth Amendment privilege. But the reported cases confirm, as most of us know from experience, that lawyers have shown surprisingly little creativity in telling clients what to say when invoking the right to remain silent. Witnesses regularly show up at hearings armed with a card that reads something remarkably close to the following language: “On the advice of counsel I respectfully decline to answer on the ground that my answer may tend to incriminate me.” And this has been going on for a very long time. More than 100 years ago, a witness before a grand jury rebuffed a prosecutor with the response: “That question, with all respect to the grand jury and yourself, I must decline to answer, for the reason that my answer would tend to accuse and incriminate myself.” (*Brown v. Walker*, 161 U.S. 591, 591 (1896).)

Surely that cannot sound innocent to any ordinary juror. The word *incriminate* comes from the same Latin root that gives us the words *crime* and *criminal*. When a witness refuses to answer a question “because the answer will incriminate me,” most jurors will believe that the witness is saying: “I cannot tell you the truth without admitting my guilt.” Indeed, the Supreme Court of the United States has specifically noted that “[t]oo many,

even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.” (*Ullmann v. United States*, 350 U.S. 422, 426 (1956).) The Court has also noted that “[t]he layman’s natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.” (*Lakeside v. Oregon*, 435 U.S. 333, 340, n.10 (1978) (quoting 8 WIGMORE, EVIDENCE § 2272, at 426).) That danger will naturally be greatest if the witness is heard to admit that the truth would be “incriminating.”

Almost every experienced lawyer has seen depositions or hearings at which witnesses clutch some card given to them by their lawyer with this tired talismanic formula, reading aloud the same answer to question after question. And each time the witnesses “confess” again that the truth would tend to incriminate them, the cross-examiner presses in with rising excitement to extract yet another seeming admission of guilt, as the voices of the witnesses grow weaker with each repetition of the words on the cards in their increasingly sweaty hands.

Why have so many lawyers, for such a long time, instructed their clients to explain their refusal to answer questions on the grounds that the answer would *incriminate* them? The answer is not hard to guess. After all, the Supreme Court itself has said many times, in a line of cases going back more than a century, that “[t]he Fifth Amendment prohibits only compelled testimony that is incriminating,” *Hiibel v. Sixth Judicial Court of Nevada*, 542 U.S. 177, 189 (2004), and “operates only where a witness is asked to incriminate himself.” (*Hale v. Henkel*, 201 U.S. 43, 67 (1906).) But surely this does not mean that a witness who wishes to invoke the constitutional privilege must somehow use that word, which does not even appear in the Fifth Amendment.

The Supreme Court has never held, and has in fact rejected the suggestion, “that the privilege is unavailable to those who claim innocence.” (*Ohio v. Reiner*, 532 U.S. 17, 21 (2001).) The Court has emphasized that one of the Fifth Amendment’s “basic functions is to protect innocent men who otherwise might be ensnared by ambiguous circumstances,” and has repeatedly affirmed that “truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker’s own mouth.” (*Id.*) (citations omitted). When

the Court claims that the Fifth Amendment only applies to testimony that is “incriminating,” therefore, it is not using that word in the same sense in which it is likely to sound to any ordinary juror. On the contrary, the Court is describing any evidence that could be used to help obtain the conviction of *any* individual, including the false conviction of an innocent person. (That is, of course, correct. The Fifth Amendment would be essentially worthless if it gave you the right to refuse to answer questions only when you are willing to concede on the record that the truth would prove your guilt.)

At least since the nineteenth century, American lawyers have been advising clients to explain their refusal to answer a question by claiming that the truth would tend to *incriminate* them. There is no good reason in this day and age to allow a client to say anything that sounds like such a damaging confession. The cards we give our clients to bring into the grand jury room first need to be brought into the twenty-first century. The next time you tell a witness what to say or read when refusing to answer a question on the basis of the Fifth Amendment, give the witness instead some version of the following:

On the advice of my lawyer, I respectfully decline to answer on the basis of the Fifth Amendment, which—according to the United States Supreme Court—protects everyone, even innocent people, from the need to answer questions if the truth might be used to help create the misleading impression that they were somehow involved in a crime that they did not commit.

That is a perfectly accurate statement of perhaps the most important function served by the Fifth Amendment. But how different it sounds from the countless witnesses who are advised by their lawyers to recite that they cannot tell the truth without “incriminating” themselves!

Have your client read *those* words in response to each question, and watch the dramatic reversal of the normal roles. This time it will be the *witness* whose voice grows stronger and more confident with each repetition of the majestic purpose of the Fifth Amendment, and the cross-examiner who will quickly tire of hearing those reminders and who will decide to move on to something else. ■