

THE RIGHT TO REMAIN SILENT: ASSERTING FIFTH AMENDMENT RIGHT DOESN'T IMPLY GUILT

by

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For too long, a stigma of guilt has attached unfairly to any witness courageous and wise enough to exercise his or her Fifth Amendment right to remain silent. With so many people in corporate America and public office lately being called to answer questions about the crisis *du jour* in Congressional hearings, grand juries, and elsewhere, now is the time to change the incorrect perception of this important constitutional right—a right that every person, including the innocent, may exercise.

The Correct Recitation of the Right: To Not Be a Witness Against Oneself. As early as the 1790s, at least one federal court upheld a witness's right not to testify about anything that "might 'tend to criminate [sic] himself.'" *United States v. Goosely*, 25 F. Cas. 1363, 1364 (C.C. Va.) (No. 15,230). From actual televised congressional hearings on organized crime beginning in the 1950s to fictional scenes in television and movies today, we have heard witnesses time and again invoke their Fifth Amendment right against testifying on "the ground that it might incriminate me" or words to that effect. However, this popularly recognized refrain is as legally unnecessary as it is misleading. The Fifth Amendment provides more broadly that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself" and the Supreme Court in more recent times has expressly stated that it is "not in dispute" that "[t]he term 'privilege against self-incrimination' is not an entirely accurate description[.]" See *United States v. Hubbell*, 530 U.S. 27, 34 (2000). Whether one has something "incriminating" or not to reveal is not part of the equation. The Fifth Amendment protects anyone, including innocent persons, from being compelled to be a witness against themselves at all.

Naturally, one may ask why an innocent person would fear being a witness against himself. The Supreme Court answered that question in the 19th century: "If an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully

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evident in so many of the earlier [English] trials . . . made the system so odious as to give rise to a demand for its total abolition.” *Bram v. United States*, 168 U.S. 532, 544 (1897) (reversing conviction of sailor accused of murdering ship’s captain where sailor, insisting he was innocent, nevertheless gave a statement to a detective which was then introduced as evidence against sailor at trial). The “odious” reference is to the English inquisition system in the ecclesiastical and Star Chamber courts of centuries ago. By contrast, “the American system of criminal prosecution is accusatorial, not inquisitorial, and . . . governments . . . are thus constitutionally compelled to establish guilt by evidence independently and freely secured and may not by coercion prove a charge against an accused out of his own mouth.” *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964) (holding right not to be a witness against oneself applies to the states through the Fourteenth Amendment).

Guilt Is Neither Required Nor Properly Implied from an Assertion of the Fifth Amendment. Two centuries of American jurisprudence confirm that the Fifth Amendment protects the innocent as well as the guilty and should never imply guilt when asserted. In 1952, a New York State teacher was subpoenaed but refused to answer questions before a U.S. Senate subcommittee investigating, among other things, communism. At the time, New York law provided that any public teacher would be terminated from employment for invoking the privilege against self-incrimination and refusing to answer questions related to the teacher’s official conduct. See *Slochower v. Bd. Of Higher Ed. Of City Of N.Y.*, 350 U.S. 551, 553 (1956). The school board, in terminating the teacher, concluded that there were only two possible inferences to be drawn from his refusal to testify: either that answering would prove the teacher guilty of a crime or that the teacher lied (and thus committed the crime of perjury) in falsely stating that to answer would incriminate him. *Id.* at 556-57. The Supreme Court “condemned” what it called “imputing a sinister meaning to the exercise” of one’s Fifth Amendment right. To compare its exercise to a confession of guilt or to presume perjury would reduce the right “to a hollow mockery[.]” *Id.* Indeed, the Court warned that a witness “may have a reasonable fear of prosecution and yet be innocent of any wrongdoing.” *Id.* at 557-58.

Criminal Jeopardy, Not Innocence, Is the Test. Only once the jeopardy of criminal prosecution against a person is removed entirely may a person’s basis for asserting the Fifth Amendment’s privilege finally be overcome, as illustrated in *Brown v. Walker*, 161 U.S. 591 (1896), which concerned an auditor of a railway company who was subpoenaed to testify as a witness before a grand jury investigating certain railroad executives for suspected violations of an interstate commerce act. In affirming the auditor’s contempt citation for refusing to testify, the Supreme Court examined the federal statute requiring witnesses to appear before the Interstate Commerce Commission. The statute provided that, while no person would be excused from testifying on Fifth Amendment grounds, no person who testified would be prosecuted or subjected to any penalty “for or on account of any transaction, matter or thing, concerning which he may testify” before the commission. *Id.* at 593-94. Because the statute removed the possibility of prosecution of the witness for anything related to his testimony, then any concern that the witness could somehow directly or indirectly aid his own prosecution (even unwittingly) by his testimony also is removed. Similarly, if a person were to receive court-ordered derivative-use immunity (whereby, pursuant to 18 U.S.C. § 6002, a federal judge orders a person to testify notwithstanding the exercise of his Fifth Amendment right) or receives a presidential pardon for a particular offense, the possibility of prosecution is removed; only in such instances where a person cannot stand in jeopardy of potential prosecution might he no longer have a basis for asserting the right provided by the Fifth Amendment.

Thus the Fifth Amendment does not turn on whether or not a person called to answer a question is innocent or not innocent; indeed the question of innocence matters not. Rather, the basis for asserting the Fifth Amendment right not to be a witness against oneself turns entirely on whether or not there exists the potential for a criminal prosecution. More than a century ago, the Supreme Court recognized that “[t]here is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put

to the expense of defending himself.... He may even be convicted of a crime and suffer imprisonment or other punishment before his innocence is discovered.” *Brown*, 161 U.S. at 608. No matter what the reason may be for an innocent person some day falling victim to a wrongful prosecution—some are politically motivated, some based on falsified evidence, some simply error-ridden—it is clear that the Constitution protects all of us from having to aid such a prosecution by providing any words from our own mouths.

Indeed, courts have often described this as not having to furnish a “link in the chain of evidence” needed in a prosecution against oneself. *See, e.g., United States v. Burr*, 25 F. Cas. 38, 40 (1807); *Blau v. United States*, 340 U.S. 159 (1950). *Blau* involved a woman who refused to answer a grand jury’s questions about her knowledge of a local branch of the Communist Party, citing the potential for prosecution under the Smith Act, which outlawed membership in any organization with knowledge that such organization advocates the violent or forceful overthrow of the government. Although the grand jury did not appear to ask the ultimate question as to the witness’s actual knowledge of the organization’s purpose, it did ask her about the organization’s membership and books and records which, if she had answered the questions, would be evidence furnishing a link in the chain of evidence needed to prosecute her under the Smith Act, even if her admissions to those limited questions were not sufficient alone to convict her. *Blau*, 340 U.S. at 161. The Constitution protects her from exactly that burden.

Nearly 25 years after *Brown v. Walker*, the Court again took up the Fifth Amendment issue, but with a differently worded statute yielding a different result, again illustrating that criminal jeopardy—not innocence or guilt—controls the Fifth Amendment question. Jules Arndstein was a bankrupt debtor who refused to answer questions posed to him by the federal bankruptcy examiner and was held in contempt. *See Arndstein v. McCarthy*, 254 U.S. 71 (1920). The Supreme Court reversed, holding that the protection of the Fifth Amendment was not removed simply because the bankruptcy statute’s immunity provision would have prevented the defendant’s testimony from being entered into evidence in any criminal proceeding. Unlike the interstate commerce statute at issue in *Brown*, the bankruptcy statute did not provide derivative immunity against prosecution but rather provided only what today we call “use” immunity—meaning that the testimony the witness gives will not be used against him. The Court acknowledged that the defendant would still be at risk that “other evidence” developed as a result of the defendant’s testimony could be used against him: “It is impossible to say from mere consideration of the questions propounded [to the defendant] . . . that they could have been answered with entire impunity.” *Id.* at 72-73. Thus, where the potential for criminal jeopardy remained, Arndstein’s Fifth Amendment exercise was appropriate.

Supreme Court States it Bluntly: Fifth Amendment Is to Protect the Innocent. To the extent it was not already clear, in 2001 the Supreme Court expressly stated *per curiam* that “the privilege protects the innocent as well as the guilty.” *Ohio v. Reiner*, 532 U.S. 17, 18. On appeal in *Reiner* was the conviction of a father for the death of his daughter. At his trial, the jury heard testimony from the infant’s babysitter, who after first refusing to testify and asserting her Fifth Amendment privilege, was granted complete immunity by the trial court and testified at trial that she had done nothing wrong, had not shaken the baby (as was suggested by the father’s defense) and denied any involvement in the baby’s death. The father appealed his conviction on the ground that the court’s grant of immunity was unlawful because the babysitter—by first asserting not that she had committed a wrong but that she was innocent—had no valid Fifth Amendment claim. The Supreme Court affirmed the father’s conviction, holding that that the babysitter had a valid Fifth Amendment privilege to assert because “...one of the Fifth Amendment’s basic functions . . . is to protect *innocent* men . . . who otherwise might be ensnared by ambiguous circumstances.” (internal quotations omitted). *Id.* at 21 (citing *Grunewald*, 353 U.S. 391, 421 (1957)); *see also Slochower*, 350 U.S. at 557-58 (“The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.”). In *Reiner*, the Court explained that the privilege not to be compelled to be a witness

against one's self protects any witness who has "reasonable cause to apprehend danger from a direct answer" and that the protection "not only extends to answers that would in themselves support a conviction...but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant." 532 U.S. at 20 (citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

A Word of Caution and of Courage. Anyone—including those experienced at public speaking—quick to adopt the too popular notion that an innocent man has nothing to fear in giving testimony should first ask himself how he might fare on the witness stand. The Supreme Court described the reality of testifying: "It is not every one who can safely venture on the witness stand, though entirely innocent Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character . . . will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him." *Griffen v. California*, 380 U.S. 609, 613 (1965).

Today, an unprecedented number of criminal, congressional, and regulatory investigations are underway in the wake of serious financial crises in our nation. It is not a time either to be too proud to assert or too foolish to ignore the Constitution's right not to be a witness against oneself, regardless whether one is innocent, guilty, or something in between. Though likely to be criticized by public relations consultants and media pundits alike, the law allows—and good counsel may recommend—that even an innocent client decline to answer any questions. In fact, more than fifty years ago the Supreme Court answered those who profess there to be a "stigma that might result from a forthright claim of [a person's] constitutional right to refuse to testify. It is precisely at such times—when the privilege is under attack by those who wrongly conceive of it as merely a shield for the guilty—that governmental bodies must be most scrupulous in protecting its exercise." *Quinn v. United States*, 349 U.S. 155, 164 (1955) (reversing conviction for contempt for refusal to answer congressional subcommittee). Now is such a time.