

## You do not have to say anything

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# “You Do Not Have To Say Anything”?

## Preface

### The Right to Silence

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The privilege against self-incrimination, and the right to silence, form foundation cornerstones of our common law heritage. However, over many years, the substance of the right to silence has arguably become eroded – most notably by the Criminal Justice and Public Order Act 1994 (CJPOA). This Act provided that, in some circumstances, adverse inferences may be drawn by the jury, from a defendant’s failure to mention any fact relied upon in their defence, when questioned under caution regarding (or, later charged with) a particular specified offence.

Many defendants may still, however, choose “no comment” as their sole statement, either under questioning, or at trial, or both. For some, this may be based on personal reasons, and for others, this may be based on legal advice. Nevertheless, the position of the defence practitioner faced with such a client may be difficult – the position in the latter instance being described by Lord Woolf CJ in *Beckles* [2005] 1 Cr App R 23 as: “singularly delicate,” and the situation with s.34 of CJPOA as: “a notorious minefield”.

This article aims to examine approaches that the defence practitioner may consider when faced with a steadfast “no comment” client. It is not aimed at those whose clients are in the position of deciding whether to comment – and, if a defence is to be argued, then this decision must be one for case-by-case contemplation. However, as the aim of this article is those practitioners whose clients wish to go “no comment,” those points are not relevant here.

### Damned by Silence?

One of the main problems faced by defence practitioners with “no comment” clients is the risk that the jury may well draw adverse inferences from their silence. This fear is arguably amplified by the sanctity of the jurors’ deliberations – so it is not known whether such an inference has been a factor in the verdict, or not. This is a commonly-raised concern in commentary on miscarriage of justice cases involving “no comment” situations – one example being debate on this issue as a possible consideration in the *Sam Hallam* case (as discussed in C. Baksi, “Going ‘no comment’: a delicate balancing act,” *Law Society Gazette*, May 24, 2012). If a direction has been given, it remains impossible to know for certain whether one’s client has actually been affected by adverse inferences.

Noting the prevalent concerns regarding such potential adversity, there is a case to consider whether an assertion of “no comment” might actually harm one’s chance of

acquittal with a jury. Though “no comment” remains a valid comment, broader contemplation of alternative options for jury trial may perhaps be worthwhile.

It may well be that a jury might presume one with an “innocent explanation” would elaborate the same at trial or interview – but the range and variety of clients for whom “no comment” may be used or advised is testimony itself as to the potential error of such a presumption. A client may well have sound, solid personal reasons for going “no comment” – which may be unconnected to the facts in issue, or even the case in question.

### “Silence Plus Because”?

However, might there be an alternative to “no comment” which still preserves the sanctity of silence, but may find favour with a jury more easily than its predecessor? In attempting to begin the debates on this point, this article has considered a range of precedents, and psychological research, in order to propose early (and as yet untested) thoughts for further contemplation. It must be stressed that the contents of this article are as yet untested, academic, and used at the practitioner’s own risk.

That being said, for such a client area, this article develops the idea of “silence plus because”. This would be a very brief statement made, in careful and concise terms (potentially in writing), reserving the right to silence, and, briefly, setting out the client’s reasons for doing so (within precise parameters, such as privilege, to be discussed later). On the face of it, this notion may appear novel, if not counterintuitive to the general concept of not having to justify oneself. However, on deeper and more careful consideration, it may be something to think on.

### Powers of Persuasion?

Research from the field of psychology has shown that, when people depart from certain social values, confusion and disappointment may result (G. R. Maio, J. M. Olson, L. Allen, and M. M. Bernard, “Addressing Discrepancies between Values and Behavior: The Motivating Effect of Reasons,” (2004) *Journal of Experimental Social Psychology* 37, 104). Though not the subject of the study in question, this may potentially be extrapolated to the failure to comment. The findings of the researchers’ study may give some insight into gathering understanding of the jury for the defendant’s position of “no comment”. Their study focussed on others’ support for individual values (which may contradict social values) – and how support may be increased for the individual’s values. Their results supported the view that providing reasons for a value might convince others that the value has a rational basis, thus potentially explaining why such an action might be seen as sensible and justified. This could allow others (or, in a legal environment, a jury) a guide for the person’s behaviour (or choice to go “no comment”). Indeed, the study found that the personal nature of values may have effect even if the reasons are objectively weak.

Similarly, another study (J-B. Légal, J. Chappé, V. Coiffard, A. Villiard-Forest, “Don’t you know that you want to trust me? Subliminal goal priming and persuasion,” (2012) *Journal of Experimental Social Psychology* 48, 358) demonstrated some evidence of increased agreement when reasons were given for requests, rather than the request made by itself – and this seemed so even when the reason given did not make sense. Thus there is some evidence from psychological research that the provision of reasons may be looked upon favourably by the public. Furthermore, this study suggested that those primed with the goal “to trust” showed more signs of evaluating messages linked to this, and sources of such, and appeared to exhibit more behaviour compatible with the message. Thus, it is possible that use of the word “trust” may be a thought for such an instance.



### that the personal reasons for silence are brief, and distinct to, the basis of legal advice to remain silent



Overall, a client’s personal reasons for choosing “no comment” might thus be relevant? It appears that the field of persuasion in psychology may have great relevance to defence practitioners – but the legal position of any derogation from a planned “no comment” must always be carefully evaluated against the legal precedents present.

#### Protecting Privilege

It is important that a client, if relying on legal advice for not commenting, does not accidentally waive their legal professional privilege in attempting to seek a jury’s empathy for their reasoning. It was held in *R. v. Derby Magistrates’ Court ex parte B* [1996] 1 AC 487, that the existence of legal professional privilege is essential. It was further confirmed that a defendant does not waive privilege by merely refusing to answer questions, based on legal advice. However, if they go beyond this and set out the grounds on which this advice was given, it may constitute a waiver of privilege (*Bowden* [1999] 2 Cr App R 176).

Thus, it is arguably very wise, if relying on personal reasons for silence, and legal advice to do the same, that the personal reasons for silence are brief, and distinct to, the basis of legal advice to remain silent – and that the grounds for such legal advice, or reasons for it, are not explained to the court, even if known to the defendant. Otherwise, this course of action runs the risk of being perilously close to an inadvertent waiver of privilege. It would be for the practitioner, on a case-by-case basis, to advise upon the potential use and wording of, and responsibility for, any such “silence plus because” statement.

#### “Silence Plus Because” – Concept Under Construction?

The precise wording of a “silence plus because” statement is not yet conclusive, and, if developed, is something which

would require further thought, and, possibly, individual wording for individual cases. It could be possible to provide a “double-barrelled” reasoning (and the potential reasons for doing so shall be explained later). Such a statement could potentially be along the lines of the following hypothetical example:

“I would like (to invite) you to trust and respect my choice to reserve my right to silence.

The reason(s) I wish to remain silent, maintaining that I am not guilty, but am innocent, is/are because:

1) Here would be individual’s suitable personal reason, or principle, or value, eg, a vow of confidentiality, or some other suitable reason.

And (if applicable);

2) I have been advised not to comment by my legal adviser/solicitor/barrister, am following their advice genuinely, I may not even be aware of the grounds of this, and, because of legal professional privilege, the grounds of this may not be lawfully questioned.”

There might also be the option for those wishing to elaborate with a defence to submit that this will be made by their legal adviser, solicitor, or counsel, or by written statement – but if a defence is to be argued, the sort of statement above may not always be appropriate?

#### Sensible Explanation For Silence?

In terms of either the “personal reasons” or legally privileged advice not to comment (or both), the client may have a case for a submission of adverse inferences not being drawn from silence. This is because, following the case of *Condon* [1997] 1 Cr App R 185, when being directed on s.34, CJPOA 1994, the jury should be advised that they may draw an adverse inference only where they are satisfied that the only sensible explanation for the defendant’s silence is that the defendant had no answer, or at least none that would stand up to scrutiny. The European Court of Human Rights affirmed (in *Condon v. UK* [2001] 31 EHRR 1) that failure to give such advice may have art.6 implications.

However, if the reasons given are the personal ones, or legal professionally privileged advice (or both, if distinctly set out) then arguably, the jury may have some explanation to contemplate in terms of *Condon* before concluding on the possibility of inferences.

There remains, of course, no guarantee that they will not draw such inferences.

To conclude, it is hoped that the ideas in this article, while untested, (and practitioners would be responsible for their use, and any consequence) may provide some basis for further thoughts on the representation, reasons, and fair trial of “no comment” defendants in our criminal courts.

As Plato once observed: “Wise men talk because they have something to say; fools, because they have to say something.” ■