A FIFTH AMENDMENT SWORD: THE INCONSISTENT DOCTRINE OF PRIVILEGE WITHDRAWAL AND THE BURDEN PLACED ON CIVIL PLAINTIFFS IN POLICE MISCONDUCT SUITS

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ABSTRACT

In civil litigation, the doctrine of withdrawal affords defendants the ability to assert their Fifth Amendment privilege protecting against self-incrimination and then revoke the privilege after the suit has progressed. Such shifting use of the privilege generates several challenges for a plaintiff's case, turning the Fifth Amendment into a defense strategy. This ploy is ripe for abuse in police misconduct suits. Civil plaintiffs face several, specific obstacles in such suits relating to a late withdrawal of the privilege by defendant police officers. But allowing a late privilege withdrawal can create an incentive structure, vulnerable to pressure by a municipality, to tactically extend the privilege—resulting in officers sitting out discovery but not being appropriately sanctioned for doing so. Circuit courts have approached this Fifth Amendment withdrawal doctrine in inconsistent manners. The result has, at times, meant that certain plaintiffs in police misconduct suits fail to have a fair process during their civil trial. This note analyzes three particular circuit court approaches and abuse of the doctrine. Through this analysis, this note concludes that the doctrine of withdrawal needs a consistent application to mitigate incentives for abuse. It will then propose such remedies to address obstacles created by the withdrawal doctrine including creating harmony across circuits in late withdrawal and direct action by Congress or the Supreme Court.

INTRODUCTION

"What to do when civil litigants invoke the Fifth Amendment's

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privilege against self-incrimination during discovery but waive the privilege on the eve of trial?"[1] It is a question that, by its nature, judges will seldom have to answer because of the many conditions that must be met. First, a civil defendant must have a legitimate reason to fear criminal prosecution. They must then invoke their Fifth Amendment privilege in response to this fear. Then, following discovery, the defendant must demand to offer new and previously privileged testimony to avoid a litigation sanction.[2] Finally, the plaintiff must then object and ask the court to impose some form of sanction on the defendant based on the revocation of their privilege.[3]

This situation is rare. A judge does not often have to confront this issue and determine the appropriate remedy. But as this note will show, failing to get the right remedy can "wreak havoc" and produce a "fundamentally unfair trial" for litigants seeking justice in civil cases.[4]

Intuitively, the problem seems rather strange. One might wonder what defendant would demand to be deposed after availing themselves of their Fifth Amendment privilege. One might also wonder why a plaintiff, who would now gain the information that a civil defendant was previously withholding, would object to the deposition. But a review of the cases involving withdrawal of the Fifth Amendment privilege illuminates why parties would seem to be taking counter-intuitive positions.

In their demand to be deposed, defendants are seeking to avoid a sanction, known as the "adverse inference," that permits juries in civil trials to draw a negative inference from an invocation of the Fifth Amendment.[5] Withdrawing their previous invocation may enable a defendant to avoid the permissible penalties for previously invoking their Fifth Amendment privilege in the civil case.[6] And by now answering questions, defendants can theoretically prevent a jury from ever learning that they previously

1. Evans v. City of Chicago, 513 F.3d 735, 747 (7th Cir. 2008) (Williams, J., dissenting).

2. *See* John C. O'Brien, *Judicial Responses When A Civil Litigant Exercises a Privilege: Seeking the Least Costly Remedy*, 31 ST. LOUIS U. L.J. 323, 324–29 (1987) (observing ways in which "summary disposition sanctions" have been imposed on civil litigants invoking their Fifth Amendment privilege during discovery).

3. *See id.*

4. *See Evans*, 513 F.3d at 747 (Williams, J., dissenting).

5. *See* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (concluding the Fifth Amendment "does not forbid [a penalty of] adverse inferences against parties to civil actions" when civil litigants invoke their right not to testify).

6. *See Evans*, 513 F.3d at 747 (permitting a withdrawal of Fifth Amendment privilege without litigation penalty).

invoked the Fifth Amendment prior to trial.[7]

For their part, plaintiffs generally want to hold a defendant to their invocation of the Fifth Amendment. After all, the adverse inference would allow the jury to draw a conclusion—based on intuition alone—that the alleged activity did occur since the defendant failed to specifically refute the plaintiff's claims. But more practically, this sudden shift by a defendant can generate substantial prejudice to a plaintiff's case. A later withdrawal of the privilege can, for instance, allow a defendant to sit out discovery "for months and months, and then, after seeing [the] entire case unfold," and learning the plaintiff's "strengths and weaknesses," suddenly change their mind and revoke their invocation of the Fifth Amendment.[8] Thus, the defendant has the benefit of strategizing their testimony after the plaintiff has already shown their hand. Despite the Court's admonishment that litigants cannot "convert the [Fifth Amendment] privilege from [a] shield . . . into a sword,"[9] such a tactical withdrawal can turn the Fifth Amendment into an effective defense strategy.

Such gamesmanship is ripe for abuse in the context of police misconduct suits. Litigants bringing a civil action against police officers are faced with numerous barriers as it is. Qualified immunity, for example, poses a barrier for individuals before their case ever proceeds on the merits.[10] But an unexplored barrier facing litigants emerges when police, after asserting their Fifth Amendment privilege in a civil suit to protect against self-incrimination, change course and wish to be deposed. In doing so, police defendants can now avoid the adverse inference at trial. While the situation exists in all matters involving parallel litigation,[11] the nature of police misconduct litigation creates incentives for abusing the Fifth Amendment privilege. This note will look at the nature of the Fifth

7. *See* Harris v. City of Chicago, 266 F.3d 750, 753 (7th Cir. 2001) (observing the likely analysis for ruling on exclusion of a prior invocation of the Fifth Amendment rests on Rule 403 of the Federal Rules of Evidence and whether the "prejudicial effect of [the defendant's] prior silence substantially outweigh[s] its probative value.").

8. *Evans*, 513 F.3d at 749 (Williams, J., dissenting).

9. *See* United States v. Rylander, 460 U.S. 752, 758 (1983).

10. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 893 (2014) (citing Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974)) (explaining that Supreme Court qualified immunity doctrine permits the dismissal of a suit even if a constitutional violation is found by a court).

11. For purposes of this note, "parallel litigation" refers to situations where both a criminal and civil suit are possible consequences of a given action by the same defendant. Some examples in addition to police misconduct suits include antitrust litigation, securities fraud, and RICO actions.

Amendment withdrawal process across three different circuits, the use of privilege withdrawal in police misconduct suits, and existing concerns when civil litigants attempt to hold police officers accountable.

Part I of this note looks at the history of the Fifth Amendment adverse inference, the attempts by the circuits to determine how to cure the prejudice of prior silence, and the variety of factors that courts look to when determining how to fashion remedies for late privilege withdrawals. It begins with a review of the historical development of the adverse inference starting from *Baxter v. Palmigiano*,[12] to the evolution of privilege withdrawal in the circuit courts. This note will examine the withdrawal process across three circuits: the Fifth Circuit approach in *Davis-Lynch, Inc. v. Moreno*;[13] the Third Circuit in *SEC v. Graystone Nash, Inc.*;[14] and the Seventh Circuit's approach through *Harris v. City of Chicago*[15] and *Evans v. City of Chicago*.[16] This note will compare these circuits approaches, highlighting how—unlike the Fifth and Third Circuits—the Seventh Circuit's approach primarily deferred to the district courts when they acknowledged prejudice and made some attempt to cure it.[17] Part I will conclude with an analysis of police misconduct suits, highlighting how actual liability and the parties to police misconduct suits create perverse incentives, unlike other parallel litigation, that incentivizes the abuse of the Fifth Amendment withdrawal.

Part II will analyze how the nature of police misconduct suits, given their deviations from other parallel litigation, creates an opportunity for

12. *Baxter*, 425 U.S. at 318–19 (holding that, in the civil context, a factfinder may draw a negative inference based on a defendant's invocation of the Fifth Amendment).

13. Here, the court addressed the process of withdrawal both prior to and during summary judgment motions and, in weighing the factors, adopted an approach that balanced the "timing and circumstances under which a litigant withdraws the privilege" as a measurement as to "whether a litigant is attempting to abuse or gain some unfair advantage." *See* Davis-Lynch, Inc. v. Moreno, 667 F.3d 539, 547 (5th Cir. 2012).

14. In this case, the court took a similar approach to the Fifth Circuit, weighing timing of the withdrawal against the prejudice incurred by the plaintiff. *See* SEC v. Graystone Nash, Inc., 25 F.3d 187, 193–94 (3d Cir. 1994).

15. The Seventh Circuit addressed the issue of privilege withdrawal after trial began. *See* Harris v. City of Chicago, 266 F.3d 750, 752–53 (7th Cir. 2001). The Seventh Circuit ultimately reversed the lower court and ordered a new trial. *See id.* at 755–56.

16. The Seventh Circuit affirmed a lower court's ruling to allow defendants to withdraw their privilege shortly before trial without sanction, giving wide discretion to the district court on how to handle the process. Evans v. City of Chicago, 513 F.3d 735, 742–45, 747 (7th Cir. 2008).

17. *Compare* cases cited *supra* notes 13, 14 and accompanying text, *with* cases cited *supra* notes 15, 16 and accompanying text.

abuse by civil defendants. It will further demonstrate that the approaches taken by the Fifth and Third Circuit present a more equitable path for preventing abuse compared to the Seventh Circuit. Part III will conclude with proposed solutions, policy responses, and areas that require further exploration to understand the potential remedies that courts and Congress can adopt. Among those suggested solutions is the need for circuit courts to create harmony among themselves when reviewing the issue of privilege withdrawal. Or—at a minimum—for the circuits to at least understand the nature of privilege withdrawal, including some the misunderstood assumptions underlying prior decisions. It will also propose uniform rules to ensure trial courts get consistent and accurate results whenever they are faced with a defendant's late withdrawal of their Fifth Amendment privilege.

I. HISTORY

A. The Adverse Inference of Fifth Amendment Silence

The adverse inference in civil cases began as a consequence of extending the Fifth Amendment privilege to civil cases. In *McCarthy v. Arndstein*, the Supreme Court held that Fifth Amendment protections were not limited solely to criminal cases, but "appl[y] alike to civil and criminal proceedings."[18] This privilege applied to all situations, even where a "mere witness[']" answer to a question "might tend to subject [them] to criminal responsibility."[19] Scholars have debated whether such an extension of the Fifth Amendment is sound policy,[20] but the Court has nonetheless concluded that this reading of the Fifth Amendment privilege "reflects many of our fundamental values and most noble aspirations."[21]

18. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

19. *Id.*

20. *Compare*, 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251 (2d. ed. 1923) (offering general criticism of the policy rationale behind extending the Fifth Amendment to private party civil suits), *with* Dennis J. Bartlett, *Adverse Inferences Based on Non-Party Invocations: The Real Magic Trick in Fifth Amendment Civil Cases*, 60 NOTRE DAME L. REV. 370, 374 (1985) ("Arguably, the policy reasons for the use of the privilege in civil cases are not as strong as those in the criminal area, but valuable goals are served by extending the protections of the [F]ifth [A]mendment to civil cases. These protections should not be abrogated. Applying the privilege in civil cases is more difficult, however.").

21. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Among the "fundamental values"

But while the policy goals of extending Fifth Amendment protections to civil cases has merit, it comes at a cost. Namely, while the privilege was intended to protect individuals from disclosing incriminating evidence that the government may use for prosecution, the use of the privilege can—much to the frustration of courts—result in litigants "avoid[ing] the discovery process altogether."[22] To prevent these situations, the circuits have long fashioned rules to ensure a defendant cannot "use the [F]ifth [A]mendment to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise testimony at trial."[23] These rules typically take the form of sanctions. Some of these sanctions include, as one scholar labeled them, "summary disposition" sanctions.[24] These summary disposition sanctions can include dismissal of a suit when a plaintiff invokes the privilege[25] and default—or similar judgment—against a defendant invoking the privilege.[26] However, such sanctions against a defendant can

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that the Court believed were reflected by the extension of the Fifth Amendment to civil cases were the following:

> "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that the self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' our own distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'"

Id. (citations omitted).

22. *See* Harris v. City of Chicago, 266 F.3d 750, 752 (7th Cir. 2001) (reversing a district court ruling that allowed defendant to invoke the Fifth Amendment privilege during discovery, but also allowed him to testify at trial free from impeachment by prior silence, as "prejudicial error" that "allowed [defendant] to avoid the discovery process altogether.").

23. *See* Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 577 (1st Cir. 1989); *see also, e.g.*, *In re* Edmond, 934 F.2d 1304, 1309 (4th Cir. 1991) (upholding a denial of motion for summary judgment by a defendant who offered an affidavit in lieu of deposition where he invoked the Fifth Amendment privilege due to his refusal to be deposed).

24. *See* O'Brien, *supra* note **Error! Bookmark not defined.**, at 324–29.

25. *See id.* at 326–27. Albeit, Professor O'Brien notes that "the sanction of summary disposition is appropriate only when other, less costly measures would be unfair to the defendant." *Id.* at 327 (citing Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1088 (5th Cir. 1979)).

26. *See* O'Brien, *supra* note **Error! Bookmark not defined.**, at 327–28. Although O'Brien noted "courts have so far refrained from imposing summary disposition against defendants asserting the privilege against self-incrimination," *id.* at 327, more recent court decisions have contradicted this claim. *See* SEC v. Smart, 678 F.3d 850, 855–56 (10th Cir. 2012) (upholding a district court's decision to strike

create an "undue cost" on litigants "for the good faith exercise of a constitutional right," especially considering defendants "are in court involuntarily."[27]

A less drastic sanction to ensure the Fifth Amendment privilege is used as a "shield" and not a "sword" in litigation is the adverse inference. The Supreme Court assented to the adverse inference as a permissible sanction in *Baxter v. Palmigiano*.[28] In that case, an inmate was brought before a prison disciplinary board for conduct violations and was informed that he may also be subject to criminal prosecution for a violation of state law.[29] The inmate was told that, while he had the ability to remain silent during the civil-disciplinary hearing, "if he remained silent his silence would be held against him."[30] The inmate chose to remain silent and was punished under the disciplinary process.[31] The Court reversed the First Circuit and held that allowing an adverse inference to be drawn from silence in a civil proceeding did not violate the Fifth Amendment.[32] The Court observed that drawing an adverse inference from the inmate's silence during the disciplinary hearing was "consistent with the prevailing rule that the 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."[33] Although the First Circuit noted that its ruling was based on policy concerns rooted in the Fifth Amendment, the Supreme Court concluded that, in the civil context, utilization of the Fifth Amendment "has little to do with a fair trial and derogates rather than improves the chances for accurate decisions."[34]

The Court's holding in *Baxter* spawned extensive criticism about the

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declarations of a defendant, who previously invoked his Fifth Amendment privilege, in an attempt to raise new issues to defeat summary judgment).

27. O'Brien, *supra* note **Error! Bookmark not defined.**, at 327–28 (citing Mahne v. Mahne, 328 A.2d 225, 228 (N.J. 1974)).

28. Baxter v. Palmigiano, 425 U.S. 308, 320 (1976).

29. *See id.* at 312; *see also* Brief for Petitioner at 3–6, Baxter v. Palmigiano, 425 U.S. 308 (1975) (No. 74-1187) 1975 WL 173643 (providing similar procedural background to the case).

30. *Baxter*, 425 U.S. at 312.

31. *See id.* at 312–13.

32. *See id.* at 316.

33. *Id.* at 318. In its holding, the Court in *Baxter* cabined its ruling to civil actions only, maintaining the rule set down in Griffin v. California, 380 U.S. 609 (1965) that, in criminal trials, the Fifth Amendment "prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." *Id.* at 319.

34. *Id.*

way the adverse inference was applied in civil litigation. Some criticized that, especially in the antitrust context, the adverse inference's extension to non-parties creates fairness concerns for litigating parties.[35] This is because civil anti-trust litigants may have to bear the consequences of an adverse inference for the silence of a non-party with no interest in the outcome of the case.[36] Others have raised concerns that only permitting a possible, but not mandatory, sanction of an adverse inference can still give defendants an advantage during civil litigation.[37] These issues raise concerns about applying the adverse inference as a sanction during civil litigation. However, the Supreme Court has largely stayed out of these concerns, instead leaving its application to the circuits.

B. Circuit Approaches to Curing the Prejudice

Invoking the Fifth Amendment privilege in civil litigation can lead to real consequences, including the adverse inference. But a civil defendant[38] is not saddled with their decision throughout the remainder of litigation. Appellate courts have developed differing processes for addressing when a litigant can withdraw the privilege and avoid the adverse inference altogether.[39] Typically, an appellate court reviews a sanction or attempt to cure the prejudice of prior assertion of the privilege using an abuse of discretion standard.[40] The Fifth, Third, and Seventh Circuits provide some

35. *See* Michael Tubach et al., *When Silence Is Not Golden: Real World Implications of Non-Parties "Taking the Fifth" in Civil Proceedings*, 35 ANTITRUST 82, 83 (2021) (criticizing the use of the adverse inference against non-parties in antitrust litigation).

36. *See id.* ("A nonparty may have less knowledge of the relevant facts, less of a stake in the outcome of the litigation, and varied motives for invocation.").

37. *See Evans v. City of Chicago*, 513 F.3d 735, 749 (7th Cir. 2008) (Williams, J., dissenting) ("The defendants sat out discovery for months and months, and then, after seeing Evans's entire case unfold, they elected to testify. They knew the strengths and weaknesses of his case; they knew where his emphasis lay; they knew what he would ask them about; they had heard testimony from not just all of his fact witnesses, but also all of his expert witnesses.").

38. While, as noted earlier, the Fifth Amendment privilege can be invoked by both civil plaintiffs and defendants. However, this note will only look at the context of a civil defendant's invocation, and later withdrawal of, the Fifth Amendment privilege.

39. *See generally, e.g.*, Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989); SEC v. Graystone Nash, Inc., 25 F.3d 187 (3d Cir. 1994); *In re* Edmond, 934 F.2d 1304 (4th Cir. 1991); Davis-Lynch, Inc. v. Moreno, 667 F.3d 539 (5th Cir. 2012); Evans v. City of Chicago, 513 F.3d 735 (7th Cir. 2008); SEC v. Smart, 678 F.3d 850 (10th Cir. 2012).

40. *See, e.g.*, *Smart*, 678 F.3d at 855 ("A district court's order denying a party's withdrawal of a previously asserted Fifth Amendment privilege in a civil case is reviewed for abuse of discretion.")

examples of how circuit courts have grappled with this issue.

i. The Fifth Circuit: *Davis-Lynch, Inc. v. Moreno*

Although not the first circuit to deal with the issue, the Fifth Circuit provided a framework for analyzing a revocation of the Fifth Amendment privilege in *Davis-Lynch, Inc. v. Moreno*.[41] In that case, a business sued a group of defendants, alleging they had embezzled money from the company.[42] After initially asserting his Fifth Amendment privilege, defendant Moreno withdrew his assertion and proceeded to answer substantive questions.[43] The plaintiff, Davis-Lynch, then moved for summary judgment.[44] After Moreno attempted to dispute material facts in the motion, the district court accepted plaintiff's motion to strike because of the prior assertion of the Fifth Amendment.[45] Another defendant, Ronald Pucek, also had his assertions struck after he attempted to withdraw his assertion of his privilege in response to summary judgment.[46]

While it was an issue of first impression for their court, the Fifth Circuit noted that the way in which most other circuits address the withdrawal of the Fifth Amendment was "dependent on the particular facts and circumstances of each case."[47] Given the Supreme Court's caution to not impose sanctions that would make the invocation of the Fifth Amendment "costly"—as well as the desire to give parties "a reasonable opportunity to litigate a civil case fully"—the Fifth Circuit advised that a trial court should seek "to permit 'as much testimony as possible'" in a civil case.[48] However, the court also warned that "withdrawal is not permitted if the litigant is trying to 'abuse, manipulate or gain an unfair strategic advantage over opposing parties.'"[49] Therefore, "[t]he timing and circumstances under

(citing Davis-Lynch, Inc. v. Moreno, 667 F.3d 539, 546 (5th Cir. 2012)); *see also Evans*, 513 F.3d at 742 ("We review a district court's decision to allow withdrawal of a privilege for an abuse of discretion.").

41. *Moreno*, 667 F.3d at 548.
42. *See id.* at 543–44.
43. *See id.* at 544.
44. *See id.* at 545–46.
45. *See id.*
46. *See id.* at 546.
47. *Id.*
48. *Id.* at 547 (citations omitted).
49. *Id.* (citation omitted).

which a litigant withdraws the privilege are relevant factors in considering whether a litigant is attempting to abuse or gain some unfair advantage."[50]

The Fifth Circuit created factors to help determine if the withdrawal resulted in an unfair advantage. Such factors include: whether the withdrawal at a "late stage places the opposing party at a significant disadvantage because of increased costs, delays, and the need for a new investigation"; if the "litigant who provides previously withheld information at summary judgment places the opposing party at a significant disadvantage in responding to such information"; if the use of the privilege was "in a tactical, abusive manner"; and whether the "opposing party would not experience undue prejudice as a result" of the Fifth Amendment privilege.[51]

In applying these factors to the case, the Fifth Circuit then looked at the two litigants who withdrew their Fifth Amendment privilege. The Fifth Circuit found that Moreno, who withdrew prior to summary judgment, should not have had his responses struck due to his prior invocation of the Fifth Amendment.[52] In reversing the district court, the Fifth Circuit found two dispositive factors that required the lower court to receive Moreno's testimony into evidence: "(1) Davis–Lynch had several weeks to depose Moreno before the discovery deadline and (2) doing so would allow as much testimony as possible to be presented in the instant litigation."[53] Despite noting the possibility of additional costs imposed on the plaintiff, the Fifth Circuit reasoned that the two factors in Moreno's situation ensured the assertion of the privilege would not be "unnecessarily burdensome" on the defendant.[54]

Conversely, the Fifth Circuit upheld the decision to strike Pucek's assertion.[55] The court noted that "Pucek invoked his Fifth Amendment privilege throughout the discovery process, only to withdraw his assertion in the face of a motion for summary judgment."[56] Further, "Pucek withheld

50. *Id.*
51. *Id.* at 548.
52. *See id.* at 549.
53. *See id.*
54. *See id.*
55. *See id.* ("[U]nlike Moreno's withdrawal, however, Puck's withdrawal of his Fifth Amendment privilege in response to Davis-Lynch's motion for summary judgment appears more likely to be an attempt to abuse the system or gain an unfair advantage.").
56. *Id.*

information that Davis–Lynch could have used in its investigation, only to provide information at the last moment" and left the plaintiffs with "less than a week to depose [him] before the close of the discovery period," unlike the months Moreno left plaintiffs.[57] Considering the disadvantage Pucek left the plaintiffs in, the court found that the "district court did not abuse its discretion in denying Pucek's withdrawal" of the privilege.[58]

ii. The Third Circuit: *SEC v. Graystone Nash, Inc.*

The Fifth Circuit's approach places significant emphasis on timing and the disadvantage that a Fifth Amendment withdrawal places on litigants. In contrast, the Third Circuit implemented a more expansive balancing analysis on the prejudice placed on the plaintiff from a withdrawal of the privilege. *SEC v. Graystone Nash, Inc.* is an example of this analysis. There, two defendants, Richard Adams and Thomas Ackerly, were alleged to have engaged in a "massive securities fraud operation" along with other corporate officers of Graystone Nash.[59] In its civil suit, the SEC sought disgorgement and an injunction to prevent future violations of securities law.[60] Both Adams and Ackerly were deposed, without any formal legal representation,[61] and proceeded to invoke their Fifth Amendment privilege.[62] The SEC then filed a motion for summary judgment along with a motion to order preclusion against Adams and Ackerly from supplying information.[63] The district court granted the motions, noting that allowing the defendants to now supply answers to depositions[64] "after plaintiff has deposed many witnesses and submitted its arguments and proofs, would load the scales unjustly."[65]

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57. *See id.*
58. *Id.*
59. SEC v. Graystone Nash, Inc., 25 F.3d 187, 189 (3d Cir. 1994).
60. *See id.* at 189–90.
61. *See id.* at 189. While not legally represented, the defendants indicated they "were advised by three former prosecutors that you simply don't give testimony." *Id.*
62. *See id.*
63. *See id.*
64. This was treated, for the purposes of the suit, as the moment the litigants attempted to withdraw their invocation of the Fifth Amendment privilege. *See id.* at 189. However, the Third Circuit noted that the record left "serious questions about whether defendants waived their privilege" before the summary judgment motions because Adams and Ackerly had previously filed affidavits that were "addressed to some of the same matters that they had refused to discuss at their depositions." *Id.* at 193.
65. *Id.* at 190.

The Third Circuit reversed the judgment of the district court.[66] The court began its analysis by explaining that, since the defendants never had proper legal counsel, they failed to be afforded "the benefit of such carefully considered advice" on the costs they could face by invoking their Fifth Amendment privilege.[67] Beyond the defendants' inability to grasp the consequences of invoking the privilege, there was also a "lack of support in the record for the SEC's contention that it suffered prejudice because of the defendants' belated attempts to present evidence on their own behalf."[68] The court observed this was "the first indication given to defendants that they might be unable to present any kind of defense" and that, in order to properly assert "that defendants had 'sandbagged' the agency at the eleventh hour," the SEC should have sought the preclusion order "before the motion for summary judgment was filed."[69] According to the court, the "SEC possessed substantial evidence" demonstrating this was a "far cry from a case where invocation of the privilege prevented the opposing party from obtaining the evidence it needed to prevail in the litigation."[70] In all, the Third Circuit determined that nothing within the record indicated the SEC could not have "present[ed] a strong case," even if the defendants were "permitted to testify if they chose."[71]

By weighing these factors, the Third Circuit advised lower courts that "special consideration must be given to the plight of the party asserting the Fifth Amendment," especially when "the government is a party in a civil case and also controls the decision as to whether criminal proceedings will be initiated."[72] However, the court cautioned that its order "should not be understood as holding that . . . no remedial measures should be imposed."[73] Rather, any remedial sanctions imposed should be ones that "are necessary to prevent a party from being unduly prejudiced."[74] While the "imposition of an appropriate remedy is within the discretion of the trial court," that

66. *Id.* at 194.
67. *See id.* at 192–93.
68. *Id.* at 193.
69. *Id.*
70. *Id.*
71. *Id.* The district court's preclusion order went beyond just prohibiting testifying, but also "from presenting any evidence from third parties." *Id.* This was characterized by the Third Circuit as a "severe remedy" to the prejudice from late withdrawal and, as such "was even less necessary." *Id.*
72. *Id.* at 193–94.
73. *Id.* at 194.
74. *Id.*

court must include a "proper evaluation" by balancing these "significant factors" to justify the sanction.[75]

iii. The Seventh Circuit: the *Harris* and *Evans* Cases

The Fifth and Third Circuits considered the prejudice of parties during or prior to summary judgment. The Seventh Circuit's precedent, on the other hand, deals with withdrawing the privilege following summary judgment and leading up to trial.

The Seventh Circuit first addressed the withdrawal of the privilege in *Harris v. City of Chicago*.[76] There, a police officer named Alex Ramos faced a suit under 42 U.S.C. § 1983 for malicious prosecution after he allegedly planted evidence at the plaintiff's residence.[77] Ramos was also subject to an active criminal probe, causing the district court to stay discovery for the civil suit until the resolution of the criminal suit.[78] However, even after Ramos pled guilty and the discovery stay was lifted, he continued to invoke his Fifth Amendment privilege.[79] Even in the face of an order compelling him to provide testimony, Ramos still refused under the guise of his Fifth Amendment privilege.[80] Nevertheless, Ramos proceeded to waive the privilege at trial and began to answer all questions posed to him "including questions which he had previously refused to answer."[81] The district court barred the introduction of impeachment evidence or cross-examination of Ramos regarding his prior silence.[82] Following a jury verdict for Ramos, the district court denied a motion for a new trial despite the argument that the court "abused its discretion by precluding evidence of Ramos's invocation of the Fifth Amendment."[83]

The Seventh Circuit reversed the district court.[84] The court's principal analysis looked to "the timing of Ramos's abandonment of the Fifth

75. *Id.*
76. Harris v. City of Chicago, 266 F.3d 750, 751–52 (7th Cir. 2001).
77. *See id.* at 752.
78. *See id.*
79. *See id.*
80. *See id.* at 752–53.
81. *See id.* at 753.
82. *See id.*
83. *See id.*
84. *See id.* at 756.

Amendment privilege."[85] The court determined that if Ramos had failed to timely withdraw his privilege, and the district court simultaneously refused to allow impeachment of his new testimony by his previous invocation, then the "effect of such a ruling [by the district court] would be tantamount to allowing Ramos to avoid discovery altogether."[86] Finding that "Ramos did not abandon his Fifth Amendment privilege . . . until just prior to trial," the Seventh Circuit determined that the order "preclud[ing] [plaintiff] from presenting to the jury evidence of Ramos's prior silence was an abuse of discretion."[87]

Under the Seventh Circuit's precedent, revoking one's Fifth Amendment privilege after trial begins requires sanction. However, considering the next case addressed by the Seventh Circuit, that appears to be the only situation where sanctions are warranted. In *Evans v. City of Chicago*, plaintiff Michael Evans accused Chicago police officers of conspiring to falsely accuse and convict him of the abduction, rape, and murder of a nine-year-old victim in 1977.[88] Evans was convicted, but exonerated twenty-seven years later based on DNA evidence and subsequently pardoned for the underlying crime.[89] He brought suit under 42 U.S.C. § 1983 and, after surviving a defense of qualified immunity,[90] the case proceeded to discovery.[91]

During discovery, a group of eight officer-defendants, known as the "5A officers," asserted their Fifth Amendment privilege.[92] With the exception of one of the 5A officers, the group moved to reopen discovery and sought to be deposed twelve days before trial.[93] Initially, the district

85. *Id.* at 753. Ramos "selectively invoked his Fifth Amendment privilege," which principally led to his refusal "to answer any questions about the time frame of his criminal activities." *Id.* at 752. This was the information that the plaintiff sought to impeach Ramos with at trial. *See id.* at 753.

86. *See id.* at 754.

87. *Id.* at 755.

88. *See* Evans v. City of Chicago, 513 F.3d 735, 738 (7th Cir. 2008).

89. *See id.*

90. *See id.* (acknowledging that the same court upheld a denial of a qualified immunity defense by the officers in Evans v. Katalinic, 445 F.3d 953 (7th Cir. 2006)).

91. *See id.* at 738.

92. The names of these defendants were "Officers Dignan, DiGiacomo, Hill, Katalinic, McKenna, Leracz, Ryan, and Swick (the '5A officers')" which, the court acknowledged all "took the same position: all declined to testify, asserting their rights under the Fifth Amendment." *Id.* at 739.

93. *See id.* Defendant Katalinic attempted to rescind his Fifth Amendment privilege on November 22, 2005, approximately 2 months prior to the scheduled trial and "after fact discovery had closed but before the close of all discovery." *See id.*

court determined that the 5A officers "made a calculated determination" to invoke their Fifth Amendment privilege and, given the late stage of litigation, they would be "bound by their determination."[94] The district court did, however, reserve making a final ruling on the issue and allowed briefing.[95]

Following briefing, the district court found that the bulk of the officers had "not acted timely" and that "there [was] prejudice."[96] Nevertheless, the district court later ruled that the 5A officers could still testify at trial provided they "answered all written discovery and appeared for a deposition within 10 days."[97] Despite failing to adequately meet this deadline,[98] the district court—just before opening statements—denied a motion by Evans to sanction the 5A officers to being "defaulted or bound to their prior privilege assertions."[99] Conversely, it granted the motion by the 5A officers that would "bar any mention of their prior Fifth Amendment assertions."[100] The jury returned a verdict in favor of the officers—which the judge later corrected to be in favor of the City of Chicago as well—and Evans appealed.[101]

While the Seventh Circuit considered several issues on appeal,[102] the

94. *Id.* (internal quotations omitted).

95. *See id.*

96. Initially, the district court determined that only Officer Katalinic could testify because he made a "made a more timely request" and therefore could defeat the need for an adverse inference "if he answered all written discovery and appeared for a deposition within 10 days." *Id.* (internal quotations omitted).

97. *Id.*

98. The dissenting opinion criticized the majority opinion's failure to note that the 5A officers failed to even comply with the remedy that the district court ordered. *Id.* at 750 (Williams, J., dissenting) ("If by 'appear for a deposition within 10 days,' the judge meant that the officers could show up for the depositions and then leave without being deposed, then the officers did indeed meet the condition. But as I read the record, the defendants pushed the depositions to the final days before trial. Shortly after the district court ordered the redepositions, Evans moved to appoint an additional lawyer, Flint Taylor, for help completing this monumental task in such a short amount of time. The defendants objected to Taylor's participation, saying that he would 'harass and intimidate' the officers, and they walked out of their redepositions . . . . It's hard to rule out gamesmanship on either side here, but recall that the defendants created this last-minute situation by deciding to testify so late in the process. If the burden was on any party to complete the depositions quickly, it was on them.").

99. *See id.* at 739–40.

100. *Id.* at 740.

101. *See id.*

102. The appeal also included questions—that are not at issue for this note's purposes—surrounding the way the court treated an officer's choice to be held to his Fifth Amendment assertion and "the rejection of certain proposed instructions and verdict questions regarding the City's liability." *Id.*

"main event" was whether the district court "erred in allowing the 5A officers to withdraw their privilege and testify," while also "excluding evidence of their prior silence if they were deposed prior to trial."[103] A divided panel for the Seventh Circuit upheld the ruling of the district court.[104] The Seventh Circuit noted that—in the district court's denial of the requested sanctions—the lower court properly made "*Harris* findings" that (1) the 5A officers failed to withdraw their privilege in a timely manner and (2) prejudice existed from the late request.[105] Since the district court made such findings, the Seventh Circuit determined that the district court was "exercising [its] discretion" and that the court sufficiently "attempt[ed] to cure the prejudice" by having the 5A officers deposed shortly before trial.[106] Specifically, the Seventh Circuit relied on its extremely deferential standard that the panel will "not reverse if we merely conclude that we would have reached a different decision if asked to consider the issue in the first instance."[107]

Using this deferential standard, the court interpreted its ruling in *Harris* "to imply that, if additional discovery alleviates the prejudice from an untimely request to testify, the district court *may* exclude evidence of prior silence."[108] In doing so, the court flipped the logic of *Harris* on its head, determining that such an exclusion may be warranted if the district court finds that "the effect of such a ruling would [no longer] be tantamount to allowing [a party] to avoid discovery altogether."[109] Distinct from *Harris*, the Seventh Circuit noted that the district court offered a "remedy that was not available to the district court in *Harris*."[110] In the end, the Seventh Circuit acknowledged that while it "might well have reached a different decision" on whether such remedies sufficiently cured the prejudice "if asked to consider the matter in the first instance," the court concluded that "substituting our judgment for that of the trial judge . . . is something we are not permitted to do."[111]

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103. *Id.* at 742.
104. *See id.* at 747.
105. *See id.* at 744.
106. *See id.* at 745.
107. *See id.* (citing Hall v. Norfolk S. Ry. Co., 469 F.3d 590, 594 (7th Cir. 2006)).
108. *Evans*, 513 F.3d at 745 (emphasis in original).
109. *See id.* (citing Harris v. City of Chicago, 266 F.3d 750, 754 (7th Cir. 2001)).
110. *See id.* at 746.
111. *See id.*

Judge Williams authored a stern dissent. She began by noting that late revocations of the Fifth Amendment privilege "when used tactically . . . can wreak havoc on an opposing party and create a fundamentally unfair trial."[112] Looking to the Third Circuit's treatment in *SEC v. Graystone Nash*, Judge Williams articulated a rule that closely mirrors that court's balancing approach:

> When a court is faced with a party who waives the Fifth Amendment privilege close to trial, it must manage the situation through "means which strike[ ] a fair balance and accommodate[ ] both parties"—that is, "both a litigant's valid Fifth Amendment interests and the opposing parties' needs in having the litigation conducted fairly." . . . If it finds that the system has been gamed for unfair advantage, the court should either prevent the party from waiving the privilege and testifying at trial, or, as a lesser sanction, allow the opposing party to impeach the formerly silent party with its prior silence.[113]

In looking to strike this balance, Judge Williams criticized the Seventh Circuit's new approach as endorsing the proposition that "[s]ome discovery, any discovery—no matter how crammed or last-minute; no matter what tactical advantage it affords the formerly silent party; no matter that it devastates the opposing party's trial preparation—remedies the prejudice caused by a late waiver."[114]

In analyzing the issue of prejudice more closely, Judge Williams believed that the prejudicial effect of the 5A officers' late waiver warranted some sanctions, such as impeachment by their prior silence.[115] Under her analysis, the district court failed to recognize that in a "massive, acrimonious lawsuit" like this one, "deposing seven critical witnesses in the nine days before trial simply cannot go off without a hitch."[116] As such, the "district court should have recognized that the defendants had created an impossible situation and sanctioned them by allowing Evans to impeach

112. *Id.* at 747.
113. *Id.* at 747 (citations omitted).
114. *Id.* at 748.
115. *See id.* at 750.
116. *Id.* at 749–50.

them with their prior silence."[117]

Yet, according to Judge Williams, the timing of the 5A officer depositions was not the only prejudice Evans faced because of the late revocation of privilege.[118] Another prejudicial event occurred when an officer made an admission that Evans had been ruled out as a suspect prior to his prosecution.[119] But because the admission was made just five days before trial, Evans was "unable to conduct any follow-up discovery on this matter."[120] Furthermore, Evans's star witness, who was to provide testimony regarding police abuse practices within the precinct of the 5A officers, was terminally ill and could only testify through a videotaped deposition.[121] However, since the witness was too sick to give a new video deposition, the witness had no opportunity to rebut the testimony of the 5A officers, thereby "leaving the impression that there was nothing in those depositions to rebut."[122]

Thus, for Judge Williams, the "last-minute depositions did not cure this prejudice" as the majority contended.[123] In the end, Judge Williams aptly summarized how Evans' case came to a close: "what happened to Michael Evans was a tragedy: he spent 27 years in prison for a crime for which he has been exonerated and pardoned. He deserved justice in his civil trial, but he did not receive it because the trial was fundamentally unfair."[124]

C. Liability in Police Misconduct Suits[125]

The Seventh Circuit showed in *Evans* that police misconduct plaintiffs face a sharp burden when, after litigation progressed right to the eve of trial, their strategy may be thrown into disarray. In theory, however, such a situation accompanies any parallel litigation. The Department of Justice

117. *Id.*
118. *See id.*
119. *See id.*
120. *See id.*
121. *See id.* at 750.
122. *See id.*
123. *Id.*
124. *Id.* at 753.
125. The scope of this analysis looks at actions brought under federal causes of action, such as 42 U.S.C. § 1983. While state tort or other actions may be available to plaintiffs in a police misconduct suit, these actions are not included as part of this review. Given that the circuit split regards the application of federal rules for withdrawing the privilege, state actions are outside of the scope of this note.

may prolong its criminal investigation up until the eve of a civil trial, leaving a civil plaintiff in a similarly precarious position.[126] However, at least two deviations unique to police misconduct suits create a perverse incentive structure compared to other parallel litigation.

The nature of the parties involved in police misconduct suits is one such deviation from most other parallel litigation. For instance, in antitrust or securities fraud suits, the plaintiff and prosecution of a parallel case are often different entities entirely.[127] And, even when they are the same entity, their interests remain aligned. Prosecutors are motivated to secure a conviction. Plaintiffs are motivated to secure a favorable judgment to remedy a loss. Both are seeking an action against a common defendant. Neither plaintiff nor prosecutor is necessarily affected by the outcome of the other case.

But in police misconduct suits, criminal probes are often spearheaded by the state or the local municipalities employing the police officer.[128] However, those same municipalities are often also on the defense side for the civil litigation.[129] Since the Court's ruling in *Monell v. Department of Social Services of the City of New York*, municipalities have been held liable for actions that are said to be performed as a matter of "official policy" or done "pursuant to governmental 'custom,'" even without formal approval.[130] Such liability has extended to police misconduct suits in which the conduct of the officer violates constitutional rights pursuant to an

126. There is, however, evidence of frequent use of discovery stays to avoid this situation. *See* Kellie Lerner & Elizabeth Friedman, *DOJ Stays Are Often Unfair To Private Antitrust Plaintiffs*, LAW 360 (Mar. 3, 2014, 5:54 PM), https://www.law360.com/articles/514161/doj-stays-are-often-unfair-to-private-antitrust-plaintiffs [https://perma.cc/GT72-6LF6]. While the usage of these stays has been criticized for delaying private litigants their "day in court," *see id.*, discovery stays remain an option to avoid the potential of having the defendant continue to invoke their Fifth Amendment privilege until the eve of civil trial.

127. *But see* SEC v. Graystone Nash, Inc., 25 F.3d 187, 193–94 (3d Cir. 1994) (noting that, in a case involving the SEC, "the government is a party in a civil case and also controls the decision as to whether criminal proceedings will be initiated").

128. *See* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 805–06 (2000) (describing a study indicating the failure of local and state prosecutors to bring police misconduct criminal charges in large cities and pointing out that the federal statute to prosecute police misconduct is "rarely used").

129. *Cf.* Amelia Thomson-Devaux et al., *Police Misconduct Costs Cities Millions Every Year. But That's Where The Accountability Ends*, THE MARSHALL PROJECT (Feb. 22, 2021, 6:00 AM), https://www.themarshallproject.org/2021/02/22/police-misconduct-costs-cities-millions-every-year-but-that-s-where-the-accountability-ends [https://perma.cc/5DCD-3H48] (finding thirty-one major municipalities that have paid out claims for police misconduct suits over the past ten years).

130. Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 690–91 (1978).

express policy or custom and, albeit with greater difficulty, unexpressed policies or customs.[131] Because of this, municipalities are often joined in police misconduct suits with the individual police officers.[132]

This divergence becomes important in the context of the Fifth Amendment. For a valid assertion of the Fifth Amendment privilege, a litigant must have "reasonable cause to apprehend a real danger of incrimination . . . . [N]ot a mere imaginary, remote or speculative possibility of prosecution."[133] The longer a criminal probe or investigation lasts, the longer the danger remains real. In addition, the municipality—unlike other litigants—dictates how long a criminal probe lasts and can also be joined as a defendant in the civil litigation with the officer.[134] This could possibly dampen the desire to hurry along the criminal probe given that, once the probe has concluded, the defendant police officers would no longer have a valid assertion of the Fifth Amendment. Granted, not every municipality will make it all the way to trial if *Monell*'s policy or custom nexus is not met. In those circumstances, the police officer may stand alone in a civil suit.

This leads to the second important deviation between police misconduct and other parallel litigation cases: who ultimately pays. In other parallel litigation, such as an antitrust case, the answer is straightforward. Like other civil defendants, an antitrust defendant who is found liable is the entity saddled with the responsibility of paying all damages.[135] Obviously, should the municipality itself be found liable, it will be required to pay its portion of the damages. And, in theory, the individual officer would be held liable to whatever portion their liability comes to. Thus, at least as assumptions go, a municipality found not liable despite a verdict against a police officer would pay nothing.

131. *See* Clinton J. Elliott, *Police Misconduct: Municipal Liability Under Section 1983*, 74 KY. L.J. 651, 655–56 (1986).

132. *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 523 (1993) (finding that the Court has viewed the joining of municipalities to the misconduct suits of individual officers "ensure[s] that municipalities [do] not escape legal accountability").

133. *See In re* Morganroth, 718 F.2d 161, 167 (6th Cir. 1983) (citations omitted).

134. The investigation of the 5A Officers in *Evans* offers an example of how prosecutors can control the length of their investigations. *See* Evans v. City of Chicago, 513 F.3d 735, 738–40 (7th Cir. 2008).

135. *See generally* Joseph Gregory Sidak, *Rethinking Antitrust Damages*, 33 STAN. L. REV. 329 (1981) (noting the defendant's liability for damages).

But the reality is it may not even matter if the municipality is a part of the suit or not. Empirical data gathered by Professor Joanna Schwartz across a range of jurisdictions found that, of the police departments polled, few officers contributed to damages awarded for their misconduct under § 1983 suits.[136] Professor Schwartz found that, "[b]etween 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just 0.41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just 0.02% of the over $730 million spent by cities, counties, and states in these cases."[137] While not every jurisdiction treats the indemnification issue the same,[138] Professor Schwartz has observed that "[p]olice officers are virtually always indemnified" in cases brought for police misconduct suits.[139]

Therefore—despite not being held liable by name—municipalities are generally on the hook for damages themselves. Thus, unlike the federal government in an antitrust suit, there is a further incentive to delay crucial testimony from being given to the civil plaintiffs. And if—as the defendants did in *Evans*—the prejudice can be "cured" on the eve of trial, then prolonging a criminal probe until that point may prove beneficial for the municipality.

136. *See* Schwartz, *supra* note 10, at 890.

137. *Id.*

138. As Professor Schwartz observes through her research,

> "[i]n some jurisdictions, the indemnification issue is decided during the first weeks of the case; in other jurisdictions, who will satisfy the judgment remains an open question until after a jury's verdict. In some cases, the indemnification issue is hotly contested by the parties; in other cases the issue never arises. Some jurisdictions refuse to indemnify their officers outright but will agree to satisfy the entirety of a settlement so long as the individual officer is dismissed from the case. Other jurisdictions appear to have no qualms about writing a check on an officer's behalf."

Id. at 916–17.

139. *Id.* at 890.

II. ANALYSIS

A. The Problems Faced by the Current Doctrine of Fifth Amendment Withdrawal

As *Evans* illustrates, the outcomes from late withdrawals of the Fifth Amendment can have devastating effects on a civil case. Civil plaintiffs in police misconduct suits face high costs from late privilege withdrawals by defendants. Those costs are magnified by two issues surrounding privilege withdrawal: the assumptions-incentive structures of Fifth Amendment withdrawal and the inconsistent approaches taken by the circuits.

i. Wrong Assumptions and Bad Incentives

As shown above, the incentive structure around the withdrawal of the Fifth Amendment is built on a flawed understanding of the parties to parallel litigation. That flaw rests on an unstated assumption: the plaintiff and prosecution in parallel litigation are not adversaries. The chart in Figure 1 best illustrates this point. In litigation involving antitrust, the interests of the government and a "civilian plaintiff" are the same. Both want to hold the "antitrust violator" accountable. Whether that means criminal sanctions are sought by the government or financial penalties are sought by the civilian plaintiff—both are motivated by a favorable judgment against the defendant. The relevance lies in this: a valid assertion of the Fifth Amendment can only be made if there is a legitimate threat of criminal prosecution. If none exists, then the assertion of the privilege must cease.[140] Theoretically, the longer the criminal probe or prosecution lasts, the longer the assertion of the Fifth Amendment remains valid. But since the government and the civilian plaintiff in antitrust litigation are, at worst, neutral toward each other, the government has no motivation to drag out a criminal probe.

But the calculus changes in police misconduct suits. There, the

140. Indeed, this was the problem faced by defendant Ramos in *Harris*. He was found guilty of the underlying criminal offense and continued to assert a Fifth Amendment privilege. Harris v. City of Chicago, 266 F.3d 750, 752 (7th Cir. 2001). In light of this, the district court issued an order compelling him to answer discovery questions, especially since some of the answers "could not possibly incriminate him." *Id.* at 752–53.

municipality or locality governs the scope of the criminal trial. In light of the *Monell* doctrine, the municipality can also end up as a named defendant in the civil suit.[141] And even if they are not a named defendant, Professor Schwartz's research regarding the rate of indemnification indicates that—while the officer may "lose" the case—it is the city or town that has to pay.[142] Thus, unlike the government and civilian plaintiff in an antitrust suit, the possible criminal prosecutor (the municipality) and the civilian plaintiff are at odds with each other. After all, should the civil plaintiff prevail in their suit, the prosecutor will end up having to pay the damages that the officer is ordered to pay.[143]

Figure 1[144]

	Antitrust Litigation (Government as Civil Plaintiff)	Antitrust Litigation (Civilian as Civil Plaintiff)	Police Misconduct Suit
Criminal Prosecution/Probe	United States v. Antitrust Violator	United States v. Antitrust Violator	Municipality v. Officer
Civil Litigation	Unites States v. Antitrust Violator	Civilian Plaintiff v. Antitrust Violator	Civilian Plaintiff v. Officer and Municipality

141. Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 690–91 (1978).

142. *See* Schwartz, *supra* note 10, at 890.

143. This is not the only instance where bad assumptions produce problems for plaintiffs in police misconduct suits. As a critique of the qualified immunity doctrine, Professor Schwartz explains that the basis of Supreme Court decisions "rests on an unfounded premise—that defendants are financially responsible for settlements and judgments entered against them." Schwartz, *supra* note 10, at 894.

144. The table illustrates the comparison between police misconduct suits and other parallel litigation. In antitrust cases, where the government seeks civil penalties, the same parties are on both sides of the 'v.' of the civil and criminal case. Thus, the plaintiff and prosecutor are always aligned. As such, there is no incentive for the government to prolong a criminal investigation until the eve of trial. Doing so would likely only harm their interests in the civil litigation. The same is the case for when the civil plaintiff is not the government. Although all parties are not the same, the government has no incentive to prolong the criminal trial unnecessarily. At worst, the government is indifferent to the civil plaintiff's action. However, the situation is different for police misconduct suits. There, the municipality is on the prosecution side of the criminal suit, and the defense side of the civil. Therefore, the municipality has the ability, and incentive, to prolong the criminal investigation. This is what makes police misconduct suits unique compared to other parallel litigation.

Thus, the municipality is incentivized to extend a criminal probe for as long as possible. Then, once summary judgment has passed and the defenses of qualified immunity are exhausted, the municipality may simply tell the officer that they are no longer within the scope of the criminal probe, right before trial begins. Thus, no valid assertion of the Fifth Amendment exists. A trial court can "remedy" the late revocation by ordering new depositions and suppressing any mention of prior invocations of the Fifth Amendment. Such a scenario is not difficult to imagine. Indeed, it mirrors the exact situation that the Seventh Circuit faced in *Evans*.[145] Appellate courts can develop tests to weigh the district court's orders against the actual prejudice incurred by litigants. As discussed, the Third and Fifth Circuits have done just that. But when courts—such as the Seventh Circuit in *Evans*—refuse to 'second guess' the decision by district courts, the effect is truly no review at all. By giving the district courts wide latitude to have the final say on whether *their own* remedy was sufficient, the incentive to use late withdrawal as a trial strategy increases. Thus, the Seventh Circuit's approach only increases the likelihood for gamesmanship at the expense of justice.

This is not to suggest that those who prosecute police misconduct suits are corrupted or influenced by the possibility that the municipality itself will be subject to liability. There are certainly many dedicated prosecutors who are governed by the pursuit of justice, no matter the cost. But the incentive structure leaves the justice process, both civil and criminal, vulnerable to pressure. Considering the political division on issues of police,[146] such incentive structures leave the opportunity for gamesmanship that should not be permitted in the justice system.

ii. Inconsistency Between Circuits

Perhaps the most glaring issue is the inconsistent way appellate courts

145. *See generally* Evans v. City of Chicago, 513 F.3d 735, 738–41 (7th Cir. 2008).

146. *See* Sean Sullivan et al., *Democrats pushed hard last year to rein in police. A rise in homicides is prompting a shift.*, WASH. POST, (June 26, 2021, 12:14 PM), https://www.washingtonpost.com/politics/democrats-policing-murder-rate/2021/06/26/e37c38fc-d4fd-11eb-ae54-515e2f63d37d_story.html [https://perma.cc/D7K4-TN6S] (comparing Democratic response to policing following violent police interactions to invest in *changing* police programming, with former House Republican Leader Kevin McCarthy's stance that Republicans will add *more* and "will not defund the police.").

have approached the Fifth Amendment withdrawal doctrine. The samples chosen for this note demonstrate what those inconsistencies look like and the problematic results they produce.

As noted above, the Fifth Circuit employs a multiple-factor-based inquiry that considers whether the late withdrawal of the privilege prejudices the plaintiff.[147] This factor analysis provides a rubric to view the ruling of a district court when it makes a decision on sanctions following a late waiver. Although its factors are not as clear as the Fifth Circuit's, the Third Circuit requires a showing of "support in the record" that a plaintiff "suffered prejudice because of the defendants' belated attempts to present evidence on their own behalf."[148] And while the Third Circuit leaves the issue of remedies largely to the discretion of trial judges, it also requires the lower court to conduct a sufficient weighing of relevant factors to account for the prejudice incurred from the late waiver.[149]

The Seventh Circuit, on the other hand, does not engage in this balancing of a district court's remedy against the prejudice of a late withdrawal. Instead, provided a district court makes "*Harris* findings" on timeliness and prejudice, the Seventh Circuit will largely defer to whatever the "attempt to cure the prejudice" may be, regardless of what the appeals court thinks of the sufficiency of the remedy.[150] In *Evans*, the Seventh Circuit determined that because "*Harris* findings" had been made, they must affirm the district court's remedy.[151]

However, had *Evans* come before the Fifth Circuit, the case would have

147. Those factors include: whether the withdrawal at a "late stage places the opposing party at a significant disadvantage because of increased costs, delays, and the need for a new investigation"; if the "litigant who provides previously withheld information at summary judgment places the opposing party at a significant disadvantage in responding to such information"; if the use of the privilege was "not using the privilege in a tactical, abusive manner"; and whether the "opposing party would not experience undue prejudice as a result" of the Fifth Amendment privilege. Davis-Lynch, Inc. v. Moreno, 667 F.3d 539, 547–548 (5th Cir. 2012).

148. SEC v. Graystone Nash, Inc., 25 F.3d 187, 193 (3d Cir. 1994).

149. *See id.* at 194 ("The imposition of an appropriate remedy is within the discretion of the trial court. When significant factors are not weighed in making that determination, however, we must remand so that a proper evaluation may be reached.").

150. *See* Evans v. City of Chicago, 513 F.3d 735, 745–46 (7th Cir. 2008) ("We have some concerns that ordering redepositions 5 weeks before the scheduled start of the trial was not enough to cure the prejudice in this case. Indeed, the primary remedy that Evans now seeks is a new trial to provide him with more time for fact and expert discovery . . . . We might well have reached a different decision if asked to consider the matter in the first instance, but [] substituting our judgment for that of the trial judge . . . is something we are not permitted to do.").

151. *See id.* at 747.

likely come out the other way. For instance, one of the factors in *Davis-Lynch* is whether the withdrawal "places the [plaintiff] at a significant disadvantage because of increased costs, delays, and the need for a new investigation."[152] Clearly, Evans was placed at a significant disadvantage by the late waiver of the 5A officers. The motion came shortly before trial, requiring his attorneys to reformulate their trial strategy. The move required new depositions, revealed new information not previously known, made it impossible for his star witness to rebut, and even forced Evans to bring on additional counsel "for help completing this monumental task [of deposing the seven 5A officers] in such a short amount of time."[153] The late withdrawals severely prejudiced Evans's case. Considering the way the Fifth Circuit approached withdrawal, it is likely that the case would have come out differently if it were before that court. This is not to say that the Fifth Circuit would certainly have sided with Evans or his desired remedy. But unlike the Seventh Circuit's approach, the Fifth Circuit analysis would have almost certainly provided more than stating "some concern" over the remedy, yet ultimately allowing the trial court extensive deference. [154]

Without consistency across the circuits, litigants can receive different outcomes based on the location of their injury. A plaintiff filing in a district court within the Seventh Circuit may be faced with a far more deferential review to the discretionary judgment of the trial court if the case is appealed. Meanwhile, a litigant in the Fifth Circuit will receive a decision on a late waiver sanction under the *Davis-Lynch* factors for prejudicial effect. But in the interest of fairness, a litigant should get at least some semblance of similarity in the adjudication of sensitive issues such as Fifth Amendment withdrawal. The opportunity to get a fair trial should not depend on where one's civil rights were violated.

Naturally, the ability for the circuits to generally develop rules without rigid parameters set by the Supreme Court enables growth and exploration in the legal system. But when, as here, the doctrine produces extreme disparities,[155] the desire for exploration must give way to firm guidance.

152. *Davis-Lynch*, 667 F.3d at 548.
153. *Evans*, 513 F.3d at 749–50 (Williams, J., dissenting).
154. *See id.* at 745.
155. *Compare Davis-Lynch*, 667 F.3d at 549 (denying defendant's "11th hour withdrawal of his Fifth Amendment privilege" due to a late waiver just before summary judgment), *with Evans*, 513 F.3d at 747 (upholding a rejection of sanctions when a late waiver happened post-summary judgment and just prior to trial).

Given the divergence of the circuits, such guidance is now warranted.

III. SOLUTIONS

The problems caused the Fifth Amendment withdrawal's nature are not without the hope of attainable solutions. While this article does not envision the following to be an exhaustive list of such remedies, it offers some points for courts and policymakers to explore solutions.

First, appellate courts should create harmony across the circuits in their approach to addressing late Fifth Amendment withdrawal. Notably, despite the fact that early cases such as *Graystone Nash* already addressed the issue, the majority opinion of the Seventh Circuit failed to examine it in deciding *Evans*.[156] Instead, the court relied principally on its decision in *Harris* to conclude that a district court judge should receive wide latitude in determining what an appropriate remedy is to cure prejudice resulting from a late waiver of the privilege.[157] While it may not represent the best approach to dealing with the situation, the choice by the Fifth Circuit to create factors in analyzing a district court's decision enables the court to make better assessments regarding the equity of a district court's decision. By providing a set of standards for a reviewing court to consider the impact of possible prejudice, courts can properly measure if the remedy offered by a district court is sufficient. While those guiding factors may differ from what the Fifth Circuit has developed, having some set of standards can give at least some consistency for litigants when a party withdraws their Fifth Amendment privilege. At a minimum, such an approach is more transparent than an ad hoc method taken by district courts.

Second, courts should at least recognize that the assumptions in parallel litigation (e.g., anti-trust litigation) do not exist in police misconduct cases. Unlike other parallel litigation, the prosecutor or criminal investigator of a police misconduct case is also invested in the outcome of the civil case.[158] Should the civil plaintiff prevail, the criminal investigating body will be on

156. Nowhere in the opinion does the majority cite to *Graystone Nash*. *See generally Evans*, 513 F.3d at 735–47. *But see id.* at 747 (Williams, J., dissenting) (citing SEC v. Graystone Nash, Inc., 25 F.3d 187, 191 (3d Cir. 1994)).

157. *See id.* at 745 ("[W]e will not reverse if we merely conclude that we would have reached a different decision if asked to consider the issue in the first instance.") (citation omitted) (internal quotations omitted).

158. *See supra* Figure 1 and accompanying footnote.

the hook for the damages.[159] Thus, there exists an incentive to prolong an investigation so that the officer may essentially avoid discovery. This is not to say that one will necessarily engage in such conduct. But, courts must be mindful of such incentive structures when determining whether or not a particular litigant gamed their invocation of the Fifth Amendment and subsequent withdrawal.

Finally, and perhaps the best solution, is for Congress or the Supreme Court to promulgate rules that speak directly to Fifth Amendment withdrawal. The Supreme Court, via the Rules Enabling Act, has the authority to promulgate rules of civil procedure with the assent of Congress.[160] The Court should create more concrete rules regarding the withdrawal of the Fifth Amendment privilege. While the Court could similarly adopt a rule within a case, the Federal Rules of Civil Procedure offer greater flexibility in altering the rules should they prove unworkable or insufficient. One such rule could include a process for when silence may be introduced to impeach a litigant for their later withdrawal. For instance, the Court could craft a rule that—should a litigant fail to revoke their Fifth Amendment privilege before discovery closes—a court should presumably admit evidence of prior silence. Of course, any admission should still be subjected to the regular balancing analysis, such as in Federal Rule of Evidence 403.[161] But providing some default rule would give better guidance to the district courts.

Similarly, Congress can provide a clearer framework for how civil litigants can rescind their invocation of the Fifth Amendment. Since police misconduct suits are typically brought under the federal statute of 42 U.S.C. § 1983,[162] Congress could place restrictions on withdrawing the Fifth Amendment privilege when raising a defense under that statute. For instance, Congress could create higher burdens on those who seek to withdraw the privilege *after* summary judgment. In a similar vein, Congress could create stronger presumptions or admissibility rules for civil cases. Doing so would ensure district courts are acting uniformly in any circuit. By providing clear statutory text, Congress can make certain that every

159. *See supra* Part II.A.i.

160. *See* Rules Enabling Act, 28 U.S.C. § 2072 (a) (granting Supreme Court ability to prescribe rules related to evidence in federal district court cases).

161. *See* FED. R. EVID. 403.

162. *See* Schwartz, *supra* note 10, at 892 (noting § 1983 litigation is partly designed to be a deterrent to police misconduct).

litigant understands how their case will proceed. That is, the case will proceed on the merits of a claim—and not through the shadow of surprise gamesmanship. Granted, any limitations created by Congress cannot attack the fundamental right to the Fifth Amendment. But, by erecting such rules and acknowledging the incentive structures within police misconduct suits, the Fifth Amendment will be less likely to be used as a sword in those cases.

CONCLUSION

The Fifth Amendment holds eminent value to the American public. The right to remain silent is embedded as a bedrock value in our criminal justice system. Indeed, these are the first words recited by police officers when issuing a *Miranda* warning.[163] In criminal law, the Fifth Amendment represents a principle of justice and fairness.[164]

But in civil litigation, the Fifth Amendment's value has less to do with fairness. Instead, as the Supreme Court notes, it "derogates rather than improves the chances for accurate decisions."[165] If litigants can use the Fifth Amendment as a sword, rather than just a shield against criminal prosecution, then the chances of getting accurate decisions—or even fair ones—slip even further away. The doctrine of withdrawal needs a consistent and balanced approach to mitigate any incentive for abuse.

This note does not intend to portray the task of remedying the situation as easy. The proposed solutions are options for further exploration, but they are by no means guaranteed to provide the consistency that litigants deserve. However, at least some attempt to produce solutions—especially in police misconduct suits—should be made. Litigants to police misconduct suits face tough barriers in their attempts to hold officers and departments accountable. Leaving open an avenue for abuse would result in even fewer opportunities to reach the just and right decision in such cases.

While this note does explore the differences and problems of the current

163. *See* Miranda v. Ariz., 384 U.S. 436, 479 (1966) ("He must be warned prior to any questioning that *he has the right to remain silent,* that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.") (emphasis added).

164. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (elucidating the values inherent in the Fifth Amendment, including "our sense of fair play. . . [and] our respect for . . . the right of each individual 'to a private enclave where he may lead a private life'") (citations omitted).

165. Baxter v. Palmigiano, 425 U.S. 308, 319 (1976).

state of Fifth Amendment withdrawal doctrine within three circuits, it also faces at least three limitations that may be better explored through future research. One notable limitation is that it does not account for the number of times such issues have been raised within district courts since *Baxter*. Examining the treatment district courts can further aid the Supreme Court's or Congress's attempts to fashion rules to prevent abuse by litigants in the future.

Second, this note does not explore how the implications of Fifth Amendment withdrawal affect the perception of the justice process by the public or a litigant in a police misconduct suit. Notions of procedural justice have been explored in other areas dealing with the litigation process in federal courts.[166] Procedural justice concerns may similarly exist in this area. Considering the low rate of police misconduct criminal proceedings that result in a conviction of the officer,[167]—let alone those that are never charged in the first place—[168] civil litigation may be the only hope for achieving a sense of justice after mistreatment by the police. If courts permit yet another barrier by allowing abuse of the Fifth Amendment privilege, litigants may become more disillusioned with the justice system. Further exploration of this issue could help courts or policymakers understand the implications of allowing this incentive structure to persist.

Finally, this note is limited in scope to the treatment by federal courts and the federal constitution. It does not explore how state supreme courts or legislatures have addressed the concern of privileges against self-incrimination within civil litigation. A study of those courts and systems may clarify more points of comparison and garner more potential solutions to the problem faced by civil litigants.

The purpose of the Fifth Amendment is to be a shield against

166. *See generally* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127 (2011) (providing background information on the impact procedural justice has on litigants).

167. As observed by one source, the general conviction rate—which the survey considers to be the number of charges for defendants— of the population is approximately 68% in 2009, compared to 33% conviction rate for those charged with crimes for their misconduct. Reuben Fischer-Baum, *Allegations Of Police Misconduct Rarely Result In Charges*, FIVETHIRTYEIGHT, (Nov. 25, 2014, 9:45 AM), https://fivethirtyeight.com/features/allegations-of-police-misconduct-rarely-result-in-charges/ [https://perma.cc/2PPD-ULHJ] (citing data from the Bureau of Justice Statistics, National Police Misconduct Reporting Project).

168. *See id.* ("Of the more than 8,300 misconduct accusations (involving almost 11,000 officers) in Packman's database from April 2009 through the end of 2010, 3,238 resulted in legal action.").

incrimination.[169] In most cases, it works just that way. And when litigants have attempted to use it as a sword in civil litigation, the adverse inference has generally done a good job to ensure the abuse is limited. But given the differing approaches, coupled with the incentive structures around police misconduct suits, the invocation and later withdrawal of the Fifth Amendment remains ripe for abuse. To allow litigants to wait until the "eve of trial" to rescind the privilege can "wreak havoc" on the ability to gain justice.[170] A fair system cannot allow such havoc. Rather, it must enable justice to prevail on the merits—not have outcomes determined by gamesmanship. With the right decisions by courts or Congress, such a fair system of justice can be achieved.

169. *See* United States v. Rylander, 460 U.S. 752, 758 (1983).
170. Evans v. City of Chicago, 513 F.3d 735, 747 (7th Cir. 2008) (Williams, J., dissenting).