

BOOK REVIEW: JAMES DUANE, *YOU HAVE THE RIGHT TO REMAIN INNOCENT: WHAT POLICE OFFICERS TELL THEIR CHILDREN ABOUT THE FIFTH AMENDMENT*

*Cecily J. Mullins**

James Duane does not trust the police. At least he does not trust the criminal justice system. Duane is a graduate of Harvard Law School and a professor at Regent Law School. Duane's career as a criminal defense attorney and his experiences in that arena have clearly shaped his outlook on the American criminal justice system. Duane is a national speaker who lectures on the Fifth Amendment and its practical application and function in modern society. And James Duane firmly insists: don't talk to the police. Ever.

Duane's most recent book, *You Have the Right to Remain Innocent*,¹ is an extension of his lecture titled "Don't Talk to the Police"² and the majority of the work is dedicated to presenting empirical evidence to support his basic position—never speak to the police. Duane gives lectures at universities around the country and always asks students what their parents have told them about talking to the police.³ He has never had a single child of a police officer or prosecutor tell him anything other than "never agree to talk to the police."⁴ Duane skillfully exposes the stark contrast between the message that police officers and prosecutors send to the public regarding speaking with the police and the message they tell their own children.

At the beginning of his book, Duane strives to set the foundation for his position on reasoned and non-political grounds. He states that he is not anti-police, and he is advocating for no specific political agenda. He states:

* University of Akron School of Law, J.D. expected 2018.

1. JAMES DUANE, *YOU HAVE THE RIGHT TO REMAIN INNOCENT* (Little A 2016).

2. James Duane, *Don't Talk to the Police*, YOUTUBE, https://www.youtube.com/watch?v=CkZf6_jK3Zs (last visited July 1, 2017).

3. DUANE, *supra* note 1, at 3.

4. *Id.*

[L]iberal or conservative . . . [n]obody of sound mind can dispute that there is something fundamentally wrong, and intrinsically corrupt, about a legal system that encourages police officers and prosecutors to do everything in their power to persuade you and your children (no matter how young or old) to “do the right thing” and talk—when they tell their own children the exact opposite.⁵

Much of Duane’s message echoes this central theme: the public should know what police officers’ children all know, that one should never speak to the police.

Duane notes only one single exception to his rule against speaking to the police. He encourages people to always willingly tell the police who they are and what they are doing right now, where they currently are.⁶ He explains that a police officer needs this much information to reasonably serve and protect, so citizens should cooperate to this level. However, Duane urges that speaking to the police about anything other than the present is dangerous.

While Duane does not advocate in this book for lawlessness or vilifying the police force, he does emphatically stress the dangers of speaking to the police under any circumstances, regardless of whether or not you have something to hide.⁷ Duane points to the inherent risks involved in speaking to the police. He discusses the assumption that only the guilty need to invoke the Fifth Amendment and cleanly disposes of it with multiple case reviews of innocent men who were charged, tried, and convicted of crimes of which they were innocent of committing and later exonerated.⁸ He deals with the issues of false confessions as well as “incriminating” statements that lead to convictions.⁹ He demonstrates that innocent comments may be taken out of context, misquoted, misremembered, or simply misleadingly portrayed to juries.¹⁰ Duane explains clearly, and in lay terms, the concept of confirmation bias, a common phenomenon identified by psychologists where a person finds it very difficult to change their mind after they have come to a conclusion.¹¹ Duane explains how this bias can dramatically affect the direction of a police investigation as well as a police officer’s recollection of interrogations and what exactly it was that the suspect

5. *Id.* at 4.

6. *Id.* at 6.

7. *Id.* at 29.

8. *Id.*

9. *Id.* at 44, 64.

10. *Id.* at 12.

11. *Id.* at 10.

said.¹² Duane focuses on the American criminal justice system as a whole and on how all of the moving parts of that system—the police, prosecutors, judges and appellate courts—work together to encourage the police to directly manipulate, and even lie to, suspects through interrogation techniques that have been shown to produce a significant number of false confessions.¹³ Duane is, however, far more offended by the courts’ indulgence in and encouragement of this practice of deception than he is of police officers’ utilization of it.¹⁴

One of the most eye-opening and startling aspects of Duane’s argument is his focus on the very real likelihood that all Americans have unwittingly committed numerous felonies.¹⁵ He cites many criminal laws, passed by Congress, and hidden throughout various volumes of the extensive United States Code.¹⁶ Duane discusses this “overcriminalization” in American society and the quotes a study that found that Congress was passing, on average, a new criminal law once a week. He notes that while in the past it was difficult for a criminal to claim that they were unaware of the criminal nature of his act, now that claim is entirely reasonable.¹⁷ Thanks to the extensive number of laws being passed by Congress and the states at an alarming pace, even the Congressional Research Service “is no longer able to keep count of the exact number of federal crimes.”¹⁸

In addition to the multitude of criminal acts now prohibited by Congress and the states, Duane also points to another significant issue. He states that Congress now drafts most criminal statutes so broadly that they can be applied to utterly absurd situations.¹⁹ He gives multiple theoretical and actual scenarios where, given how broadly a law has been written, it could be, or has been, applied in a circumstance so utterly ridiculous that one finds oneself sitting in stunned silence, debating how many felonies one must have accidentally committed in the past. For example, Duane points out that it is a felony, punishable by up to ten years imprisonment and a one million dollar fine, to “send a postcard to your grandmother in a nursing home, trying to make her feel

12. *Id.*

13. *Id.* at 28.

14. *Id.* at 26.

15. *Id.* at 22.

16. *Id.* at 15.

17. *Id.* at 13.

18. *Id.*

19. *Id.* at 16-19.

better by lying about how nice the weather has been in Florida, or how low the gas prices have been.”²⁰

Duane also spends some time addressing the crime of lying to police; a crime that one only subjects oneself to when one, in fact, talks to the police.²¹ Under Title 18 of the United States Code, section 1001, prosecutors can charge a person with a federal felony carrying up to a five-year prison sentence for saying any untrue statement to the police, whether or not they are lying about the commission of a crime.²² According to Duane, “even though our legal system permits and encourages the police to lie to you about almost everything while they are talking to you, it is a federal offense—indeed it is a felony—for you to make a single statement to the police that you know to be false.”²³

Duane moves seamlessly from his argument against talking to police into his concern over the current state of the Fifth Amendment.²⁴ This section of his book is where the lawyers’ ears prick up. First, a reader believes they have the answer: plead the Fifth. But Duane then analyzes the dramatic weakening of the Fifth Amendment through recent Supreme Court decisions as well as the lower courts’ holdings.²⁵ He bemoans *Salinas v. Texas*,²⁶ a 2013 case where the United States Supreme Court held for the first time that the silence of a criminal suspect may be used as evidence in trial to help persuade the jury that the suspect is guilty.²⁷ He demonstrates through multiple cases that the courts are operating under the faulty assumption that only the guilty have a reason to remain silent, and that silence is actually a form of confession of guilt.²⁸ Duane goes a step further. He claims that one cannot even assert the Fifth Amendment’s protections safely anymore.²⁹ He tells readers that “the Department of Justice has now served official notice that . . . courts should allow a prosecutor to argue under any circumstances that your willingness to assert the Fifth Amendment privilege can and should be used against you as evidence of your guilt.”³⁰

20. *Id.* at 19-20.

21. *Id.* at 51.

22. *Id.* at 52.

23. *Id.* at 51-52.

24. *Id.* at 88.

25. *Id.* at 89.

26. *Salinas v. Texas*, 570 U.S. ___, 133 S. Ct. 2174 (2013).

27. DUANE, *supra* note 1, at 93.

28. *Id.* at 107.

29. *Id.*

30. *Id.* at 110.

If Duane ended his book here, it would be a very hopeless read. Happily, Duane moves on to his next section: plead the Sixth.³¹ The Sixth Amendment guarantees the right to legal counsel. Duane tells his readers that the only way to really protect themselves in our current American criminal justice system is to always insist upon their constitutional right to a lawyer.³²

Duane's work is well written and engaging. The book is short, only 137 pages including endnotes. Duane writes for both lawyers and the public, and he does so effectively. His arguments are concise, focused, and persuasive. The biggest criticism that a reader might raise is that Duane perhaps fails to give note to the struggles of police officers and prosecutors in finding, charging, and successfully convicting guilty offenders. He carefully and completely explains why the current system is broken, but he does little to suggest actual change. His message is simply how to protect yourself and your children from a broken system; he does not actually advocate for change that would correct the system's faults. This is not, however, an unforgivable sin. The roots of the problem he is describing are complex, interwoven, and stem from multiple trees: faulty assumptions about human psychology and the effects of interrogation; numerous and overly broad legislation; American society's infatuation with criminalizing more and more acts that are not inherently immoral, like the random federal crime of disturbing the mud in a cave on federal land.³³ To conquer the problem Duane is addressing would be a serious and difficult task. Duane decides instead to teach people how to protect themselves from the broken system in the meantime. Not only do I highly recommend reading Duane's book, I will make sure that my children do the same.

31. *Id.* at 111.

32. *Id.* at 113.

33. *Id.* at 124 n.18