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High School Legal Education: The Fifth Amendment Unit

THE FIFTH AMENDMENT UNIT

PURPOSE OF THE MINI-COURSE

This unit of instruction is designed to explain to high school level students the nature and scope of one of the legal rights granted by the Constitution, the privilege against self-incrimination.

The instructional material is presented primarily by examples and illustrations based on recent court cases, brief lectures on the historical background of the arguments for and against the self-incrimination privlege. Class discussions used throughout the unit. After attending this mini-course the student should be able to define the privilige against self-incrimination, and know how, when and why to claim the privilege. He will also be aware of the historical development of this right, the situations in which the courts have said it may not be used, the borderline areas where the courts have not been clear regarding the exercise of the privilege, and the pro and con arguments concerning the use of the privilege.

THE FIFTH AMENDMENT TO THE CONTSTITUTION

INTRODUCTION:

SOME ENGLISH AND AMERICAN HISTORY

Large stars adorn the high ceiling of the notorious "Star Chamber," the scene of many inquisitorial proceedings in England during the Fifteenth through the Seventeenth centuries. One of the primary means used in the Star Chamber to exact a self-incriminating confession from an accused person was the "oath ex officio." Supreme Court Justice William O. Douglas in his book Almanac of Liberty said:

> The oath "ex officio" was introduced into England by Pope Gregory IX in 1236. It read, "You shall swear to answer all such interrogatories as shall be offered unto you and declare your whole knowledge therein, so God help you."----If he refused to take the oath, he was held in contempt and punished. If he took the oath and then refused to answer a question, the refusal was taken as a confession of the thing charged in the question. Thus were men compelled to testify against themselves.

Trials in the Star Chamber were used mainly to suppress political and religious opponents of the English kings, and it was particularly used against those advocating freedom of speech, press and religion. Justice Douglas described its penalties as follows:

> Though it never applied the death sentence, its punishments were severe and barbarous. Staggering fines were imposed. Ears were cut off; cheeks branded; noses slit; tongues drilled. The pillory and whipping post were used. Convicts were paraded in public to show their offense. A man who objected on religious grounds to eating pork was put on a pork diet.

> An accused could be arrested privately without any information charged against him and examined in private. Torture was used to exact confessions. So was the inquisitional oath - the oath "ex officio."

A libertarian named John Lilburne brought on the downfall of the Star Chamber and the inquisitional oath. He was accused of printing and importing radical information into England. He refused to take the oath "ex officio" even "though I be pulled in pieces by wild horses." As Douglas indicated:

> he objected to furnishing evidence to be used as the basis for future prosecutions against him.---- Lilburne was held in contempt, publicly whipped, fined and placed in solitary confinement. That was in 1638. On February 13, 1645, the House of Lords set aside that judgment as "against the liberty of the subject and the law of the land and Magna Carta." And in 1648, Lilburne was granted damages for his imprisonment.

Bills abolishing the Star Chamber and forbidding the use of self-incriminatory oaths were passed on August 1, 1641. Thus, the privilege against self-incrimination began its development in the English legal system.

One of the first appearances of this concept in the "New World" occurred in December, 1641, the same year that the Star Chamber was abolished. The Puritans of the Massachusetts Colony adopted "The Body of Liberties," a code of laws by which they were to govern themselves. It was a rudimentary forerunner of our Constitution and Bill of Rights. One of its clauses, directed at self-incrimination, prohibited the use of "torture and the hated inquisitional oath to make an accused or any other person testify to things that might incriminate him."

Later, at the time of the American Revolution, several of the colonies had "Bills of Rights" such as Virginia's and Massachusetts' Declarations of Rights. These contained prohibitions against self-incrimination and were the forerunners of the present Bill of Rights, the first ten amendments to the Constitution.

The Bill of Rights was not part of the Constitution when it was ratified in 1788. As a price for ratification of the Constitution several states led by Virginia demanded that a Bill of Rights be attached to it. The first ten amendments were ratified and declared in force on December 15, 1791, more than three years after the Constitution had become the "supreme law of the land." These amendments concern themselves primarily with the rights and privileges of persons within the United States. They generally limit the powers of the Federal and state governments.

FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION

The "founding fathers" who wrote the Constitution and the Bill of Rights felt that the English and American tradition of the right against self-incrimination was of such importance that a similar safeguard had to be included in the Bill of Rights. Therefore they wrote into the Fifth Amendment a clause:

> NOR SHALL ANY PERSON --- BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF.

This course will focus on and explore this phrase.

INCIDENT AT CAPUCHINO HIGH SCHOOL

Now that we have discussed distant historical events, let us come back to the present and events closer to home. Consider the following illustrative situation.

You are a student at Capuchino High School and an enthusiastic football fan. Some of your friends on the varsity team have shown you the athletic equipment room where you saw some low cut football shoes, several footballs and other football equipment that you wished you had for

flag football and jogging.

Several days ago, as you were leaving school, you were arrested by two plain-clothes detectives. When you asked what the charge was, they said that they would imform you of the charge at the police station. When you protested they told you not to make trouble, that it was just a routine investigation and, if you were innocent, you would be permitted to leave the police station without delay. You vaguely recalled that you should ask for a lawyer, and when you did, you were told to wait until you needed one at the police station.

At the police station you were booked on suspicion of burglarizing the Capuchino High School athletic equipment room. After a technician took your fingerpirnts, photograph and signature, you were taken to a room in another part of the police headquarters for questioning.

You were asked to have a seat at the table. After locking the door one detective sat opposite you and the other sat near the door. The policeman at the table told you that you were suspected of stealing three football uniforms and pads, two footballs and three pairs of football shoes from the Capuchino athletic equipment room. You promptly denied that.

The questioning continued in a calm manner and you decided not to say very much. Part of the interrogation went like this:

> Larry, you probably didn't go to Capuchino High School with the intent to do anything illegal. My guess is you went there with the intention of borrowing the football equipment for one of your

friends on the football team; that friend probably even told you that he would leave the door unlocked, and when you arrived you found the door locked.

You know that you had permission to get the equipment so you decided to look for an open window to get in. You found one, entered and borrowed the sports equipment. That's about it, isn't it?

You thought the police seemed sincere so you said:

Yes, that's somewhat like it was.

The police also told you that they had a witness, a high school friend of yours, who stated that you had expressed an interest in the equipment, and also that he had seen you in the vicinity of the equipment room the night of the burglary.

Two hours later you and the officers emerged from the interrogation room with a typewritten confession you had signed. At the top of the statement was a paragraph stating that the confession was made voluntarily without threats or promise of immunity, with full knowledge of your legal rights and with complete understanding that any statement you made might be used as evidence against you.

IS THE CONFESSION GOOD?

Let us consider several questions which will help develop the key legal points in the example situation just presented:

1. The Fifth Amendment says, "NO PERSON --- SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF ---" Can the confession be used as evidence against you in a court? Why not?

2. Did you have any privilege against self incrimination from the time that you were in custody?

3. Does the Fifth Amendment's privilege extend to pretrail custodial interrogations or only to the trial?

The interrogation technique used by the police in the illustration is known as the "legal excuse" method. The police give the accused a legal excuse for, or an explanation of his suspected actions. He then may feel that since his behavior was legally excusable he can give the police a full explanation of what happened.

Another method used is the "Mutt and Jeff" technique. One policeman is the friendly individual (Mutt), and the other is the stern and hostile interrogator (Jeff). Jeff conducts a "no holds barred" third degree type of questioning

while Mutt seems to intervene on the side of the accused in opposition to Jeff and his methods. By promising the accused that he won't have to suffer under Jeff anymore and by acting as a friend of the accused, the second interrogator hopes to gain the confidence of the accused person and possibly his full confession. Both methods are designed to persuade, intimidate, trick or cajole the accused out of exercising his Constitutional rights.

4. Do these methods cause the accused to be a witness against himself in violation of the self-incrimination privilege? What similarities are there between these techniques and those of the Star Chamber?

5. What is the purpose of the privilege against self-incrimination?

6. Should it protect guilty persons as well as innocent persons?

7. What type of conduct do you think it requires from law enforcement personnel and prosecuting attorneys?

THE MIRANDA WARNING

The situation presented above is actually a variation of the leading court case on this point of law, Miranda v. Arizona, decided by the United States Supreme Court in 1966. In that case Ernesto Miranda, a mentally disturbed, indigent (poor) Chicano was arrested and taken to a special interrogation room in a Phoenix police station in which the police secured a typewritten confession (1) without advising him that he had a right to remain silent, (2) that any statement he did make may be used as evidence against him, and (3) that he had a right to have an attorney present during custodial interrogations. (The Supreme Court noted: "By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.")

Miranda was convicted of kidnapping and rape. This was reversed by the Supreme Court because of the failure to advise Miranda of his Fifth Amendment privilege against self-incrimination ((1) and (2) above) and his right to have an attorney ((3) above) present at the custodial interrogation. Those three points constitute the basic Miranda warning which must be given to any person accused of a crime so that he fully understands his rights and privileges prior to any questioning by law enforcement officials.

The Supreme Court condemned the use of interrogation

techniques like those described above which tricked or coerced confessions from accused persons in violation of the self-incrimination clause. They were no more than modern day variations of the "ex officio" oath and the Star Chamber practices.

CAN YOUR HANDWRITING BE A WITNESS AGAINST YOU?

In the stolen footbal equipment example the police took a handwriting sample. Does this cause you to be a witness against yourself? Is this a violation of the self-incrimination right? In the court case, Gilbert v. California (1967), the court held that it was not a violation. The court stated that a handwriting sample was "physical" or "identifying" evidence as contrasted to self-incriminating evidence. Therefore, its admissibility as evidence did not breach the Fifth Amendment's privilege.

BLOOD SAMPLES?

Here is another situation. A high school student from San Francisco was speeding down Highway 101 toward Monterey and had an accident injuring the other driver. At the request of the police, a doctor took a blood sample from the student to test its alcoholic content. The blood test indicated too high of an alcohol content and he was convicted.

Is this sampling of the blood a violation of the privilege of not being a witness against himself? Was he an involuntary witness against himself? The answer is no. The Supreme Court held in Schmerber v. California (1966) that a blood sample was physical evidence and not self-incriminating verbal testimony.

LINE-UPS AND THE ACCUSED'S VOICE

Here is another situation. An accused bank robber was put into a line-up of several other men at the police station and was told to say on signal, "This is a hold-up! Don't get nervous; I won't hurt anyone."

The teller who was held up later indicated that the accused was the man she saw and heard at the bank robbery.

Is a line-up recognition a violation of the self-incrimination privilege? What about the voice recognition? In a 1967 Supreme Court case, U.S. v. Wade, the court held that identifying the accused by seeing him in a line-up or hearing his voice were not violations of the Fifth Amendment. Would this also apply to a "voice-print," an electronic chart that indicates by means of series of irregular lines the voice patterns unique to an individual person?

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CAN YOUR STOMACH INCRIMINATE YOU?

The taking of body fluids such as blood does not violate a person's rights. What about evidence obtained by means of a stomach pump? In a 1952 case, Rochin v. California, the U.S. Supreme Court held that the use of a stomach pump to obtain evidence (in this case two morphine capsules) swallowed by the defendant when the police entered his home without a warrant was "conduct that shocks the conscience," and is a violation of the defendant's right against self incrimination.

LIE DETECTORS

The police and other investigative agencies often use a device called a "lie detector" (or polygraph) to aid them in their investigations and interrogations. The lie detector purports to detect by means of emotional responses possible indications of lying on the part of persons being tested. The machine has attachments which measure changes in pulse rate, respiration, and perspiration, all of which are alleged to fluctuate under emotional stress caused by mental conflict as a result of lying or being less than truthful. These changes are recorded by inked needles on a graph and then interpreted by a polygraph expert. Can this report be used as evidence for or against you in a trial (depending on

whether the operator reports that the test indicated lying or truthfulness)? Because the lie detector has not been proved to be one hundred percent scientifically reliable most courts will not allow the evidence to be used. If it does prove to be perfectly reliable someday are the bodily responses self-incriminating? Would the use of the expert's report and testimony be a violation of the Fifth Amendment?

VOLUNTARILY GIVING UP THE PRIVILEGE (WAIVER)

If the accused person waives the privilege can he then reassert it at anytime? Generally, no. If the accused takes the stand at a trial and begins to answer questions, or if he voluntarily confesses at the police station during the custodial interrogation, he is considered to have waived his privilege not to be a witness against himself. The crux of these situations is whether the accused was fully knowledgeable of what he gave up and whether he waived the privilege voluntarily without police or official force or coercion. The prosecuting attorney must prove that the testimony or confession was voluntary.

Can he use the privilege on a question by question basis? The courts have decided he cannot in a criminal trial; however, it is possible at a nonjudicial proceeding such as a Congressional hearing.

Can he totally refuse to talk at all? Yes, and the court and the prosecution are prohibited from commenting in any way to the jury or judge about the accused's silence.

WHO CAN CLAIM THE PRIVILEGE?

Can an accused refuse to answer questions on the ground that it might incriminate a friend of his? No. The privilege is personal and can be claimed only when the person would incriminate himself if he answered.

THE MIRANDA WARNING TODAY

In 1968 the Congress of the United States passed the Omnibus Crime Control and Safe Streets Act which allows confessions to be used in Federal prosecutions "if it is voluntarily given." The fact that one or more of the elements of the Miranda warning were overlooked by the police no longer automatically throws out a confession from a trial. The trial judge now must determine whether the confession is voluntary by considering all of the circumstances surrounding the giving of the confession including the Miranda elements, but not limited to them. This in effect has watered down the Miranda decision. It will be of interest to see in what direction the Burger (Chief Justice Warren Burger of the U.S. Supreme Court) Court will go regarding the use of the self-incrimination privilege in the future.

APPENDIX

TABLE OF CASES

Escobedo v. Illinois, 378 U.S. 478 (1964)

Gilbert v. California, 388 U.S. 263 (1967)

Griffin v. California, 380 U.S. 609 (1965)

Malloy v. Hogan, 378 U.S. 1 (1964)

Miranda v. Arizona, 384 U.S. 436 (1966)

In Re Gault, 387 U.S. 1 (1967)

Rochin v. California, 342 U.S. 165 (1952)

Schmerber v. California, 384 U.S. 757 (1966)

United States v. Wade, 388 U.S. 218 (1967)

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BOOKS FOR FURTHER READING

L. Barker and T. Barker, Civil Liberties and the Constitution; Cases and Commentaries (1970)

P. Bartholomew, Summaries of Leading Cases On The Constitution (6th Ed., 1968)

M. Belli, The Law Revoluation (Leisure Book Ed. 1970)

W. O. Douglas, An Almanac of Liberty (1954)

W. O. Douglas, A Living Bill of Rights (1961)

M. Forkosch, Constitutional Law (2d Ed. 1969)

R. Liston, Tides of Justice, The Supreme Court and the Constitution In Our Time (Dell Laurel Ed., 1968)

S. Padover, The Living U. S. Constitution (Mentor Book Ed., 1968)

C. Smith, Smith's Review, Legal Gen Series, Constitutional Law, For Law School, Bar and College Examinations (Rev. Ed., 1969)

Behavioral Objectives:

The student, in a testing period of no more than thirty minutes and without support materials, shall in writing:

1. State the means used to exact a self-incriminating confession in the "Star Chamber";

2. Restate the intent of the "self-incrimination" clause of the Fifth Amendment.

3. Define "privilege", "self-incrimination", "confession", "custodial interrogation", "legal excuse method", and "Mutt and Jeff Technique."

4. Explain the essence and import of the following cases:

   a. Miranda v. Arizona (1966)
   b. Gilbert v. California (1967)
   c. Schmerber v. California (1966)
   d. United States v. Wade (1967)
   e. Rochin v. California (1952)

5. Given five hypothetical instances in which the "interrogation atmosphere" is evidence, the student shall correctly determine if rights have been infringed upon by law enforcement officers. Each case need not involve or include infringements, but there should be at least three instances of abuse. The student shall identify 75% of the instances of law enforcement officer abuse in the process of "custodial interrogation" and explain why it is an abuse.