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High School Legal Curricula: The Fifth Amendment

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THE FIFTH AMENDMENT

In part, the Fifth Amendment provides that "No person...shall be compelled in any criminal case to be a witness against himself...." The founding fathers of this country inserted that portion of the Fifth Amendment to avoid coerced confessions. They believed that coerced confessions were untrustworthy and inquisitorial in nature and therefore repugnant to the English concept of human dignity. In the case of *Malloy v. Hogan*,¹ the United States Supreme Court held that the Fifth Amendment was binding on the states through the Fourteenth Amendment and that states were to be judged by federal constitutional standards.

CONFESSIONS

Coerced and Involuntary

The Supreme Court first judged confessions by a standard of coercion and voluntariness. If it were determined that the accused's confession had been obtained without coercion, it was admissible against him at his trial; but, if it were found that the confession had been obtained through methods of coercion, then it could not be used. The Court defined an involuntary or coerced confession as one in which physical or psychological duress, promises, fraud or trickery were used to overcome the defendant's will to resist and resulted in his giving statements not freely self-determined. In deciding whether the confession resulted from any of the

1. 378 U.S. 1 (1964).

above factors, the defendant's age, experience, education and mental capacity were considered along with the methods used by the police to obtain the confession--length of detention, amount and manner of interrogation, and holding the defendant incommunicado.

In one case,² the Supreme Court reversed the conviction of a 25-year-old, foreign born man with a history of emotional instability because he had been questioned for eight consecutive hours by a group of men. A childhood friend of the accused's had collaborated with the police to falsely acquire his confidence and elicit his confession. In reversing, the Court examined the facts of the case and decided that this confession was involuntary and had been obtained through coercive means.

*Garrity v. New Jersey*³ presents another example of obtaining an involuntary or coerced confession. In that case, a confession was exacted from a public employee under threat of removal from office. The Supreme Court held the confession to be coerced and not a voluntary waiver of the privilege against self-incrimination.

In circumstances where a second confession follows one that has already been determined involuntary or coerced, it is the duty of the Court to determine whether the second confession is free from the coercive influence of the first. If the second confession follows closely after the first, the Court usually holds that it is influenced by the first and is also inadmissible as evidence at the defendant's trial.

2. *Spano v. New York*, 360 U.S. 315 (1959).

3. 385 U.S. 493 (1967).

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The determination of admissibility is made by the judge at a hearing out of the presence of the jury. If the judge decides that the confession is involuntary or coerced, it is not presented to the jury. The constitutional right to a full and fair hearing by a trial judge to determine the admissibility of confessions is guaranteed today under Supreme Court standards.

If, for some reason, an involuntary or coerced confession is admitted into evidence at trial, the conviction has to be reversed. Similarly, if a defendant first makes a free and voluntary confession identical to a second involuntary confession, there must be a reversal if the prosecution introduces both confessions into evidence. This same standard for judging the admissibility of confessions is applicable to the modern procedures adopted by the Supreme Court. This rule is known as the *automatic reversal rule*, that is, the Court automatically reverses the conviction without inquiring whether there may have been sufficient evidence without the confession to support the judgment or conviction reached by the jury. The Court's decision to automatically reverse is based on the unlikelihood of a jury's disregarding a defendant's own admission of guilt when so instructed by the judge.

THE COURT ADOPTS NEW STANDARDS: THE *ESCOBEDO* CASE

The courts faced a difficult problem in determining whether a confession was involuntary or coerced. In instances where the only persons present to hear a confession were the defendant himself and a police officer,

it was the defendant's word against the word of the policeman. In trying to resolve this problem, the Supreme Court recognized a strong relationship between the right to counsel and the privilege against self-incrimination. In *Escobedo v. Illinois*,⁴ the defendant was arrested for murder and interrogated incommunicado for several hours. During the interrogation, the defendant requested to see his attorney and his attorney requested to see him, but the police refused both requests. While incommunicado, Escobedo was informed that a codefendant had confessed, indicating that Escobedo had actually "pulled the trigger." When the police brought the codefendants together, Escobedo accused the other defendant of shooting the victim. This was the police's first indication that Escobedo had participated in the crime. From this statement, the police later obtained a full confession that was used to convict Escobedo. The Supreme Court reversed the conviction, holding that the defendant had been denied his right to counsel and that statements elicited during the interrogation could not be admitted against him at trial. The accused was entitled to an attorney to advise him of his privilege against self-incrimination.

In the *Escobedo* case, the Court pointed to the fact that the murder investigation had moved from investigation to accusing the defendant. The investigatory stage of the proceeding is the stage at which the police are accumulating facts that will designate a particular individual. When the police have focused on one or more persons, this is called the accusatory stage of the proceeding. In this case, the police had completed

4. 378 U.S. 478 (1964).

their investigation and had accused Escobedo and his codefendant of murder. The Court stated:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the assistance of counsel in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment.

In this case, the Court protected two separate rights under the Fifth and Sixth Amendments, the right to counsel which in turn ensured the defendant's privilege against self-incrimination. By ensuring the defendant's right to have counsel present, the Court was ensuring that the attorney would advise the accused of his constitutional rights.

THE COURT ESTABLISHES SPECIFIC GUIDELINES: THE *MIRANDA* CASE

In *Miranda v. Arizona*,⁵ the Court set up further guidelines to determine the admissibility of confessions. In clarifying the position set forth in the *Escobedo* case, the Court held that any interrogations made in a custodial setting⁶ were of a compulsory nature. Therefore, to protect the defendant's Fifth and Sixth Amendment rights, the Court formulated the now-famous *Miranda Warnings*:

5. 384 U.S. 436 (1966).

6. See p. 210.

Prior to any questioning the person must be warned that (1) he has a right to remain silent, (2) any statement he makes may be used as evidence against him, and (3) he has a right to the presence of an attorney, either retained or appointed, if he cannot afford one.

These warnings have been popularized in police dramas on television and in movies. It is a misconception that the *Miranda* warnings are mandatory upon the police. They are not. They only ensure that the statements will be admissible against the accused in court, unless the warnings were not understood by the accused or he was, in some manner, coerced into making the statements. Although many law enforcement officials have complained that the use of the warnings inhibits their investigations, the warnings serve the twofold purpose of protecting the accused and of procuring a proper conviction.

THE AFTERMATH OF *ESCOBEDO* AND *MIRANDA*

The *Escobedo* and *Miranda* cases went a long way in defining an individual's right to counsel and his privilege against self-incrimination, but these two cases did not answer all of the questions. In fact, the Court created other problems that had to be resolved in subsequent cases: What does custodial interrogation mean? What constitutes a waiver? What does adequacy of warnings mean?

The Meaning of Custodial Interrogation

In the *Miranda* case, the Court held that the warnings must be given when a *custodial interrogation* is taking place. In a 1969 case,⁷ four

7. *Orozco v. Texas*, 394 U.S. 324 (1969).

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police officers, investigating a shooting, broke into the accused's bedroom at 4 a.m. and, without issuing any of the *Miranda* warnings, questioned him. The accused admitted to having been at the restaurant where the shooting occurred and to owning a pistol, whose hiding place he disclosed. At trial, the police stated that the accused had been arrested and was not free to leave during questioning. The Court held that admitting these statements in evidence at trial was a clear violation of the Fifth Amendment self-incrimination clause. It stated that the warnings were required when the person under interrogation was "in custody at the station or otherwise deprived of his freedom of action in any significant way."

In *Mathis v. United States*,⁸ an internal revenue agent failed to warn the accused, already serving a prison term, while questioning him about his prior income tax returns. The Court held that the *Miranda* warnings should have been given since the accused was in custody and the charge under investigation was unrelated to the offense for which he was imprisoned.

The above cases clearly present custodial interrogation situations, but there are many areas in which this is not clear. For example, can a policeman stop a person on the street to ask his name and destination without giving the *Miranda* warnings? May this person legitimately refuse to give his name? May the police require some sort of written identification? If a person exposes a piece of information, may the police ask additional questions without giving the *Miranda* warnings? These are gray

8. 391 U.S. 1 (1968).

areas of custodial interrogation that have not been sufficiently defined.

What Constitutes a Waiver?

An accused may waive his rights enumerated in the *Miranda* warnings, but the waiver must be knowledgeable, intelligent and expressly made. The prosecution has the difficult task of showing that the waiver was made properly. Once the accused has requested counsel, there can be no further questioning until counsel is provided. If, at any time, the accused asserts the privilege against self-incrimination, the questioning must stop. The prosecution may not comment to the jury on the accused's silence and his refusal to answer questions during interrogation. The courts recognize the prejudicial effect of such comments on the jury. Any use of statements made before there has been a waiver are excluded at trial.

Adequacy of Warnings

Courts have held that the *Miranda* warnings must convey the importance of the rights before the evidence elicited can be admitted at trial. In *United States v. Fox*,⁹ a federal appellate court held that the warnings were inadequately administered because the accused was told that "he didn't have to make any statement" instead of being informed that he had a right to remain silent; because the accused was only told that "he could consult an attorney prior to any questioning" instead of being told that he had "the right to the presence of an attorney"; and, because the accused was

9. 403 F.2d 297 (2d Cir. 1968).

not informed of his right to have an attorney appointed prior to questioning if he could not afford one. The Court felt that the *Miranda* warnings provided no protection for the accused unless the true substance of the privilege against self-incrimination and the right to counsel was conveyed.

The warnings may make little or no impression upon the accused if the police rattle off the warnings without assurances that the accused has understood them, or if the police give them without distinguishing them from their other questions. For example, an officer may recite the warnings and then proceed to question the accused before he has had a chance to consider whether he wishes to waive his privileges. The adequacy of the warnings and an effective waiver are closely related and should be looked at together when discussing this problem.

THE MEANING OF *MIRANDA* TODAY

The makeup of the Supreme Court changes as justices leave the Court and others are appointed. Their philosophies influence their interpretations of the Constitution. Today's Court is quite different from the Court that handed down the *Miranda* decision six years ago. In a recent case, *Harris v. New York*,¹⁰ the Court held that a confession that was elicited by the police without giving the *Miranda* warnings was admissible at the defendant's trial to impeach his testimony if he took the stand in his own behalf. This means that the prosecutor can offer evidence of a

10. 401 U.S. 222 (1971).

former confession obtained without giving the *Miranda* warnings to contradict the defendant's statements on the witness stand. This accomplishes two purposes: it attacks the defendant's credibility before the jury, and the jury is able to hear the defendant's confession. Prior to this decision, the jury would not have heard the confession. Thus, if a defendant has made statements to the police before being given his *Miranda* warnings, as a practical matter, it would be unwise for him to take the stand.

Congress has limited the Supreme Court's interpretation of the privilege against self-incrimination by enacting the Omnibus Crime Control Act of 1968.¹¹ This act, which applies to all *federal* criminal trials, overturned the *Escobedo-Miranda* cases to the extent that the absence of the *Miranda* warnings required by these cases does not automatically render a defendant's confession or incriminating statements inadmissible. Under this statute, the sole test for admissibility is voluntariness, and failure to warn the accused of his rights is only one factor in determining voluntariness. The Supreme Court has not yet ruled on the constitutionality of this Act. But in light of the recent changes in the makeup of the Court, the constitutionality question is very much open.

The changes in the Court and Congressional legislation may cause a recurrence of the pre-*Miranda* problems. The Court may again be faced with the difficult decision of determining whether confessions obtained by the police are of an involuntary or coerced nature.

11. 18 U.S.C. §3501.

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THE PRIVILEGE AGAINST SELF-INCRIMINATION AT TRIAL

The privilege against self-incrimination prior to trial, as discussed above, also applies at the trial stage. The Fifth Amendment states: "No person...shall be compelled in any criminal case to be a witness against himself..." As with the area of confessions, this right has not always been clearly defined. Oftentimes a defendant's refusal to take the stand or exercise his Fifth Amendment right was pointed to by the prosecutor or the judge as indicating the defendant's guilt. If he were not guilty, the prosecutor or judge would ask the jury to consider why the defendant did not take the stand to tell his side of the story. This practice all but voided an accused's privilege against self-incrimination for, if he claimed his right, it was regarded as an admission of guilt. In 1965, in *Griffin v. California*,¹² the Supreme Court held that it was constitutional error for a prosecutor to accuse the defendant of guilt merely for exercising his Fifth Amendment right; a defendant could not be penalized for exercising a right guaranteed under the Constitution.

Prior to the *Griffin* decision, an accused was often forced to take the stand for fear of comment by the prosecutor. The *Griffin* case resolved this problem--an individual's refusal to take the stand could not be commented upon at trial--clearly defining the privilege against self-incrimination. But the recent *Harris* decision raises another problem when an individual wishes to waive his Fifth Amendment right and take the stand

12. 380 U.S. 609 (1965).

on his own behalf. In a sense, the defendant may be forced *not* to take the stand for fear that his prior statements may be used to impeach his credibility.

THE PRIVILEGE AGAINST SELF-INCRIMINATION: DOES IT APPLY TO
PHYSICAL EVIDENCE?

The privilege against self-incrimination has been discussed in the context of pretrial confessions and rights at trial. Evidence obtained from a pretrial confession or at trial is testimonial evidence. But what about physical evidence obtained from the accused? Can it be used against him at trial without violating his privilege against self-incrimination?

Blood Tests

A blood sample is the most common physical evidence obtained from an accused. The sample, used primarily to determine whether an accused was intoxicated while driving an automobile, is analyzed for alcohol content. In a California case¹³ appealed to the Supreme Court, a physician, under the direction of the police, took a blood sample from an individual being treated at a hospital for injuries sustained from an automobile accident. The injured was subsequently convicted of driving while under the influence of an intoxicating liquor. The conviction was appealed. The majority of the Supreme Court upheld the conviction, stating that the privilege against self-incrimination "protects an accused only from being

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

compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question did not involve compulsion to these ends."

The *Schmerber* case drew a clear distinction between *testimonial evidence* and *physical evidence*. Physical evidence is not protected by the self-incrimination clause. Therefore, if an accused refuses to have a blood sample taken, this refusal is admissible at trial and may be used to incriminate the defendant before the jury.

Line-ups

Line-ups used for identification purposes have also presented problems in the area of the Fifth Amendment privilege against self-incrimination. In *United States v. Wade*,¹⁴ the defendant, indicted for bank robbery, was placed in a line-up with five or six other prisoners. Each prisoner had strips of tape placed on his face identical to those worn by the robbers and was instructed to say "put the money in the bag," the same words spoken by the robbers. The two bank employees present at the time of the robbery identified Wade. At the trial, Wade was again identified and convicted of the crime.

On appeal to the Supreme Court, Wade claimed that his privilege against self-incrimination had been denied. The Supreme Court upheld the

14. 388 U.S. 218 (1967). The Wade decision was reversed by the Supreme Court as a violation of the Sixth Amendment right to counsel.

conviction and referred to the *Schmerber* case that held that the privilege against self-incrimination extends only to testimonial evidence. Exhibiting one's person or repeating words uttered by the robber is not testimonial evidence. No knowledge relating to the crime is being elicited; speaking was used for identifying physical characteristics, i.e., the tone of voice. The Court went on to cite past cases where it held that "the privilege [against self-incrimination] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or make a particular gesture."¹⁵

Handwriting Samples

In *Gilbert v. California*,¹⁶ the Supreme Court held that taking a handwriting sample does not violate a defendant's privilege against self-incrimination. The Court decided this issue on the same grounds it decided the blood samples and line-ups issues and held that a sample of a defendant's handwriting is not of a communicative or testimonial nature if it supplies no information to aid the police in their investigation of the crime. However, if a handwriting sample does supply information relating to the crime, beyond identification purposes, then the privilege against self-incrimination may be claimed.

15. *Supra*, note 13.

16. 388 U.S. 263 (1967).

Stomach Pumping

In the case of *Rochin v. California*,¹⁷ two police officers entered the defendant's home and, upon seeing the defendant swallow two morphine capsules that were by his bed, tried to extract the capsules. They were unsuccessful. They took the defendant to a hospital where his stomach was pumped and the capsules were extracted. The evidence presented at the defendant's trial led to his conviction. The Court reversed the conviction stating that the methods used by the police were similar to "rack and screw" methods. Although the Court never referred to the privilege against self-incrimination, it is clear that evidence would fall into the category of blood samples and be characterized as physical evidence, not testimonial. But the Court felt it necessary to reverse the conviction because of the methods employed by the police. This case presents a good example of coercive methods that are prohibited in obtaining confessions. Even though the privilege against self-incrimination had not been violated, the methods employed by the police were so reprehensible that a reversal of the conviction was required.

The reversal was not based on a violation of the accused's Fifth Amendment rights, but was based on a violation of the Due Process clause of the Fourteenth Amendment. The violent search violated all concepts of fairness in treatment of the accused.

17. 342 U.S. 165 (1952).

CONCLUSION

The above discussion has pointed out some of the difficulties involved when the Court determines whether an individual's privilege against self-incrimination has been violated. The Supreme Court has laid down specific guidelines in both the areas of testimonial evidence and physical evidence, but these areas are still open to different interpretations. The nature of the evidence, the methods used by the police, and the content of what the accused was required to say or write must be considered. There may be variations in the fact situations that lead to different interpretations. Through the use of the hypothetical situations included in this section, an exploration of these fact situations may lead to meaningful discussion and better understanding of the privileges granted by the Fifth Amendment.