

"Pleading the Fifth"
Self-Incrimination and the Fifth Amendment
by Tamara P. Uselman

This lesson will teach students about the Fifth Amendment's protection against self incrimination by analyzing hypothetical situations applying the amendment.

Students will:

1. Learn that the Fifth Amendment protects against self-incrimination.
2. Learn about the application of the amendment, what is covered, what is not covered.
3. Apply their knowledge using discussion, compromising, debating, public speaking, analytical, and writing skills.

Materials needed: Copies of: **Student Handout: FIFTH AMENDMENT**
Student Handout: LECTURE WORKSHEET
Student Handout: YOU BE THE JUDGE
Student Handout: CITIZENSHIP MINI-QUIZ ON THE FIFTH
Student Handout: PERSUASION SPEECH ON SELF-INCRIMINATION AND THE FIFTH AMENDMENT
Dictionaries

Time needed: 2 to 3 classes without essay, 4 to 5 classes with essay.

Grade level: 7th - 9th grades

Procedure:

1. Using **Student Handout: THE FIFTH AMENDMENT**, introduce students to the Fifth Amendment. Instruct them to read the Fifth Amendment and answer the questions.
2. Provide students with background information on the Fifth Amendment using the information contained in the teacher background. Have students complete **Student Handout: LECTURE WORKSHEET** at the close of the session. Review student answers using the key.

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Procedure cont.

3. Divide the class into small groups. Tell them that they will be role playing judges as they apply the Fifth Amendment to a variety of cases. Remind them to remember information learned through the earlier lecture. They may wish to use the **Lecture Worksheet** for referral.
4. As a large group, review the decisions of the groups. Instruct students using the answer key.
5. Review what students have learned about the Fifth Amendment using the **Student Handout: CITIZENSHIP MINI-QUIZ ON THE FIFTH**.
6. Using the **Student Handout: PERSUASION SPEECH ON SELF-INCRIMINATION AND THE FIFTH AMENDMENT** have students prepare an essay. Students may present their essays as speeches to the class.

TEACHER BACKGROUND: Fifth Amendment

The Fifth Amendment has been used to protect people's rights throughout history, but really came to the fore in the last 35 years. In the early and middle 1960s, the Supreme Court began to empathize with society's underprivileged poor and minorities who made up a disproportionately large segment of the criminally accused. Decisions by the Court in the sixties expanded civil rights and increased protection from the "*long arm of the law*," of the state. One such expansion occurred in the area of avoiding self-incrimination, a protection provided in the Fifth Amendment.

In 1966, the U.S. Supreme Court decided the accused must be read his/her rights prior to being questioned while in police custody. (Those rights are: 1. you have the right to remain silent; 2. if you speak, anything you say can and will be used against you in a court of law; and 3. you have a right to have an attorney present during questioning. If you cannot afford an attorney, one will be appointed to you.) Since this Supreme Court case, if an accused is not read his/her rights by police prior to custodial questioning, the evidence may not be admissible in any trial, that results from the accusations. Prior to this *Miranda v. Arizona* decision, there was no requirement that the accused person be notified of his/her rights. This decision reduced the chances for abuses that could otherwise occur if an accused was coerced into admitting guilt (whether or not he/she was actually guilty).

It is important to note that in the last two decades, the Supreme Court has been less concerned with protecting the rights of the accused and more concerned with punishing those believed to be guilty in an effort to promote public safety.

Students need to realize the difference between the Supreme Court of the sixties and that of the seventies and eighties in order to understand the present interpretations of the Fifth Amendment, because ultimately, the Court interprets the Bill of Rights. In the sixties, the court was very committed to making certain that persons accused of crimes were guaranteed fair trials even if it meant a very slow, inefficient process. The belief then was, "*better a guilty person go free than a free person go to jail.*" Since the sixties, the Court has shifted to a commitment to sloving crime by lessening restrictions on police officers, and prosecutors, and limiting the rights of the accused. This change in philosophy is a result of increased violent crime and the war on drugs.

Students should be made aware of the two modes of thought. They must contemplate the advantages/disadvantages of either to a free society. They should ask themselves how many rights they are willing to give up to keep crime in check and if they believe the reduction of rights will ever make a **less** corrupt society.

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Student Handout: THE FIFTH AMENDMENT

DIRECTIONS: Read Amendment V several times to yourself. Be prepared to answer the questions that follow it.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1. This Amendment has many guarantees. Locate the phrase concerned with self-incrimination and recopy it in the space provided:
2. If you are accused of a crime, you are innocent _____ and _____ proven guilty.
3. When trying to prove guilt, whose job is it - yours to prove you are innocent, or the government's to prove you are guilty?
4. Explain the difference between the terms *questioning* and *inquisition*. (Use a dictionary if you want to.) While *questioning* means _____

inquisition means _____

5. In a paragraph, explain why the government shouldn't be allowed to use inquisition techniques to get information from an accused person. How would doing so change our idea of justice?

Answer Key: The Fifth Amendment

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1. This Amendment has many guarantees. Locate the phrase concerned with self-incrimination and recopy it in the space provided: **nor shall be compelled in any case to be a witness against himself**
2. If you are accused of a crime, you are innocent **unless** and **until** proven guilty.
3. When trying to prove guilt, whose job is it - yours to prove you are innocent, or the government's to prove you are guilty? **It is the job of the state to prove your guilt, but they cannot force you to testify against yourself while they are trying to prove their case.**
4. Explain the difference between the terms *questioning* and *inquisition*. (Use a dictionary if you want to.) While *questioning* means **asking while seeking information**, *inquisition* means **using force to arrive at a presumed answer**.
5. In a paragraph, explain why the government shouldn't be allowed to use inquisition techniques to get information from an accused person. How would doing so change our idea of justice? **Answers will vary but students should be directed to thinking about what our country would be like if citizens were coerced into confessing. Would real criminals be punished? How would the innocent be affected? Would students like to live in a country that practiced coercion? etc.**

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Student Handout: LECTURE WORKSHEET

DIRECTIONS: Listen carefully as your teacher gives you information about the Fifth Amendment as it operates in our world today. Fill in the blanks (1-5) the information you hear from your teacher. You will use this information later when judging whether a person can legally "*plead the fifth*." Check your memory by answering 6-10.

...nor shall be ~~compelled in any criminal case to be a witness against himself~~...

The phrase above copied from the Fifth Amendment has five limitations.

- 1.
- 2.
- 3.
- 4.
- 5.

6. Look at limitation one. Who listed here could refuse to testify by applying the Fifth Amendment?

- _____ Stan's Book Company
- _____ Your father
- _____ Hot-Wired Electric Association

7. Look at limitation 2. Check when an accused may refuse to answer, based on the Fifth Amendment:

- _____ on the witness stand during a murder trial (you have been accused)
- _____ in police custody
- _____ in a case where an accused may have to pay his neighbor for damages

8. What information may an accused refuse to give, under the Fifth Amendment?

- _____ address
- _____ present occupation
- _____ former employers

9. How many of the following represent *coerced* information:

- _____ testify or lose public employee retirement benefits
- _____ admit to a crime before allowed to sleep while in police custody
- _____ showing tax returns with implicating evidence.

10. The last limitation deals with *testimonial evidence*. Which of the following has the Supreme Court said is **NOT** testimonial in nature? (That is, you cannot use the Fifth Amendment to avoid giving this information.)

- ___ a blood test ___ handwriting sample ___ standing in a line-up ___ verbal testimony

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ANSWER KEY: Lecture Worksheet

Directions: Listen carefully as your teacher gives you information about the Fifth Amendment as it operates in our world today. Fill in the blanks (1-5) the information you hear from your teacher. You will use this information later when judging whether a person can legally "*plead the fifth*." Check your memory by answering 6-10.

...nor shall be compelled in any criminal case to be a witness against himself...

The phrase above copied from the Fifth Amendment has five limitations.

1. *natural persons (associations such as unions, businesses, partnerships, or corporations cannot refuse to answer, based on Fifth Amendment)*
2. *criminal proceeding (including questioning when in police custody and continuing throughout the criminal procedure and trial,) does not include statements not related to criminal incrimination*
3. *self-incriminating evidence (just about any type of information can qualify since it may be incriminating; the witness must tell that he is using this Fifth Amendment privilege; he cannot just remain silent or he may be in contempt.)*
4. *forced or coerced in some way by the state (usually, if the witness is unable to use his free will, then his testimony has been coerced. If he voluntarily gives information when he is aware of his rights but regrets it later, the testimony is still admissible.)*
5. *concerning only evidence that is testimonial, not physical or real (The Court presently accepts non-verbal testimony, blood - urine tests, handwriting samples, line-ups, etc. This area has not been challenged extensively, however, and may change in the future)*

6. Look at limitation one. Who listed here could refuse to testify by applying the Fifth Amendment?

Stan's Book Company

Your father

Hot-Wired Electric Association

(The first and last choices do not qualify as natural persons, even if a specific individual was testifying for Stan's or the electric association's businesses.)

7. Look at limitation 2. Check when an accused may refuse to answer, based on the Fifth Amendment:

on the witness stand during a murder trial (you have been accused)

in police custody

in a case where an accused may have to pay his neighbor for damages (*This does not qualify for the Fifth because it is a civil case not meant to punish or deter illegal activity.*)

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ANSWER KEY: Lecture Worksheet cont.

8. What information may an accused refuse to give, under the Fifth Amendment?

address

present occupation

former employers

(All the information may be self-incriminating and will probably go unchallenged because it is difficult to prove; the witness would have to state that he is taking the Fifth Amendment privilege.)

9. How many of the following represent *coerced* information:

testify or lose public employee retirement benefits

admit to a crime before allowed to sleep while in police custody

showing tax returns with implicating evidence. (*Not considered personal-prepared for others.*)

10. The last limitation deals with *testimonial evidence*. Which of the following has the Supreme Court said is **NOT** testimonial in nature? (That is, you cannot use the Fifth Amendment to avoid giving this information.)

a blood test

handwriting sample

standing in a line-up

verbal testimony

¹ Whitebread, Charles H. *Criminal Procedure: An Analysis of Constitutional Cases and Concepts*, CH.14, New York: The Foundation Press, Inc., 1980.

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Student Handout: YOU BE THE JUDGE

DIRECTIONS: Decide whether testimony is admissible in the following examples, or whether you feel the accused has been coerced and the evidence is inadmissible. Be prepared as a group to defend your decision to the class. Remember to base all your decisions on what you have learned about the Fifth Amendment.

Mark each of the following as: **A-Admissible** **I-Inadmissible**

- _____ **1.** Mr. Brown admits to murdering someone. Police knew he was guilty and got him to confess by hanging him upside down from a tree.
- _____ **2.** A juvenile admits to a felony after being questioned by police from 12 midnight to five a.m.
- _____ **3.** Ms. X is already indicted for murder. Her friend on the police force convinces Ms. X to confess by claiming he will lose his job unless a confession is made. His wife and three pretty children will suffer.
- _____ **4.** A police woman poses as a psychiatrist and hears a confession.
- _____ **5.** Police read an accused woman her rights and give her milk, sandwiches, and cigarettes when she asks for them while questioning her. She confesses.
- _____ **6.** A mentally retarded citizen is arrested for rape. He immediately makes a seven minute confession upon entering the police car. He was not read his rights before confessing.
- _____ **7.** A suspect is on a respirator, too ill to talk, sedated but conscious. He is read his rights and questioned for several hours. He admits his guilt by writing a confession.
- _____ **8.** A person confesses after 36 hours of uninterrupted questioning.
- _____ **9.** A man is told he may call his wife once he confesses.
- _____ **10.** A contractor is told he will lose public projects unless he testifies against

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himself.

ANSWER KEY: You Be The Judge

DIRECTIONS: Decide whether testimony is admissible in the following examples, or whether you feel the accused has been coerced and the evidence is inadmissible. Be prepared as a group to defend your decision to the class. Remember to base all your decisions on what you have learned about the Fifth Amendment.

Mark each of the following as: **A-Admissible** **I-Inadmissible**

- I** **1.** Mr. Brown admits to murdering someone. Police knew he was guilty and got him to confess by hanging him upside down from a tree.
- I** **2.** A juvenile admits to a felony after being questioned by police from 12 midnight to five a.m.
- I** **3.** Ms. X is already indicted for murder. Her friend on the police force convinces Ms. X to confess by claiming he will lose his job unless a confession is made. His wife and three pretty children will suffer.
- I** **4.** A police woman poses as a psychiatrist and hears a confession.
- A** **5.** Police read an accused woman her rights and give her milk, sandwiches, and cigarettes when she asks for them while questioning her. She confesses.
- A** **6.** A mentally retarded citizen is arrested for rape. He immediately makes a seven minute confession upon entering the police car. He was not read his rights before confessing.
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- I** **10.** A contractor is told he will lose public projects unless he testifies against

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himself.

Student Handout: Citizenship Mini-Quiz on the Fifth

Mark each of the following statements: **T-True** or **F-False**

- _____ 1. You do not have to testify against yourself in a criminal procedure.
- _____ 2. You cannot testify against yourself in a criminal procedure.
- _____ 3. Legally, police can make their jobs easier by bribing you to confess.
- _____ 4. Once you are arrested, police can question you before reading you your rights.
- _____ 5. Police can question you before your attorney is present.
- _____ 6. Police can refuse to let you have an attorney if they know you are guilty.
- _____ 7. You can refuse blood or urine tests under the Fifth Amendment.
- _____ 8. You must testify against your union if you are on the witness stand in a trial involving the union in a criminal procedure.
- _____ 9. You may use the Fifth Amendment in a civil procedure.
- _____ 10. You confess to a crime and are found guilty. In prison, you realize you should have used the Fifth Amendment. You can demand a retrial which will leave out your confession.
- _____ 11. In order to be put to death for murder, you must undergo a psychiatric evaluation. Once declared sane, you can be executed. You decide to use the Fifth Amendment to refuse the psychiatric evaluation for fear the results may be self-incriminating.
- _____ 12. You have received immunity from prosecution but decide to plead the Fifth anyway. This is permissible, under the Fifth Amendment.
- _____ 13. You walk into a police station and admit to a crime to get it off your chest. The prosecution can use this information against you, even though you had not been read your rights.
- _____ 14. While being questioned by the police, you say you want to confess a crime. At this point, the police must interrupt you to read you your rights.

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ANSWER KEY: Citizenship Mini-Quiz on the Fifth

Mark each of the following statements: **T-True** or **F-False**

- __T__ 1.** You do not have to testify against yourself in a criminal procedure.
- __F__ 2.** You cannot testify against yourself in a criminal procedure.
- __F__ 3.** Legally, police can make their jobs easier by bribing you to confess.
- __F__ 4.** Once you are arrested, police can question you before reading you your rights. (**Confession will be inadmissible.**)
- __T__ 5.** Police can question you before your attorney is present. (**You must request an attorney and then remain silent until he/she arrives. Police should not question you during the interval.**)
- __F__ 6.** Police can refuse to let you have an attorney if they know you are guilty.
- __F__ 7.** You can refuse blood or urine tests under the Fifth Amendment. (**These are not considered in the same category as verbal confessions.**)
- __T__ 8.** You must testify against your union if you are on the witness stand in a trial involving the union in a criminal procedure.
- __F__ 9.** You may use the Fifth Amendment in a civil procedure. (**Unless it will incriminate you in a criminal case.**)
- __F__ 10.** You confess to a crime and are found guilty. In prison, you realize you should have used the Fifth Amendment. You can demand a retrial which will leave out your confession. (**Provided there was no coercion during your confession.**)
- __T__ 11.** In order to be put to death for murder, you must undergo a psychiatric evaluation. Once declared sane, you can be executed. You decide to use the Fifth Amendment to refuse the psychiatric evaluation for fear the results may be self-incriminating. (**This was held true in Texas.**)
- __F__ 12.** You have received immunity from prosecution but decide to plead the Fifth anyway. This is permissible, under the Fifth Amendment.

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ANSWER KEY: Citizenship Mini-Quiz on the Fifth

T **13.** You walk into a police station and admit to a crime to get it off your chest. The prosecution can use this information against you, even though you had not been read your rights. (**You were not "in custody."**)

T **14.** While being questioned by the police, you say you want to confess a crime. At this point, the police must interrupt you to read you your rights.

Student Handout: PERSUASION SPEECH ON SELF-INCRIMINATION AND THE FIFTH AMENDMENT

Your theme must have a title, an introductory paragraph with a clear thesis, at least three paragraphs of body or supporting detail in which you explain your ideas, using examples if necessary, and finally, your theme must have a conclusion paragraph that is clearly related to the main idea. Select a topic below, taking note that selection C involves research and requires more abstract ideas than either A or B. In each choice, you will be graded primarily on your ability to present a coherent, persuasive argument.

A. Consider the drug war and the challenges our society faces if we are to become more "*drug free*." Must police follow all their rules in dealing with suspected drug dealers? Why or why not? Explain your position, using yourself in an example.

B. Should evidence like blood test or urine tests which are presently thought of as real or physical but not testimonial evidence continue to be allowed in court? Are these forms of "*witnessing against oneself*"? Explain your position, using yourself in an example.

C. Over the last two decades, the Supreme Court has reduced the effectiveness of the Fifth Amendment. Would an expanded interpretation of the Fifth Amendment, specifically the self-incrimination clause, treat underprivileged minorities more fairly than the present interpretation? What is best for society in the short run? In the long run? Explain your position, considering socio-economic factors in your answer.