

Fifth Amendment Self-Incrimination Clause seminar  
(Syllabus)  
Spring 2024

Professor Tracey Maclin, Spring 2024

Office Location: Holland Hall 312L

Class: Thursdays 3:30 – 5:30pm in Holland Hall 285A.

Office Hours: Thursday afternoons from 1:30pm – 3:30pm. If that time is inconvenient, please call or e-mail me to make an appointment for an alternative time.

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Office phone: 352 273 0917.

The following is a general guide regarding the requirements of the course. For specific questions regarding law school rules, students should consult the University of Florida Student Handbook and Academic Policies. A link to the handbook is here:

<https://www.law.ufl.edu/life-at-uf-law/office-of-student-affairs/current-students/uf-law-student-handbook-and-academic-policies>

***Attendance and Preparation:***

***Regular attendance is expected of every student.*** In other words, unless you have a very good excuse for missing a class, you must attend class every day.

Attendance in class is required by both the ABA and the Law School. If you miss more than six classes, your grade for the semester will be adversely affected. If you have a legitimate reason for missing class, you should contact me before or soon after class ends for your absence to be excused.

***Preparation of class assignments and informed participation in class discussion is expected of each student.***

***Observance of religious holidays:***

UF Law respects students' [observance of religious holidays](#).

- Students, upon prior notification to their instructors, shall be excused from class or other scheduled academic activity to observe a religious holy day of their faith.

- Students shall be permitted a reasonable amount of time to make up the material or activities covered in their absence.
- Students shall not be penalized due to absence from class or other scheduled academic activity because of religious observances.

### ***Final Grade:***

The student's attendance, class preparation, and classroom participation will be considered by the professor in determining each student's final grade. This may include either RAISING or LOWERING a student's final grade on account of class attendance, preparation, and participation. **IF YOU ARE CALLED UPON TO DISCUSS THE ASSIGNED MATERIALS, AND YOU ARE NOT PREPARED, YOUR GRADE WILL AUTOMATICALLY BE LOWERED ONE LEVEL. PERIOD.**

If you unprepared for a specific class and do not want to be called on, e-mail me at least one hour *before* class and I will not call on you for that class. **DO NOT ABUSE THIS PRIVILEGE.** In other words, only use this privilege once or twice this semester.

### ***Grading Evaluation and Advanced Writing Requirement:***

Students final grade will be based upon six papers and class participation. This course follows the Levin College of Law's grading policies found here: <https://www.law.ufl.edu/life-at-uf-law/office-of-student-affairs/current-students/uf-law-student-handbook-and-academic-policies>. The law school policy on exam delays and accommodations can be found there.

***Students who successfully complete the course's requirements will satisfy the Law School's AWR.*** Students will receive substantial feedback from me on each drafts of their six papers on Thursdays the week before papers are due.

All students are required to satisfy an advanced writing requirement as a condition of graduation. To satisfy this requirement, a student must complete one or a number of major, finished, written product or products that show evidence of original systematic scholarship based on individual research under close faculty supervision.

### ***Information on UF Law Grading Policies:***

The Levin College of Law's mean and mandatory distributions are posted on the College's website and this class adheres to that posted grading policy.

The law school grading policy is available at: <https://www.law.ufl.edu/life-at-uf-law/office-of-student-affairs/current-students/uf-law-student-handbook-and-academic-policies#grading-and-examinations>.

### ***Statement Related to Accommodations for Students with Disabilities:***

Students requesting accommodations for disabilities must first register with the Disability Resource Center (<https://disability.ufl.edu/>). Once registered, students will receive an accommodation letter, which must be presented to the Assistant Dean for Student Affairs. Students with disabilities should follow this procedure as early as possible in the semester, as accommodations are not retroactive. It is important for students to share their accommodation letter with their instructor and discuss their access needs as early as possible in the semester.

Questions about exam delays and accommodations can be found here: <https://www.law.ufl.edu/life-at-uf-law/office-of-student-affairs/current-students/forms-applications/exam-delays-accommodations-form>.

### ***Course Description and Objectives:***

The seminar focuses on the Supreme Court's Fifth Amendment doctrine. Students will read Supreme Court cases; law review articles and briefs filed in the Supreme Court. The diligent student will finish the course with greater understanding of how the Supreme Court interprets the Self-Incrimination Clause.

There is no final exam. Students will write six papers totaling at least 25 pages.

### ***Student Course Evaluations:***

Students are expected to provide professional and respectful feedback on the quality of instruction in this course by completing course evaluations online via GatorEvals. Click here (<https://gatorevals.aa.ufl.edu/students/>) for guidance on how to give feedback in a professional and respectful manner. Students will be notified when the evaluation period opens and may complete evaluations through the email they receive from GatorEvals, in their Canvas course menu under

GatorEvals, or via <https://ufl.bluera.com/ufl/>. Summaries of course evaluation results are available to students here: <https://gatorevals.aa.ufl.edu/public-results/>.

### **Recordings of Class:**

All classes will be recorded via Mediasite in case students must miss class for health reasons. The Office of Student Affairs will determine when students may have access to these recordings, and the recordings will be password protected. These recordings will be retained only for a short period of time, and it is the student's responsibility to contact the Office of Student Affairs as soon as possible after an absence.

### **ABA Out -Of-Class Hours Requirements:**

ABA Standard 310 requires that students devote 120 minutes to out-of-class preparation for every "classroom hour" of in-class instruction. **Each weekly class is approximately 2 hours in length, requiring at least 5 to 6 hours of preparation outside of class including reading the assigned materials, writing critical analyses, and developing your final paper.**

### **Readings for the Fifth Amendment's Self-Incrimination Clause seminar:**

First class: January 18, 2024. Introduction to the course.

January 25: Discussion and substantial feedback on students' papers on why the Self-Incrimination Clause is in the Constitution and should we keep it.

February 1: ***Assignment 1 (4-10 pages):***

Why is the Fifth Amendment in the Constitution? And should we keep it?

Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Michigan Law Review 2625 (1996)

David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA Law Review 1063 (1986)

Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 Valparaiso Law Review 311 (1991).

February 8 and 15: **Assignment 2 (4-10 pages):**

Was *Griffin v. California* correct? Is it time to overrule it? Why is it so controversial?

Griffin v. California, 380 U.S. 609 (1965)  
Baxter v. Palmigiano, 425 U.S. 308 (1976)  
Carter v. Kentucky, 450 U.S. 288 (1981)  
Mitchell v. United States, 526 U.S. 314 (1999)

Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt From Silence: Griffin v. California, After Fifteen Years*, 78 Michigan Law Review 841 (1980)

James J. Duane, *The Extraordinary Trajectory of Griffin v. California: The Aftermath of Playing Fifty Years of Scrabble with the Fifth Amendment*, 3 Stanford Journal of Criminal Law and Policy 1 (2015)

February 22: Discussion and substantial feedback on students' papers regarding whether a prosecutor use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt without violating the Fifth Amendment?

February 29 and March 7: **Assignment 3 (4-10 pages):**

May a prosecutor use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt without violating the Fifth Amendment?

United States v. Palacios-Solis, 949 F. 3d 567 (11th Cir. \_\_\_\_)  
Palacios-Solis's Petitioner for Writ of Certiorari  
Brief for the United States in Opposition  
Petitioner's Reply Brief in Support of Certiorari

Doyle v. Ohio, 426 U.S. 610 (1976)  
Jenkins v. Anderson, 447 U.S. 231 (1980)  
Fletcher v. Weir, 455 U.S. 603 (1982)  
Wainwright v. Greenfield, 474 U.S. 284 (1986)  
Salinas v. Texas, 570 U.S. 178 (2013)

David S. Romantz, "*You Have the Right to Remain Silent*": A Case for the Use of Silence as Substantive Proof of the Criminal Defendant's Guilt, 38 Indiana Law Review 1 (2005)

Jan Martin Rybnicek, *Damned If You Do, Damned If You Don't?: The Absence of a Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre-Miranda Silence*, 19 Civil Rights Law Journal 405 (2009)

**Spring Break** – March 10 -16

March 21: **Assignment 4 (4-10 pages):**

May police officers and other public employees be lawfully discharged for refusing to answer incriminating questions about their job performance?

Garrity v. New Jersey, 385 U.S. 493 (1967)

Gardner v. Broderick, 392 U.S. 273 (1968)

Uniformed Sanitation Men Ass'n v. Commissioner, 392 U.S. 280 (1968)

Lefkowitz v. Cunningham, 431 U.S. 801 (1977)

Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 New York University Law Review 1309 (2001)

Peter Westen, *Answer Self-Incriminating Questions or Be Fired*, 37 American Journal of Criminal Law 97 (2010)

March 28: Discussion and substantial feedback on whether the Fifth Amendment bars a court order compelling a criminal suspect to enter in a password to decrypt a locked phone, computer, or file?

April 4: **Assignment 5 (4-10 pages):**

Does the Fifth Amendment bar a court order compelling a criminal suspect to enter in a password to decrypt a locked phone, computer, or file?

Fisher v. United States, 425 U.S. 391 (1976)

Commonwealth v. Davis 220 A.3d 534 (Pa. 2019)

State of Pennsylvania's Petition for a Writ of Certiorari

Davis' Brief in Opposition

Petitioner' Reply Brief

Dan Terzian, *The Fifth Amendment, Encryption, and the Forgotten State Interest*, 61 UCLA Review Discourse 298 (2014)

Laurent Sacharoff, *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 Fordham Law Review 203 (2018)

Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 Texas Law Review 767 (2019)

April 11: Discussion and substantial feedback on students' papers on the impact of *United States v. Hubbell*.

April 18: ***Assignment 6 (4-10 pages):***

The Impact of *Hubbell*.

*United States v. Hubbell*, 530 U.S. 27 (2000)

H. Richard Uviller, *Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell Is Off the Hook*, 91 Journal of Criminal Law and Criminology 311 (2001)

Robert P. Mosteller, *Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess*, 58 Washington & Lee Law Review 487 (2001)

Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell – New Protection for Private Papers?* 29 American Journal of Criminal Law 123 (2002)