

LESSON 33

How Do the Fourth and Fifth Amendments Protect Us against Unreasonable Law Enforcement Procedures?

Purpose of Lesson

Both the Fourth and Fifth Amendments put limits on the methods used by law enforcement officials investigating crimes. The idea behind both amendments is that the government must respect the principle that people are innocent until they are proven guilty.

The Fourth Amendment limits the powers of law enforcement officials to enter and search people's houses or to stop and search someone without reasonable cause. The Fifth Amendment contains several other important protections. This lesson focuses on protecting individuals from being forced to confess to a crime. You examine the history of these rights and their importance to the Framers.

When you finish this lesson, you should be able to explain the purpose and history of the Fourth Amendment, issues raised in its interpretation, and the importance of the Fifth Amendment provision against self-incrimination. Finally you should be able to take, defend, and evaluate positions on cases involving the right against self-incrimination.

Terms to Know

- contempt of court
- exclusionary rule
- immunity
- misdemeanor
- probable cause
- right against self-incrimination
- right to privacy
- warrant

What is the purpose of the Fourth Amendment?

Although the Fourth Amendment originally limited only the powers of the federal government, it has been applied to state and local governments by its incorporation into the Fourteenth Amendment. The intent of the amendment can be discovered fairly easily by reading it, even though the authors used several legal terms, as well as phrases that are not defined and now require interpretation.

AD 93 (Rev. 5/85) Search Warrant

United States District Court

DISTRICT OF _____

In the Matter of the Search of _____
(Name, address or other description of person or property to be searched)

SEARCH WARRANT

CASE NUMBER: _____

TO: _____ and any Authorized Officer of the United States

Affidavit(s) having been made before me by _____ Affiant _____ who has reason to believe that on the person of or on the premises known as _____ (Name, description and/or location)

In the _____ District of _____ there is now concealed a certain person or property, namely (describe the person or property)

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before _____ Date _____ (not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime — 5:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to _____ U.S. Judge or Magistrate

Date and Time Issued _____ at _____ City and State _____

Name and Title of Judicial Officer _____ Signature of Judicial Officer _____

How do search warrants protect every person's right to be secure?

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourth Amendment

Although the Fourth Amendment does not specifically state that it protects the **right to privacy**, it has been interpreted to protect this right, which is one of the most significant protections of human freedom and dignity found in the Bill of Rights.

The protection of privacy from invasion by government officials is highly valued for its own sake. It also is important to the right to freedom of conscience, thought, religion, expression, and property. Without the right to privacy, these other valued rights could be violated by government officials. Such a danger is particularly acute today with advanced surveillance technology and computers available to the government. If people were under constant or periodic observation by government, how free would they be to discuss differing opinions about our political system?

The importance to a free society of the protections against unreasonable searches and seizures was stressed by Justice Robert Jackson soon after he served as a judge at the Nuremberg trials of Nazi war criminals in 1949. He said:

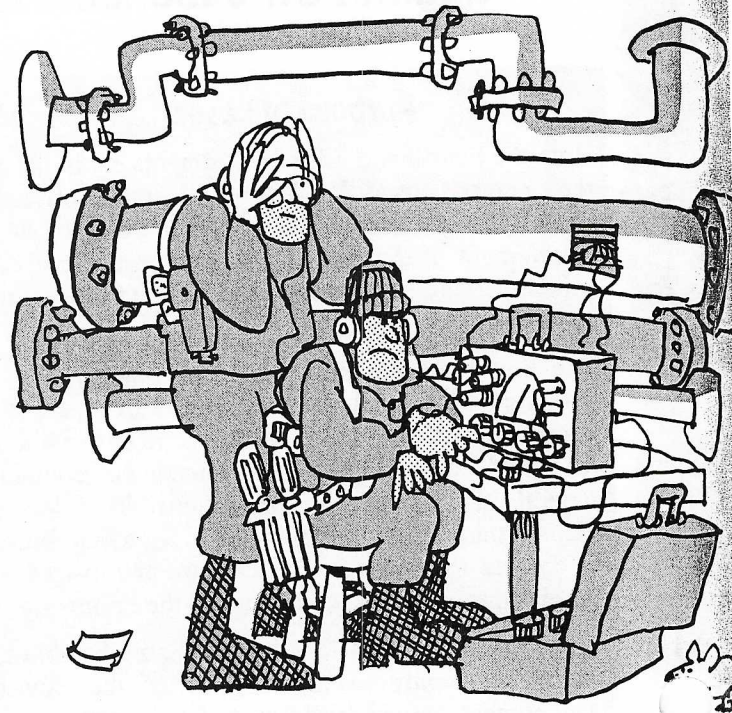
Among the deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart as uncontrolled search and seizure. It is one of the first and most effective weapons in the arsenal of every arbitrary government.

The Fourth Amendment prohibits law enforcement officers from searching or seizing people or their property unless there is **probable cause**—a good reason for suspecting a person of breaking a law. Its authors, however, decided not to allow police officers themselves to decide what constitutes probable cause. The amendment requires police officers to present their reasons for a search or seizure to a judge of a magistrate. If the judge or magistrate agrees there is probable cause to suspect a violation of law, the law enforcement officer is given a **warrant**—a written document giving permission for a search or seizure.

The Fourth Amendment has, however, been interpreted to allow searches and arrests without a warrant under certain circumstances. The Fourth Amendment provides further protection for individuals by limiting the power of judges to issue warrants. Warrants must specifically describe “the place to be searched and the persons or things to be seized.” A judge cannot give law enforcement officers a warrant that enables them to search anything they please.

In recent times the Fourth Amendment’s protections have not been limited to physical intrusions by government on an individual’s person or property. The Fourth Amendment’s language does refer only to “persons, houses, papers, and effects,” and for many years the Supreme Court gave those words a literal interpretation.

Today, however, the Court gives the Amendment a broader interpretation and extends the Amendment’s coverage to wiretapping, “bugging”, and other forms of eavesdropping. The courts have stated in these cases that persons, not places, are to be protected and, therefore, wiretapping can only occur after a warrant is issued.



How is the right to privacy different today from what it was when the Framers wrote the Constitution?

What is the history of the Fourth Amendment?

We inherited from British history the saying that “a man’s home is his castle.” The right to privacy and its importance to a free society have been understood for generations. English common law protected the right to privacy by prohibiting judges from giving law enforcement officials **general warrants** that did not describe in detail the places to be searched and the things or persons to be seized. General warrants have been referred to as open-ended “hunting licenses” authorizing government officials to search people, their businesses, homes, and property indiscriminately.

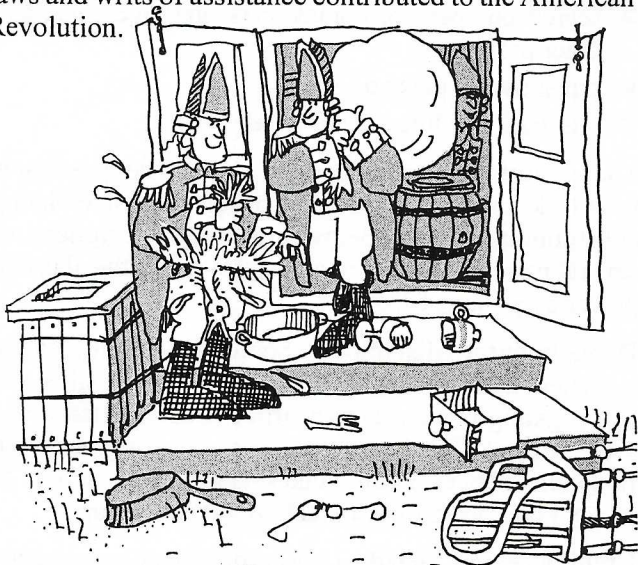
Despite the common law, royal commissions and Parliament had sometimes authorized the use of general warrants by government officials. At times these searches were directed at violent criminals. Often they were used to harass and persecute individuals who were critical of the government or who dissented from the Church of England.

As early as 1589, in a case involving a general search of Puritans and their property, English lawyers argued that the Magna Carta protected the personal privacy of individuals. Nevertheless, in 1662 Parliament passed a law that permitted general warrants called **writs of assistance**. These writs gave government officials the power to search for goods that had entered the country in violation of custom laws.

Officials did not need to convince a judge that they had reason to suspect an individual of committing a crime or that illegal goods were being hidden in a particular place. Without having to show good reason to suspect that a crime had been committed, unscrupulous government officials found it easy to use the writs of assistance to persecute individuals for their political and religious beliefs, or often, just to seek revenge against someone for personal reasons.

In the eighteenth century, Parliament again passed laws that authorized writs of assistance. These were used by British authorities in the American colonies to enforce the Trade Acts that taxed and limited the colonists' right to trade with other nations. Writs of assistance were generally used to collect taxes and to recover stolen goods, including enslaved Africans.

Colonial legislatures tried unsuccessfully to outlaw the writs by requiring warrants specifying who and what was to be searched and why. During the time just before the Revolution, the writs were used more and more frequently against colonists who were critical of British policy. They also were used against those believed to be violating the British restrictions on trade by smuggling tea and other products into Massachusetts and other colonies. The colonists' strong objections to the trade laws and writs of assistance contributed to the American Revolution.



What is the importance of the right to be secure in one's home from unreasonable searches and seizures?

The British were not entirely wrong in suspecting the colonists of smuggling. Some famous Americans violated the trade restrictions. For example, John Hancock's father had made a great deal of money smuggling tea into Boston. A writ of assistance enabled the British to discover that John Hancock himself was smuggling wine. As you can imagine, there was more than one reason why the Founders protested against such general warrants.

After the Revolution, many state declarations of rights outlawed unreasonable searches and seizures. Anti-Federalists later criticized the Constitution for not placing similar limitations on the federal government. A delegate to the Massachusetts ratifying convention said, "There is no provision made in the Constitution to prevent...the most innocent person...being taken by virtue of a general warrant...and dragged from his home." It was in response to such concerns that the Fourth Amendment was included in the Bill of Rights. Today every state constitution contains a clause similar to the Fourth Amendment.

What controversies are raised in the interpretation and application of the Fourth Amendment?

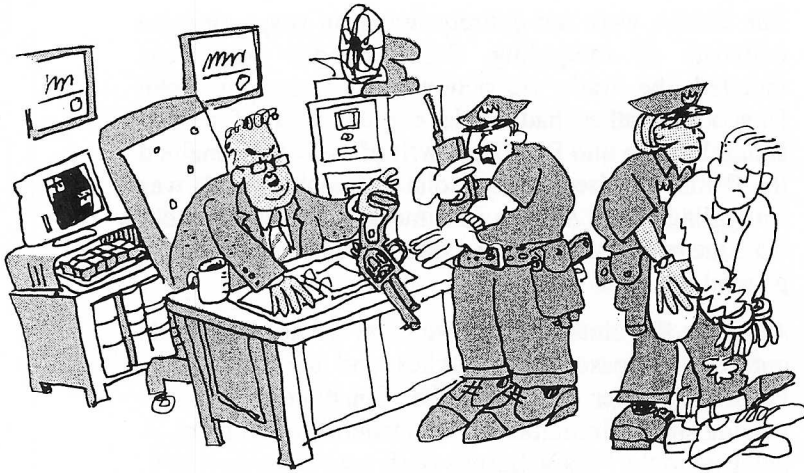
Three of the most important questions raised by the Fourth Amendment are

- When is a warrant not required?
- What is probable cause?
- How can the Fourth Amendment be enforced?

We will look briefly at the first two questions. The last question requires a more careful examination, as it has been a constant source of controversy. The next two sections focus on that issue.

When is a warrant not required? Whenever there is time to do so, law enforcement officers must convince a judge that they have probable cause to justify a search or arrest. If the judge accepts the officers' facts and reasoning, the judge will issue a warrant for an arrest, a search, or both.

There are times, however, when law enforcement officers cannot wait for a warrant. For example, police may be on the scene of a violent crime or a robbery in progress. If they do not arrest the suspect immediately, the person might injure a police officer or bystanders, or escape. Under these emergency circumstances, it is necessary for officers to be able to arrest a person or search property without a warrant. Later, however, the officers must convince a judge that they had probable cause and did not have time to obtain a warrant.



What are some situations when police officers should be able to make an arrest without a warrant?

What is probable cause? What evidence must law enforcement officers have to justify a search or seizure of a person or property? Generally, at the moment a law enforcement officer decides to arrest a person, he or she must have reliable knowledge that the suspect either has already committed a crime or is doing so at the time of arrest.

The specific criteria for probable cause are constantly being refined by the Supreme Court in the light of experience. This process reveals a commitment to protecting the rights of individuals while at the same time protecting society from those who break the law.

Critical Thinking Exercise

EVALUATING, TAKING, AND DEFENDING A POSITION ON PROBABLE CAUSE

Work with a study partner to consider the following situations which are based on actual incidents. Read the Fourth Amendment in reference to probable cause. Then with your partner decide whether the Amendment was violated in each incident. Be prepared to share your position with the class.

1. Tom Alvin was suspected of being an armed and dangerous drug dealer. The entrance to his apartment was by a very narrow staircase over which video cameras were installed. Police officers armed with a search warrant decided it was too dangerous to enter the apartment by normal means. Therefore, they placed ladders against the side of the building, climbed up to Alvin's apartment, smashed in the windows, entered, searched for, and seized cocaine.
2. A consumer organization is lobbying Congress to pass a law to prohibit the selling of a phone gadget

which reveals the caller's phone number. They claim that using the product is an unlawful invasion of privacy.

3. Lucy Briggs was laid off her job as a flight attendant as the result of testing positive for drug use. The test was part of a new company policy requiring all airline employees to undergo surprise drug tests. Lucy claims that the mandatory urine test violates the "right of the people to be secure in their persons."
4. Acting quickly before a murder suspect could wash his hands, the police seized him and took skin scrapings from beneath his fingernails. They say the warrantless search was legal because there was no time to get a warrant before the suspect destroyed the evidence.
5. A student completed certain forms to apply for a government college loan. The confidential, personal information was stored on a computer network. It was later accessed by a different government agency and used without the student's knowledge or permission as part of a survey on college-age Americans.

What are means of enforcing the Fourth Amendment?

We must give law enforcement officers enough power to protect us from criminals. This means that we must trust them with the power, in certain situations, to limit some of our most valuable rights. Under certain circumstances, law enforcement officers have the power to

- stop and question us
- use force, if necessary, to restrain us
- search our person, homes, cars, garbage cans, and other property
- arrest us and place us in jail
- question us while we are in jail

These powers are easily open to abuse. The question is how to keep law enforcement officials from violating constitutional rights. Below are brief descriptions of several policies that are being used to check the abuse of power by police officers.

Departmental discipline. Some law enforcement agencies have a board of officers responsible for investigating claims that an officer has violated a due process right. The board conducts a hearing and, if it finds the officer guilty, takes appropriate action to prevent that person from breaking the law again.

Civilian review boards. Law enforcement agencies are sometimes supervised by a civilian review board appointed by local government. This board has the authority to investigate charges against officers accused

of breaking the law or violating rules and procedures. It also has the responsibility to provide the officer a fair hearing. If the board reaches the conclusion that the officer is guilty, it recommends appropriate action to the law enforcement agency or suggests criminal prosecution.

Civil suits. Civilians who think their rights have been violated by law enforcement officers sometimes have the right to sue individual officers and the agency for damages in a civil court or under the Civil Rights Act.

Exclusionary rule. Any evidence gained by law enforcement officers as a result of breaking the law may not be used as evidence in court against the defendant. This evidence is said to be "excluded" by the judge at the trial.

What do you think?

1. What should be done if law enforcement officers break the law and violate individual rights protected by the Fourth Amendment?
2. Suppose officers arbitrarily and unfairly search a person's home or other property or arrest a person without having a good reason for doing so?
3. What can be done to prevent law enforcement officers from violating people's constitutional rights?

What is the significance of the exclusionary rule?

Perhaps the most controversial of these policies is the **exclusionary rule**. The rule is most often used to exclude evidence attained from illegal searches and seizures. It also is used to exclude evidence gathered in violation of the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel.

The exclusionary rule was created by judges to discourage law enforcement officers from breaking the law. The courts have argued that it is the most effective way of preventing violations of individual rights.

The exclusionary rule has been used since 1914 to limit the powers of federal law enforcement agencies such as the F.B.I. It was not until 1961, however, that the Supreme Court applied the exclusionary rule to criminal prosecutions at the state and local levels in the case *Mapp v. Ohio*. Since that time there has been continual controversy about its use.

What do you think?

1. What might be the advantages and disadvantages of each of the policies described on page 178 and above?
2. Which policies would you support? Why?

What is the purpose of the Fifth Amendment provision against self-incrimination?

The **right against self-incrimination** is a protection of both the innocent and the guilty alike from the potential abuse of government power. The Fifth Amendment provides that, "No person...shall be compelled in any criminal case to be a witness against himself." Its primary purpose is to prohibit the government from threatening, mistreating, or even torturing people to gain evidence against them or their associates.

A confession is powerful evidence. If a prosecutor or police can obtain a confession from a suspect, it often eliminates the need for a costly or careful search for other evidence. The Framers were aware of the problems that could arise from the "third degree" and other forms of improper pressure.

Refusing to testify by "taking the Fifth" is one of the most familiar provisions of the Bill of Rights. It is controversial because many people see the refusal to testify as a right that only benefits those who are guilty. The right not to testify against oneself, however, is essential to uphold the principle that a person is presumed innocent until proven guilty beyond a reasonable doubt.

This clause of the Fifth Amendment protects persons accused of crimes. It also protects witnesses from being forced to incriminate themselves.

Critical Thinking Exercise

EXAMINING ISSUES OF SELF-INCRIMINATION

This exercise provides you an opportunity to examine both a historical and a contemporary case involving the right against self-incrimination. Your class should be divided into six groups. Three groups should be assigned to the 1791 case and three to the 1991 case. Students in the first group assigned to each case will play the role of justices. The other two groups assigned for each case will argue for or against the position that the Fifth Amendment prohibition against self-incrimination has been violated. After two-minute oral arguments have been made for each side in each case, the justices should deliberate. Then they should issue their opinions on the question, "Has the self-incrimination clause of the Fifth Amendment been violated?"

Afterward, your entire class should compare the cases and discuss your views using the following questions as a guide:

1. In what ways are the two cases similar or dissimilar?
2. What values and interests are involved in each case?

3. Under what conditions, if any, should the right against self-incrimination be applied and limited? Explain your reasoning.

Commonwealth v. Dillon (1791). On the 18th of December, Dillon, a twelve-year-old Philadelphia apprentice, was arrested for arson, a crime punishable by death. He was accused of burning several stables containing hay and other goods. According to court records, the boy was visited by his minister, master, and other “respectable citizens”. They urged him to confess for the good of his “mortal body and soul”. He said he was not guilty.

The inspectors of the prison...[then] carried him into the dungeon; they displayed it in all its gloom and horror; they said that he would be confined in it, dark and cold and hungry, unless he made full disclosure [confession]; but if he did...he would be well accommodated with room, fire, and victuals [food], and might expect pity and favour from the court.

Dillon continued to deny his guilt, even when kept in the dungeon without heat, food, or water. After about forty-eight hours, however, the boy confessed in front of the mayor, his master, and law enforcement officials.

When the case came to trial, Dillon’s attorney argued that the charges should be dismissed. He said that the main evidence against Dillon was his confession, which was forced by keeping him in the dungeon, threatening him, and promising him he could expect pity and good treatment by the court. He claimed that such confessions were unreliable and illegal.

The state’s attorney, however, argued that the confession was freely made in public. Therefore, it could be used as evidence at his trial. The attorney admitted that the interference of the inspectors at the prison was slightly irregular, but the way in which Dillon was encouraged to confess was not threatening. Therefore, his confession was not forced and should not be excluded at the trial. To do so would be to excuse the fact that he had committed a serious crime. The boy had confessed to a crime which had endangered lives and destroyed the property of others.

The state’s attorney said that confessions freely given, as everyone knows, are the best evidence of guilt. The point to be considered was whether Dillon falsely accused himself of a crime. If there was any possibility that he had done so, he should not be executed. But since Dillon had never retracted his statement, he should be found guilty.

Fulminante v. Arizona (1991). The Arizona police lacked enough evidence to prove that Orestes Fulminante, a convicted child molester, had murdered

his eleven-year-old stepdaughter. He was sent to prison on a weapons charge. The murder case, however, remained unsolved. In prison, Fulminante was threatened by several inmates who had heard rumors that he was a child killer. A fellow inmate, with a reputation for mob connections, offered to protect him. But first, the inmate insisted on knowing the details of the murder.

Fearing for his life, Fulminante admitted that he had driven the young girl to the desert. There he abused her, forced her to beg for her life, and then shot her twice in the head.

What Fulminante didn’t know was that his fellow inmate was an FBI informer. After being freed on the gun charge, Fulminante was arrested, tried, and convicted of murder. The main evidence against him was his confession to the inmate and a similar confession made to the informant’s fiancée at a later date.

Fulminante’s attorney appealed the conviction. He argued that the prison confession was forced. Its use to convict Fulminante was a violation of the Fifth Amendment right against self-incrimination. Since the confessions were the only real evidence against Fulminante, he deserved a new trial with a jury that would not hear about the confessions.

The state’s attorney argued that even if the first confession was forced, the second was not forced. It was freely made. At most, introducing the confession as evidence should be considered a harmless error, made in good faith by officers and prosecutors in a brutal child sexual assault and murder case.

What happened to Dillon and Fulminante?

The cases you have examined illustrate how issues involving the right against self-incrimination have been debated for centuries. In 1791, the judge ruled that because arson was a crime punishable by death, benefit of the doubt should be given to twelve-year-old Dillon. The arson charge was dropped and he was retried on a **misdemeanor** charge—a less serious crime. The judge said:

Though it is the province [of the court] to administer justice, and not to bestow mercy; and though it is better not to err at all...in a doubtful case, error on the side of mercy if safer...than error on the side of rigid justice.

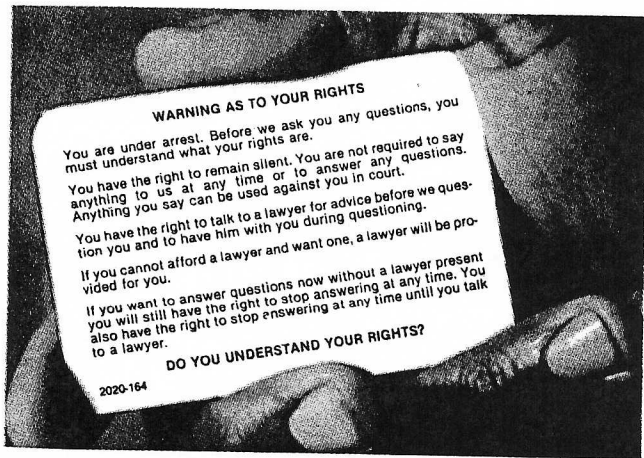
In 1991, the Supreme Court also sent back the Fulminante case for retrial. The majority of justices said that the confession in prison was made under a believable threat of physical violence. Thus it was the product of coercion and was the main evidence against Fulminante.

Without the confession, the prosecution probably would not have had enough evidence to get a conviction. Therefore, Fulminante was entitled to a new trial.

How have protections against self-incrimination developed?

There are a number of contemporary issues involving the right against self-incrimination. Originally, the right was limited to proceedings during a trial and did not limit the power of law enforcement officers to question persons they had arrested. This allowed the police to force people to confess or give evidence against themselves.

After hearing numerous cases in which the right against self-incrimination had been violated, the Supreme Court ruled, in *Miranda v. Arizona* (1966), that law enforcement officers must warn suspects that they may remain silent and that they have the right to have an attorney with them when being questioned. Suspects must also be told that anything they say can and will be used against them and that if they cannot afford an attorney, one will be appointed for them. This warning has become known as the "Miranda warning." The Court has ruled, however, that the right to remain silent does not mean that officers cannot take a voluntary statement from the accused.



What are common limitations on the right against self-incrimination?

The exercise of the right against self-incrimination is, however, subject to some limitations. For example:

- **Personal right.** Because the right against self-incrimination is intended to protect individuals, it cannot be used to protect organizations such as businesses or trade unions. Nor may someone refuse to testify if the testimony would incriminate a friend or family member. Witnesses, as well as defendants, may refuse to answer questions if their answers might incriminate them personally.

- **Immunity.** Under certain circumstances, a person may be compelled to testify if the court offers **immunity**. For example, if the court states that nothing the person says can be used in a trial against him or her, the person must testify or be charged with **contempt of court**.

What do you think?

1. What position would you take on the recent Supreme Court decision that allows forced confessions to be used in court if there is enough other evidence to convict a person? Explain your position.
2. If someone refuses to answer questions by the police, or to be a witness in his or her own defense at a trial, are we entitled to assume that the person is hiding something, and must be guilty? Would it be constitutional for a prosecutor to remind the jury that the defendant had an opportunity to speak in his or her own defense, and chose not to?

Reviewing and Using the Lesson

1. How would you define the "right to privacy"? How does the Fourth Amendment protect this right?
2. How would you explain the term "probable cause"? Why does the Fourth Amendment require "probable cause" before a warrant can be issued?
3. Why does the Fourth Amendment generally require a warrant before a search can be conducted? Why does the Fourth Amendment require warrants to "particularly describ[e] the place to be searched, and the persons or things to be seized"? Under what circumstances is a warrant not required? Why?
4. How would you explain the right against self-incrimination? What purposes does this right serve?
5. What are some limitations on the right against self-incrimination?
6. Research search and seizure issues in a school setting by examining the case *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Report your findings to the class.

