3 Rights of the Accused

Section Preview

Objectives

1. **Define** the writ of habeas corpus, bills of attainder, and ex post facto laws.
2. **Outline** how the right to a grand jury and the guarantee against double jeopardy help ensure the rights of the accused.
3. **Describe** issues that arise from the guarantee of a speedy and public trial.
4. **Determine** what constitutes a fair trial by jury.
5. **Examine** the right to an adequate defense and the guarantee against self-incrimination.

Why It Matters

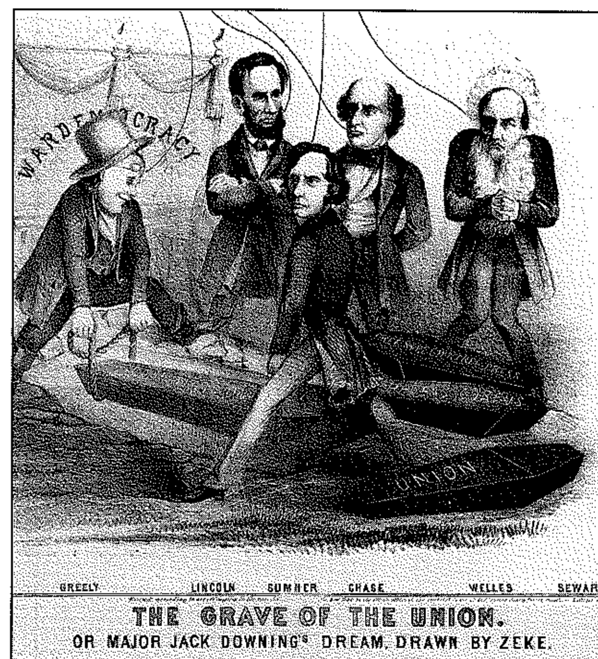
In the American judicial system, any person who is accused of a crime must be presumed to be innocent until proven guilty. The Constitution, especially in the 5th, 6th, and 14th amendments, contains a number of provisions designed to ensure that the rights of people accused of a crime are upheld.

Political Dictionary

* **writ of habeas corpus**
* **bill of attainder**
* **ex post facto law**
* **grand jury**
* **indictment**
* **double jeopardy**
* **bench trial**
* **Miranda Rule**

Think about this statement for a moment: "It is better that ten guilty persons go free than that one innocent person be punished." That maxim expresses one of the bedrock principles of the American legal system.

Of course, society must punish criminals in order to preserve itself. However, the law intends that any person who is suspected or accused of a crime must be presumed innocent until proven guilty by fair and lawful means.



Interpreting Political Cartoons This detail from an 1860s cartoon is critical of President Lincoln's 1861 suspension of the writ of habeas corpus. ***Why is a coffin labeled "Constitution" being lowered into the ground?***

Habeas Corpus

The **writ of habeas corpus,** sometimes called the writ of liberty, is intended to prevent unjust arrests and imprisonments.[6] It is a court order directed to an officer holding a prisoner. It commands that the prisoner be brought before the court and that the officer show cause—explain, with good reason—why the prisoner should not be released.

The right to seek a writ of habeas corpus is protected against the National Government in Article I, Section 9 of the Constitution. That right is guaranteed against the States in each of their own constitutions.

The Constitution says that the right to the writ cannot be suspended, "unless when in Cases of Rebellion or Invasion the public Safety may require it." President Abraham Lincoln suspended the writ in 1861. His order covered various parts of the country, including several areas in which war was not then being waged. Chief Justice Roger B. Taney, sitting as a circuit judge, held Lincoln's action unconstitutional.

Taney ruled that the Constitution gives the power to suspend the writ to Congress alone. Congress then passed the Habeas Corpus Act of 1863. It gave the President the power to suspend the writ when and where, in his judgment, that action was necessary. In *Ex parte Milligan,* 1866, the Supreme Court ruled that neither Congress nor the President can legally suspend the writ where there is no actual fighting nor the likelihood of any.

The right to the writ has been suspended only once since the Civil War and the Reconstruction Period that followed it. The territorial governor of Hawaii suspended the writ following the Japanese attack on Pearl Harbor, December 7, 1941. The Supreme Court later ruled that the governor did not have the power to take that action, *Duncan* v. *Kahanamoku,* 1946.

Bills of Attainder

A **bill of attainder** is a legislative act that inflicts punishment without a court trial. Neither Congress nor the States can pass such a measure (Article I, Sections 9 and 10).

The ban on bills of attainder is both a protection of individual freedom and part of the system of separation of powers. A legislative body can pass laws that define crime and set the penalties for violation of those laws. It cannot, however, pass a law that declares a person guilty of a crime and provides for the punishment of that person.

The Supreme Court has held that this prohibition is aimed at all legislative acts that apply "to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial," *United States* v. *Lovett,* 1946.

The Framers wrote the ban on bills of attainder into the Constitution because both Parliament and the colonial legislatures had passed many such bills. Bills of attainder have been rare in our national history, however.

United States v. *Brown,* 1965, is one of the few cases in which the Court has struck down a law as a bill of attainder. There it overturned a provision of the Landrum-Griffin Act of 1959. That provision made it a federal crime for a member of the Communist Party to serve as an officer of a labor union.

Ex Post Facto Laws

An **ex post facto law** (a law passed "after the fact") has three features. It is (1) a criminal law, one defining a crime or providing for its punishment; (2) applied to an act committed before its passage; and (3) works to the disadvantage of the accused. Neither Congress nor the State legislatures may pass such laws.[7]

For example, a law making it a crime to sell marijuana cannot be applied to someone who sold it before that law was passed. Or, a law that changed the penalty for murder from life in prison to death could not be applied to a person who committed a murder before the punishment was changed.

Ex post facto cases do not come along very often. The Court decided its most recent one, *Carmell* v. *Texas,* in 2000. There, the Court overturned a man's sexual abuse conviction because of a change in State law. That change had made it easier for the prosecution to prove its charge than was the case when the abuse was committed.

Retroactive civil laws are *not* forbidden. Thus, a law raising income tax rates could be passed in November and applied to income earned through the whole year.

Grand Jury

The Constitution provides that:

FROM THE *Constitution*

> *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."*
>
> —5th Amendment

The **grand jury** is the formal device by which a person can be accused of a serious crime.[8] In federal cases, it is a body of from 16 to 23 persons drawn from the area of the federal district court that it serves. The votes of at least 12 of the

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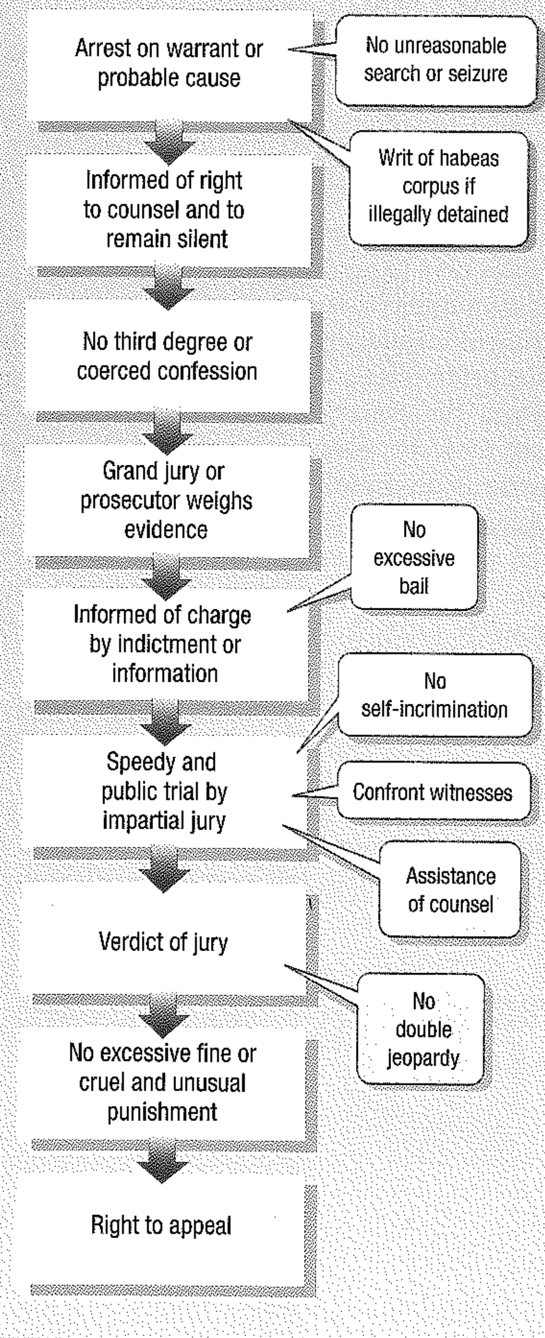
[6] The phrase *habeas corpus* comes from the Latin, meaning "you should have the body," and those are the opening words of the writ.

[7] Article I, Sections 9 and 10. The phrase *ex post facto* is from the Latin, meaning "after the fact."

[8] The 5th Amendment provides that the guarantee of grand jury does not extend to "cases arising in the land or naval forces." The conduct of members of the armed forces is regulated under a code of military law enacted by Congress.



Interpreting Charts Any person accused of a crime is presumed innocent until proven guilty. ***What protections does the Constitution extend to those convicted of a crime?***

grand jurors are needed to return an indictment or to make a presentment.

An **indictment** is a formal complaint that the prosecutor lays before a grand jury. It charges the accused with one or more crimes. If the grand jury finds that there is enough evidence for a trial, it returns a "true bill of indictment." The accused is then held for prosecution. If the grand jury does not make such a finding, the charge is dropped.

A presentment is a formal accusation brought by the grand jury on its own motion, rather than that of the prosecutor. It is little used in federal courts.

A grand jury's proceedings are not a trial. Since unfair harm could come if they were public, its sessions are secret. They are also one-sided—in the law, *ex parte.* That is, only the prosecution, not the defense, is present.

The right to grand jury is intended as a protection against overzealous prosecutors. Critics say that it is too time-consuming, too expensive, and too likely to follow the dictates of the prosecutor.

The 5th Amendment's grand jury provision is the only part of the Bill of Rights relating to criminal prosecution that the Supreme Court has not brought within the coverage of the 14th Amendment's Due Process Clause. In most States today, most criminal charges are not brought by grand jury indictment. They are brought, instead, by an information, an affidavit in which the prosecutor swears that there is enough evidence to justify a trial (see Chapter 24).

Double Jeopardy

The Fifth Amendment's guarantee against double jeopardy is the first of several protections in the Bill of Rights especially intended to ensure fair trial in the federal courts.[9] Fair trials are guaranteed in State courts by each State's own constitution and by the 14th Amendment's Due Process Clause.

The Fifth Amendment says in part that no person can be "twice put in jeopardy of life or limb." Today, this prohibition against **double jeopardy** means that once a person has been tried for a crime, he or she cannot be tried again for that same crime.

A person can violate both a federal *and* a State law in a single act, however—for example, by selling narcotics. That person can then be tried for the federal crime in a federal court and for the State crime in a State court. A single act can also result in the commission of several crimes. A person who breaks into a store, steals liquor, and sells it can be tried for illegal entry, theft, and selling liquor without a license.

In a trial in which a jury cannot agree on a verdict, there is no jeopardy. It is as though no trial had been held, and the accused can be tried again. Nor is double jeopardy involved when a case is appealed to a higher court.[10] Recall that the Supreme Court has held that the 5th Amendment's ban on double jeopardy applies against the States through the 14th Amendment, *Benton* v. *Maryland,* 1969.

Several States allow the continued confinement of violent sex predators after they have completed a prison term. The Court has twice (in 1987 and 2001) held that that confinement is not punishment—and so does not involve double jeopardy. Rather, the practice is intended to protect the public from harm.

Speedy and Public Trial

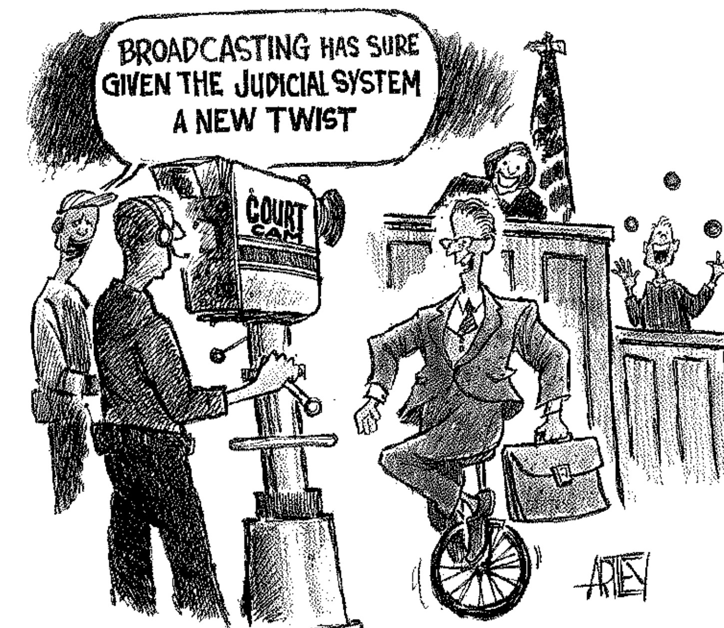
The Constitution commands:

> FROM THE Constitution
>
> *"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."*
>
> —6th Amendment

Speedy Trial

The guarantee of a speedy trial is meant to ensure that the government will try a person accused of crime without undue delay. But how long a delay is too long? The Supreme Court has long recognized that each case must be looked at on its own merits.

In a leading case, *Barker* v. *Wingo,* 1972, the Court listed four criteria for determining if a delay has violated the constitutional protection. They are (1) the length of the delay, (2) the reasons for it, (3) whether the delay has in fact harmed the defendant, and (4) whether the defendant asked for a prompt trial.



Interpreting Political Cartoons The term "media circus" applies to trials that generate a great deal of publicity. ***What are the dangers of a trial becoming too public?***

The Speedy Trial Act of 1974 says that the time between a person's arrest and the beginning of his or her federal criminal trial cannot be more than 100 days. The law does allow for some exceptions, however. Examples include a case where the defendant must undergo extensive mental tests, or when the defendant or a key witness is ill.

The 6th Amendment guarantees a prompt trial in *federal* cases. The Supreme Court first declared that this right applies against the States as part of the 14th Amendment's Due Process Clause in *Klopfer* v. *North Carolina,* 1967.

Public Trial

The 6th Amendment says that a trial must also be public. The right to be tried in public is also part of the 14th Amendment's guarantee of procedural due process.

A trial must not be *too* speedy or *too* public, however. The Supreme Court threw out an Arkansas murder conviction in 1923 on just those grounds. The trial had taken only 45 minutes, and it had been held in a courtroom packed by a threatening mob.

Within reason, a judge can limit both the number and the kinds of spectators who may be present at a trial. Those who seek to disrupt a courtroom can be barred from it. A judge can order a courtroom cleared when the expected

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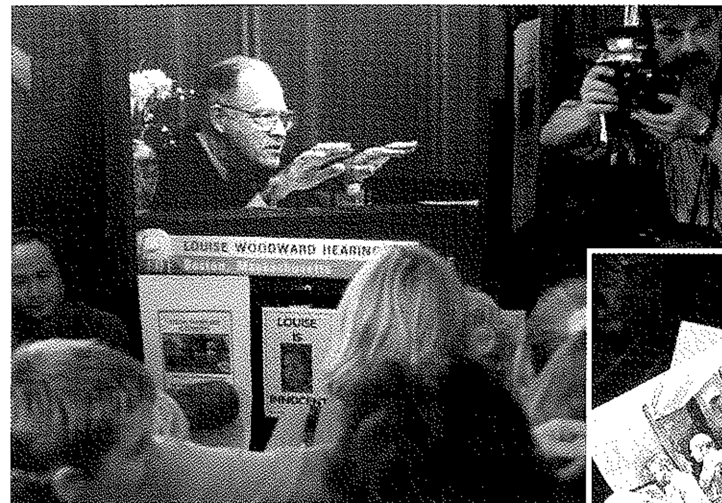
[9] See the 5th, 6th, 7th, and 8th amendments and Article III, Section 2, Clause 3. The practice of excluding evidence obtained in violation of the 4th Amendment is also intended to guarantee a fair trial.

[10] The Organized Crime Control Act of 1970 allows federal prosecutors to appeal sentences they believe to be too lenient. The Supreme Court has held that such appeals do not violate the double jeopardy guarantee, *United States* v. *Di Francesco,* 1980.



▲ ***Cameras in the Courtroom?*** Friends and family watch the 1997 televised trial (above) of nanny Louise Woodward for the murder of a child in her care. In trials in which cameras are not allowed in the courtroom, lawyers and the public may "view" the trial through courtroom sketches (right).

testimony may be embarrassing to a witness or to someone else not a party to the case.

Many of the questions about how public a trial should be involve the media—especially newspapers and television. The guarantees of fair trial and free press, however, often conflict in the courts. On the one hand, a courtroom is a public place where the media have a right to be present. On the other hand, media coverage must not damage the right to a fair trial.

Champions of the public's right to know hold that the courts must allow the broadest possible press coverage of a trial. The Supreme Court has often held, however, that the media have only the same right as the general public to be present in a courtroom. The right to a public trial belongs to the defendant, not to the media.

What of televised trials? Television cameras are barred from all federal courtrooms. Most States do allow some form of in-court television reporting, however. Does televising a criminal trial violate a defendant's rights?

An early major case on the point was *Estes* v. *Texas,* 1965. Radio and television reporting of Estes' case had been allowed from within the courtroom and over the objections of Estes himself. The Court held that this reporting had been so disruptive that it had denied Estes a fair trial.

Sixteen years later, the Court held in *Chandler* v. *Florida,* 1981, that nothing in the Constitution prevents a State from allowing the televising of a criminal trial. At least, televising is not prohibited as long as steps are taken to avoid too much publicity and to protect the defendant's rights.

Trial by Jury

The 6th Amendment also says that a person accused of a federal crime must be tried "by an impartial jury." This guarantee reinforces an earlier one set out in Article III, Section 2. The right to trial by jury is also binding on the States through the 14th Amendment's Due Process Clause, but only in cases involving "serious" crimes, *Duncan* v. *Louisiana,* 1968.[11] The trial jury is often called the petit jury. *Petit* is the French word for "small."

The 6th Amendment adds that the members of the federal court jury must be drawn from "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." This clause gives the defendant any benefit there might be in having a court and jury familiar with the people and problems of the area.

A defendant may ask to be tried in another place—seek a "change of venue"—on grounds that the people of the locality are so prejudiced in the case that an impartial jury cannot be drawn. The judge must decide whether a change of venue is justified.

A defendant may also waive (put aside or relinquish) the right to a jury trial. However, he or she can do so only if the judge is satisfied that the defendant is fully aware of his or her rights and understands what that action means. In fact, a judge can order a jury trial even when a defendant does not want one, *One Lot Emerald Cut Stones and One Ring* v. *United States,* 1972. If a defendant waives the right, a **bench trial** is held. That is, a judge alone hears the case. (Of course, a defendant can plead guilty and so avoid a trial of any kind.)

[11]In *Baldwin* v. *New York,* 1970, the Court defined those crimes as offenses for which imprisonment for more than six months is possible.

In federal practice, the jury that hears a criminal case must have 12 members. Some federal civil cases are tried before juries of as few as six members, however. Several States now provide for smaller juries, often of six members, in both criminal and civil cases.

In the federal courts, the jury that hears a criminal case can convict the accused only by a unanimous vote. Most States follow the same rule.[12]

In a long series of cases, dating from *Strauder* v. *West Virginia,* 1880, the Supreme Court has held that a jury must be "drawn from a fair cross section of the community." A person is denied the right to an impartial jury if he or she is tried by a jury from which members of any groups "playing major roles in the community" have been excluded, *Taylor* v. *Louisiana,* 1975.

In short, no person can be kept off a jury on such grounds as race, color, religion, national origin, or sex. As the Court put it in one of its more recent decisions on the point: Both the 5th and the 14th amendments mean that jury service cannot be determined by "the pigmentation of skin, the accident of birth, or the choice of religion," *Georgia* v. *McCollum,* 1992.

Right to an Adequate Defense

Every person accused of a crime has the right to the best possible defense that circumstances will allow. The 6th Amendment says that a defendant has the right (1) "to be informed of the nature and cause of the accusation," (2) "to be confronted with the witnesses against him" and question them in open court, (3) "to have compulsory process for obtaining witnesses in his favor" (that is, favorable witnesses can be subpoenaed, or forced to attend), and (4) "to have the Assistance of Counsel for his defense."

These key safeguards apply in the federal courts. Still, if a State fails to honor any of them, the accused can appeal a conviction on grounds that the 14th Amendment's Due Process Clause has been violated. Recall from Chapter 19 that the Supreme Court protected the right to counsel in *Gideon* v. *Wainwright,* 1963; the right of confrontation in *Pointer* v. *Texas,* 1965; and the right to call witnesses in *Washington* v. *Texas,* 1967.

These guarantees are intended to prevent the cards from being stacked in favor of the prosecution. One of the leading right-to-counsel cases, *Escobedo* v. *Illinois,* 1964, illustrates this point.

Chicago police picked up Danny Escobedo for questioning in the death of his brother-in-law. On the way to the police station, and then while he was being questioned there, he asked several times to see his lawyer. The police denied these requests. They did so even though his lawyer was in the police station and was trying to see him, and the police knew the lawyer was there. Through a long night of questioning, Escobedo made several damaging statements. Prosecutors later used those statements in court as a major part of the evidence that led to his murder conviction.

The Supreme Court ordered Escobedo freed from prison four years later. It held that he had been improperly denied his right to counsel.

In *Gideon* v. *Wainwright,* 1963, the Court held that an attorney must be furnished to a defendant who cannot afford one. In many places, a judge still assigns a lawyer from the local community, or a private legal aid association provides counsel.

[12]The 14th Amendment does not say that there cannot be juries of fewer than 12 persons, *Williams* v. *Florida,* 1970, but it does not allow juries of fewer than six members, *Ballew* v. *Georgia,* 1978. Nor does it prevent a State from providing for a conviction on a less than unanimous jury vote, *Apodaca* v. *Oregon,* 1972. But if a jury has only six members, it may convict only by a unanimous vote, *Burch* v. *Louisiana,* 1979.

Interpreting Political Cartoons ***Would a poll of friends and neighbors produce a fair verdict? Explain your answer.***

Since *Gideon,* however, a growing number of States, and many local governments, have established tax-supported public defender offices. In 1970, Congress authorized the appointment of federal public defenders or, as an alternative, the creation of community legal service organizations financed by federal grants.

Self-Incrimination

The guarantee against self-incrimination is among the protections set out in the Fifth Amendment. That provision declares that no person can be "compelled in any criminal case to be a witness against himself." This protection must be honored in both the federal and State courts, *Malloy* v. *Hogan,* 1964.

In a criminal case, the burden of proof is always on the prosecution. The defendant does not have to prove his or her innocence. The ban on self-incrimination prevents the prosecution from shifting the burden of proof to the defendant. As the Court put it in *Malloy* v. *Hogan,* the prosecution cannot force the accused to "prove the charge against" him "out of his own mouth."

Applying the Guarantee

The language of the 5th Amendment suggests that the guarantee against self-incrimination applies only to criminal cases. In fact, the guarantee covers any governmental proceeding in which a person is legally compelled to answer any question that could lead to a criminal charge. Thus, a person may claim the right ("take the Fifth") in a variety of situations: in a divorce proceeding (which is a civil matter), before a legislative committee, at a school board's disciplinary hearing, and so on.

The courts, not the individuals who claim it, decide when the right can be properly invoked. If the plea of self-incrimination is pushed too far, a person can be held in contempt of court.

The guarantee against self-incrimination is a personal right. One can claim it only for oneself.[13] It cannot be invoked in someone else's behalf; a person *can* be forced to "rat" on another.

The privilege does not protect a person from being fingerprinted or photographed, submitting a handwriting sample, or appearing in a police lineup. And, recall, it does not mean that a person does not have to submit to a blood test in a drunk driving situation, *Schmerber* v. *California,* 1966.

A person cannot, however, be forced to confess to a crime under duress, that is, as a result of torture or other physical or psychological pressure. In *Ashcraft* v. *Tennessee,* 1944, for example, the Supreme Court threw out the conviction of a man accused of hiring another person to murder his wife. The confession on which his conviction rested had been secured only after some 36 hours of continuous, threatening interrogation. The questioning was conducted by officers who worked in shifts because, they said, they became so tired that they had to rest.

The gulf between what the Constitution says and what goes on in some police stations can be wide indeed. For that reason, the Supreme Court has come down hard in favor of the defendant in many cases involving the protection against self-incrimination and the closely related right to counsel.

Recall, for example, the Court's decision in *Escobedo* v. *Illinois,* 1964. There it held that a confession cannot be used against a defendant if it was obtained by police who refused to allow the defendant to see his attorney and did not tell him that he had a right to refuse to answer their questions.

Miranda v. *Arizona*

In a truly historic decision, the Court refined the *Escobedo* holding in *Miranda* v. *Arizona,* 1966. A mentally retarded man, Ernesto Miranda, had been convicted of kidnapping and rape. Ten days after the crime, the victim picked Miranda out of a police lineup. After two hours of questioning, during which the police did not tell him of his rights, Miranda confessed.

The Supreme Court struck down Miranda's conviction. More importantly, the Court said that it would no longer uphold convictions in any cases in which suspects had not been told of their constitutional rights before police questioning. It thus laid down the **Miranda Rule.** Under the rule, before police may question a suspect, that person must be

[13]With this major exception: A husband cannot be forced to testify against his wife, or a wife against her husband, *Trammel* v. *United States,* 1980. One can testify against the other voluntarily, however.

(1) told of his or her right to remain silent;
(2) warned that anything he or she says can be used in court;
(3) informed of the right to have an attorney present during questioning;
(4) told that if he or she is unable to hire an attorney, one will be provided at public expense;
(5) told that he or she may bring police questioning to an end at any time.

The Miranda Rule has been in force for 35 years now and has been built into thousands of television programs and books over that period. As the Court put it in *Dickerson* v. *United States,* 2000, the rule "has become embedded in routine police practice to the point where the warnings have become part of our national culture."

The Supreme Court is still refining the rule on a case-by-case basis. Most often the rule is closely followed. But there are exceptions. Thus, the Court has held that an undercover police officer posing as a prisoner does not have to tell a cell mate of his Miranda rights before prompting him to talk about a murder, *Illinois* v. *Perkins,* 1990.

Texas v. *Cobb,* 2001, involved a man who had been read his rights in a burglary case. Later, out on bail, he confessed to killing a woman and her child during the burglary.

Cobb confessed to police voluntarily, but without consulting his attorney. He was convicted of the murders and sentenced to death. On appeal, Cobb argued that his confession should not have been used against him—because he had not had the help of his attorney. But the High Court disagreed, 5–4; it held that his Miranda rights had not been violated.

▲ In 1966, the Court struck down the conviction of Ernesto Miranda (right), who had confessed to a crime without being told of his rights. ***Critical Thinking* What were the long-term effects of the Miranda decision on police procedures?**

The Miranda rule has always been controversial. Critics see it as a serious obstacle to effective law enforcement. Many contend that it "puts criminals back on the streets." Others applaud the rule, however. They hold that criminal law enforcement is most effective when it relies on independently secured evidence, rather than on confessions gained by questionable tactics from defendants who do not have the help of a lawyer.

Section 3 Assessment

Key Terms and Main Ideas

1. What does the **writ of habeas corpus** seek to prevent?
2. Why are **bills of attainder** and **ex post facto laws** forbidden?
3. What does the 5th Amendment guarantee to the accused?
4. List the provisions of the 6th Amendment concerning the rights of the accused.

Critical Thinking

5. **Drawing Inferences** Consider the statement, "It is better that ten guilty persons go free than that one innocent person be punished." Use this statement as the first sentence in a paragraph in which you evaluate whether and/or when the rights of individuals should ever be violated even against claims for the public good.
6. **Predicting Consequences** If the guarantee against self-incrimination were removed from the Bill of Rights, what might be the effect on the modern criminal justice system? Would justice be more or less likely to be carried out?

Take It to the Net

7. Analyze issues that involve Supreme Court interpretations of constitutional rights by reading more about the Miranda Rule. Then work with a small group of classmates to write a paragraph summarizing the importance of the rule. Use the links provided in the Social Studies area at the following Web site for help in completing this activity. **www.phschool.com**