All governments—whether a constitutional democracy, a monarchy, or a dictatorship—operate through the exercise of coercion. The fundamental question is, by what authority or criteria may government exercise that coercion? When we say in the United States that we have a government of law and not of men, we mean that government may exercise coercion only in terms of principle, embodied in the law, rather than according to the arbitrary whims of government officials. Under the rule of law coercion exists in two forms. First, law coerces us by prohibiting us from doing what we want to do (e.g., speeding), and requiring us to do what we do not want to do (e.g., pay taxes). Second, law coerces us by charging, convicting, and punishing us for not obeying either dimension of law in its first form.

Criminal law and procedures have to do with that second sense of the coercive power of law. In a society whose Founding document speaks of life, liberty, and the pursuit of happiness, the question of when and how government may legitimately employ its coercive power—in the words of the Fifth and Fourteenth Amendments, to deprive us of our life, liberty, and property—is thus central. Given the presumption of innocence that is implicit in our constitutional scheme, the rights of criminal suspects and defendants flow from and give effect to that presumption and the rule of law itself. For that reason, it is appropriate the think of these protections not as criminal rights, but rather as the rights of criminal suspects and defendants. Under our system of government people charged with criminal activity are not criminals in the eyes of the law until after they confess or are convicted in a trial. In simplest terms, we can say that the criminal-justice process consists of three stages: first, when police suspect someone of criminal activity, he is a criminal suspect; second, when police amass sufficient evidence for a prosecutor to charge someone with a crime, he is a criminal defendant; and third, once someone has confessed or has been found guilty in a trial, he is a criminal. Broadly conceived, the Fourth Amendment covers the criminal suspect, the Fifth, Sixth, and Seventh Amendments cover the criminal defendant; and the Eighth Amendment (aside from bail) covers the criminal’s punishment.

Some people argue that the rights of the accused are mere technicalities, but one could argue that it is those very “technicalities” that distinguish a constitutional democracy from an authoritarian, tyrannical, or totalitarian political system.
in *Mapp v. Ohio* (1961), the privilege against self-incrimination (as well as the guarantee of due process) in the Fifth Amendment, at issue in *Miranda v. Arizona* (1966), and the right to counsel in the Sixth Amendment, at issue in *Gideon v. Wainwright* (1963)—that distinguish a constitutional democracy from an authoritarian, tyrannical, or totalitarian political system. You may be familiar with a phrase out of the old American West: “Give him a fair trial and then hang him.” Sometimes used today as well, this phrase suggests that we know someone’s guilt prior to a trial, but under the law it is only through an elaborate set of procedures that we are authorized to determine one’s guilt or innocence. Under the presumption of innocence, the rights of the accused are the foundation of those procedures.

Understanding the rights of the accused requires us to consider four central issues. The first one is what we can call the interpretive question: what is the meaning of a particular right or procedural guarantee? For example, what is a search, what is a seizure, and what is the difference between a reasonable and unreasonable search and seizure? Is the government engaged in a reasonable search when it wiretaps telephone conversations (*Katz v. United States*, 1967), or when it points a thermal-imaging device at someone’s home to determine whether he is generating enough heat inside to indicate that he is using heat lamps to grow marijuana (*Kyllo v. United States*, 2001)?

If police officers see a suspect swallow a substance during a drug bust and they take him to hospital to have his stomach pumped to obtain that substance as possible evidence of a crime, is that a reasonable search and seizure or a violation of the privilege against self-incrimination (*Rochin v. California*, 1952)? How much time must pass before one is deprived of the right to a speedy trial? Does allowing a child to testify behind a screen against an alleged child molester deny the defendant his right to confront the witnesses against him? These and other interpretive questions arise constantly when criminal suspects and defendants assert their constitutional rights.

Additionally, in answering the interpretive question we have to ask whether the meaning of a particular right or procedural guarantee can change over time. When we ask what “cruel and unusual punishment” is, for example, do we ask what those who wrote and ratified that prohibition in 1791 meant by it, or what we might consider it to mean today? Posing a hypothetical situation in which “some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses,” Justice Antonin Scalia, who as an originalist takes the former position, has written, “Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791 … I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge” (“Originalism: The Lesser Evil,” 57 *University of Cincinnati Law Review* 849, 861 [1989]). Relatedly, how do the criminal procedure guarantees ratified in 1791 apply to technological innovations unknown at the time, such as telephones, computers, automobiles, and airplanes?

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**How do the criminal procedure guarantees ratified in 1791 apply to technological innovations unknown at the time, such as telephones, computers, automobiles, and airplanes?**
There is always a tension between liberty and security: too much concern for liberty can threaten our personal and national security, and too much concern for our personal and national security can threaten our liberty.

The second central issue is what we can call the federalism issue: to what extent are federal criminal procedure guarantees applicable against the states? In other words, to what extent are states, where we find the vast bulk of criminal law, free to deal with criminal justice matters as they see fit, and to what extent are they bound by a federally mandated floor of criminal procedures? For example, the exclusionary rule at issue in *Mapp v. Ohio* requires that evidence obtained by the government in violation of the rights of the accused be excluded from use by the prosecution at trial. The Supreme Court first announced this rule as binding on the federal government in *Weeks v. United States* (1914). The Court held in *Wolf v. Colorado* (1949) that it was binding only on the federal government, and not the states. Do all rights of the accused in federal proceedings apply against the states, or only some of them—and how do we determine which do and which do not?

The exclusionary rule exemplifies the third central issue in understanding the rights of the accused: what is the constitutional status of rules the Supreme Court fashions to give meaning and effect to the procedural rights and guarantees stated explicitly in the Fourth through Eighth Amendments? It is one thing to state that criminal suspects and defendants are protected against unreasonable searches and seizures, have a right to counsel and due process, a protection against self-incrimination and cruel and unusual punishment, and so forth, but how are such rights and guarantees to be enforced?

Justice Benjamin Cardozo complained that the meaning of the exclusionary rule is that “the criminal is to go free because the constable has blundered” (*People v. Defore*, 1926). Standard arguments against such rules are, first, that they are not constitutional provisions; second, that they handicap the police, making investigation of crimes more difficult; and, third, that they let guilty people go. Standard arguments in favor of such rules are, first, that they are rules fashioned by the courts to give meaning, content, and effect to explicitly stated constitutional protections, protections that would not exist in any meaningful way otherwise. Second, that far from handicapping police, requiring adherence to the Miranda warning and the exclusionary rule actually makes the police more careful and thus more likely to sustain a case and secure a conviction. Third, that there is evidence that relatively few convictions are ever overturned on these “technical” grounds.

Finally, understanding the rights of the accused raises a fourth central issue, one with particular salience in our post-9/11 world: to what extent, if any, do those rights—especially the prohibition on unreasonable searches and seizures and the privilege against self-incrimination—apply, for example, in the case of suspected terrorists who may have knowledge of a conspiracy to detonate a nuclear explosion in an American city? Even in a constitutional democracy dedicated to liberty, the rule of law, and the presumption of innocence, we have to remember that the central function of government is to provide for...
the national defense and the maintenance of law and order. There is always a tension between liberty and security: too much concern for liberty can threaten our personal and national security, and too much concern for our personal and national security can threaten our liberty. How do we strike the proper balance between liberty and security in ordinary cases of domestic criminal activity, and how do we do so in extraordinary cases of domestic and international terrorism? As you read the following materials on the rights of the accused, consider how you would balance your liberty against your need for protection against both criminals and terrorists.

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Case Background

The Fourth Amendment protects individuals from unreasonable searches and seizures and requires two branches of government to agree in order for search warrants to be issued. But what happens when the police do not act within the law, and conduct searches without a warrant? The Fourth Amendment does not specify.

In a series of cases, the Court was asked to consider whether criminal defendants’ convictions could stand if illegally-seized evidence was used against them in Court. In the 1914 case of *Weeks v. United States*, the Court answered no. With this ruling, the Court established the exclusionary rule for federal cases: evidence seized in violation of the Constitution may not be used at trial. Among the early critics of the exclusionary rule was Appeals Court Judge Benjamin Cardozo. Cardozo famously objected in 1926, “The criminal is to go free because the constable has blundered.”

About thirty-five years later in 1949, the Court declined to apply the exclusionary rule to the states through the Fourteenth Amendment’s Due Process Clause, reasoning that states could use other methods of ensuring due process of law.

When *Mapp v. Ohio* reached the Court in 1961, it was not initially seen as a Fourth Amendment case. Dollree Mapp was convicted under Ohio law for possessing “lewd, lascivious, or obscene material.” Mapp appealed her conviction. She based her claim on First Amendment grounds, saying that she had a right to possess the materials. When the case reached the Supreme Court, however, the Justices did not address her First Amendment claim. The Court instead overturned her conviction because the evidence against her had been seized without a warrant. In so ruling, the Court applied the exclusionary rule to the states. The exclusionary rule remains controversial. Supporters say it ensures liberty and justice, while critics claim it actually threatens those values.
**DOCUMENT A**

James Otis, Against Writs of Assistance, 1761

*Note: Writs of Assistance were general search warrants allowing British officials to search the Colonists’ homes and businesses when and where they pleased.*

I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand and villainy on the other as this Writ of Assistance is. It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book....

[General writs of assistance are] a power that places the liberty of every man in the hands of every petty officer. I say I admit that special Writs of Assistance, to search special places, may be granted to certain persons on oath; but I deny that the [general] writ now prayed for can be granted...

- What is the difference between general Writs of Assistance and “special Writs of Assistance”?

**DOCUMENT B**

The Fourth Amendment, 1791

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.

- What similarities do you see between the Fourth Amendment and Otis’s description of “special Writs of Assistance” in Document A?

**DOCUMENT C**

Section of The Fifth Amendment, 1791

No person shall be ... compelled in any criminal case to be a witness against himself.

- List three ways a person might act as a “witness against himself.”
DOCUMENT D

Excerpt from the Fourteenth Amendment, 1868

No state shall … deprive any person of life, liberty, or property, without due process of law.

- Are the requirements of the Fourth and Fifth Amendments (Documents B and C) essential parts of “due process of law”?

DOCUMENT E

Weeks v. United States, 1914

Where letters and papers of the accused were taken from his premises by an official of the United States … without any search warrant and in violation of the constitutional rights of accused under the Fourth Amendment, and … they are used in evidence over his objections, prejudicial error is committed and the judgment [conviction] should be reversed.

[The Fourth Amendment] took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people … those safeguards … to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants … and seizures under the so-called writs of assistance, issued in the American colonies.

- Why did the Court rule that illegally seized evidence may not be used in federal criminal trials?

DOCUMENT F

Wolf v. Colorado, 1949

In Weeks v. United States, this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment....

The exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons ... to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford....

(continued on next page)
We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

- Why did the Court refuse to apply the exclusionary rule to the states?

**DOCUM ENT G**

**MAJORITY OPINION**

**Maj ority Opinion (6-3), Mapp v. Ohio, 1961**

Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government ... in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right....

[O]ur holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense.

There are those who say ... that under our constitutional exclusionary doctrine “[t]he criminal is to go free because the constable has blundered.” ...[And] in some cases this will undoubtedly be the result. But...there is another consideration—the imperative of judicial integrity. ...The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

- Why did the Court apply the exclusionary rule to the states?
- What did the Court mean by “judicial integrity”?
- Is the Court’s ruling the only way to protect citizens from unreasonable searches? Can you think of any alternatives to the exclusionary rule?
DOCUMENT H

Concurring Opinion, Mapp v. Ohio, 1961

I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however ... has led me to conclude that when the Fourth Amendment’s ban against unreasonable searches and seizures is considered together with the Fifth Amendment’s ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

- How does this opinion come to the same conclusion as the majority, yet for a different reason?

DOCUMENT I

Dissenting Opinion, Mapp v. Ohio, 1961

In this posture of things, I think it fair to say that five members of this Court have simply “reached out” to overrule Wolf....

It seems to me that justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied....

I would not impose upon the States this federal exclusionary remedy....

Our concern here is not with the desirability of that [exclusionary] rule but only with the question whether the States are Constitutionally free to follow it or not as they themselves determine....

- Why are the dissenters concerned that the majority overruled Wolf (Document F)?
**DOCUMENT J**

“I Don’t Care That Your Conviction Was Overturned,” 2002

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What is the cartoonist’s viewpoint about the exclusionary rule’s relationship to moral and legal justice?

**DIRECTIONS**

Answer the Key Question in a well-organized essay that incorporates your interpretations of Documents A-J, as well as your own knowledge of history.

**KEY QUESTION**

Assess the claim that the exclusionary rule helps ensure liberty and justice.
Georgia v. Randolph, 2005

...It is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant’s invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, “stay out.” ...There is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders....

We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.

- Why does the Court hold that police cannot search a home without a warrant when one resident consents to the search but the other does not?
- Do you agree with this ruling? Why or why not?