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?
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

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 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

At the time the Constitution was adopted, British courts denied lawyers to individuals charged with treason or felonies. People accused of criminal misdemeanors, however, were provided lawyers. The American colonies and, later, the states, rejected this practice. Most of the original thirteen states allowed defendants in all cases to have lawyers. Through the years, the Supreme Court has heard several cases involving the question of whether poor criminal defendants had a right to a lawyer at public expense, or whether the Sixth Amendment merely meant that the government could not stop accused persons from hiring one.

In 1961, Clarence Earl Gideon was arrested in Florida for breaking into a Panama City pool hall with the intent to steal money from the vending machines. This was a felony. When Gideon appeared in court, his request for a court-appointed lawyer was denied, as Florida law only required lawyers for defendants charged with capital offenses. Gideon defended himself at trial. He was found guilty, and sentenced to five years in prison.

While in prison, Gideon made frequent use of the prison library. With the knowledge he gained there, along with the help of a fellow inmate with a legal background, he submitted a hand-written petition to the Supreme Court. In his petition, he challenged the constitutionality of his conviction, as he had not been able to have the assistance of counsel for his defense.
Sections of Colonial and State Constitutions, 1641-1777

The Body of Liberties of the Massachusetts Colony in New England, 1641

Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines.

Virginia Declaration of Rights, 1776

8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

Vermont Constitution, 1777

X. That, in all prosecutions for criminal offences, a man hath a right to be heard, by himself and his counsel—to demand the cause and nature of his accusation....

Georgia Constitution, 1777

Art. LVIII. No person shall be allowed to plead in the courts of law in this State, except those who are authorized so to do by the house of assembly; and if any person so authorized shall be found guilty of malpractice before the house of assembly, they shall have power to suspend them. This is not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own cause.

- Underline sections that protect a right to counsel.

DOCUMENT B

Section of the Sixth Amendment, 1791

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

- Compare or contrast this document with at least one selection from Document A.
DOCUMENT C

Section of the Fourteenth Amendment, 1868
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law...

- What level of government does this amendment restrict?
- Is the Sixth Amendment’s protection of right to counsel in Document B part of the “due process” protected by the Fourteenth Amendment?

DOCUMENT D

Powell v. Alabama, 1932
Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate, and feeble-minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted, and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law; and we venture to think that no appellate court, state or federal, would hesitate so to decide....

The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord...lends convincing support to the conclusion we have reached as to the fundamental nature of that right.

- What does the Court mean by “judicial murder” in the first paragraph?
- What reason does the Court give for its conclusion that the right to counsel is of a “fundamental nature” in the second paragraph?
Betts v. Brady, 1942

The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment....

Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances and in the light of other considerations, fall short of such denial....

States should not be straight-jacketed in this respect by a construction of the Fourteenth Amendment.

- To which level of government does this ruling assert the Sixth Amendment applies?
- What method does the Court assert should be used when determining whether a state denied a defendant due process?
Clarence Gideon’s Petition to the Supreme Court, 1962

[Partial transcript] Petitioner submits that the Supreme Court of the United States has the authority and jurisdiction to review the final judgment of the Supreme Court of the state of Florida ... because the “due process clause” of the Fourteenth Amendment and the fifth and sixth articles of the Bill of Rights has [sic] been violated....

- What constitutional rights does Gideon claim the state of Florida has violated?
Unanimous Majority Opinion, Gideon v. Wainwright, 1963

Since 1942, when Betts v. Brady ... was decided by a divided Court, the problem of a defendant’s federal constitutional right to counsel has been a continuing source of controversy and litigation in both state and federal courts....

We accept Betts v. Brady’s assumption, based as it was on our prior cases, that a provision of the Bill of Rights, which is “fundamental and essential to a fair trial” is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights.

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments ... spend vast sums of money to ... try defendants accused of crimes. ...Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

The Court in Betts v. Brady departed from the sound wisdom upon which the Court’s holding in Powell v. Alabama rested. Florida, supported by two other States, has asked that Betts v. Brady be left intact. Twenty-two states, as friends of the Court, argue that Betts was “an anachronism when handed down” and that it should now be overruled. We agree.

On what key reasons does the unanimous Court base its ruling?

[T]he Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprivations of “liberty” just as for deprivations of “life,” and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprivations of liberty may be less onerous than deprivations of life—a value judgment not universally accepted or that only the latter deprivations are irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

- Summarize the main idea of the concurring opinion.
DOCUMENT I

“I Can’t Defend Myself,” 2004

Identify the people in the cartoon and the point of view of the cartoonist.

I can’t defend myself. I need appointed counsel.

And yet you’ve gotten your case all the way to the Supreme Court. How ironic.

DIRECTIONS

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

KEY QUESTION

Does the Sixth Amendment guarantee the right to counsel in all cases? Further, does the Sixth Amendment require government to provide a lawyer to defendants who want one but cannot afford one?
Hamdi v. Rumsfeld, 2004

...Born an American citizen in Louisiana in 1980, Yaser Esam Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military ... [because the Government believed he participated in the waging of war against the United States].

The Government contends that Hamdi is an “enemy combatant,” and that this status justifies holding him in the United States indefinitely–without formal charges or proceedings–unless and until it makes the determination that access to counsel or further process is warranted....

Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. Since [we agreed to hear] this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case....

- Should citizens who are accused of waging war against the United States have the right to counsel?