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?
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

Ernesto Miranda was accused of kidnapping and rape. The victim identified Miranda in a line-up. Miranda also identified her as the victim at the police station. He was taken to an interrogation room for two hours. He did not request a lawyer; neither was he informed that he had the right to have an attorney present.

After two hours of questioning, Miranda orally confessed to the crime, as well as signed a written confession. The confession included the acknowledgement: “I do hereby swear that I make this statement voluntarily and of my own free will with no threats, coercion or promises of immunity and with full knowledge of my legal rights understanding any statement I make may be used against me.”

Miranda was convicted of kidnapping and rape and sentenced to two twenty to thirty-year terms. He challenged the constitutionality of his conviction because he had not been advised of his rights to remain silent and have a lawyer present during questioning. His case eventually went to the Supreme Court. The Court had to consider whether confessions or other incriminating statements could be used by prosecutors at trial if police had not informed the accused person of their Fifth and Sixth Amendment rights.
**DOCUMENT A**

**Massachusetts Body of Liberties, 1641**

No man shall be forced by torture to confess any crime against himself nor any other unless it be in some capital case where he is first fully convicted by clear and sufficient evidence to be guilty, after which if the cause be of that nature that it is very apparent there be other conspirators or confederates with him, then he may be tortured, yet not with such torture as be barbarous and inhumane....

- Put this law into your own words.

**DOCUMENT B**

**Laws of Connecticut Colony, 1655**

It is ordered by the authority of this court that no man shall be forced by torture to confess any crime against himself.

- How does the Connecticut law differ from the Massachusetts Body of Liberties provision?

**DOCUMENT C**

**Cotton Mather, On Obtaining Confessions of Witchcraft, 1695**

*Note: Puritan Minister Cotton Mather gave these instructions to a judge before one of the Salem witch trials.*

Now first a credible confession of the guilty wretches is one of the most hopeful ways of coming at them. ...I am far from urging the Un-English method of torture ... but whatever hath a tendency to put the witches into confusion is likely to bring unto confession. ...Here Crosse & Swift Questions have their use.

- How does Mather advise judges to obtain confessions of witchcraft?
DOCUMENT D

Patrick Henry, *Virginia Debates on Ratification of the Constitution, 1788*

Congress may introduce the practice of ... torturing to extort confessions of the crime. ...They will tell you that they must have a criminal equity, and extort confessions by torture, in order to punish with still more relentless severity....

- What warning does Patrick Henry give about the powers of Congress in the proposed federal constitution (which had no bill of rights)?

DOCUMENT E

*Sections of the Fifth and Sixth Amendments, 1791*

*Amendment V*: No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...

*Amendment VI*: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to have the assistance of counsel for his defense.

- In what situation(s) do the Fifth and Sixth Amendments require that accused persons have rights against self-incrimination and to have the assistance of counsel?
**DOCUMENT F**

*Fundamentals of Criminal Investigation, 1956*

...If at all practicable, the interrogation should take place in the investigator’s office or at least in a room of his own choice. The subject should be deprived of every psychological advantage....

[The investigator] must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject’s necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion....

How does this manual advise investigators to conduct interrogations “without resorting to duress or coercion”?

**DOCUMENT G**

*MAJORITY OPINION*

**Majority Opinion (5-4), Miranda v. Arizona, 1966**

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity....

An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak....

There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.

We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege

*(continued on next page)*
against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given....

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. ...Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

- How does the Court define “compelling influences”?
- Why does the Court hold that it is unconstitutional for police to interrogate accused persons without informing them of their “Fifth Amendment privilege”?

**DOCUMENT H**

**Dissenting Opinion (Byron White), Miranda v. Arizona, 1966**

An accused, arrested on probable cause, may blurt out a confession which will be admissible. ...Yet, under the Court’s rule, if the police ask him a single question ... his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary.

If the defendant may not answer without a warning a question such as “Where were you last night?” without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint? And why, if counsel is present and the accused nevertheless confesses, or counsel tells the accused to tell the truth and that is what the accused does, is the situation any less coercive insofar as the accused is concerned?

All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes....

- What apparent contradiction does White see in the majority opinion?
DOCUMENT I


The Court’s opinion, in my view, reveals no adequate basis for extending the Fifth Amendment’s privilege against self-incrimination to the police station. Far more important, it fails to show that the Court’s new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation….

[The majority holds that] pressure on the suspect must be eliminated, though it be only the subtle influence of the atmosphere and surroundings. The Fifth Amendment, however, has never been thought to forbid all pressure to incriminate one’s self in the situations covered by it.…

Miranda’s oral and written confessions are now held inadmissible under the Court’s new rules. One is entitled to feel astonished that the Constitution can be read to produce this result. These confessions were obtained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim’s identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court’s own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country.…

- On what bases does Harlan object to the Court’s ruling?
Miranda Warnings Card

**MIRANDA WARNING**

1. **YOU HAVE THE RIGHT TO REMAIN SILENT.**
2. **ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.**
3. **YOU HAVE THE RIGHT TO CONSULT WITH A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED.**
4. **IF YOU CANNOT AFFORD A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU.**
5. **YOU CAN DECIDE AT ANY TIME TO EXERCISE THESE RIGHTS AND NOT ANSWER ANY QUESTIONS OR MAKE ANY STATEMENTS.**

**WAIVER**

DO YOU UNDERSTAND EACH OF THESE RIGHTS AS I HAVE EXPLAINED THEM TO YOU? HAVING THESE RIGHTS IN MIND, DO YOU WISH TO TALK TO US NOW?

- Does the requirement that police read these warnings to accused persons fulfill the promises of the Fifth and Sixth Amendments?
DOCUMENT K

“They Used My Confession Against Me,” 2005

What is the cartoonist’s point of view?

DIRECTIONS

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

KEY QUESTION

Evaluate the extent to which the ruling in Miranda is the fulfillment of the legal tradition of the promise against self-incrimination.
Dissenting Opinion, *Dickerson v. United States*, 2000

[emphasis original]

History and precedent aside, the decision in *Miranda*, if read as an explication of what the Constitution requires, is preposterous.

There is a world of difference ... between compelling a suspect to incriminate himself and preventing him from foolishly doing so of his own accord.

Preventing foolish (rather than compelled) confessions is likewise the only conceivable basis for the rules (suggested in *Miranda*...) that courts must exclude any confession elicited by questioning conducted, without interruption, after the suspect has indicated a desire to stand on his right to remain silent. ...The Constitution is not, unlike the *Miranda* majority, offended by a criminal’s commendable qualm of conscience or fortunate fit of stupidity.

Finally, I am not convinced ... that *Miranda* should be preserved because the decision occupies a special place in the “public’s consciousness.” As far as I am aware, the public is not under the illusion that we are infallible....

- In the 34 years following the *Miranda* decision, the Court was asked to decide 60 cases involving the rules it established. Why does this dissenting justice object to the rules established in *Miranda v. Arizona*?

- Do you think holdings should be preserved because they are firmly in the “public’s consciousness”? Why or why not?