The Bill of Rights and DUE PROCESS

Covers search and seizure, rights of the accused, due process of law, jury trials, and protection from cruel and unusual punishment guaranteed in the Fourth, Fifth, Sixth, and Eighth Amendments.

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

–Fourth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use without just compensation.

–Fifth Amendment

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 defence.

–Sixth Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

–Seventh Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

–Eighth Amendment
In the years leading up to the Revolutionary War, inhabitants of most of the British colonies in North America did not enjoy the full rights of Englishmen. Homeowners could have their home invaded by soldiers and their property taken without reason. Those accused of crimes could be tried without a jury and without a lawyer, or held without trial altogether.

In drafting a new Constitution for the federal government, the Founders reasoned that when that government suspected or accused an individual of wrongdoing, the government's actions must follow certain procedures designed to secure justice. In the subsequently ratified Bill of Rights, the Founders sought to spell out those procedures to protect citizens from being abused, coerced, and wrongfully penalized.

**UNIT OBJECTIVES**

Students will:

- Understand why criminal procedure protections came to be included in the Bill of Rights.
- Understand and articulate specific protections found in the Fourth, Fifth, Sixth, and Eighth Amendments.
- Understand the principle of due process, which holds that the government must interact with all citizens according to the tenets of the law, and applying these rules equally among all citizens.
- Understand ways the Supreme Court has interpreted the Fourth and Eighth Amendment.

**SYNOPSIS OF LESSONS**

**Lesson 1: How Do Due Process Protections for the Accused Protect Us All?**

Students explore criminal procedure protections included in the Fourth, Fifth, Sixth, and Eighth Amendments and evaluate the Supreme Court's interpretation of these amendments.

**Lesson 2: What Is A Reasonable Expectation of Privacy?**

Students understand the principle of due process and evaluate the Supreme Court's interpretation of the Fourth Amendment.

**CONSTITUTIONAL PRINCIPLES**

- Due process
- Individual responsibility
- Liberty
- Natural rights

**FOUNDERS’ QUOTES**

“All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.”

–THOMAS JEFFERSON

“Government should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.”

–JAMES WILSON

**KEY TERMS**

- Double jeopardy
- Self-incrimination
- Warrant
How Do Due Process Protections for the Accused Aim to Protect Us All?

LESSON OVERVIEW
Throughout history, many governments’ treatment of the accused has served as a hallmark of tyranny and unlimited government. While British subjects were some of the most free people on earth in the 1700s, American colonists experienced a variety of legal abuses at the hands of Britain and found themselves outside of many common protections afforded to English citizens. The Founders paid close attention to the rights of the accused because they realized that this was one group of people who particularly needed protection from government. Understanding how the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments operate to guarantee such protection and how they work both to ensure individual liberty and to limit government power, is vital to maintaining free citizenship.

LESSON OBJECTIVES
Students will:

- Understand why criminal procedure protections came to be included in the Bill of Rights.
- Identify ways in which these protections serve to ensure liberty and limit government.
- Understand and articulate specific protections found in the Fourth, Fifth, Sixth, and Eighth Amendments.
- Evaluate Supreme Court rulings concerning the Eighth Amendment’s Cruel and Unusual Punishment Clause.

CONSTITUTIONAL PRINCIPLES
- Due process
- Individual responsibility
- Liberty
- Natural rights

MATERIALS
- Handout A: Background Essay - How Do Due Process Protections for the Accused Aim to Protect Us All?
- Handout B: Criminal and Civil Procedure Protections
- Handout C: Defining Cruel and Unusual
- Handout D: Cruel and Unusual?

RECOMMENDED TIME
One 60-minute class period.

STANDARDS
- NCHS (9-12): Era III, Standards 3A and 3B
- CCE (9-12): IIA1, IIA2, IID3
- NCSS: Strands 6 and 10
- Common Core (9-12): RI.4, RI.8, RI.9, RH.1, RH.4, SL.1, SL.2
Background/Homework

20 minutes the day before

Have students read Handout A: Background Essay - How Do Due Process Protections for the Accused Protect Us All? Instruct students to answer the questions at the end of the Background Essay.

Warm-up

10 minutes

A. Point students back to the bullet-pointed descriptors of a society without criminal procedure protections, contained in the beginning of Handout A.

B. Conduct a brief class discussion. Ask students to consider the following questions:

1. If you lived in such a society, would you be free? Why or why not?

2. Would the government have any limitations on its powers if society looked like this? Why or why not?

3. What types of governments/nations/societies around the world still look like this?

Activity I

20 minutes

A. Distribute Handout B: Criminal and Civil Procedure Protections and a copy of the Bill of Rights (see Appendix). Put students into groups of four.

B. Assign one amendment—Fourth, Fifth, Sixth, Seventh, or Eighth—to each group. Have groups complete the portion of Handout B that is applicable to their assigned amendment only. Instruct students to discuss each element/clause of their amendment, and arrive at an agreed upon interpretation for each clause.

C. Have one group who read the Fourth Amendment explain their interpretations. If there is a second group who worked with the Fourth Amendment, have them share their interpretations only if they feel their interpretations are substantially different from the ones just presented. Compare student responses to the Answer Key and clarify any misunderstandings.

D. Repeat procedure for the Fifth, Sixth, Seventh, and Eighth Amendments, in each case making sure that each element of the amendment is identified and its meaning clarified.
Activity II  

A. Distribute Handout C: Defining Cruel and Unusual, and put students into groups of five.

B. Instruct students to spend a few minutes sharing their individual thoughts/ideas about Handout C. Explain that they are now acting, in their groups, as the Supreme Court. Have them construct a one-sentence, group definition of “cruel and unusual” that they can apply to Eighth Amendment scenarios. Walk around to the room, visiting groups, to keep their discussion focused and assist them in coming to a group definition for Handout C.

C. Distribute Handout D: Cruel and Unusual? to all students. Instruct groups to select one student in each group to read Scenario 1 aloud to his/her group, while the other students read along. Then, have students discuss and complete questions 1-3 for Scenario 1, deciding, as a Supreme Court, whether the punishment involved in Scenario 1 is "cruel and unusual." In deciding, each group should carefully apply their definition of cruel and unusual as written in Handout C, and should vote, just as the real Supreme Court might do to answer question 3 (3 students agreeing constitutes a majority of the group, and thus is their ruling). Have students individually answer question 4 and briefly discuss with their group if anything would have changed their view.

D. Have students continue the process for Scenarios 2 and 3.

E. Wrap up by conducting a class discussion to answer the following questions:
   1. How do several Bill of Rights amendments protect due process?
   2. How does due process protect our liberty?
   3. How should “cruel and unusual” be defined?
   4. Why should law-abiding citizens care about protections for criminals?

Homework and Extension Options

A. Have students locate one local or national news article about an individual who is accused of committing a crime (students should use a newspaper or news-station website for local stories; or http://www.billofrightsinstitute.org for daily headlines of national stories). Students should cut out or print the news article, and submit a 2-paragraph response on the following:
   1. A brief summary of the individual involved, the crime he/she is accused of committing, and any other pertinent details.
   2. Identification/explanation of particular elements of the Bill of Rights that are evident in the article (mentions of a search, representation by an attorney, trial, punishment, etc.). In doing so, students should make specific reference to the amendment(s) that is/are evident.
B. Have students visually depict the WHY and the HOW of due process. The Fourth, Fifth, Sixth, Seventh, and Eighth Amendments trace the criminal procedure process in order, from the initial search/seizure/questioning to trial and punishment. Have students create a collage using images found online tracing this process (an image of a search warrant, for example). Students can do a posterboard, or an electronic collage/presentation through Prezi or Glogster. Images should illustrate a variety - but not necessarily all - of the protections, with a brief statement below each of what particular right is illustrated and the amendment that protects it. Students should title their presentations with a statement or slogan about WHY the constitutional principle of due process is important. (e.g. “Protecting the accused protects us all.”)

C. Invite your School Resource Officer (or a local police officer, if your school does not have one assigned) to speak to your class. Prior to his/her visit, brainstorm with students a list of questions to ask, centering on how he/she follows and upholds the protections of the Fourth, Fifth, Sixth, and Eighth Amendments in the course of their job enforcing the law and dealing with suspected criminals. Ask the officer to share police department policies relating to these protections, real scenarios they've encountered, etc.

D. As of 2013, 33 states and the federal government have the death penalty as an option for particular violent crimes. Utilizing the “State by State” section of the Resources tab at http://www.deathpenaltyinfo.org, have students do research to answer the following questions:

1. Does your state allow the death penalty? If so, for which crimes? If not, when was it abolished?

2. Do you agree with your state’s position on the death penalty? What do you believe about the death penalty itself? Is it cruel and unusual? Or is it appropriate punishment in certain circumstances? Explain your position thoroughly using the Constitution, legal precedent, facts, and data.
Imagine living in a society in which your government can do the following things to you:

A. Demand to enter your home for no particular reason and forcibly enter if you object.
B. Ignore your demands to know why your home or property is being searched.
C. Bring you up on charges that you’re not even aware of, and force you to confess your guilt.
D. Find you guilty in secret a very long time after your arrest.
E. Keep putting you on trial over and over until a jury decides you are guilty.
F. Take your property without paying you for it.

If you lived in such a society, would you be free? If government could do these kinds of things, would there be any real limit on its powers?

Why Did the Founders Include So Many Provisions Regarding the Rights of the Accused?

People are often surprised to find how much of the Bill of Rights involves protections for those who have been accused of a crime. Five amendments in the Bill of Rights deal with some aspect of criminal procedure—the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. History and experience told the Founders that if there were not specific protections provided for citizens who are accused of committing crimes, and corresponding rules for the government to follow, then citizens could not live freely and the government would have unlimited power. The traditional principle was that it was better for guilty people to go free than for the judicial system to condemn even one innocent person.

Gathering Evidence: What Does the Fourth Amendment Protect?

One of the most common violations that the American colonists experienced at the hands of the British was the use of “general” search warrants. These warrants were easy to get and did not list a particular person or place to be searched. Any official who held a general warrant could search for anything he pleased, and British officers often used these warrants to harass colonists. The Founders sought to eliminate this type of tyranny with the Fourth Amendment. It requires that warrants be issued only when probable
cause supports it and that the warrant must state the particular person and place to be searched. Law enforcement officials must present evidence to a judge showing the probable cause that the individual is involved in a crime or may be involved in a future crime. It also requires that the warrant specifically list the items that officials may search for and seize. The Fourth Amendment demands that government officials go beyond simple suspicion and balance citizen rights with proper enforcement of laws.

**Government Power: What Does the Fifth Amendment Protect?**

The Fifth Amendment contains a variety of protections for individuals after a search has been conducted or an arrest has been made. One of the most important safeguards is protection from self-incrimination. Also known as “the right to remain silent,” this protection prevents the government from forcing an individual to offer up evidence against himself. A person may refuse to answer police questions that might make one seem guilty, and, at trial, one cannot be required to take the stand and testify under oath.

The Fifth Amendment also provides a guarantee that the government cannot endlessly try an accused individual for the same crime, also known as double jeopardy. Without a ban on double jeopardy, the government could just keep trying an individual over and over using its vast resources until it got the verdict it wanted.

**Determining Guilt or Innocence: What Does the Sixth Amendment Protect?**

The Sixth Amendment guarantees a jury trial for all individuals accused of a criminal offense. Trials must be speedy, public, and be held in the location where the alleged crime took place. It also requires that citizen juries, not a judge, determine the guilt or innocence of the accused. (This protection is also in the body of the Constitution.) Accused individuals have a right to know the specific crime(s) for which they are being tried, to examine all evidence the government has against them, to confront their
accuser(s), to call witnesses in their defense, and to have a lawyer to assist in their defense. The Sixth Amendment is vital to liberty, and it is crucial in protecting individuals from the overwhelming power and resources of the government.

Jury Overruled? What Does the Seventh Amendment Protect?

The Seventh Amendment to the Constitution guarantees a right to trial by jury in common law cases where the value disputed is over $20. It also states that cases decided by a jury cannot be overturned unless there was a factual error. A judge can set aside a jury’s verdict, but he or she cannot state a verdict or call a new trial. The Supreme Court upheld this clause in Slocum v. New York Insurance Co. (1813). The Court stated that, “Under the rules of the common law, an appellate court may set aside a verdict for error of law in the proceedings and order a new trial, but it may not itself determine the issues of fact.”

Guilty: What Does the Eighth Amendment Protect?

The Founders recognized that individual rights do not end when someone is found guilty, even of a hideous crime. The Eighth Amendment requires that fines and penalties for guilty persons not be excessive. Most people understand this as the principle that the punishment must fit the crime. While the Bill of Rights does not specify what is “excessive,” the Supreme Court has defined it as one that is extremely out of balance with the offenses committed in United States v. Bajakajian (1988).

Perhaps more challenging to define is the Eighth Amendment’s requirement that no “cruel and unusual punishments” be imposed upon guilty individuals. Generally, this protection was meant to prevent punishments such as drawing and quartering, whipping, or other methods common throughout history. What constitutes “cruel and unusual” punishment is often hotly debated.

Criminal Procedure Protections and You

Most citizens are law-abiding, but the principle of due process does not protect just those people who find themselves on the wrong side of the law. It is important for us all. The Founders wrote the Constitution to “establish justice” and “to secure the blessings of liberty” for themselves and future generations. A big part of that was protecting minorities (including suspected criminals who are often disliked) from the “tyranny of the majority.” The protections of the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments all help strike the balance between individual rights and the powers of government.
Comprehension and Critical Thinking Questions

1. What amendments contained in the Bill of Rights address protections for those accused of crimes? Why did the Founders include them in the Bill of Rights?

2. What specific protections for the accused are contained in the Fourth Amendment? In the Fifth Amendment?

3. In what ways does the Sixth Amendment protect an accused individual after he has been charged with a crime?

4. Consider the following quote from the Supreme Court case of *Mapp v. Ohio* (1961), which held that evidence obtained in violation of the Constitution could not be used against defendants at trial:

   “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.”

   How does this quote illustrate the importance of criminal procedure protections? Do you think the Founders would agree with this statement? Why or why not? (Answer in 2-3 sentences.)

5. Imagine you were talking to someone who said that she didn’t worry about protecting the rights of the accused because she never planned to commit a crime. How would you respond?
**Criminal and Civil Procedure Protections**

**Directions:** Using a copy of the Bill of Rights, complete the chart of due process protections for accused persons in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. Several are completed for you.

<table>
<thead>
<tr>
<th>FOURTH AMENDMENT</th>
<th>INTERPRETATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. “the right of the people to be secure … against unreasonable searches and seizures, Shall not be violated…”</td>
<td>1. People and their homes, possessions, etc., cannot be searched or taken without reason.</td>
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<td>2.</td>
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<thead>
<tr>
<th>FIFTH AMENDMENT</th>
<th>INTERPRETATION</th>
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<tbody>
<tr>
<td>1. “No person shall be held to answer for a capital … crime unless on a presentment or indictment of by a Grand Jury”</td>
<td>1. People suspected of very serious crimes must be indicted [formally accused] by a Grand Jury.</td>
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<tr>
<td>2. “nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb….</td>
<td>2.</td>
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<td>4.</td>
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<tr>
<td>SIXTH AMENDMENT</td>
<td>INTERPRETATION</td>
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<td>------------------</td>
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<tr>
<td>1. “the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”</td>
<td>1.</td>
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<tr>
<td>2. “[the accused shall] be informed of the nature and cause of the accusation.”</td>
<td>2. People must be told what crime they are accused of committing.</td>
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<tr>
<th>SEVENTH AMENDMENT</th>
<th>INTERPRETATION</th>
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<tr>
<td>1. “where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”</td>
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<tr>
<th>EIGHTH AMENDMENT</th>
<th>INTERPRETATION</th>
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<tr>
<td>1. Excessive bail shall not be imposed.</td>
<td>1.</td>
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<td>3.</td>
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Defining Cruel and Unusual

Directions: Pretend that your group is the Supreme Court. As the Justices, your job is not only to interpret the words of the Constitution, but also to apply your interpretation to cases and situations that affect the lives of millions of people. Taking what you know about the Constitution into account, think about how you would interpret the ban on “cruel and unusual” in deciding the constitutionality of government action. Discuss the guiding questions below.

Text of the Eighth Amendment:
“…nor cruel and unusual punishments inflicted.”

“Cruel:”

A. How do you know if a punishment is cruel?
B. Is a cruel punishment one that...
   1. ...causes lots of pain and suffering?
   2. ...is unnecessarily lengthy to carry out?
   3. ...involves other considerations that are not mentioned here?
D. Does the type of crime committed, the characteristics of the accused, or the method of punishment matter in how you interpret this word?

“Unusual:”

1. How do you know if a punishment is unusual?
2. Where is the line drawn between “usual” and “unusual”? How uncommon does a punishment have to be to be called unusual?
3. What comparisons should be used to determine what is unusual? State and federal laws and practices? International laws and practices?

Notes:
**SCENARIO 1**

Christopher, a high school junior who was within months of his 18th birthday, told two of his friends, aged 15 and 16, that he wanted to murder someone. He had a plan. Christopher would break into someone’s home, tie him or her up, and throw him or her off a nearby bridge. His two friends, while hesitant, decided to be a part of his plan when Christopher assured them they could “get away with it” because they were minors. The three boys met at 2:00 a.m. on the night of the murder, but Christopher’s 16-year-old friend was nervous and backed out. Christopher and his 15-year-old accomplice set out to commit their pre-planned crime.

The pair entered Shirley’s home through an open window, awakening her. She turned on a hallway light and called out, “Who’s there?” Christopher went down the hall and entered Shirley’s bedroom. He realized he recognized her from a car accident the two had been involved in, which he later admitted reinforced his decision to kill. The boys bound Shirley’s hands, covered her eyes with duct tape, and drove her to a nearby bridge. They tightened her bindings and threw her into the river below where she drowned. Christopher was overheard bragging about the murder the next day at school where police arrested him. He waived his rights to remain silent and to have an attorney present. Christopher then confessed to the murder and agreed to reenact the crime on videotape.

His first-degree murder trial occurred nine months later, after he had turned 18. After hearing about the plan, Christopher’s bragging, and watching the videotaped reenactment, the jury quickly convicted him and recommended the death penalty. The judge agreed, and Christopher was sentenced to death.
SCENARIO 2

Evan was a very troubled 14-year-old who had been in and out of foster care for years. His mother was addicted to drugs and alcohol, and he had been abused by his stepfather. Evan himself was a regular user of drugs and alcohol, and he had attempted suicide four times. The first attempt was when he was only six years old.

One night Evan was at home with his two friends, Colby and Cole. The two friends came to make a drug deal with Evan’s mother, who sold them marijuana and gave them alcohol. All three boys left and went to Cole’s trailer, where they smoked their drugs and played drinking games. Eventually, Cole passed out. Evan decided to steal Cole’s wallet, grabbing it from the pocket of his passed out friend. Evan and Colby split the $300 between them. When Evan was trying to put the wallet back into Cole’s pocket, Cole woke up and grabbed Evan by the throat. Evan got hold of a nearby baseball bat and repeatedly hit Cole with it. After a number of hits, Evan placed a sheet over Cole’s head, said “I am God, I’ve come to take your life,” and hit Cole one more time. Evan and Colby then ran from Cole’s trailer, but quickly returned to cover up their crime. They lit two fires, burning the trailer and leaving Cole to die from trauma and smoke inhalation.

Alabama tried Evan as an adult, pointing to his mental maturity and his record of past crimes. He was charged with murder in the course of arson, a crime that carried a mandatory sentence of life without the possibility of parole. A jury convicted Evan, and he was sentenced to life in prison.
SCENARIO 3

The death penalty has been available as a punishment for certain crimes in most American states since before the Founding era. Methods of carrying out the death penalty have changed over the years in an effort to make the process more humane. Plenty of Americans disagree entirely with the death penalty, however, arguing that it is outside the powers of properly limited government, or that it is a moral, religious, and social wrong no matter how it is carried out.

By the mid-1800s, hanging was the nearly universal method of execution throughout the country. In 1888, New York’s governor commissioned a study to determine the most humane method of executing dangerous criminals. The committee’s answer was the electric chair, which the state legislature adopted. The electric chair became the preferred method of execution for the vast majority of states for the next 100 years, but there were growing concerns about the pain and suffering caused by the electric chair. In response, Oklahoma became the first state to seek a different method. Upon the advice of the head of anesthesiology at the University of Oklahoma’s College of Medicine, it replaced the electric chair with lethal injection. Lethal injection is now the primary way condemned prisoners are put to death in the United States.

Medical personnel are responsible for setting up the IVs, drugs and dosages. The prison warden typically conducts the execution from a separate room with doctors overseeing the process for any signs of trouble. In some instances it is difficult for the prison warden to find a doctor willing to oversee the execution. This is because they are sworn to abide by the Hippocratic Oath, which commands each doctor to “do no harm.”

Kentucky uses lethal injection. Two Kentucky death row inmates, both sentenced to death for their role in a double homicide, contend that the lethal injection process itself is cruel and unusual. They argue it can lead to pain, torture, suffering and an unnecessarily long death if it is not carried out with exact timing, dosages, and medical expertise.
CRUEL AND UNUSUAL SCENARIO QUESTIONS

1. What arguments would convince you that the punishment in this situation is not cruel and unusual?

2. What arguments would convince you that the punishment in this situation is cruel and unusual?

3. How would you rule in this case?

4. Is there anything about the details of this case that, if different, would change your ruling? Explain.
What Is A Reasonable Expectation of Privacy?

LESSON OVERVIEW

The Constitutional principle of due process, which holds that government must interact with citizens according to duly-enacted laws, balances the rights of suspects with public safety. The Fourth Amendment was added to the Constitution to ensure we would be protected from unreasonable searches and seizures. But do all searches require a judge-approved warrant? How do we know which ones do? Further, surveillance technology has posed challenges to the meaning and application of the Fourth Amendment, and understandings of “reasonable,” “papers and effects,” and “search” have changed over time. Understanding, analyzing, and applying the Fourth Amendment is vital to maintaining the freedom the Founders sought to protect and the principle of due process.

LESSON OBJECTIVES

Students will:

- Understand the principle of due process, which holds that the government must interact with all citizens according to the tenets of the law; applying these rules equally among all citizens.
- Understand ways the Supreme Court has interpreted the Fourth Amendment.
- Evaluate whether the Fourth Amendment is effectively protecting citizens from unreasonable search and seizure.

CONSTITUTIONAL PRINCIPLES

- Due process
- Individual responsibility
- Liberty
- Natural rights

MATERIALS

- Handout A: Background Essay—How Have the Protections of the Fourth Amendment Been Interpreted, Applied, and Enforced?
- Handout B: Attitude Inventory
- Handout C: Interpreting the Fourth Amendment
- Handout D: Should You Expect Privacy?
- “Are They Watching You” Game, available at http://teachingfoundingprinciples.org

RECOMMENDED TIME

Two 50-minute class periods plus game time.

STANDARDS

- NCHS (9-12): Era III, Standards 3A and 3B
- CCE (9-12): IIA1, IIA2, IID3
- NCSS: Strands 6 and 10
- Common Core (9-12): RI.4, RI.8, RI.9, RH.1, RH.4, SL.1, SL.
LESSON PLAN

Background/Homework

Have students read Handout A: Background Essay—How Have the Protections of the Fourth Amendment Been Interpreted, Applied, and Enforced? and answer the questions.

DAY I

Warm-up

A. Distribute Handout B: Attitude Inventory and do a think-pair-share. Allow students to change their answers after discussing with their partner.

B. Reconvene the class and ask for a few volunteers to share their responses. Which items led to the most discussion? Did anyone change their mind? Why?

C. Ask students how they responded to the questions that asked about their understanding of concepts (numbers 1-2). What information do students need to increase their understandings? Make a list on the board and refer to it through the activities.

Activity I

A. Project and/or distribute Handout C: Interpreting the Fourth Amendment. Read the text of the Fourth Amendment aloud to the class.

B. Ask students to contribute their answers, and type or write their contributions on the projected handout. See the Answer Key for suggested responses.

Activity II

A. Put students in groups of 2-4, and distribute Handout D: Should You Expect Privacy?

B. Give students 10 minutes to complete the chart. After deciding on each scenario, they should include a one-sentence justification.

C. Bring the class together and ask for student responses to the first scenario.

D. When student discussion of each scenario is complete, share the information from the Answer Key.

Wrap-Up

Conduct a brief discussion on the following questions.

1. Is it always clear when someone has a “reasonable expectation of privacy”?
2. Based on the kinds of things the Supreme Court has said the Fourth Amendment allows government to do, is the amendment effectively protecting citizens from unreasonable search and seizure?

3. Why is it important that Americans have an ongoing conversation about what is private and what government can and cannot do to its citizens?

**DAY II**

**Activity I**

A. Have students play the “Are They Watching You” interactive game, available at [http://teachingfoundingprinciples.org](http://teachingfoundingprinciples.org). In this game, students will explore five colorful, interactive scenes and analyze instances of possible searches or surveillance.

B. Remind students that the Fourth Amendment only limits government, but they should look for all instances of searches or surveillance. The questions that follow several of the items will ask them to consider whether the Fourth Amendment would apply.

C. Encourage students to write thoughtful answers to the final question.

**Wrap-Up**

A. Clarify any questions about Fourth Amendment applications, especially the difference between public and private actors.

B. Ask students to answer the questions on Handout B again individually, using a different color pen than they did last time. After a few minutes, have students pair up once again to discuss their answers.

C. Reconvene the class for one final discussion on the questions:

   1. Is the Fourth Amendment effectively protecting citizens from unreasonable search and seizure?
   2. What can citizens do if the government violates constitutional protections?
   3. Why is the constitutional principle of due process important?

**Homework and Extension Options**

A. Have students pretend they are a member of Congress who wishes to propose a new amendment to the U.S. Constitution that “updates” the Fourth Amendment and addresses new issues of personal privacy. In ONE sentence—just as the Fourth Amendment is one sentence—have them write a new amendment that includes Fourth Amendment-style
protections for new technologies and modern life. In 2-3 paragraphs, have students defend and justify what they included in their new, proposed Amendment.

1. Do they believe their proposed amendment answers ALL of the potential challenges to both privacy and search/seizure in modern life and going forward? Is it even possible?

2. What does this assignment reveal about the durability of the Fourth Amendment?

B. Explain to students that customs agents at the national border may search a person or their property without a warrant. The same is true at an airport when someone wants to board a flight. (Airports have been the subject of controversy with the installation of backscatter radiation full-body scanners and the carrying out of full-body pat-downs). Write a 2-3 paragraph response to the following questions:

1. How have fears of terrorism affected the way people view these practices?

2. What other criminal procedures, if any, would it be acceptable to relax in light of the War on Terror?

C. Although the Bill of Rights does not explicitly protect a “right to privacy,” such a right to be free from unwarranted government intrusion is implicitly protected by the Constitution and Bill of Rights in many ways. Give students a copy of the Bill of Rights from the Appendix.

1. Putting them in pairs or small groups, have them locate specific provisions of Amendments 1-10 that they believe protect privacy. They should keep a running list of all of the provisions they believe imply such a right and be able to justify their selections.

2. Have each group share their results, noting similarities and differences. Explain to students that while *Griswold v. Connecticut* (1965) didn’t “create” the right to privacy within marriage, it is considered to be the first case where the Supreme Court specifically defined a right to privacy and justified it via our Bill of Rights.

3. Have students read selected parts of the majority opinion of *Griswold* at [www.law.cornell.edu/supct/html/historics/USSC_CR_0381_0479_ZO.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0381_0479_ZO.html) and compare/contrast their discovery of privacy in the Bill of Rights with the Supreme Court’s decisions.

D. Have students interview a school official and ask the following suggested questions. Students should then write a 1-2 page summary of the official’s answers, closing with a statement of student opinion regarding the state of the Fourth Amendment in your school:

1. What recent situations have you encountered in which you’ve conducted a search?

2. How do you go about the decision to conduct a search? What district policies, state laws, and/or Supreme Court rulings guide your decision to conduct a search?

3. Do you believe the application of the Fourth Amendment in schools strikes a good balance between student rights and the need to preserve school safety and learning?
How Have the Protections of the Fourth Amendment been Interpreted, Applied, and Enforced?

BACKGROUND ESSAY

The Founders knew that some of the most vulnerable people in our society are those suspected of crimes. Suspected criminals tend to be disliked, and almost all lack the vast resources of government. The Fourth Amendment was added to the Constitution to protect the rights of accused persons - and all citizens - from abuse by government. Due process protections are evident in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments to the Constitution. The principle of due process means that, in going about the business of enforcing laws, government must follow established rules and procedures that respect all citizens’ rights. (In other words, it is not enough for the laws to be followed. The principle of due process requires that laws themselves are constitutional.) The Fourth Amendment’s warrant requirement provides for one of the most important individual protections: freedom from unreasonable searches and seizures. If the police want to search someone, they must first get a warrant by convincing a court that there is probable cause to believe that an individual has committed a crime. If the court agrees, they will give the police permission to act.

When is a Warrant Required?

Warrant requirements are not always clear-cut. In general, a search of someone’s home requires a warrant that states the person and place to be searched and the items to be located. The Supreme Court has ruled, however, that many types of searches can be considered “reasonable” even if conducted without a warrant. If a police officer is in a place where he is allowed to be and sees an illegal item in plain sight, the item may be seized without a warrant. Police may also conduct a warrantless search if they believe there is an immediate danger to his life or the life and property of others. In these “exigent circumstances,” a search is considered reasonable, so long as there is no intent by the officer to either arrest or seize evidence. Cars, the Supreme Court has ruled, can be searched without a warrant, provided the officer legally stopped the vehicle in the first place and has reasonable suspicion that a crime may have been committed. Finally, no warrant is required if an individual voluntarily allows a search.
**What is the Exclusionary Rule?**

All searches are subject to the Exclusionary Rule, which holds that evidence obtained through unconstitutional means may not be used against defendants at trial. The Court first interpreted the Fourth Amendment this way in federal trials in 1914 and applied it to the states in the case of *Mapp v. Ohio* (1961). Police must be certain their warrant is correct and complete, as the Court ruled in *Groh v. Ramirez* (2004). An incorrectly written search warrant could also lead to evidence being excluded from trial.

The Exclusionary Rule can be controversial. The text of the Fourth Amendment does not require it, and critics argue there are others ways to discourage police from conducting illegal searches that do not threaten public safety by setting guilty people free. Other critics claim the rule does not actually stop officers from conducting illegal searches because they face no personal punishment. Supporters tend to agree with the Court that allowing the government to punish people using evidence it obtained in violation of the law would be unjust and violate the principle of due process.

Like the warrant requirement of the Fourth Amendment, however, the Exclusionary Rule is not absolute, according to the Court. If the police can prove the evidence would surely have been found through legal means, it may be presented in court. This is called “inevitable discovery.”

**Has Technology Changed the Meaning of the Fourth Amendment?**

Technological advances, surveillance technology, and the use of military-grade equipment by police have dramatically enhanced the government’s power to search. In many cases, these developments have forced citizens and the Court to wrestle with finding the constitutional balance of liberty and security.

In 1965, Charles Katz was suspected by the FBI of being involved in illegal interstate gambling. He would often use a pay-phone near his apartment to place his bets, so police attached a listening device to the outside of the phone booth to record his conversations. He was arrested and later convicted. He challenged the search on the basis that his conversation, though in a public location, was private and protected by the Fourth Amendment. The Supreme Court agreed in *Katz v. United States* (1967), reasoning that the Fourth Amendment protected “people, not places,” and that Katz had a “reasonable expectation of privacy” that was protected from an unreasonable government search.

The case of *Kyllo v. United States* (2001) also concerned issues of technology and privacy.

Police believed Danny Kyllo was growing marijuana in his home. They used a heat-sensing device to look for the telltale signs of heat lamps that are commonly used to grow the illegal plants. The Court found that the
police actions were an illegal search, as the government “use[d] a device… to explore the details of the home … [which is] unreasonable without a warrant.”

The widespread use of GPS devices has prompted constitutional questions about privacy and the Fourth Amendment. Antoine Jones was suspected of possessing and dealing drugs. In 2005, police attached a GPS-tracking device to his car without a warrant. They traced his movements for nearly a month. In mapping his whereabouts, along with other evidence, police were able to tie Jones to locations where drug transactions were known to occur. In United States v. Jones (2012), the Supreme Court unanimously agreed that the warrantless GPS tracking was an unreasonable search. The Court further argued that while Jones drove on public streets, he did so with a “reasonable expectation” of privacy. This ruling may prove an important precedent in future cases, as many Americans now carry GPS-enabled cell phones as they go about their daily lives.

Terri was a high school student in New Jersey, and exited the girl’s bathroom smelling like smoke. A teacher took Terri to the principal’s office, where an assistant vice principal searched her purse, finding not only cigarettes, but rolling papers, a pipe, and other evidence of marijuana use. In New Jersey v. T.L.O. (1985), the Supreme Court upheld the constitutionality of the search, adopting a lower standard than is applied to police in criminal situations. The court held that school officials only needed “reasonable suspicion” to search students.

While the Court found this lower standard met in T.L.O., it found in 2009 that Arizona school officials went too far in strip-searching a 13 year old student who they thought might be distributing ibuprofen (Advil). In Safford Unified School District v. Reading (2009), the Court ruled that while schools have search authority to root out contraband, the search cannot be “excessively intrusive” in light of the age and sex of the student, and the nature of the items being searched.

Drug tests can also be a kind of “search,” and the Supreme Court has weighed in on the use of them by public schools. In the 1995 case of Vernonia School District v. Acton, the Court ruled that schools may force athletes to submit to random drug tests. In Board of Education of Pottawatomie County v. Earls (2002), students fought a school rule that required drug testing for all extra-
The drug test was even a condition to take courses such as band or choir. The Court upheld the policy because it “reasonably serve[d] the School District’s important interest in preventing drug use among students.”

The principle of due process, like other constitutional principles, is a means to an end. In other words, as the Constitution’s Preamble states, it is a way to ensure our government establishes justice and secures the blessings of liberty for future generations. While technologies and threats to security change, the rights protected by the Constitution don’t. This means it will always be important to understand the protections in our Bill of Rights and the reasons for them.

Comprehension and Critical Thinking Questions

1. How does the Fourth Amendment’s warrant requirement protect you?

2. What is the Exclusionary Rule?

3. How has the Supreme Court applied the Fourth Amendment to public school officials? How have they ruled with regard to drug testing in schools? Do you agree with these rulings?

4. The principle of due process, like other constitutional principles, is a means to an end. What is that end? Explain.

5. You may have noticed that the Fourth Amendment applies differently in different circumstances. Do you think the Court has allowed government officials (including public school administrators) too much leeway in conducting searches? Just enough? Not enough? Is the Fourth Amendment today being enforced in ways its text commands, and in ways the Founders would agree with?
Attitude Inventory

Directions: For each statement, circle the number that best describes your response, 1 being you completely disagree, 10 being you completely agree.

1. I understand the purpose of the Fourth Amendment.
   
   1 2 3 4 5 6 7 8 9 10

2. I understand the constitutional principle of due process.
   
   1 2 3 4 5 6 7 8 9 10

3. I believe that protections from unreasonable search and seizure are important.
   
   1 2 3 4 5 6 7 8 9 10

4. It is important for the people to give government more power to search because it will keep us safe.
   
   1 2 3 4 5 6 7 8 9 10

5. If people object to being searched, it’s because they have something to hide.
   
   1 2 3 4 5 6 7 8 9 10

6. When balancing liberty and security, I think liberty is more important.
   
   1 2 3 4 5 6 7 8 9 10
Interpreting the Fourth Amendment

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

–FOURTH AMENDMENT

1. What qualifies as “persons”?

__________________________________________________________________________

2. What qualifies as “houses”?

__________________________________________________________________________

3. What qualifies as “papers”?

__________________________________________________________________________

4. What qualifies as an “effect”?

__________________________________________________________________________

5. What words/phrases come to mind for the word “unreasonable”?

__________________________________________________________________________

6. How do you know if you or your property has been “seized”? What characteristics define “seizure”?

__________________________________________________________________________

7. In general, “probable cause” means the facts of a given situation would convince a reasonable person that a crime has been, or is being, committed. What sorts of facts or circumstances might make up probable cause?

__________________________________________________________________________
**Directions:** Imagine your friend is being charged with a crime. The police have evidence against her which they found in several different ways. For each example, decide whether you believe the government should be able to use that evidence if they didn't have a warrant when they seized it.

<table>
<thead>
<tr>
<th>ITEM/LOCATION SEARCHED WITHOUT A WARRANT</th>
<th>SHOULD POLICE BE ABLE TO USE THIS EVIDENCE AGAINST HER?</th>
<th>WHY OR WHY NOT?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Evidence from her public school locker.</td>
<td></td>
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<tr>
<td>2. Websites that she visited on her home computer.</td>
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<td>3. An email that she sent to a friend.</td>
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<tr>
<td>4. Information from her Facebook page, including status updates and pictures with locations and other people tagged.</td>
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<td>5. Her movements by car on public streets.</td>
<td></td>
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<tr>
<td>6. The contents of her cell phone.</td>
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<td></td>
</tr>
<tr>
<td>ITEM/LOCATION SEARCHED WITHOUT A WARRANT</td>
<td>SHOULD POLICE BE ABLE TO USE THIS EVIDENCE AGAINST HER?</td>
<td>WHY OR WHY NOT?</td>
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<td>-----------------------------------------</td>
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<tr>
<td>7. Things she said on a land-line phone conversation she had at home.</td>
<td></td>
<td></td>
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<tr>
<td>8. Trash from her home placed by her family in a garbage can by the curb.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9. Something in her fenced backyard, not visible from the street.</td>
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