

# Les Fiches notions de la Corpo



Chers étudiants, ça y est, le semestre touche à sa fin. Mais pour bien profiter de l'été et éviter les rattrapages, la case des partiels semble inévitable !

Depuis maintenant 90 ans la Corpo Assas accompagne les étudiants dans tous les domaines de la vie universitaire, et pour cette année on vous propose des fiches notions. Ces fiches sont écrites par nos membres dans le but de favoriser l'entraide étudiante ainsi que de vous aider dans l'apprentissage de certaines notions clés d'une matière, sans reprendre le cours du professeur.

Effectivement, ces fiches sont là pour vous orienter, elles sont faites par des étudiants et ne sont en aucun cas un substitut à ce qui a été enseigné en TD ou en cours car elles ne se basent que sur les recherches et l'apprentissage personnelles de nos membres.

Si jamais il vous venait des questions, n'hésitez pas à nous envoyer un message sur la page Facebook Corpo Assas ou à contacter *Angèle Thiollier* ou *Lina Cherkaoui*.

### **Comment valider votre année ?**

Pour les L1 :

Il faut tout d'abord rappeler que toutes vos notes se compensent. Pour valider de la manière la plus simple votre année, il vous faut valider votre bloc de matières fondamentales mais aussi votre bloc de matières complémentaires. Cependant, le calcul peut s'avérer plus complexe...

Chaque fin de semestre est marquée par des examens qui constituent l'épine dorsale de la validation de votre année. Bon nombre d'autres possibilités vous sont proposées pour engranger un maximum de points et limiter ainsi l'impact de vos partiels. Chacun de vos chargés de TD va vous attribuer une note sur 20 à l'issue du semestre. Vos TD de matières fondamentales comptent donc autant que l'examen écrit, lui aussi noté sur 20. Cet examen s'effectue en 3h et nécessite un exercice de rédaction. Sur un semestre, une matière fondamentale peut donc vous

rapporter jusqu'à 40 points. Seuls 20 points sont nécessaires à la validation de la matière. Pour valider votre bloc de fondamentales, il vous faut donc obtenir 40 points en additionnant vos notes de TD et vos notes aux partiels. Si toutefois vous n'obtenez pas ces 40 points, vous repasserez en juillet lors de la session de rattrapage, la ou les matières que vous n'auriez pas validée(s).

**Attention** : le passage par juillet annule votre note de TD obtenue dans la matière.

Pour les L2 :

Le principe est similaire, à la différence qu'il y a plus de matières fondamentales et plus de matières complémentaires.

Conclusion simple : travailler toutes les matières un minimum en mettant l'accent sur les TD et les matières fondamentales (les plus gros coefficients) vous permettra de maximiser vos chances de valider votre année du premier coup et ainsi éviter l'écueil des rattrapages de juillet.

Si, au sein même des unités d'enseignement, les matières se compensent, les blocs peuvent aussi se compenser entre eux à la fin de l'année. Ainsi, si vous obtenez une moyenne générale sur l'année de 10/20, votre passage est assuré.

En cas d'échec lors des sessions de janvier et de mai, une seconde chance vous est offerte en juillet.

**Attention**, contrairement aux idées reçues, les rattrapages ne sont pas plus faciles, ils sont connus pour être notés plus sévèrement. Toutes les matières des blocs non validés où vous n'avez pas eu la moyenne sont à repasser. S'il s'agit d'une matière à TD, la note de TD est annulée (même si vous avez été défaillant), de sorte que la note obtenue en juillet compte double (8/20 revient à 16/40). Les points d'avance acquis lors de l'année (points au-dessus de la moyenne lors de la validation d'un bloc) sont valables après les rattrapages et permettent donc la compensation finale comme décrite précédemment.

À noter que le jury peut vous accorder quelques points pour l'obtention de votre année, notamment dans le cas d'un étudiant sérieux en TD...  
À bon entendeur !

Pour les L1, le passage en deuxième année peut aussi se faire en conditionnel, pour cela il vous faut valider les deux unités d'enseignement fondamental et une unité d'enseignement complémentaire tout en sachant que l'autre unité complémentaire sera à repasser en L2.

## **AVERTISSEMENT**

Il est important de rappeler que les Professeurs et Maitres de conférence ne sauraient être tenus responsables d'une erreur ou d'une omission au sein des fiches de cours proposées, puisque ces dernières sont comme dit précédemment, réalisées, relues, et mises en page par des étudiants appartenant à la Corpo Paris Assas.

## Introduction

*“The Framers of the Bill of Rights did not purport to ‘create’ rights...”—Justice William Brennan*  
→ rights = preexisting; the Bill of Rights = protection from government infringement.

In L3 → focus on amendments, especially the first ten = the Bill of Rights (ratified in 1791).

### Historical context

These 10 amendments have become **extremely famous** → more Americans know the 1st & 2nd A. than what Article II of the Constitution actually states.

- The Constitution (1787) created a political & institutional system still used today.  
→ The Bill of Rights **aimed to protect fundamental democratic rights**: freedom of speech & religion, right to bear arms, right to counsel, trial by jury, etc.

Overall purpose of the Constitution (articles + amendments) → **ensure the new US would always remain a democracy and never fall under tyranny.**

- This mindset comes from the American Revolution: colonists broke from Britain because they rejected the authoritarian British regime (“yoke” of tyranny).

In 1776, the 13 colonies wanted a new political system as much as their own independent nation.

→ **After independence (1783), Framers aimed to create a system where citizens’ fundamental rights and the democratic nature of the country could never be threatened.**

- The Bill of Rights (1791) was as essential as the Constitution (1787).  
→ Many Founding Fathers would not sign the Constitution without the promise of a future bill of rights.  
→ The Constitution gave significant power to the federal government; the Bill of Rights was meant to limit that power and prevent violations of individual liberties.
- Rights were protected through constitutional amendments, not simple laws.  
→ Simple law = can be repealed by 50% + 1 in both chambers.  
→ Amendment = **can only be repealed through another amendment** → **need 2/3 of both houses + 3/4 of states.**
- Very difficult to change → rights protected from temporary majorities.
- Founders wanted to protect these rights from democracy itself and from the very citizens who might vote to restrict them.

### **How were the rights chosen?**

- Framers’ key question: **“What rights would a tyrant want to take away from the people?”**  
→ Rights vulnerable to tyranny = protected through the Bill of Rights.
- Some major rights today are **NOT** in the Bill of Rights:  
→ e.g. No explicit constitutional right to vote in the first ten amendments.

- Some less essential rights **ARE** included:
  - 7th Amend.: jury trial in civil cases > \$20.
- Why this paradox?
  - Dictators often allow voting today; what matters is whether elections are free & transparent, not merely the existence of voting rights.
  - A tyrant is more interested **in silencing speech, restricting religion, or controlling trials than dictating where people live or whether they marry.**
- Explains why the Bill of Rights focuses on speech, religion, fair trials, etc.
- According to Justice Brennan's quote → Founders believed rights **were natural, not created by government.**
  - Bill of Rights = **protection of rights people already had by birth.**
- Some provisions appear odd to non-Americans.
  - 2nd Amendment: originally seen as the ultimate safeguard against tyranny → armed citizens could resist an authoritarian government.

### Methodology :

Two ways to study the Bill of Rights:

- **Numerical approach** → 1st to 10th Amendment. in order
- **Procedural approach** → rights organized by stage of legal proceedings (pre-trial / trial / post-trial)

This semester → **procedural approach.** = More intuitive for law students.

→ Example: Fifth Amendment appears in all three stages (pre, during, post-trial).

→ In numerical study → would only appear once.

Procedural approach shows the practical role of each amendment.

**BUT:** the Bill of Rights was originally drafted as a list of substantive rights, not a simple set of procedural guarantees.

- Americans generally think first of substantive rights (speech, religion, arms) rather than procedural rights (speedy trial, double jeopardy, etc.).
- Bill of Rights was meant to limit all federal power, not just courts
  - begins with "Congress shall make no law..."
- Several procedural rights were added while the Bill of Rights applied only to the federal government
  - most cases were handled at state level at the time.
- When procedural approach creates confusion
  - Why death penalty if 8th A. forbids "cruel and unusual punishments"?
  - Why appeals if 5th A. forbids double jeopardy?),
- Always return to the fundamental objective:
  - ensuring the US always remains a democracy and cannot be turned into a dictatorship.**

## Unit 1 — The Fourteenth Amendment

### **I. A BRIEF HISTORY OF THE FOURTEENTH AMENDMENT**

→ Ratified 1868, during Reconstruction after the Civil War.

→ Objective: rebuild the Union, protect freed slaves, redefine relation between states and federal government.

Purpose: Rebuild the Union, protect freed slaves, redefine national-state relations.

#### **Main objectives of Congress (1866-1868):**

- Protect the newly freed slaves after the 13<sup>th</sup> Amendment
- Invalidate the Three-Fifths Clause
- Prevent Confederate leaders from regaining federal office
- Reject Confederate state debts from the Civil War
- Give federal government power to intervene when states violated basic rights.

#### **Introduces four revolutionary clauses:**

- **Citizenship Clause, Privileges or Immunities, Due process Clause, Equal Protection Clause**

Protection of freed slaves:

- Southern states tried to reimpose slavery through Black Codes
- 14<sup>th</sup> Amendment gives freedmen U.S. citizenship, enabling them to sue states violating their rights
- Example: if Georgia reinstated slavery – suit under 13<sup>th</sup> A.+ 14<sup>th</sup> A. Due Process.

Limits in practice (1868-1954):

- States imposed Jim Crow segregation.
- **Plessy v. Ferguson (1896):** “separate but equal” = constitutional = segregation legalized
- 14<sup>th</sup> Amendment remained almost powerless for decades

Turning point:

- **Brown v. Board (1954):** segregation in schools violates Equal Protection = overturns Plessy
- **Civil Rights Act (1964):** ends public segregation in the U.S.

### **II. INCORPORATING THE BILL OF RIGHTS THROUGH THE FOURTEENTH AMENDMENT**

Originally, Bill of Rights = only federal restrictions

- Ratified 1791 to restrain federal government
- Wording “Congress shall make no law...” = no application to states
- States could regulate speech, religion, guns, procedural rights freely

#### **Barron v. Baltimore (1833):**

- Marshall: framers clearly did not intend the Bill of Rights to bind states
- Therefore, no incorporation before 1868

❖ **After 14<sup>th</sup> A.: which clause incorporates ?**

Debate among judges: Privileges or Immunities ? Due Process ? No incorporation at all ?

**Slaughter-House Cases (1873):**

- Court reduces privileges or Immunities to a tiny set of rights
- Prevents using it to incorporate the Bill of Rights
- Shift toward Due Process Clause

**Gitlow v. New York (1925):**

- First recognition of incorporation: freedom of speech applies to states
- Court gives no methodology = incorporation remains unclear

Total vs Selective Incorporation

TOTAL INCORPORATION	SELECTIVE INCORPORATION
<ul style="list-style-type: none"> <li>♦ All rights in the Bill of Rights automatically apply to states</li> <li>♦ Problematic</li> <li>♦ Weakens state autonomy</li> </ul>	<ul style="list-style-type: none"> <li>♦ Case-by-case approach</li> <li>♦ Only rights “fundamental to ordered liberty” are incorporated</li> </ul>

**Palko v. Connecticut (1937):**

- Establishes the test: rights incorporated if they are:
  - “Implicit in the concept of ordered liberty”
  - “Deeply rooted in tradition and conscience of the people”
- Confirms selective incorporation

**Warren Court (1953-1969):**

- Court nationalizes criminal procedure
- Incorporates most of the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> Amendments

Key cases:

- **Mapp v. Ohio (1961): exclusionary rule**
- **Gideon v. Arizona (1966): Miranda warnings**
- **Benton v. Maryland (1969): Double jeopardy**

By 1970 most of the first eight amendments applied to states.

Incorporated vs not incorporated

INCORPORATED	NOT INCORPORATED
♦ 1 <sup>st</sup> , 2 <sup>nd</sup> , 4 <sup>th</sup> , 5 <sup>th</sup> , 6 <sup>th</sup> , 8 <sup>th</sup>	♦ 3 <sup>rd</sup> , 7 <sup>th</sup> , 9 <sup>th</sup> , 10 <sup>th</sup>

### III SUBSTANTIVE AND PROCEDURAL DUE PROCESS

#### Origins of Due Process:

- **From Magna Carta (1215):** government must act through fair rules
- Basis for fairness, natural justice, rule of law

#### Due Process Clause (14th A.)

“No State shall deprive any person of life, liberty, or property without due process of law”

4 major functions:

- Incorporation of Bill of Rights
- Vagueness Doctrine = laws must be clear
- Procedural Due Process = fairness of procedures
- Substantive Due Process = some rights protected from government even with fair procedures

#### **Procedural Due Process (How the state acts):**

##### Guarantees:

- Notice of charges
  - Rights to counsel (Gideon)
  - Ability to present and confront evidence and witnesses
  - Impartial judge/jury
  - Public, fair, speedy trial
- Purpose: prevent arbitrary state action

#### **Substantive Due Process (what the state may regulate)**

- Protects certain fundamental rights from government interference
- Even if procedures are “fair”, the government cannot infringe fundamental liberties

#### Strict Scrutiny:

Applied when:

- A fundamental right is limited, or a suspect classification is used

Government must show:

- Compelling interest, narrowly tailored law, least restrictive means

Examples : Right to marry (**Loving v. Virginia 1967**) Privacy rights (contraception, intimacy)

#### Modern controversies :

- **Obergefell v. Hodges (2015):** same-sex marriage = fundamental right
- **Dobbs v. Jackson (2022):** Roe overturned = abortion not a fundamental right
- Justice Thomas suggests reconsidering other substantive due process cases (contraception, privacy, marriage)

## Unit 2 – The First Amendment (1) : Freedom of Speech

### The seven rights protected by the first amendment

Religious Freedom (2 rights)	Speech-Related Rights (5 rights)
<ul style="list-style-type: none"><li>➤ Freedom from religion</li><li>→ No official state religion</li><li>➤ Freedom of religion</li><li>➤ Free to practice any (or no) religion</li></ul>	<ul style="list-style-type: none"><li>➤ Freedom of Speech</li><li>➤ Freedom of the press</li><li>➤ Freedom of the assembly</li><li>➤ Right to petition government</li><li>➤ Freedom of association</li></ul>

- These freedoms come first because they were considered essential to: the survival of democracy, preventing tyranny, allowing political debate, limiting government power.

### INCORPORATION → APPLYING THE FIRST AMENDMENT TO THE STATES

- **Originally (1791):** applies only to **federal government**
  - “Congress shall make no law...” = federal only.
  - States could, in theory, restrict speech or press.
- **After the Fourteenth Amendment (1868)**
  - Supreme Court used the **Due Process Clause** to “incorporate” 1st Amendment.
  - **States AND local governments must now respect all seven rights.**
- Complete incorporation
  - **All clauses of the First Amendment are fully incorporated.**

### Historical Context

- Under English law = criticism = “seditious libel” (punishable by life imprisonment)
- Founders rejected this model

A republic needs citizens who can : challenge authority, debate public issues, criticize government without fear, spread ideas freely.

### Theoretical justifications for Free Speech

#### **Marketplace of ideas theory:**

- Society benefits when ideas compete
- True ideas survive; false ideas fail

#### **Self-government theory:**

- Democracy requires citizens able to challenge and influence the government
- Political speech = highest form of protected speech

#### **Self-realization theory:**

- Speech contributes to personal growth, autonomy, identity

These theories guide the Supreme Court in free speech cases.

### HATE SPEECH IN THE UNITED STATES

Hate speech is protected speech. Unlike Europe or Canada, the US offers no exception for hate speech.

#### **Skokie Case (1977):**

- Nazis allowed to march in a Jewish suburb of Chicago
- Court: hate speech is “indistinguishable” from other forms of political expression

#### **Snyder v. Phelps (2011):**

- Westboro Baptist Church protected for hateful funeral protests.

#### **Matal v. Tam (2017):**

- Supreme Court defines hate speech for first time
- Unanimous ruling: “We protect the freedom to express the thought that we hate”

#### Government and private sector :

- Government cannot punish hate speech
- Private employers and social media can fire, ban, suspend, etc
  - Because the First Amendment restricts government, not private actors

### WHAT COUNTS AS “SPEECH”?

- **Expressive conduct** (symbolic speech)
  - Wearing black armbands (**Tinker v. Des Moines 1969**)
  - Burning the American flag (**Texas v. Johnson 1989**)
- **Freedom from compelled speech**
  - State cannot force you to say something against your will
- **Prior restraint**
  - Government usually cannot block speech before it happens

### LIMITS OF THE FIRST AMENDMENT

- The First Amendment is extremely protective but **not absolute**

#### Categorie of “low-value” speech

Still partially regulated:

- **Fighting words** = insults provoking immediate
- **True threats**
- **Obscenity**
- **Incitement to illegal action:**
  - Brandenburg v. Ohio (1969):** speech punishable only if : directed to cause, imminent, lawless action, likely to produce it = very high standard = most speech is protected
- **Commercial speech and defamation** = once unprotected, now partially protected

Key Case: Citizens United (2010) : Political spending by corporation = protected speech  
“money is speech”

### **Content-based vs Time/Place/Manner regulation**

- Content-based regulation
  - Almost always unconstitutional
  - Viewpoint discrimination = even more forbidden
- Time, place, manner restrictions
  - Allowed if :
    - Content-neutral
    - Narrowly tailored
    - Serve legitimate goals (noise, safety)
  - **Ward v. Rock Against Racism 1989 :**
    - NYC could regulate concert volume

### **Special contexts with greater governmental authority**

- Schools = limited
  - **Mahanoy v. B.L. 2021:**
    - Protects off-campus student speech
- Prisons and military = speech rights reduced for security and discipline
- Public employees = can be restricted in their official capacity

### **Right to petition and right to assemble**

- Right to petition
  - Request government to fix laws, address grievances, or file lawsuits
- Right to assemble
  - Gather peacefully for protests, meetings, demonstrations

= Both are essential for democratic participation

### **Freedom of association (implicit right)**

- Recognized in **NAACP v. Alabama (1958)**
- Right to join groups to express beliefs collectively
- Often arises in cases involving discrimination and membership rules

### **Incorporation summary**

- All First amendment rights apply to the states through the Fourteenth Amendment
- Ensures nationwide protection speech, religion, press, assembly, petition and association

## **Unit 2: The First Amendment (2): Freedom of Religion**

### **HISTORICAL BACKGROUND**

- Early American colonies founded to escape **religious persecution in England** (1600s)
- Colonies often had official religions but gradually developed **a shared commitment to religious freedom**
- The First amendment (1791) ensures:
  - **Establishment Clause**: Government cannot establish religion
  - **Free Exercise Clause**: Citizens can freely practice religion

### **THE ESTABLISHMENT CLAUSE**

- Purpose:
  - Prevent government from establishing an official religion or favoring one religion over another or favoring religion over non-religion or vice versa and coercing participation in religion
- Neutrality principle:
  - Government must not coerce or influence religious belief
  - Acknowledging religion culturally is allowed but government must remain neutral

Key Cases:

#### **Everson v. Board of Education (1947):**

- Incorporates Establishing Clause against states; government must remain neutral in religious matters

#### **Lemon v. Kurtzman (1971):**

- Introduced Lemon test for Establishment Clause:
  - Law must have a legitimate secular purpose
  - Primary effect cannot advance or inhibit religion
  - Must avoid excessive government entanglement with religion

#### **Marsh v. Chambers (1983):**

- Originalist approach; legislative prayer permissible.

#### **American Legion v. American Humanist Assn. (2019):**

- Court abandons Lemon test for longstanding religious practices

#### **Kennedy v. Bremerton (2022):**

- Public school coach praying not coercive, protected by Free Exercise and Free Speech

School coercion cases: (Heightened scrutiny due to influence on children:

#### **Engel v. Vitale (1962):**

- Official school prayer violates Establishment Clause

#### **Lee v. Weisman (1992):**

- Graduation prayers = coercion

#### **Santa Fe ISD v. Doe (2000):**

- Student-led pre-game prayer under supervision = coercion

**Good News Club v. Milford (2001):**

- Private religious clubs after school allowed; protected by Free Speech and Free Exercise

**THE FREE EXERCISE CLAUSE**

- Purpose
  - Protects religious beliefs and some actions motivated by religion
- Belief-action distinction
  - Government may regulate actions even if religiously motivated
  - Beliefs = fully protected

Key Cases:

**Reynolds v. U.S. (1879):**

- Polygamy banned; Free Exercise protects belief, not action

**Jacobson v Massachusetts (1905):**

- Government can override religious objections for public health (smallpox vaccination)

**Sherbert v. Verner (1963):**

- Government may burden religion only for compelling interest

Wisconsin v. Yoder (1972):

- Compelling interest must outweigh religious rights; Amish education exemption

**Employment Division v. Smith (1990):**

- Neutral, generally applicable laws can override religious practice; limited Sherbert test.

**RELIGIOUS FREEDOM RESTORATION ACT (RFRA, 1993)**

- Purpose:
  - Restore compelling-interest test at federal level
- Federal application:
  - Only applies to federal laws > RFRA applies
  - State/local laws:
    - City of Boerne v. Flores (1997):**
      - RFRA cannot override state constitutional protections

Key Cases:

**Burwell v. Hobby Lobby (2014):**

→ Federal contraceptive mandate; RFRA protects religious exemption for corporations

**Masterpiece Cakeshop v. Colorado (2018):**

→ State action cannot compel religious participation in ceremonies offensive to beliefs

**Mahmoud v. Taylor (2024):**

→ Parents exempt children from school curriculum violating religious beliefs

## **Unit 3 – Pre-trial – Arrest and Custody (4th, 5th and 6<sup>th</sup> Amendments)**

### **CONSTITUTIONAL RIGHTS UPON ARREST AND CUSTODY**

All individuals in the U.S. have protections during arrest and custody, primarily under:

- 4<sup>th</sup> Amendment → Protection against unreasonable searches and seizures
- 5<sup>th</sup> Amendment → Protection against self-incrimination
- 6<sup>th</sup> Amendment → Right to legal counsel

These rights ensure that individuals are not coerced or unfairly prosecuted before trial.

### **MIRANDA RIGHTS**

**Origin:**

**Miranda v. Arizona (1966)**

- Established that suspects must be informed of their rights before questioning, so that any waiver is truly voluntary
- Standard warning:
  - Right to remain silent
  - Anything said be used against you in court
  - Right to an attorney; if unaffordable, one will be provided

**Core principles:**

- Suspect cannot be forced to speak
- Any unwarned statement is generally **inadmissible** in trial (exclusionary rule)
- Physical evidence obtained due to an unwarned statement may still be used (U.S. v. Illinois, 2004)

**Exceptions and Narrowing**

- Public Safety Exception:

**New York v. Quarles (1984):**

- Immediate threat to public safety justifies admitting unwarned statements
- Miranda rights can be delayed but not eliminated

- Undercover Officers:

**Illinois v. Perkins (1990):**

- Statements to undercover officers are admissible because Miranda protects against coercion, not deception

- Pre-arrest Silence

**Salinas v. Texas (2013):**

- A suspect's refusal to answer questions pre-arrest may be used as evidence

**STOP AND FRISK (TERRY STOPS)**

**Terry v. Ohio (1968):**

- Officers may stop and frisk someone if they have reasonable suspicion of criminal activity and believe the person is armed
- Reasonable suspicion = minimal objective justification; lower than probable cause
- Stop must be proportional in duration and scope

**Case law refinements**

**Alabama v. White (1998):**

- Officers may rely on anonymous tips only if corroborated

**Minnesota v. Dickerson (1993):**

- Objects felt during a frisk may be seized if reasonably recognized as weapons (plain feel doctrine)

**Floyd v. City of New York (2008):**

- NYPD stop-and-frisk found unconstitutional due to racial profiling and excessive stops

**Exclusionary rule and fruit of the poisonous tree**

- Evidence from illegal stops is inadmissible
- Any evidence obtained indirectly from an unconstitutional stop may also be excluded

**EXCEPTIONS TO THE WARRANT REQUIREMENT**

The 4th Amendment protects against unreasonable searches, but the courts recognize several exceptions:

- Searches incident to lawful arrest:

- Officers may search the suspect and immediate surroundings
- Exigent circumstances:
  - Emergencies to protect life or prevent destruction of evidence
- Plain view doctrine:
  - Officers may seize objects in plain sight if lawfully present
- Checkpoints:
  - DUI and immigration checkpoints are allowed; general crime-fighting checkpoints generally are not permitted
- Consent:
  - Voluntary consent by a person removes the need for a warrant

### **Reasonable suspicion vs probable cause:**

- Stop-and-frisk: reasonable suspicion
- Arrest/search: probable cause required

## **Unit 4 – Pre-Trial Proceedings**

### **FIRST APPEARANCE AND BAIL**

First appearance = the defendant's initial court appearance after arrest.

→ Must occur:

- Without unnecessary delay after an arrest with a warrant
- Within 48 hours after a warrantless arrest → to determine probable cause

Probable cause = reasonable grounds, based on facts, to believe the suspect committed a crime.

→ If no probable cause → defendant released without charges.

If arrest is lawful, the judge:

- Informs the defendant of:
  - Right against self-incrimination (5<sup>th</sup> Amendment)
  - Right to counsel (6<sup>th</sup> Amendment)
- Appoints counsel if the defendant cannot afford one.
- Schedules a preliminary hearing.
- Decides whether to:
  - release the defendant, or
  - keep them in custody, usually with bail

### **Bail**

Bail = money or property posted as security to obtain release before trial.

- Returned if the defendant appears in court.
- Forfeited if the defendant fails to appear.

Forms of bail:

Cash bail → full amount paid to court.

Property bond → property used as collateral.

Surety bond → bail bondsperson posts bail; defendant pays ~10% (non-refundable)

Release on own recognizance → no bail, based on promise to return.

Judges consider:

- risk of flight
- danger to society (except historically in New York)
- seriousness of the offense

Capital or very violent crimes → bail usually denied.

### **Constitutional framework and criticism**

8<sup>th</sup> Amendment:

“Excessive bail shall not be required”

- Bail must not be excessive.
- Does not require bail to be affordable.
- Incorporation unclear (only dicta / footnotes).

Main criticism:

- Cash bail disproportionately affects poor defendants.
- Many pre-trial detainees are jailed because they are poor, not dangerous.

### **Bail reform**

State reforms include:

- New Jersey and Alaska → risk-based release systems.
- California:
  - Cash bail repeal rejected (2020).
  - CA Supreme Court: jailing solely due to inability to pay is unconstitutional
- New York (2020):
  - Cash bail eliminated for misdemeanors and some non-violent felonies.
  - Later revisions expanded judicial discretion.
- Illinois (2023):
  - First state to abolish cash bail entirely.
- Texas (2025):
  - Expanded offenses eligible for bail denial.
  - Prosecutors can appeal bail decisions.

## **FORMAL CHARGING: INFORMATION AND GRAND JURY INDICTMENT**

Formal charging = official decision to prosecute the defendant.

May occur through:

- judge at a preliminary hearing
- Prosecutor issuing an information
- Grand jury indictment

Only 23 states require grand jury indictments in some felony cases.

### **Grand Jury and the 5<sup>th</sup> 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...”

- Applies to federal felony cases (>1 year imprisonment)
- Not incorporated → *Hurtado v. California* (1884)

Infamous crime = serious crime punishable by imprisonment.

Defendants charged with lesser offenses may waive grand jury indictment.

### **Structure and procedure of Grand Juries**

Grand jury = body of citizens deciding whether probable cause exists to indict.

Federal grand jury:

- 16-23 members
- Majority vote
- Fair cross-section of the community

Possible outcomes:

- True bill → indictment
- No bill → no charges.

<b>Criticism</b>	<b>Justification</b>
<ul style="list-style-type: none"><li>➤ Grand juries rubber-stamp prosecutorial decisions.</li><li>➤ One-sided discovery.</li><li>➤ Rarely protect defendants.</li><li>➤ Less likely to indict police officers</li></ul>	<ul style="list-style-type: none"><li>➤ Citizen participation in justice.</li><li>➤ Encourages stronger prosecutorial cases.</li><li>➤ Still a procedural safeguard.</li></ul>

If indicted → defendant is bound over for trial → arraignment.

## **ARRAIGNMENT AND PLEA BARGAINING**

Arraignment = court hearing where:

- Charges are read

- Defendant enters a plea

Three possible pleas:

- Not guilty → case proceeds to trial.
- Guilty → no trial; sentencing follows.
- Nolo contendere (no contest):
  - no admission of guilt
  - conviction cannot be used in civil lawsuits.

### **Plea bargaining**

Plea bargaining = negotiated agreement between prosecution and defense.

- 90-98% of criminal cases end in guilty pleas.

Typical agreements:

- Reduced charges, dismissal of some counts, reduced sentence, concurrent sentences, cooperation against co-defendants.

Judge must approve the deal.

By pleading guilty, defendants waive:

- 5<sup>th</sup> Amendment (self-incrimination)
- 6<sup>th</sup> Amendment (jury trial, confrontation)

Cases:

#### **Boykin v Alabama (1969):**

- The Supreme Court held that a guilty plea must be voluntary, knowing, and intelligent.

#### **Brady v. United States (1970):**

- Confirmed that pleas must be entered with full awareness of the consequences.

→ After a guilty plea, the defendant has a limited right to appeal.

### **Right to a counsel in a plea bargaining**

Defendants also have a right to effective legal assistance during plea negotiations.

Cases (2012):

#### **Missouri v. Frye**

- **Lawyers must inform defendants of plea offers.**

#### **Lafler v. Cooper**

- **Ineffective counsel during plea bargaining can violate the Sixth Amendment.**

→ Ensures defendants make informed decisions when agreeing to a plea deal.

Advantages	Problems
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<ul style="list-style-type: none"> <li>➤ Faster justice</li> <li>➤ Reduced sentences</li> <li>➤ Avoid trial trauma for victims</li> </ul>	<ul style="list-style-type: none"> <li>➤ Innocent defendants may plead guilty to avoid harsher sentences or the risk of a trial penalty</li> <li>➤ Unequal power</li> <li>➤ Guilt not proven beyond reasonable doubt</li> </ul>
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## **Unit 5 – Pretrial motions and suppression of evidence**

Pretrial motion = formal request submitted to a judge asking for a specific ruling or order before trial

Purpose:

- Protect constitutional rights of defendants (4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup> Amendments)
- Challenge evidence, jurisdiction, venue, or procedural errors

Common types:

- **Motion to dismiss:** ask court to throw out charges  
Examples: lack of jurisdiction, violation of 6<sup>th</sup> Amendment right to a speedy trial, double jeopardy claims
- **Motion for change of venue:** moves trial to another district  
→ Ensures 6<sup>th</sup> Amendment right to impartial jury  
→ **Groppi v. Wisconsin (1971):**  
Pretrial publicity may justify transfer
- **Motion for discovery:** requests evidence prosecution  
→ **Brady v. Maryland (1963):**  
Prosecutors must disclose evidence material to guilt or punishment
- **Motion to suppress evidence:** excludes evidence obtained unlawfully

### **FOURTH AMENDMENT AND EVIDENCE SUPPRESSION**

4<sup>th</sup> Amendment: protects against unreasonable searches and seizures.

Warrant required: based on probable cause, describing place and items/persons

**Weeks v. United States (1914):**

- Federal exclusionary rule.

Mapp v. Ohio (1961):

- Exclusionary rule applies to states.

**Step 1: Did a search/seizure occur?**

**Katz v. United States (1967):**

- Search = intrusion on reasonable expectation of privacy.

Protected → homes, pockets, bags, private items

Not protected → plain view, open fields, abandoned property, public/commercial areas

### **Step 2: Was the search reasonable?**

Warrant preferred, probable cause required:

#### **United States v. Grubbs (2006):**

- Probable cause = fair probability of evidence at specific place

Warrantless exceptions:

- 1) **Search incident to lawful arrest** → search suspect + immediate area
- 2) **Consent** → voluntary; co-occupant can consent to shared areas
- 3) **Automobile exception** → probable cause + vehicle mobility
- 4) **Exigent circumstances** → emergency, hot pursuit, prevent evidence destruction

#### **Cupp v. Murphy (1973):**

- Warrantless search allowed to prevent destruction of evidence
- 5) **Stop and frisk** → reasonable suspicion, suspect is armed (**Terry v. Ohio, 1968**)

Physical trespass counts:

#### **United States v. Jones (2012)**

- Installing GPS on car = search

Cellphone/location data:

#### **Carpenter v. United States (2018)**

- Cellphone location records protected

### **Step 3: Unreasonable search → exclusion**

Exclusionary rule = illegally obtained evidence inadmissible

Weeks v. U.S. (1914) → federal

Mapp v. Ohio (1961) → states/local

Fruit of the poisonous tree: derivative evidence also excluded

Exceptions:

**Good faith:** officers act objectively reasonably

#### **Herring v. U.S. (2009):**

- Evidence admissible if officer relied on outdated warrant unknowingly

**Inevitable discovery:** evidence would have been found lawfully

**Attenuation:** connection between illegal act and evidence is remote

## Unit 6 – Trial

<b>5<sup>th</sup> Amendment</b>	<b>6<sup>th</sup> Amendment</b>
<ul style="list-style-type: none"><li>➤ Grand Jury indictment required for capital/infamous crimes</li><li>➤ Double jeopardy protection → cannot be tried twice for the same offense</li><li>➤ Self-incrimination protection → cannot be forced to testify (coerced confessions inadmissible)</li><li>➤ Due process → fair procedures before deprivation of life, liberty, or property</li><li>➤ Takings Clause → private property cannot be taken without just compensation</li></ul>	<ul style="list-style-type: none"><li>➤ Speedy and public trial</li><li>➤ Impartial jury in the crime district</li><li>➤ Informed of charges</li><li>➤ Confront witnesses</li><li>➤ Compulsory process → subpoena witnesses for defense</li><li>➤ Assistance of counsel → right to lawyer</li></ul>

Most cases resolved before trial (plea bargains, dismissals)

Accusatorial/adversarial system:

- Burden of proof = prosecution
- Defense not obliged to help prosecution
- Judge = neutral arbiter

Six trial phases: jury selection, opening statements, witness examination, closing arguments, jury instructions, deliberation/verdict

### Jury Selection

Random selection from DMV, voter rolls, phone books

Peremptory strikes → attorneys dismiss jurors without reason

### **Batson v. Kentucky (1986):**

- strikes based solely on race violate 14th Amendment

Issue: studies show all-white juries convict Black defendants 16% more in Florida (Duke study)

→ Jury must be impartial and representative

### Opening Statements

<b>Prosecution</b>	<b>Defense</b>
presents charges, evidence, witnesses; aims to prove guilt beyond reasonable doubt	responds, presents own evidence/witnesses, maintains not guilty plea

## Witness Examination and Cross-Examination

Confrontation Clause (6th Amendment) → defendants face adverse witnesses, cross-examine to test credibility

→ Hearsay usually inadmissible

**Compulsory process** → defense can subpoena exculpatory witnesses

**Goal:** ensure fair trial and adversarial balance

## Closing arguments

- Lawyers summarize evidence and main arguments
- Prosecution emphasizes guilt, defense emphasizes reasonable doubt

## Jury instructions

- Judge explains relevant laws, burden of proof, and legal definitions
- Guides jury deliberation

## Jury deliberation and verdict

- Jury deliberates privately; may take hours → weeks
- Unanimous verdict required for serious crimes

→ SCOTUS April 2020 → unanimous verdicts required for all state/federal criminal cases

Hung jury → mistrial, possible new trial

## Defendant's constitutional rights

### Notice of Accusation

- Must know **nature and cause** of charges (indictment, information, complaint)
- Prevents **conviction for materially different crime**
- Federal courts: written copy not constitutionally required
- States → must provide due process notice

### Protection against self-incrimination

- 5th Amendment → cannot be compelled to testify
- Confessions must be voluntary, uncoerced
- Defendant may plead the Fifth or remain silent
- Evidence like fingerprints, DNA, handwriting is admissible if legally obtained

### **Miranda v. Arizona (1966):**

- suspects must be informed of rights

### Right to speedy and public trial

- Prevents **arbitrary detention**
- **Presumption of violation** if trial delayed >1 year (unless government explains delay)

- Public trial ensures **transparency and fairness**
- Exceptions: sensitive cases (e.g., sexual abuse of minors) → trial may be in camera

### Assistance of counsel

#### **Gideon v. Wainwright (1963):**

- right to counsel is fundamental; applied to states via 14th Amendment
- Wealthy defendants can hire private lawyers; poor defendants rely on public defenders (often overworked)
- Self-representation allowed at trial but **not on appeal**

### Right to trial by impartial jury

Rooted in Magna Carta

- Jury = 12 members (petit jury)
- Verdict = unanimous

→ April 2020 SCOTUS ruling → all state & federal criminal trials must have unanimous jury verdict  
 → Jury selection sensitive to bias; peremptory challenges cannot be race-based (Batson v. Kentucky, 1986)

## **Unit 7 – Sentencing**

After a defendant pleads guilty or is convicted at trial, the next stage is sentencing.

→ It can occur immediately or at a sentencing hearing days/weeks later.

Purpose:

- decide type and length of the sentence based on the offense, aggravating/mitigating factors, defendant's characteristics, and judge's discretion.

### Purposes of punishment

**Retribution** → punishment proportionate to the crime ("they deserve it")

**Deterrence** → prevent the defendant from reoffending or deter the general public

**Rehabilitation** → reform the defendant into a productive member of society

**Incapacitation** → remove dangerous individuals from society

**Restoration** → repair harm to victims (financial restitution, community service)

Trend: 1970s → shift from rehabilitation to retribution

### Sentencing hearing

Misdemeanor: sentence usually immediate after conviction

→ Felony: sentencing hearing scheduled

→ Presentence report: prepared by probation office → informs the court

### Adversarial process:

<b>Prosecution</b>	<b>Defense</b>
evidence of aggravating factors	evidence of mitigating factors

Victim impact statements: admissible even if unrelated to the crime (Payne v. Tennessee, 1991)

Capital cases → jury decides sentence after verdict; otherwise, judge

### **Most common sentences**

- Capital punishment (death penalty)
- Imprisonment / incarceration (with or without parole)
- Probation / suspended sentence (conditions must be met)
- Fines
- Restitution
- Alternative sentences: community service, drug treatment, electronic monitoring, house arrest
- Concurrent vs. consecutive sentences for multiple offenses

## **DEATH PENALTY AND EIGHTH AMENDMENT**

### **Cruel and unusual punishment clause**

8th Amendment: "Excessive bail/fines, cruel & unusual punishment"

Incorporated against states: **Robinson v. California (1962)**

- Debates: constitutionality, fairness, methods, eligible individuals, prison conditions
- State use: 27 states allow death penalty, 23 abolished

### **Fairness in capital trials**

**Furman v. Georgia (1972):**

- arbitrariness → death penalty unconstitutional → moratorium

**Gregg v. Georgia (1976):**

- two-stage process (guilt + sentencing) approved → moratorium lifted

**Hurst v. Florida (2016):**

- jury must find facts; judge alone cannot impose death sentence

**McKinney v. Arizona (2020):**

- no jury resentencing required for prior sentencing errors

### **Racial fairness:**

**Foster v. Chatman (2016):**

- Batson violation → racial discrimination in jury strikes

**Flowers v. Mississippi (2019):**

- repeated Batson violations → conviction reversed

### **Defendant control:**

**McCoy v. Louisiana (2018):**

- attorney cannot admit client's guilt against client's wish

### **Glossip v. Gross (2015):**

- due process violated if false testimony not corrected

### **Methods of execution**

- Lethal injection → most common since late 1970s
- Other methods: electrocution, gas chamber, hanging, firing squad
- Challenges: botched executions → **Baze v. Rees (2008):**  
three-drug protocol upheld

### **Glossip v. Gross (2015):**

- midazolam upheld; new standard for challenging methods:
  - substantial risk of severe pain
  - feasible alternative method

### **Bucklew v. Precythe (2019):**

- alternative execution required; denied for medical condition

States experimenting: nitrogen hypoxia, firing squad (Idaho 2026)

Who may be sentenced to death ?

- Juveniles & intellectually disabled → execution unconstitutional
- **Atkins v. Virginia (2002):** execution of intellectually disabled unconstitutional
- **Roper v. Simmons (2005):** execution of under 18 unconstitutional
- **Hall v. Florida (2014):** IQ cutoff alone insufficient → consider other evidence
- **Moore v. Texas (2017, 2019):** state criteria must follow medical standards
- **Madison v. Alabama (2019):** mentally impaired inmates may be exempt
- **Woodson v. North Carolina (1976):** mandatory death sentences unconstitutional
- **Kennedy v. Louisiana (2008):** death penalty only for murder

### **Life Without Parole (LWOP) and juveniles**

- **Graham v. Florida (2010):** LWOP unconstitutional for non-murder juveniles
- **Miller v. Alabama (2012):** mandatory LWOP for juveniles unconstitutional
- **Montgomery v. Alabama (2016):** Miller retroactive → ~2,000 juvenile lifers eligible for re-sentencing
- **Jones v. Mississippi (2021):** judge discretion sufficient; no “permanently incorrigible” requirement
- Trend: Many states abolished LWOP for juveniles;
  - Massachusetts 2024 → under 21
  - Michigan 2025 → under 21, mandatory LWOP prohibited

### **Sentencing guidelines and mandatory minimums**

= Rules to **standardize sentences** and reduce disparities.

**1987:** First U.S. **Sentencing Commission** guidelines.

**Criticism:** Too complex, limits judicial discretion, may conflict with jury's role.

**Key Cases:**

**Apprendi v. New Jersey (2000):**

- Facts increasing sentence must be jury-proven.

**Blakely v. Washington (2004):**

- Judges cannot enhance sentences without jury findings.

**Cunningham v. California (2007):**

- State guidelines unconstitutional if judges find facts.

**US v. Booker (2005):**

- Federal guidelines made **advisory**; jury must determine facts.

**Nelson v. US (2009):**

- Confirmed guidelines should be advisory.

**Principle:** Guidelines aim for **consistency** but must respect **Sixth Amendment jury rights**.

**Mandatory minimums**

= Laws requiring judges to impose **minimum sentences**, regardless of context.

**1970s:** NY introduced mandatory minimums for some drug offenses.

**1986: Anti-Drug Abuse Act** → federal mandatory minimums.

**Controversy:**

**Crack vs. powder cocaine:**

100:1 → reduced to 18:1 (**Fair Sentencing Act 2010**). Retroactive via **First Step Act 2018**.

**Problems:** Reduces judicial discretion, increases prosecutorial power, contributes to racial disparities and mass incarceration.

**Principle:** Mandatory minimums **deter crime and standardize sentencing** but can cause **inequities**.