Due Process: What is it and Why Does it Matter?

What We Will Cover

• What is Due Process?
• What is the Origin of Due Process?
• What Does Due Process Mean Today?
  • Procedural Due Process
  • Protection from Vaguely Written Laws
  • Substantive Due Process
• Due Process in the Daily Life of a Justice of the Peace
What should be the most important trait of a court?

How Would You Rule?
What is the most important trait of a court?

A. To get all your pending cases decided as quickly as possible.
B. To impress everyone by being decisive and clear in your rulings.
C. To be fair and give the appearance of fairness in all of the court’s proceedings.
What is Due Process?

• Idea that laws and legal proceedings must be fair.
• Limitation on the coercive power of government.
• Protection against arbitrary governmental action.

What is Due Process?

• Due Process ensures **fairness** before a person is deprived of a fundamental right by some action of the government.
• It is an obligation owed by the **government**.
• Not by:
  • A private citizen.
  • The public.
  • The media.
What is Due Process?

• A state might:
  • Fire someone from a government job.
  • Send a defendant to prison.
  • Revoke a prisoner’s parole.
  • Cut social security payments or welfare benefits.
• Due Process does not prohibit these actions.
• But it does require that certain procedures are followed before any action is taken.

Origin of Due Process

• Anglo Saxon law:
  • All property was held under the right of the King.
  • The King could divest anyone of property and give it to someone else.
Origin of Due Process

• This led to the Magna Carta in 1215:
  • No free man could be imprisoned or exiled and his freedom and lands could not be taken “except by the lawful judgment of his peers or by the law of the land.”
  • King John was forced to sign it.
• Codified by King Edward III in 1354
  • First time the words “due process” were used.

Origin of Due Process

• Words “due process” are not in the Constitution itself as adopted in 1788.
• Proposed by only one state (New York) as an amendment.
• Included in the Fifth Amendment:
  • “No person . . . shall be deprived of life, liberty or property without due process of law.”
Origin of Due Process

• The Supreme Court held in 1833 that the Fifth Amendment due process clause is not directly binding on the states.
• But the 14th Amendment was adopted in 1868.
• And it says:
  • “[N]or shall any State deprive any person of life, liberty or property without due process of law.”

Texas Constitution

• Article I, Section 19 of the Texas Constitution: “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.”
• Article I, Section 13: “All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”
What Does Due Process Mean Today?

(1) Procedural Due Process
   • Two key components:
     • The government cannot charge you with a crime or take other action depriving you of life, liberty or property without notifying you of the charges or proposed action; and
     • You must be given an opportunity to present your side of the story to a neutral fact-finder before action is taken.
     • Due process does not mean you have the right to be believed; only that you have the right to be heard.

What Does Due Process Mean Today?

(2) Protection from vaguely written laws.

(3) Substantive Due Process
   • Does a government action or a law unreasonably infringe on a fundamental liberty or property interest regardless of the procedure the affected person is given?
Procedural Due Process

• Procedural due process rules do not protect persons from the **deprivation** of life, liberty or property but from the **mistaken or unjustified deprivation** of life, liberty or property.

  -- *Carey v. Piphus*, 435 U.S. 247, 259 (1978);

How Do They Do This?

• By enabling persons to contest the basis on which a state proposes to deprive them of protected interests.

"And Dubois, here, is in charge of due process."
How Do They Do This?

• So we need to know what interests are protected and how much “process” is required to keep that interest from being wrongfully taken away from a person by the government.

How Do They Do This?

• Life or liberty is obviously threatened when a person is charged with a crime that may be punished by confinement in prison or jail.
• So the Supreme Court has applied the protections of all of the Bill of Rights (the first ten Amendments) to the states through the due process clause of the 14th Amendment.
Bill of Rights Applies to the States

- This is known as “incorporation” of the Bill of Rights into the due process clause of the 14th Amendment. For example:
  - Right to be free from unreasonable searches and seizures (4th Amendment)
  - Right to be free from self-incrimination (5th Amendment)
  - Right to a speedy and public trial (6th Amendment)
  - Right to confront witnesses (6th Amendment)
  - Right to be free from cruel and unusual punishment (8th Amendment)

Timbs v. Indiana

- Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance.
- Police seized a Land Rover SUV he had purchased for $42,000 with money he received from an insurance policy when his father died.
- The State sought civil forfeiture of the SUV claiming it had been used to transport heroin.
- Since he had recently purchased the SUV for more than four times the maximum monetary fine of $10,000 for his drug conviction, the trial court denied the State’s request.
**Timbs v. Indiana**

- Trial court held the forfeiture would be grossly disproportionate to the gravity of the offense and therefore violate the Excessive Fines Clause of the Eighth Amendment.
- Indiana Supreme Court held that the Excessive Fines Clause does not apply to the states.

**Timbs v. Indiana**

- United States Supreme Court reversed (Feb. 20, 2019):
  - The Fourteenth Amendment’s due process clause incorporates and renders applicable to the states those protections in the Bill of Rights that are “fundamental to our scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition.”
  - The prohibition embodied in the Excessive Fines Clause carries forward protections found in sources from Magna Carta to the English Bill of Rights to state constitutions from the colonial era to the present day.
What Liberty Interests Are Protected?

• The Liberty Interest protected by Due Process is not just at the trial of a defendant on criminal charges.
• For example, parole revocations trigger due process requirements.
• A parolee is not entitled to all the rights afforded in a criminal prosecution, but the parolee’s liberty interest is significant enough to require an orderly process, even if informal.

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What Property Interests are Protected?

• It is not enough that one has an abstract need or desire for a benefit or a unilateral expectation.
• He must have a legitimate claim of entitlement to the benefit.
  • Property interests are not created by the Constitution.
  • They are created by an independent source such as state law that secures certain benefits and supports a claim of entitlement to those benefits.

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*Board of Regents v. Roth,* 408 U.S. 564, 569–71 (1972)
What Property Interests Are Protected?

• So a teacher who had a one-year contract with a public university did not have a protected property interest when the university decided not to renew his contract.
  • There was nothing in the university’s contract, regulations or policies that created any legitimate claim to re-employment.

  -- *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)

What Property Interests Are Protected?

• But a professor who was employed for several years at a public college did have a protected property interest even though his employment contract had no tenure provision and there was no statutory assurance of it.
  • The “existing rules or understandings” had the characteristics of tenure and so he had a legitimate expectation independent of any contract provision.

How Would You Rule?

Does a woman have a protected property interest in enforcement by the police of a restraining order obtained against her husband where the police had probable cause to believe the order had been violated?

A. Yes
B. No

What the Supreme Court Said

- No. She did not have an enforceable property interest because there is a longstanding tradition of police discretion in enforcing protective orders even when there is mandatory arrest language in the statute.
How Would You Rule?

May a state suspend a driver’s license for 90 days without a prior hearing if a person refuses to take a breathalyzer test?

A. Yes
B. No

What the Supreme Court Said

  - Yes. The state’s interest in removing drunk drivers from highways outweighed a person’s “liberty” interest in continuing to be able to drive.
  - As a condition of having a license a person impliedly consents to being subject to a breathalyzer test.
  - An administrative hearing is available later if driver fails to pass intoxication test.
Extent of Due Process Depends on the Property Interest Protected

• Before a deprivation of real or personal property a person is entitled to a trial. For example:
  • Condemnation of land;
  • Garnishment of wages or bank accounts.
• Before a deprivation of intangible property a person is entitled to an administrative hearing. For example:
  • Termination of government benefits;
  • Termination of a government job.

What Process is Due?

• Fundamental requirements of procedural due process:
  • Notice and a hearing before an impartial tribunal;
  • An opportunity for confrontation and cross-examination;
  • A decision based on the record; and
  • The right to be represented by an attorney.

Notice

• Notice must be:
  • Reasonably calculated to apprise interested parties of the pendency of the action and give them an opportunity to present their objections.
  • Sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.

Hearing

• Some form of hearing is required before an individual is deprived of a property or liberty interest:
  • This is a basic aspect of the duty of government to follow a fair process of decision making.
  • The purpose of this requirement is to ensure fair play to the individual and to protect his use and possession of property from arbitrary encroachment by the government.


Impartial Tribunal

• An essential right in both criminal and civil proceedings. The neutrality requirement:
  • Helps to guarantee that life, liberty or property will not be taken based on an erroneous or distorted conception of the facts or the law.
  • Preserves both the appearance and reality of fairness by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with the assurance that the arbiter is not predisposed to find against him.

How Would You Rule?

A state Optometry Board made up of only private practitioners was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Does this violate due process because it is not an impartial tribunal?

A. Yes  
B. No

What the Supreme Court Said

• Yes. This violates due process.
How Would You Rule?

A jury verdict of $50 million was rendered against a company. While an appeal was pending, the Chairman of the company spent $3 million to elect a justice to the Supreme Court of West Virginia. This was more than the total amount contributed by all of the justice’s other supporters and three times the amount spent by the justice’s own committee. He was elected, declined to recuse himself, and joined a 3-2 decision to overturn the jury verdict. Did this violate due process?

A. Yes
B. No

What the Supreme Court Said

- Yes. There was a serious risk of actual bias -- and the appearance of bias.
How Would You Rule?

A judge on the Pennsylvania Supreme Court, in his former role as a district attorney, had given approval to seek the death penalty against a defendant; the defendant was convicted of first degree murder and sentenced to death. The judge then participated in a case denying post-conviction relief to the defendant. Did due process require the judge to recuse himself?

A. Yes
B. No

What the Supreme Court Said


• Yes. This violates due process.
How Would You Rule?

What if a judge receives his compensation out of the fines imposed on convicted defendants; and receives no compensation if the defendant is not convicted? Does this violate due process by denying the defendant a right to a fair trial?

A. Yes
B. No

What the Supreme Court Said

• *Tumey v. Ohio*, 273 U.S. 510, 520 (1927):
• Yes. This violates due process.
How Would You Rule?

The defendant is brought to trial in irons, including shackles, leg irons or belly chains? Does this violate due process?

A. Yes
B. No

What the Supreme Court Said

• Yes. This violates due process.
• *Deck v. Missouri*, 544 U.S. 622 (2005): The rule against bringing a defendant to trial in chains dates back to English common law; chains may be used only as a last resort.
How Would You Rule?

The defendant is compelled to stand before a jury dressed in identifiable prison clothes. Does this violate due process?

A. Yes
B. No

What the Supreme Court Said

  • Yes. This violates due process because it may impair the presumption of innocence in the minds of the jurors.
How Would You Rule?

Does the presence in the courtroom of uniformed state troopers serving as security guards violate due process?

A. Yes
B. No

What the Supreme Court Said

• *Holbrook v. Flynn*, 475 U.S. 560 (1986):
  • No. The presence in the courtroom of uniformed state troopers serving as security guards is not the same sort of inherently prejudicial situation as requiring the defendant to wear prison garb.
Confrontation and Cross-Examination

1603 trial of Sir Walter Raleigh for treason:
- Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury.
- Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour."
Confrontation and Cross-Examination

- Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face .... ."
- The judges refused, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.


Confrontation and Cross-Examination

- Applies whenever important decisions turn on questions of fact.
- Where evidence consists of the testimony of individuals whose perception or memory might be faulty, or who might have a motive for not testifying truthfully.
- Only way to test their testimony is through the right of confrontation and cross-examination.

Decision on the Record

• The decisionmaker’s conclusion must rest solely on the legal rules and evidence adduced at the hearing.
• To show that this occurred, the decisionmaker should state the reasons for his determination and indicate the evidence he relied upon, although his statement is not required to amount to a full opinion or formal findings of fact and conclusions of law.


Right to Counsel

• A party has the right to have counsel assist them.
  • And in criminal cases where the defendant may be sentenced to jail or imprisonment, an indigent defendant has a right to have counsel appointed.
  • But generally in civil cases an indigent person does not have a right to have counsel appointed unless his “physical liberty” is threatened.

How Would You Rule?

Is a state required to provide counsel to an indigent person in a proceeding to terminate parental rights?

A. Yes
B. No

What the Supreme Court Said


• No. The state was not required to appoint counsel in this proceeding.
Vaguely Written Laws

• Statutes that lack sufficient definiteness or specificity are subject to being held “void for vagueness” in violation of due process.
  • “Men of common intelligence cannot be required to guess at the meaning of an enactment.”
• “The vagueness may be from uncertainty in regard to persons within the scope of the act . . . Or in regard to the applicable test to ascertain guilt.”

Jacksonville city ordinance punished “dissolute persons who go about begging, . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children . . . .”
Vaguely Written Laws

- This ordinance was invalid under the due process clause because it did not give fair notice, it did not require specific intent to commit an unlawful act, it permitted and encouraged arbitrary and erratic arrests and convictions, it committed too much discretion to the police, and it criminalized activities that by modern standards are normally innocent.
  
  -- Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)

State of Texas v. Doyal (Feb. 27, 2019)

- Provision of the Texas Open Meetings Act makes it a crime if a member or group of members of a governmental body “knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.”

- Texas Court of Criminal Appeals: “This provision is unconstitutionally vague on its face.”
State of Texas v. Doyal (Feb. 27, 2019)

• To pass constitutional muster, a law that imposes criminal liability must be sufficiently clear (1) to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) to establish determinate guidelines for law enforcement.

• “The statute before us is hopelessly indeterminate by being too abstract.”

How Would You Rule?

• Defendant was convicted of violating a 1919 statute prohibiting any person from transporting a stolen “motor vehicle” across state lines. Defendant had transported an airplane he knew to be stolen from Illinois to Oklahoma.

• The statute defined “motor vehicle” as “an automobile, . . . truck, . . . motor cycle . . . or any other self-propelled vehicle not designed for running on rails.”

• Is an airplane a “motor vehicle?”

A. Yes, the defendant should be convicted.
B. No, the statute does not give the defendant sufficient notice of the offense when applied to an airplane.
What the Supreme Court Said


- A “vehicle” in every day speech calls up an image of a thing moving on land.
- When criminal penalties are involved fair warning should be given to the world.
- The statute should not be extended to aircraft just because the legislature would have used broader language if it had thought of it.

Substantive Due Process

- What is Substantive Due Process?
  - The notion that due process not only protects certain legal procedures but also protects certain fundamental rights unrelated to procedure.
  - In other words, in some situations the due process clause prohibits the government from depriving individuals of life, liberty or property even if those individuals receive the fairest possible procedures in an adjudication.
Substantive Due Process

- Concept used by the Supreme Court in the Dred Scott case in 1857 in holding the Missouri Compromise unconstitutional:

  “And an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.”

  -- *Scott v. Sandford*, 60 U.S. 393, 450 (1857)

How Would You Rule?

A New York law prohibited a bakery from employing bakers for more than 60 hours a week or 10 hours a day. The bakery claims the statute is unconstitutional because it violates the liberty protected by the due process clause of the 14th Amendment since everyone has a right to enter into contracts for their labor.

A. The N.Y. statute is unconstitutional.
B. The N.Y. statute is constitutional.
What the Supreme Court Said

  - “The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”
  - “Under that provision no state can deprive any person of life, liberty or property without due process of law. The right to purchase or sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right.”
  - “The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker.” 198 U.S. at 53, 57.

Other Lochner-Era Cases

- *Adair v. United States* (1908): striking down a federal law prohibiting a railroad company from requiring a worker not to join a labor union as a condition of employment.
End of the Lochner Era

- FDR Court-packing proposal (Judicial Procedures Reform Bill of 1937): President could appoint an additional Justice, up to a maximum of six, for each sitting member over the age of 70 ½.
- *West Coast Hotel Co. v. Parrish* (1937): Court upheld a Washington state law setting a minimum wage for women.
- Supreme Court abandoned the Lochner-era approach to substantive due process and held that economic regulations by the government were generally valid as long as they had a “rational basis.”

Substantive Due Process Today

- The Supreme Court has found a fundamental right of privacy inherent in the due process clause although not expressly included in any one amendment of the Bill of Rights.
- “We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system.” *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).
Substantive Due Process Today

• Relying on this fundamental right of privacy the Court has found the following laws to be unconstitutional:

Substantive Due Process Today

Substantive Due Process Today

Due Process in the Daily
Life of a Justice of the Peace

- Can a defendant be tried “in absentia” if he fails to appear for a fine only misdemeanor case?
- What happens if a defendant pleads not guilty but doesn’t show up for trial?
  - Can he be convicted?
  - Can a fine be assessed?
- What if the prosecutor doesn’t appear for trial? May the judge call the peace officer to the stand and conduct his examination?
Due Process in the Daily Life of a Justice Court Judge

• Can a defendant be required to post an appearance bond if he pleads not guilty to a traffic offense?
  • Can it be a surety bond? Or does it have to be a personal bond?
• If a defendant fails to pay a fine can he be committed to jail without a hearing?

Due Process in the Daily Life of a Justice of the Peace

• If a defendant fails to obey a court order can he be held in contempt and committed to jail without a hearing?
  • What if it’s direct contempt (committed in the presence of the court)?
  • What if the contempt is committed by a lawyer?
  • Do you have to appoint counsel before committing the defendant to jail?
Due Process in the Daily Life of a Justice of the Peace

• Bubba Smith goes to Kansas and is in a car accident while he’s in Kansas. When he gets back to Texas, Bubba sues Jeff Jones in a Texas Justice Court. Jeff has never been to Texas; Jeff mails in a motion to dismiss for “forum non conveniens.”
  • Do you have to grant that?
  • Can you enter a judgment against Jeff?

Due Process in the Daily Life of a Justice of the Peace

• You are both a justice court judge and a municipal court judge. The city you are a municipal judge for files an eviction case in your justice court. Should you recuse yourself?
Due Process in the Daily Life of a Justice of the Peace

• A mother files a suit against her daughter in your court. The mother has been in to see you multiple times before filing the suit and has told you about the situation with her daughter. Should you recuse yourself?

• A defendant is arrested and charged with felony assault involving family violence. When the defendant is brought before you the deputy tells you that he (the deputy) has already told the defendant what his rights are so you can save time and just skip that part. Is the deputy right? What should you do?
• The deputy also tells you the D.A. doesn’t want this defendant out on bond before trial. What should you do?

A law enforcement officer calls you late at night to ask you to sign a search warrant. He says he’s in a hurry because it’s a drug case. He says he didn’t have time to write a “detailed” probable cause affidavit. You look at the affidavit and it says only: “I have reason to believe and do believe there are controlled substances at 123 West Elm St., Abilene, TX.”

• What should you do?