# Introduction to Due Process

# Learning Objectives for this Module

## Learn the difference between substantive and procedural due process.

## Learn how due process rights evolved from rights and privileges to the new property.

## Learn the predicates for a due process hearing.

## Learn the limits on the right to contest governmental postings of potentially defamatory information.

## Learn why hearing can be important for clients.

# Reading Assignment

## Chapter 4 to p. 118, b. Liberty and Correctional Facilities and the Ivor van Heerden cases.

# Issues to be addressed

## Introduction

### Substantive Due Process

#### Substantive Due Process refers to the limits on what government can regulate

#### Federal - commerce clause, national security powers, foreign affairs,

#### State - police powers v. privacy (abortion)

#### Important in the early days of the court before the modern expansive reading of the commerce clause

#### Might be important again, depending on the whims of the United States Supreme Court judges.

#### Substantive due process is studied in constitutional law.

### Procedural Due Process

#### Procedural due process refers to the procedures by which government may affect the rights of an individual in a specific situation

#### Procedural due process is required in adjudications and other proceeding that affect individuals or a small group of persons based on the specific factual determinations

#### We study procedural due process in administrative law.

##### It is usually on the Louisiana bar.

### Why Procedural Due Process is Not Liberal or Conservative

#### Conservatives

##### Want the little man (and the rich man) to be fairly treated by the government, i.e., to be able to resist regulation

#### Liberals

##### Want the individual to get lots of due process, and cannot exclude corporations.

#### Both think the government losing against individuals is good in individual cases.

### History of Procedural Due Process

#### Real Property Takings Review

##### This is an administrative due process requirement that is the constitution.

##### What is a traditional property "taking"?

##### What due process is involved?

##### What about compensation?

##### How is compensation measured?

#### Non-real property procedural due process

##### The constitution mostly did not apply to the states

##### The 14th amendment was eventually used to apply the constitution to the states

##### Criminal due process protections outside of the trial developed in the federal system in the early 1900s, but was not applied to the states until the Warren Court cases decided in the 1950s and 1960s.

##### The late 1960s and early 1970s were the high point of administrative due process.

##### Modern due process comes from Matthews v Eldridge in 1976

##### The current cutting edge of due process is transforming criminal due process into administrative, as with terrorist detainees.

## Do you get any due process at all?

### Accidental Deprivations

#### Assume the postman runs over your dog or the forest service accidentally burns down your home

##### Have you suffered a taking?

##### Are these due process deprivations?

##### If so, how could the government provide due process?

##### (We cover these in the tort claims act section.)

#### What if the government repeatedly “forgets” to give mental patients a hearing before committing them?

##### How is this different?

### Rights v. Privileges - History

#### In 1940 a city fires a policeman because the police chief heard a rumor that the policeman had accepted free coffee and doughnuts from a shop on his beat.

##### Was a job a right or a privilege?

##### Was this a due process violation?

#### Government privileges were construed broadly - going to a state college, for example.

##### You could condition these with restrictions that would otherwise be impermissible

##### Bitter with the Sweet Doctrine

### Client counseling: Why are you fighting for a hearing?

#### Convincing the court that you get a hearing does not mean you win at the hearing

##### Getting a hearing means that the agency has to show on the record why it wants to rule against you.

##### You will have a chance to rebut the record.

##### If the agency has built the record, you are likely to lose.

#### However, many agencies, especially state and local government agencies, do not do a great job at building records, so the agency will not be able to show in the record their justification for the action.

##### This may get your client a second chance or a settlement.

## Predicates to a Hearing

### Who is constitutionally eligible for a hearing?

#### Due process only applies to actions by the government.

#### Only government employees have a constitutional right to a hearing and due process.

##### State rights are defined by the state laws and constitutions, not the US constitution, and can be broader than the US rights.

##### States cannot provide less than the US Constitutional minimum due process.

#### The US Constitution does not apply to private employers.

##### The states and congress can create statutory rights to employment due process for private employees.

### While we do not talk about “standing” for a hearing, there must be facts at issue to get a hearing.

#### As Matthews will later make clear, hearings are not an abstract right that everyone gets when the government does something to them. If there are not facts at issue, then there is nothing for the claimant to contest during the hearing.

##### Why were there no facts at issue in Codd v. Velger, 429 U.S. 624 (1977) (suicidal policeman)?

#### The facts can be facts in mitigation, which can include the factfinder’s evaluation of the claimant.

##### Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542- 544 (1985)

###### “Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.”

##### The limit on Loudermill is that the factfinder has to have the discretion to change the decision based on facts in mitigation.

### The most basic factual question in an employment case is whether the employee has any expectation of continued employment.

#### Under the old Bitter with the Sweet doctrine, there were no hearing because there was no expectation of continued employment.

#### Modern cases reject this simplistic analysis, but the employee still has to show a reasonable expectation of continued employment.

### Perry v. Sinderman, 408 U.S. 593 (1972)

#### Facts

##### Taught for 10 years

##### University policy was to not fire without cause after 7 years

##### Fired without cause

#### What process did he want?

#### Why was the university policy on continued employment critical?

### Boards of Regents v Roth, 408 U.S. 564 (1972)

#### What were the terms of the contract?

#### Why did he claim he was fired?

##### Is this before the court?

#### What process did he want?

#### Did the university claim he had done anything wrong?

##### If they had, how could this have changed the result?

#### Did he get the hearing?

### Ivor van Heerden (Remember, these are motions for summary judgment, so the court treats the plaintiff’s claims as true.)

#### The de facto tenure case

##### What did plaintiff claim as the factual support for his claim of de facto tenure – the Sinderman claim?

##### What did LSU show to defeat this claim?

#### The stigma+ claims

##### What was the basis for the stigma+ claim?

##### What evidence did plaintiff show to support this claim?

##### Did LSU give him a chance to clear his name?

## New Property v. Old Property

### The court’s recognition of the right to continued employment established that the state could be liable for depriving plaintiff of things other than traditional property.

### This created the notion of the new property.

### The court expanded this beyond employment to include other liberty interests, i.e., non-employment government benefits, both monetary and non-monetary.

#### How are the rights different for new property versus old property?

#### How is the process different if I take your medical license, versus taking your land?

### What if I abolish your job or your welfare entitlement through legislation?

#### Do you have a due process right?

### Melissa I

#### Melissa is charged with plagiarism, which can result in expulsion from the (state) law school

#### What is the purpose of granting her a hearing?

##### What issues should she raise?

##### What should the school present to support its case as the moving party?

##### What is the value of the record of the hearing?

#### Should she get a hearing?

#### What about cancelling her scholarship without a hearing?

### Melissa II

#### Melissa admits she plagiarized, but claims extenuating circumstances.

#### Thinking about the reasons for a hearing from Melissa I, how are these factors changed by her admission?

##### How has the burden of proof shifted?

#### Is there any factual dispute to resolve?

##### What if the law school has discretion in the type of punishment for plagiarism?

## Liberty and Reputation

### Shakespeare

#### Good name in man and woman, dear my lord,Is the immediate jewel of their souls.Who steals my purse steals trash; 'tis something, nothing;'Twas mine, 'tis his, and has been slave to thousands;But he that filches from me my good nameRobs me of that which not enriches him,And makes me poor indeed.Othello Act 3, scene 3, 155–161

### Wisconsin v. Constantineau, 400 U.S. 433 (1971)

#### A state law required the posting of the names of “public drunkards” at places where alcoholic beverages are sold

##### Did plaintiff concede that he was a public drunkard?

##### Had there been an adjudication to determine his status?

##### What would be the fact at issue?

##### What did the United States Supreme Court say the state should have provided him?

#### How was the impact of this case and following case limited, as compared to what happens in the current electronic world?

### Paul v. Davis, 424 U.S. 693 (1976)

#### Note that this is the same term as Matthews – think about whether they are related when we read Matthews.

#### The sheriff gave out a list of "active shoplifters," including persons who had been arrested but not convicted

##### Should that count as a finding of guilt?

##### What about employers and the bar examiners asking about arrests which do not result in prosecution or pleas?

#### What did plaintiff claim as an injury in this case?

#### What did the court seem to be saying that plaintiff would have to show to make the stigma + test?

#### The alternative remedy theory.

##### Rather than due process hearing to contest his inclusion on the list, what did Rehnquist say was his remedy if the characterization was incorrect?

##### What are the limits of such a remedy?

##### Is this realistic for the plaintiff?

### Perverts R Us WWW sites: Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 (2003)

#### State is going to list all persons convicted of a list of sexually related crimes on a public registry

##### Why does plaintiff want a hearing on before he is listed?

##### Why is this a relevant factual inquiry?

#### What did the court find?

##### Why isn't this an additional punishment? (Hint - Kansas v. Hendricks – an adlaw decision)

##### If you were writing the opinion, where would you argue that plaintiff got his due process?

##### (Also see: Smith v. Doe, 123 S.Ct. 1140 (2003))

#### Thought question - public registries for sex offenders

##### Why are these popular?

##### What is the policy justification?

##### How does this affect the offender's ability to get a job or have a place to live?

##### How narrow are the grounds for being on the list?

###### How does this contribute to the guy in CA who was on the list but was able to keep a kidnap victim hostage for nearly two decades?

### The legal issues in for cause firings

#### Siegert v. Gilley, 500 U.S. 226 (1991)

##### Bad recommendations from government employer

###### Unethical and incompetent

###### Fired at new (government) job

##### What was the injury?

###### Was it the firing?

###### So what was damaged?

##### What link between the firing and the reputational injury was the court looking for when it created the "stigma plus" category?

###### Did the old employer fire him?

###### Why did the court say the employer fired him?

###### So what was injured?

###### How is this like Paul v. Davis?

###### What would be plaintiff's alternative remedy?

##### How is this at issue in the recent military mass murder by a military psychiatrist case?

### Melissa III

#### Melissa was charged with plagiarism but was not provided any due process protections.

#### Fearful of a lawsuit, the law school did not expel her, but upon her graduation it sent a letter to the State Board of Bar Examiners informing the Board that Melissa had “engaged in plagiarism in Legal Writing during her first year.”

#### Have her due process rights been violated under Siegert?

##### What is damaged?

##### Is the law school ruling that she cannot take the bar?

##### Is this fair?

##### What is her remedy?

### Codd v. Velger, 429 U.S. 624 (1977)

#### Plaintiff claimed that putting information about his suicide attempt in his personnel file damaged his reputation and made it impossible for him to find other employment as a policeman.

##### He did not have an employment claim because he was a probationary employee/

#### Why the appeals court say that the employer could not assume that on one know about the information in the personnel file.

##### The lower court reversed, finding there was stigma, raising the issue of whether there should be a hearing to if there was a dispute about what is put in the file.

##### This is dicta, since the case was decided on other grounds by the United States Supreme Court:

###### “Nowhere in his pleadings or elsewhere has respondent affirmatively asserted that the report of the apparent suicide attempt was substantially false.” at 627

### Melissa IV

#### Melissa is charged with plagiarism, expelled from law school without a hearing, and the plagiarism is entered on her transcript.

#### She sues, saying this injury to reputation rises to the level of violation of her liberty interests.

#### The law school say that the transcript is confidential and no one will see it unless she releases it.

#### How would you argue that it is unreasonable to assume that she can keep the transcript secret?

## Homeland Security and the CIA

### One of the big fights over the Homeland Security Bill was its limitation of employee hearing rights

#### National security agency personnel are subject to firing without stated cause and get no hearing.

#### The Homeland Security Act extends the definition of a national security job to many more employees, who thus lose civil service protection

### Why do this?

### Is this a good idea?

# Evaluation Questions

## Basic Due Process

### What is substantive due process?

#### What is an example of a substantive due process question from a United States Supreme Court case?

#### How does it differ from procedural due process?

### Takings (property)

#### What is a "taking" under the Takings Clause of the Constitution?

#### What due process is required?

#### What about compensation?

### What is a regulatory taking?

#### Why isn’t compensation required in most cases where regulations reduce the value of property, such as designating private property endangered species habitat and thus limiting the uses to which it can be put?

### Is it a taking when the postman runs over your dog or hits your car? Explain.

### Explain the “facts at issue” predicate for a hearing.

#### Why do we have hearings?

#### Are you entitled to a hearing just to tell your story?

#### Why didn’t the suicidal policeman get a hearing?

### Even if the basic facts are not in issue, what does *Loudermill* tell us about facts in mitigation and explanation?

#### When are mitigation and explanation relevant?

#### Why weren’t they relevant for the suicidal policeman?

## New Property

### What is the "bitter with the sweet" doctrine?

#### Why did the court find that it was unconstitutional for government employment

#### How did this create the "new property"?

### How are the rights different for new property versus old property?

#### As a matter of constitutional law, as opposed to potential statutory protections and contracts, what are you entitled to if the legislature abolishes your government job or your welfare entitlement?

#### Assume that governor and legislature of Louisiana, following the philosophy of Milton Freedman (a noted free market economist) decide to abolish law licenses and allow anyone to practice law.

#### Do you have any constitutional entitlement to compensation as a licensed lawyer?

#### Think carefully and explain the constitutional basis for this being different from welfare or a job at governmental agency, if it is.

## The Employment Cases

### Do private employers owe employees constitutional due process?

### What should a public university learn from *Roth* and *Sinderman*?

#### What is de facto tenure?

#### How can universities avoid creating it?

#### What problems might this cause for the university?

#### What is stigma+?

#### What do these cases tell us about why a university should not comment on the failure to renew the contract of a professor?

#### How can you screw up a proper firing and end up paying damages for injuring the employee?

### Recommendation letters

#### Why did the court find that putting reasons dismissal in the suicidal policeman’s his employment file meant that it was public?

#### Was it defamation?

#### What if government employer gives an employee a bad recommendation that causes him to lose a subsequent job?

#### Is this stigma+?

#### What would the employee have to show to get stigma+?

#### What do you tell your employer client about what goes in recommendation letters? (Assume it wants to give as much information to the next employer as they can, without violating the employee’s rights.)

## Liberty Interests

### What are examples of liberty interests?

### Privacy as a protected liberty interest:

#### How did the court change its analysis between the drunkard and the shoplifter cases?

### How do the "perverts R us" WWW site cases modify this? (*Connecticut Dept. of Public Safety v. Doe*, 123 S.Ct. 1160, (2003); *Smith v. Doe*, 123 S.Ct. 1140 (2003)

#### How were the facts determined in the perverts R us cases?

#### Why does this undermine the basis for demanding a hearing?

#### Why isn't this an ex post facto law situation?