The Elements of Due Process

Initiation of the Prosecution.

Indictment by a grand jury is not a requirement of due process; a state may proceed instead by information.[1082] Due process does require that, whatever the procedure, a defendant must be given adequate notice of the offense charged against him and for which he is to be tried,[1083] even aside from the notice requirements of the Sixth Amendment (/constitution/sixth_amendment).[1084] Where, of course, a grand jury is used, it must be fairly constituted and free from prejudicial influences.[1085]

Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine.

Criminal statutes that lack sufficient definiteness or speci-ficity are commonly held "void for vagueness."[1086] Such legislation "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."[1087] "Men of common intelligence cannot be required to guess at the meaning of [an] enactment."[1088] In other situations, a statute may be unconstitutionally vague because the statute is worded in a standardless way that invites arbitrary enforcement. In this vein, the Court has invalidated two kinds of laws as "void for vagueness": (1) laws that define criminal offenses; and (2) laws that fix the permissible sentences for criminal offenses.[1089] With respect to laws that define criminal offenses, the Court has required that a penal statute provide the definition of the offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[1090]

For instance, the Court voided for vagueness a criminal statute providing that a person was a "gangster" and subject to fine or imprisonment if he was without lawful employment, had been either convicted at least three times for disorderly conduct or had been convicted of any other crime, and was "known to be a member of a gang of two or more persons." The Court observed that neither common law nor the statute gave the words "gang" or "gangster" definite meaning, that the enforcing agencies and courts were free to construe the terms broadly or narrowly, and that the phrase "known to be a member" was ambiguous. The statute was held void, and the Court refused to allow specification of details in the particular indictment to save it because it was the statute, not the indictment, that prescribed the rules to govern conduct.[1091]

A statute may be so vague or so threatening to constitutionally protected activity that it can be pronounced wholly unconstitutional; in other words, "unconstitutional on its face."[1092] Thus, for instance, a unanimous Court in *Papachristou v. City of Jacksonville*[1093] struck down as invalid on its face a vagrancy ordinance that 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 house 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 . . . ."[1094] The ordinance was found to be facially invalid, according to Justice Douglas for the Court, 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 policemen, and it criminalized activities that by modern standards are normally innocent.[1095]

In *FCC v. Fox*, 567 U.S. ___, No. 10–1293, slip op. (2012) the Court held that the Federal Communiations Commission (FCC) had violated the Fifth Amendment (/constitution/fifth_amendment) due process rights of Fox Television and ABC, Inc., because the FCC had not given fair notice that broadcasting isolated instances of expletives or brief nudity could lead to punishment. 18 U.S.C. § 1464 (/uscode/text/18/1464)bans the broadcast of "any obscene, indecent, or profane language", but the FCC had a long-standing policy that it would not consider "fleeting" instances of indecency to be actionable, and had confirmed such a policy by issuance of an industry guidance. The policy was not announced until after the instances at issues in this case (two concerned isolated utterances of expletives during two live broadcasts aired by Fox Television, and a brief exposure of the nude buttocks of an adult female character by ABC). The Commission policy in place at the time of the broadcasts, therefore, gave the broadcasters no notice that a fleeting instance of indecency could be actionable as indecent.

On the other hand, some less vague statutes may be held unconstitutional only in application to the defendant before the Court.[1096] For instance, where the terms of a statute could be applied both to innocent or protected conduct (such as free speech) and unprotected conduct, but the valuable effects of the law outweigh its potential general harm, such a statute will be

held unconstitutional only as applied.[1097] Thus, in *Palmer v. City of Euclid*,[1098] an ordinance punishing "suspicious persons" defined as "[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself " was found void only as applied to a particular defendant. In *Palmer*, the Court found that the defendant, having dropped off a passenger and begun talking into a two-way radio, was engaging in conduct which could not reasonably be anticipated as fitting within the "without any visible or lawful business" portion of the ordinance's definition.

Loitering statutes that are triggered by failure to obey a police dispersal order are suspect, and may be struck down if they leave a police officer absolute discretion to give such orders.[1099] Thus, a Chicago ordinance that required police to disperse all persons in the company of "criminal street gang members" while in a public place with "no apparent purpose," failed to meet the "requirement that a legislature establish minimal guidelines to govern law enforcement."[1100] The Court noted that "no apparent purpose" is inherently subjective because its application depends on whether some purpose is "apparent" to the officer, who would presumably have the discretion to ignore such apparent purposes as engaging in idle conversation or enjoying the evening air.[1101] On the other hand, where such a statute additionally required a finding that the defendant was intent on causing inconvenience, annoyance, or alarm, it was upheld against facial challenge, at least as applied to a defendant who was interfering with the ticketing of a car by the police.[1102]

Statutes with vague standards may nonetheless be upheld if the text of statute is interpreted by a court with sufficient clarity.[1103] Thus, the civil commitment of persons of "such conditions of emotional instability . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons" was upheld by the Court, based on a state court's construction of the statute as only applying to persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The underlying conditions—habitual course of misconduct in sexual matters and lack of power to control impulses and likelihood of attack on others—were viewed as calling for evidence of past conduct pointing to probable consequences and as being as susceptible of proof as many of the criteria constantly applied in criminal proceedings.[1104]

Conceptually related to the problem of definiteness in criminal statutes is the problem of notice. Ordinarily, it can be said that ignorance of the law affords no excuse, or, in other instances, that the nature of the subject matter or conduct may be sufficient to alert one that there are laws which must be observed.[1105] On occasion the Court has even approved otherwise vague statutes because the statute forbade only "willful" violations, which the Court construed as requiring knowledge of the illegal nature of the proscribed conduct.[1106] Where conduct is not in and of itself blameworthy, however, a criminal statute may not impose a legal duty without notice.[1107]

The question of notice has also arisen in the context of "judge-made" law. Although the Ex Post Facto Clause forbids retroactive application of state and federal criminal laws, no such explicit restriction applies to the courts. Thus, when a state court abrogated the common law rule that a victim must die within a "year and a day" in order for homicide charges to be brought in *Rogers v. Tennessee*,[1108] the question arose whether such rule could be applied to acts occurring before the court's decision. The dissent argued vigorously that unlike the traditional common law practice of adapting legal principles to fit new fact situations, the court's decision was an outright reversal of existing law. Under this reasoning, the new "law" could not be applied retrospectively. The majority held, however, that only those holdings which were "unexpected and indefensible by reference to the law which had been express prior to the conduct in issue"[1109] could not be applied retroactively. The relatively archaic nature of "year and a day rule", its abandonment by most jurisdictions, and its inapplicability to modern times were all cited as reasons that the defendant had fair warning of the possible abrogation of the common law rule.

With regard to statutes that fix criminal sentences,[1110] the Court has explained that the law must specify the range of available sentences with "sufficient clarity."[1111] For example, in *Johnson v. United States*, after years of litigation on the meaning and scope of the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA),[1112] the Court concluded that the clause in question was void for vagueness.[1113] In relevant part, the ACCA imposes an increased prison term upon a felon who is in possession of a firearm, if that felon has previously been convicted for a "violent felony," a term defined by the statute to include "burglary, arson, or extortion, [a crime that] involves use of explosives, or" crimes that fall within the residual clause—that is, crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[1114] In *Johnson*, prosecutors sought an enhanced sentence for a felon found in possession of a firearm, arguing that one of the defendant's previous crimes—unlawful possession of a short-barreled shotgun— qualified as a violent felony because the crime amounted to one that "involve[d] conduct that presents a serious potential risk of physical injury to another."[1115] To determine whether a crime falls within the residual clause, the Court had previously endorsed a "categorical approach"—that is, instead of looking to whether the facts of a specific offense presented a serious risk of physical injury to another, the Supreme Court had interpreted the ACCA to require courts to look to whether the underlying crime falls within a category such that the "ordinary case" of the crime would present a serious risk of physical injury.[1116] The Court in *Johnson* concluded that the residual clause was unconstitutionally vague because the clause's requirement that courts determine what an "ordinary case" of a crime entails led to "grave uncertainty" about (1) how to estimate the risk posed by the crime and (2) how much risk was sufficient to qualify as a violent felony.[1117] For example, in determining whether attempted burglary ordinarily posed serious risks of physical injury, the Court suggested that reasonable minds could differ as to whether an attempted burglary would typically end in a violent encounter, resulting in the conclusion that the residual clause provided "no reliable way" to determine what crimes fell within its

scope.[1118] In so holding, the Court relied heavily on the difficulties that federal courts (including the Supreme Court) have had in establishing consistent standards to adjudge the scope of the residual clause, noting that the failure of "persistent efforts" to establish a standard can provide evidence of vagueness.[1119]

Entrapment.

Certain criminal offenses, because they are con-sensual actions taken between and among willing parties, present police with difficult investigative problems.[1120] Thus, in order to deter such criminal behavior, police agents may "encourage" persons to engage in criminal behavior, such as selling narcotics or contraband,[1121] or they may may seek to test the integrity of public employees, officers or public officials by offering them bribes.[1122] In such cases, an "entrapment" defense is often made, though it is unclear whether the basis for the defense is the Due Process Clause, the supervisory authority of the federal courts to deter wrongful police conduct, or merely statutory construction (interpreting criminal laws to find that the legislature would not have intended to punish conduct induced by police agents).[1123]

The Court has employed the so-called "subjective approach" in evaluating the defense of entrapment.[1124] This subjective approach follows a two-pronged analysis. First, the question is asked whether the offense was induced by a government agent. Second, if the government has induced the defendant to break the law, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."[1125] If the defendant can be shown to have been ready and willing to commit the crime whenever the opportunity presented itself, the defense of entrapment is unavailing, no matter the degree of inducement.[1126] On the other hand, "[w]hen the Government's quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the courts should intervene."[1127]

Criminal Identification Process.

In criminal trials, the re-liability and weight to be accorded an eyewitness identification ordinarily are for the jury to decide, guided by instructions by the trial judge and subject to judicial prerogatives under the rules of evidence to exclude otherwise relevant evidence whose probative value is substantially outweighed by its prejudicial impact or potential to mislead. At times, however, a defendant alleges an out-of-court identification in the presence of police is so flawed that it is inadmissible as a matter of fundamental justice under due process.[1128] These cases most commonly challenge such police-arranged procedures as lineups, showups, photographic displays, and the like.[1129] But not all cases have alleged careful police orchestration.[1130]

The Court generally disfavors judicial suppression of eyewitness identifications on due process grounds in lieu of having identification testimony tested in the normal course of the adversarial process.[1131] Two elements are required for due process suppression. First, law enforcement officers must have participated in an identification process that was *both* suggestive and unnecessary.[1132] Second, the identification procedures must have created a substantial prospect for misidentification. Determination of these elements is made by examining the "totality of the circumstances" of a case.[1133] The Court has not recognized any *per se* rule for excluding an eyewitness identification on due process grounds.[1134] Defendants have had difficulty meeting the Court's standards: Only one challenge has been successful.[1135]

Fair Trial.

As noted, the provisions of the Bill of Rights now applicable to the states contain basic guarantees of a fair trial— right to counsel, right to speedy and public trial, right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the like. But this does not exhaust the requirements of fairness. "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."[1136] Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[1137]

For instance, bias or prejudice either inherent in the structure of the trial system or as imposed by external events will deny one's right to a fair trial. Thus, in *Tumey v. Ohio*[1138] it was held to violate due process for a judge to receive compensation out of the fines imposed on convicted defendants, and no compensation beyond his salary) "if he does not convict those who are brought before him." Or, in other cases, the Court has found that contemptuous behavior in court may affect the impartiality of the presiding judge, so as to disqualify such judge from citing and sentencing the contemnors.[1139] Due process is also violated by the participation of a biased or otherwise partial juror, although there is no presumption that all jurors with a potential bias are in fact prejudiced.[1140]

Public hostility toward a defendant that intimidates a jury is, or course, a classic due process violation.[1141] More recently, concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the Court to instruct trial courts that they should be vigilant to guard against such prejudice and to curb both the publicity and the jury's exposure to it.[1142] For instance, the impact of televising trials on a jury has been a source of some concern.[1143]

The fairness of a particular rule of procedure may also be the basis for due process claims, but such decisions must be based on the totality of the circumstances surrounding such procedures.[1144] For instance, a court may not restrict the basic due process right to testify in one's own defense by automatically excluding all hypnotically refreshed testimony.[1145] Or, though a state may require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting

witnesses, due process requires reciprocal discovery in such circumstances, necessitating that the state give the defendant pretrial notice of its rebuttal evidence on the alibi issue.[1146] Due process is also violated when the accused is compelled to stand trial before a jury while dressed in identifiable prison clothes, because it may impair the presumption of innocence in the minds of the jurors.[1147]

The use of visible physical restraints, such as shackles, leg irons, or belly chains, in front of a jury, has been held to raise due process concerns. In *Deck v. Missouri*,[1148] the Court noted a rule dating back to English common law against bringing a defendant to trial in irons, and a modern day recognition that such measures should be used "only in the presence of a special need."[1149] The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and "affronts the dignity and decorum of judicial proceedings."[1150] Even where guilt has already been adjudicated, and a jury is considering the application of the death penalty, the latter two considerations would preclude the routine use of visible restraints. Only in special circumstances, such as where a judge has made particularized findings that security or flight risk requires it, can such restraints be used.

The combination of otherwise acceptable rules of criminal trials may in some instances deny a defendant due process. Thus, based on the particular circumstance of a case, two rules that (1) denied a defendant the right to cross-examine his own witness in order to elicit evidence exculpatory to the defendant[1151] and (2) denied a defendant the right to introduce the testimony of witnesses about matters told them out of court on the ground the testimony would be hearsay, denied the defendant his constitutional right to present his own defense in a meaningful way.[1152] Similarly, a questionable procedure may be saved by its combination with another. Thus, it does not deny a defendant due process to subject him initially to trial before a non-lawyer police court judge when there is a later trial *de novo* available under the state's court system.[1153]

Prosecutorial Misconduct.

When a conviction is obtained by the presentation of testimony known to the prosecuting authorities to have been perjured, due process is violated. The clause "cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."[1154]

The above-quoted language was dictum,[1155] but the principle it enunciated has required state officials to controvert allegations that knowingly false testimony had been used to convict[1156] and has upset convictions found to have been so procured.[1157] Extending the principle, the Court in *Miller v. Pate*[1158] overturned a conviction obtained after the prosecution had represented to the jury that a pair of men's shorts found near the scene of a sex attack belonged to the defendant and that they were stained with blood; the defendant showed in a *habeas corpus* proceeding that no evidence connected him with the shorts and furthermore that the shorts were not in fact bloodstained, and that the prosecution had known these facts.

This line of reasoning has even resulted in the disclosure to the defense of information not relied upon by the prosecution during trial.[1159] In *Brady v. Maryland*,[1160] the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In that case, the prosecution had suppressed an extrajudicial confession of defendant's accomplice that he had actually committed the murder.[1161] "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."[1162]

In *United States v. Agurs*,[1163] the Court summarized and somewhat expanded the prosecutor's obligation to disclose to the defense exculpatory evidence in his possession, even in the absence of a request, or upon a general request, by defendant. First, as noted, if the prosecutor knew or should have known that testimony given to the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[1164] Second, as established in *Brady*, if the defense specifically requested certain evidence and the prosecutor withheld it,[1165] the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[1166] Third (the new law created in *Agurs*), if the defense did not make a request at all, or simply asked for "all *Brady* material" or for "anything exculpatory," a duty resides in the prosecution to reveal to the defense obviously exculpatory evidence. Under this third prong, if the prosecutor did not reveal the relevant information, reversal of a conviction may be required, but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt.[1167]

This tripartite formulation, however, suffered from two apparent defects. First, it added a new level of complexity to a *Brady* inquiry by requiring a reviewing court to establish the appropriate level of materiality by classifying the situation under which the exculpating information was withheld. Second, it was not clear, if the fairness of the trial was at issue, why the circumstances of the failure to disclose should affect the evaluation of the impact that such information would have had on the trial. Ultimately, the Court addressed these issues in *United States v. Bagley*[1168] .

In *Bagley*, the Court established a uniform test for materiality, choosing the most stringent requirement that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different.[1169] This materiality standard, found in contexts outside of *Brady* inquiries,[1170] is applied not only to

exculpatory material, but also to material that would be relevant to the impeachment of witnesses.[1171] Thus, where inconsistent earlier statements by a witness to an abduction were not disclosed, the Court weighed the specific effect that impeachment of the witness would have had on establishing the required elements of the crime and of the punishment, finally concluding that there was no reasonable probability that the jury would have reached a different result.[1172]

The Supreme Court has also held that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.' . . . '[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.' "[1173]

Proof, Burden of Proof, and Presumptions.

It had long been presumed that "reasonable doubt" was the proper standard for criminal cases,[1174] but, because the standard was so widely accepted, it was only relatively recently that the Court had the opportunity to pronounce it guaranteed by due process. In 1970, the Court held in *In re Winship* that the Due Process Clauses of the Fifth and Fourteenth Amendment (/constitution/fourteenth_amendment)s "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[1175]

The standard is closely related to the presumption of innocence, which helps to ensure a defendant a fair trial,[1176] and requires that a jury consider a case solely on the evidence.[1177] "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' "[1178]

The Court had long held that, under the Due Process Clause, it would set aside convictions that are supported by no evidence at all.[1179] The holding of the *Winship* case, however, left open the question as to whether appellate courts should weigh the sufficiency of trial evidence. Thus, in *Jackson v. Virginia*,[1180] the Court held that federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves that the evidence on the record could reasonably support a finding of guilt beyond a reasonable doubt. The question the reviewing court is to ask itself is not whether *it* believes the evidence at the trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[1181]

Because due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged,[1182] the Court held in *Mullaney v. Wilbur*[1183] that it was unconstitutional to require a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter. The Court indicated that a balancing-of-interests test should be used to determine when the Due Process Clause required the prosecution to carry the burden of proof and when some part of the burden might be shifted to the defendant. The decision, however, called into question the practice in many states under which some burdens of persuasion[1184] were borne by the defense, and raised the prospect that the prosecution must bear all burdens of persuasion—a significant and weighty task given the large numbers of affirmative defenses.

The Court, however, summarily rejected the argument that *Mullaney* means that the prosecution must negate an insanity defense,[1185] and, later, in *Patterson v. New York*,[1186] upheld a state statute that required a defendant asserting "extreme emotional disturbance" as an affirmative defense to murder[1187] to prove such by a preponderance of the evidence. According to the Court, the constitutional deficiency in *Mullaney* was that the statute made malice an element of the offense, permitted malice to be presumed upon proof of the other elements, and then required the defendant to prove the absence of malice. In *Patterson*, by contrast, the statute obligated the state to prove each element of the offense (the death, the intent to kill, and the causation) beyond a reasonable doubt, while allowing the defendant to prove an affirmative defense by preponderance of the evidence that would reduce the degree of the offense.[1188] This distinction has been criticized as formalistic, as the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses.[1189]

Despite the requirement that states prove each element of a criminal offense, criminal trials generally proceed with a presumption that the defendant is sane, and a defendant may be limited in the evidence that he may present to challenge this presumption. In *Clark v. Arizona*,[1190] the Court considered a rule adopted by the Supreme Court of Arizona that prohibited the use of expert testimony regarding mental disease or mental capacity to show lack of *mens rea*, ruling that the use of such evidence could be limited to an insanity defense. In *Clark*, the Court weighed competing interests to hold that such evidence could be "channeled" to the issue of insanity due to the controversial character of some categories of mental disease, the potential of mental-disease evidence to mislead, and the danger of according greater certainty to such evidence than experts claim for it.[1191]

Another important distinction that can substantially affect a prosecutor's burden is whether a fact to be established is an element of a crime or instead is a sentencing factor. Although a criminal conviction is generally established by a jury using the "beyond a reasonable doubt" standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient "preponderance of the evidence" standard. The Court has taken a formalistic approach to this issue, allowing states

to designate essentially which facts fall under which of these two categories. For instance, the Court has held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence.[1192]

Although the Court has generally deferred to the legislature's characterizations in this area, it limited this principle in *Apprendi v. New Jersey*. In *Apprendi* the Court held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[1193] This led, in turn, to the Court's overruling conflicting prior case law that had held constitutional the use of aggravating sentencing factors by judges when imposing capital punishment.[1194] These holdings are subject to at least one exception, however,[1195] and the decisions might be evaded by legislatures revising criminal provisions to increase maximum penalties, and then providing for mitigating factors within the newly established sentencing range.

Another closely related issue is statutory presumptions, where proof of a "presumed fact" that is a required element of a crime, is established by another fact, the "basic fact."[1196] In *Tot v. United States*,[1197] the Court held that a statutory presumption was valid under the Due Process Clause only if it met a "rational connection" test. In that case, the Court struck down a presumption that a person possessing an illegal firearm had shipped, transported, or received such in interstate commerce. "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience."

In *Leary v. United States*,[1198] this due process test was stiffened to require that, for such a "rational connection" to exist, it must "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Thus, the Court voided a provision that permitted a jury to infer from a defendant's possession of marijuana his knowledge of its illegal importation. A lengthy canvass of factual materials established to the Court's satisfaction that, although the greater part of marijuana consumed in the United States is of foreign origin, there was still a good amount produced domestically and there was no way to assure that the majority of those possessing marijuana have any reason to know whether their marijuana is imported.[1199] The Court left open the question whether a presumption that survived the "rational connection" test "must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use."[1200]

In a later case, a closely divided Court drew a distinction between mandatory presumptions, which a jury must accept, and permissive presumptions, which may be presented to the jury as part of all the evidence to be considered. With respect to mandatory presumptions, "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."[1201] But, with respect to permissive presumptions, "the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*."[1202] Thus, due process was not violated by the application of the statute that provides that "the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle."[1203] The division of the Court in these cases and in the *Mullaney v. Wilbur* line of cases clearly shows the unsettled nature of the issues they concern.

The Problem of the Incompetent or Insane Defendant.

It is a denial of due process to try or sentence a defendant who is insane or incompetent to stand trial.[1204] When it becomes evident during the trial that a defendant is or has become insane or incompetent to stand trial, the court on its own initiative must conduct a hearing on the issue.[1205] Although there is no constitutional requirement that the state assume the burden of proving a defendant competent, the state must provide the defendant with a chance to prove that he is incompetent to stand trial. Thus, a statutory presumption that a criminal defendant is competent to stand trial or a requirement that the defendant bear the burden of proving incompetence by a preponderance of the evidence does not violate due process.[1206]

When a state determines that a person charged with a criminal offense is incompetent to stand trial, he cannot be committed indefinitely for that reason. The court's power is to commit him to a period no longer than is necessary to determine whether there is a substantial probability that he will attain his capacity in the foreseeable future. If it is determined that he will not, then the state must either release the defendant or institute the customary civil commitment proceeding that would be required to commit any other citizen.[1207]

Where a defendant is found competent to stand trial, a state appears to have significant discretion in how it takes account of mental illness or defect at the time of the offense in determining criminal responsibility.[1208] The Court has identified several tests that are used by states in varying combinations to address the issue: the M'Naghten test (cognitive incapacity or moral incapacity),[1209] volitional incapacity,[1210] and the irresistible-impulse test.[1211] "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."[1212]

Commitment to a mental hospital of a criminal defendant acquitted by reason of insanity does not offend due process, and the period of confinement may extend beyond the period for which the person could have been sentenced if convicted.[1213] The purpose of the confinement is not punishment, but treatment, and the Court explained that the length of a possible criminal sentence "therefore is irrelevant to the purposes of . . . commitment."[1214] Thus, the insanity-defense acquittee may be confined for treatment "until such time as he has regained his sanity or is no longer a danger to himself or society."[1215] It follows, however, that a state may not indefinitely confine an insanity-defense acquittee who is no longer mentally ill but who has an untreatable personality disorder that may lead to criminal conduct.[1216]

The Court held in *Ford v. Wainwright* that the Eighth Amendment (/constitution/eighth_amendment) prohibits the state from executing a person who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding that satisfies the requirements of due process.[1217] Due process is not met when the decision on sanity is left to the unfettered discretion of the governor; rather, due process requires the opportunity to be heard before an impartial officer or board.[1218] The Court, however, left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[1219]

In *Atkins v. Virginia*, the Court held that the Eighth Amendment (/constitution/eighth_amendment) also prohibits the state from executing a person who is mentally retarded, and added, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' "[1220]

Issues of substantive due process may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper*,[1221] the Court had found that an individual has a significant "liberty interest" in avoiding the unwanted administration of antipsychotic drugs. In *Sell v. United States*,[1222] the Court found that this liberty interest could in "rare" instances be outweighed by the government's interest in bringing an incompetent individual to trial. First, however, the government must engage in a fact-specific inquiry as to whether this interest is important in a particular case.[1223] Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant's ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.

Guilty Pleas.

A defendant may plead guilty instead of insist-ing that the prosecution prove him guilty. Often the defendant does so as part of a "plea bargain" with the prosecution, where the defendant is guaranteed a light sentence or is allowed to plead to a lesser offense.[1224] Although the government may not structure its system so as to coerce a guilty plea,[1225] a guilty plea that is entered voluntarily, knowingly, and understandingly, even to obtain an advantage, is sufficient to overcome constitutional objections.[1226] The guilty plea and the often concomitant plea bargain are important and necessary components of the criminal justice system,[1227] and it is permissible for a prosecutor during such plea bargains to require a defendant to forgo his right to a trial in return for escaping additional charges that are likely upon conviction to result in a more severe penalty.[1228] But the prosecutor does deny due process if he penalizes the assertion of a right or privilege by the defendant by charging more severely or recommending a longer sentence.[1229]

In accepting a guilty plea, the court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly,[1230] and "the adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that, when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."[1231]

Sentencing.

In the absence of errors by the sentencing judge, [1232] or of sentencing jurors considering invalid factors,[1233] the significance of procedural due process at sentencing is limited.[1234] In *Williams v. New York*,[1235] the Court upheld the imposition of the death penalty, despite a jury's recommendation of mercy, where the judge acted based on information in a presentence report not shown to the defendant or his counsel. The Court viewed as highly undesirable the restriction of judicial discretion in sentencing by requiring adherence to rules of evidence which would exclude highly relevant and informative material. Further, disclosure of such information to the defense could well dry up sources who feared retribution or embarrassment. Thus, hearsay and rumors can be considered in sentencing. In *Gardner v. Florida*,[1236] however, the Court limited the application of *Williams* to capital cases.[1237]

In *United States v. Grayson*,[1238] a noncapital case, the Court relied heavily on *Williams* in holding that a sentencing judge may properly consider his *belief* that the defendant was untruthful in his trial testimony in deciding to impose a more severe sentence than he would otherwise have imposed. the Court declared that, under the current scheme of individualized indeterminate sentencing, the judge must be free to consider the broadest range of information in assessing the defendant's prospects for rehabilitation; defendant's truthfulness, as assessed by the trial judge from his own observations, is relevant information.[1239]

There are various sentencing proceedings, however, that so implicate substantial rights that additional procedural protections are required.[1240] Thus, in *Specht v. Patterson*,[1241] the Court considered a defendant who had been convicted of taking indecent liberties, which carried a maximum sentence of ten years, but was sentenced under a sex offenders statute to an indefinite term of one day to life. The sex offenders law, the Court observed, did not make the commission of the particular offense the basis for sentencing. Instead, by triggering a new hearing to determine whether the convicted person was a public threat, a habitual offender, or mentally ill, the law in effect constituted a new charge that must be accompanied by procedural safeguards. And in *Mempa v. Rhay*,[1242] the Court held that, when sentencing is deferred subject to probation and the terms of probation are allegedly violated so that the convicted defendant is returned for sentencing, he must then be represented by counsel, inasmuch as it is a point in the process where substantial rights of the defendant may be affected.

Due process considerations can also come into play in sentencing if the state attempts to withhold relevant information from the jury. For instance, in *Simmons v. South Carolina*, the Court held that due process requires that if prosecutor makes an argument for the death penalty based on the future dangerousness of the defendant to society, the jury must then be informed if the only alternative to a death sentence is a life sentence without possibility of parole.[1243] But, in *Ramdass v. Angelone*,[1244] the Court refused to apply the reasoning of *Simmons* because the defendant was not technically parole ineligible at time of sentencing.

A defendant should not be penalized for exercising a right to appeal. Thus, it is a denial of due process for a judge to sentence a convicted defendant on retrial to a longer sentence than he received after the first trial if the object of the sentence is to punish the defendant for having successfully appealed his first conviction or to discourage similar appeals by others.[1245] If the judge does impose a longer sentence the second time, he must justify it on the record by showing, for example, the existence of new information meriting a longer sentence.[1246]

Because the possibility of vindictiveness in resentencing is *de minimis* when it is the jury that sentences, however, the requirement of justifying a more severe sentence upon resentencing is inapplicable to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence.[1247] The presumption of vindictiveness is also inapplicable if the first sentence was imposed following a guilty plea. Here the Court reasoned that a trial may well afford the court insights into the nature of the crime and the character of the defendant that were not available following the initial guilty plea.[1248]

Corrective Process: Appeals and Other Remedies.

"An ap-peal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review."[1249] This holding has been reaffirmed,[1250] although the Court has also held that, when a state does provide appellate review, it may not so condition the privilege as to deny it irrationally to some persons, such as indigents.[1251]

A state is not free, however, to have no corrective process in which defendants may pursue remedies for federal constitutional violations. In *Frank v. Mangum*,[1252] the Court asserted that a conviction obtained in a mob-dominated trial was contrary to due process: "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." Consequently, the Court has stated numerous times that the absence of some form of corrective process when the convicted defendant alleges a federal constitutional violation contravenes the Fourteenth Amendment (/constitution/fourteenth_amendment),[1253] and the Court has held that to burden this process, such as by limiting the right to petition for *habeas corpus*, is to deny the convicted defendant his constitutional rights.[1254]

The mode by which federal constitutional rights are to be vindicated after conviction is for the government concerned to determine. "Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . In respecting the duty laid upon them . . . States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis*. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated."[1255] If a state provides a mode of redress, then a defendant must first exhaust that mode. If he is unsuccessful, or if a state does not provide an adequate mode of redress, then the defendant may petition a federal court for relief through a writ of *habeas corpus*.[1256]

When appellate or other corrective process is made available, because it is no less a part of the process of law under which a defendant is held in custody, it becomes subject to scrutiny for any alleged unconstitutional deprivation of life or liberty. At first, the Court seemed content to assume that, when a state appellate process formally appeared to be sufficient to correct constitutional errors committed by the trial court, the conclusion by the appellate court that the trial court's sentence of execution should be affirmed was ample assurance that life would not be forfeited without due process of law.[1257] But, in *Moore v. Dempsey*,[1258] while insisting that it was not departing from precedent, the Court directed a federal district court in which petitioners had sought a writ of *habeas corpus* to make an independent investigation of the facts alleged by the petitioners—mob

domination of their trial—notwithstanding that the state appellate court had ruled against the legal sufficiency of these same allegations. Indubitably, *Moore* marked the abandonment of the Supreme Court's deference, founded upon considerations of comity, to decisions of state appellate tribunals on issues of constitutionality, and the proclamation of its intention no longer to treat as virtually conclusive pronouncements by the latter that proceedings in a trial court were fair, an abandonment soon made even clearer in *Brown v. Mississippi*[1259] and now taken for granted.

The Court has held, however, that the Due Process Clause does not provide convicted persons a right to postconviction access to the state's evidence for DNA testing.[1260] Chief Justice Roberts, in a five-to-four decision, noted that 46 states had enacted statutes dealing specifically with access to DNA evidence, and that the Federal Government had enacted a statute that allows federal prisoners to move for court-ordered DNA testing under specified conditions. Even the states that had not enacted statutes dealing specifically with access to DNA evidence must, under the Due Process Clause, provide adequate postconviction relief procedures. The Court, therefore, saw "no reason to constitutionalize the issue."[1261] It also expressed concern that "[e]stablishing a freestanding right to access DNA evidence for testing would force us to act as policymakers . . . . We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when?"[1262]

Rights of Prisoners.

Until relatively recently the view pre-vailed that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state."[1263] This view is not now the law, and may never have been wholly correct.[1264] In 1948 the Court declared that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights";[1265] "many," indicated less than "all," and it was clear that the Due Process and Equal Protection Clauses to some extent do apply to prisoners.[1266] More direct acknowledgment of constitutional protection came in 1972: "[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the government for redress of grievances . . . ."[1267] However, while the Court affirmed that federal courts have the responsibility to scrutinize prison practices alleged to violate the Constitution, at the same time concerns of federalism and of judicial restraint caused the Court to emphasize the necessity of deference to the judgments of prison officials and others with responsibility for administering such systems.[1268]

Save for challenges to conditions of confinement of pretrial detainees,[1269] the Court has generally treated challenges to prison conditions as a whole under the Cruel and Unusual Punishments Clause of the Eighth Amendment (/constitution/eighth_amendment),[1270] while challenges to particular incidents and practices are pursued under the Due Process Clause[1271] or more specific provisions, such as the First Amendment (/constitution/first_amendment)'s speech and religion clauses.[1272] Prior to formulating its current approach, the Court recognized several rights of prisoners. Prisoners have the right to petition for redress of grievances, which includes access to the courts for purposes of presenting their complaints,[1273] and to bring actions in federal courts to recover for damages wrongfully done them by prison administrators.[1274] And they have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline.[1275]

In *Turner v. Safley*,[1276] the Court announced a general standard for measuring prisoners' claims of deprivation of constitutional rights: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[1277] Several considerations, the Court indicated, are appropriate in determining reasonableness of a prison regulation. First, there must be a rational relation to a legitimate, content-neutral objective, such as prison security, broadly defined. Availability of other avenues for exercise of the inmate right suggests reasonableness.[1278] A further indicium of reasonableness is present if accommodation would have a negative effect on the liberty or safety of guards, other inmates,[1279] or visitors.[1280] On the other hand, "if an inmate claimant can point to an alternative that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests," it would suggest unreasonableness.[1281]

Fourth Amendment (/constitution/fourth_amendment) protection is incompatible with "the concept of incarceration and the needs and objectives of penal institutions"; hence, a prisoner has no reasonable expectation of privacy in his prison cell protecting him from "shakedown" searches designed to root out weapons, drugs, and other contraband.[1282] Avenues of redress "for calculated harassment unrelated to prison needs" are not totally blocked, the Court indicated; inmates may still seek protection in the Eighth Amendment (/constitution/eighth_amendment) or in state tort law.[1283] Existence of "a meaningful postdeprivation remedy" for unauthorized, intentional deprivation of an inmate's property by prison personnel protects the inmate's due process rights.[1284] Due process is not implicated at all by negligent deprivation of life, liberty, or property by prison officials.[1285]

A change of the conditions under which a prisoner is housed, including one imposed as a matter of discipline, may implicate a protected liberty interest if such a change imposes an "atypical and significant hardship" on the inmate.[1286] In *Wolff v. McDonnell*,[1287] the Court promulgated due process standards to govern the imposition of discipline upon prisoners. Due process applies, but, because prison disciplinary proceedings are not part of a criminal prosecution, the full panoply of a defendant's rights is not available. Rather, the analysis must proceed by identifying the interest in "liberty" that the clause protects. Thus, where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for

serious misconduct, the interest of the prisoner in this degree of "liberty" entitles him to the minimum procedures appropriate under the circumstances.[1288] What the minimum procedures consist of is to be determined by balancing the prisoner's interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions.

The Court in *Wolff* held that the prison must afford the subject of a disciplinary proceeding "advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the action taken."[1289] In addition, an "inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[1290] Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt threaten valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Finally, only a partial right to an impartial tribunal was recognized, the Court ruling that limitations imposed on the discretion of a committee of prison officials sufficed for this purpose.[1291] Revocation of good time credits, the Court later ruled, must be supported by "some evidence in the record," but an amount that "might be characterized as meager" is constitutionally sufficient.[1292]

Determination whether due process requires a hearing before a prisoner is transferred from one institution to another requires a close analysis of the applicable statutes and regulations as well as a consideration of the particular harm suffered by the transferee. On the one hand, the Court found that no hearing need be held prior to the transfer from one prison to another prison in which the conditions were substantially less favorable. Because the state had not conferred any right to remain in the facility to which the prisoner was first assigned, defeasible upon the commission of acts for which transfer is a punishment, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all; consequently, there was nothing to hold a hearing about.[1293] The same principles govern interstate prison transfers.[1294]

Transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited.[1295] On the other hand, transfer of a prisoner to a mental hospital pursuant to a statute authorizing transfer if the inmate suffers from a "mental disease or defect" must, for two reasons, be preceded by a hearing. First, the statute gave the inmate a liberty interest, because it presumed that he would not be moved absent a finding that he was suffering from a mental disease or defect. Second, unlike transfers from one prison to another, transfer to a mental institution was not within the range of confinement covered by the prisoner's sentence, and, moreover, imposed a stigma constituting a deprivation of a liberty interest.[1296]

The *kind* of hearing that is required before a state may force a mentally ill prisoner to take antipsychotic drugs against his will was at issue in *Washington v. Harper*.[1297] There the Court held that a judicial hearing was not required. Instead, the inmate's substantive liberty interest (derived from the Due Process Clause as well as from state law) was adequately protected by an administrative hearing before independent medical professionals, at which hearing the inmate has the right to a lay advisor but not an attorney.

Probation and Parole.

Sometimes convicted defendants are not sentenced to jail, but instead are placed on probation subject to incarceration upon violation of the conditions that are imposed; others who are jailed may subsequently qualify for release on parole before completing their sentence, and are subject to reincarceration upon violation of imposed conditions. Because both of these dispositions are statutory privileges granted by the governmental authority,[1298] it was long assumed that the administrators of the systems did not have to accord procedural due process either in the granting stage or in the revocation stage. Now, both granting and revocation are subject to due process analysis, although the results tend to be disparate. Thus, in *Mempa v. Rhay*,[1299] the trial judge had deferred sentencing and placed the convicted defendant on probation; when facts subsequently developed that indicated a violation of the conditions of probation, he was summoned and summarily sentenced to prison. The Court held that he was entitled to counsel at the deferred sentencing hearing.

In *Morrissey v. Brewer*[1300] a unanimous Court held that parole revocations must be accompanied by the usual due process hearing and notice requirements. "[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation . . . [But] the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment (/constitution/fourteenth_amendment). Its termination calls for some orderly process, however informal."[1301] What process is due, then, turned upon the state's interests. Its principal interest was that, having once convicted a defendant, imprisoned him, and, at some risk, released him for rehabilitation purposes, it should be "able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole. Yet, the state has no interest in revoking parole without some informal procedural guarantees," inasmuch as such guarantees will not interfere with its reasonable interests.[1302]

Minimal due process, the Court held, requires that at both stages of the revocation process—the arrest of the parolee and the formal revocation—the parolee is entitled to certain rights. Promptly following arrest of the parolee, there should be an informal hearing to determine whether reasonable grounds exist for revocation of parole; this preliminary hearing should be conducted at

or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available, and should be conducted by someone not directly involved in the case, though he need not be a judicial officer. The parolee should be given adequate notice that the hearing will take place and what violations are alleged, he should be able to appear and speak in his own behalf and produce other evidence, and he should be allowed to examine those who have given adverse evidence against him unless it is determined that the identity of such informant should not be revealed. Also, the hearing officer should prepare a digest of the hearing and base his decision upon the evidence adduced at the hearing.[1303]

Prior to the final decision on revocation, there should be a more formal revocation hearing at which there would be a final evaluation of any contested relevant facts and consideration whether the facts as determined warrant revocation. The hearing must take place within a reasonable time after the parolee is taken into custody and he must be enabled to controvert the allegations or offer evidence in mitigation. The procedural details of such hearings are for the states to develop, but the Court specified minimum requirements of due process. "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole."[1304] Ordinarily, the written statement need not indicate that the sentencing court or review board considered alternatives to incarceration,[1305] but a sentencing court must consider such alternatives if the probation violation consists of the failure of an indigent probationer, through no fault of his own, to pay a fine or restitution.[1306]

The Court has applied a flexible due process standard to the provision of counsel. Counsel is not invariably required in parole or probation revocation proceedings. The state should, however, provide the assistance of counsel where an indigent person may have difficulty in presenting his version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be provided where the person requests counsel, based on a timely and colorable claim that he has not committed the alleged violation, or if that issue be uncontested, there are reasons in justification or mitigation that might make revocation inappropriate.[1307]

With respect to the granting of parole, the Court's analysis of the Due Process Clause's meaning in *Greenholtz v. Nebraska Penal Inmates*[1308] is much more problematical. The theory was rejected that the mere establishment of the possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to a due process protected expectation of being dealt with in any particular way. On the other hand, the Court did recognize that a parole statute could create an expectancy of release entitled to some measure of constitutional protection, although a determination would need to be made on a case-by-case basis,[1309] and the full panoply of due process guarantees is not required.[1310] Where, however, government by its statutes and regulations creates no obligation of the pardoning authority and thus creates no legitimate expectancy of release, the prisoner may not by showing the favorable exercise of the authority in the great number of cases demonstrate such a legitimate expectancy. The power of the executive to pardon, or grant clemency, being a matter of grace, is rarely subject to judicial review.[1311]

The Problem of the Juvenile Offender.

All fifty states and the District of Columbia provide for dealing with juvenile offenders outside the criminal system for adult offenders.[1312] Their juvenile justice systems apply both to offenses that would be criminal if committed by an adult and to delinquent behavior not recognizable under laws dealing with adults, such as habitual truancy, deportment endangering the morals or health of the juvenile or others, or disobedience making the juvenile uncontrollable by his parents. The reforms of the early part of the 20th century provided not only for segregating juveniles from adult offenders in the adjudication, detention, and correctional facilities, but they also dispensed with the substantive and procedural rules surrounding criminal trials which were mandated by due process. Justification for this abandonment of constitutional guarantees was offered by describing juvenile courts as civil not criminal and as not dispensing criminal punishment, and offering the theory that the state was acting as *parens patriae* for the juvenile offender and was in no sense his adversary.[1313]

Disillusionment with the results of juvenile reforms coupled with judicial emphasis on constitutional protection of the accused led in the 1960s to a substantial restriction of these elements of juvenile jurisprudence. After tracing in much detail this history of juvenile courts, the Court held in *In re Gault*[1314] that the application of due process to juvenile proceedings would not endanger the good intentions vested in the system nor diminish the features of the system which were deemed desirable—emphasis upon rehabilitation rather than punishment, a measure of informality, avoidance of the stigma of criminal conviction, the low visibility of the process—but that the consequences of the absence of due process standards made their application necessary.[1315]

Thus, the Court in *Gault* required that notice of charges be given in time for the juvenile to prepare a defense, required a hearing in which the juvenile could be represented by retained or appointed counsel, required observance of the rights of confrontation and cross-examination, and required that the juvenile be protected against self-incrimination.[1316] It did not pass upon the right of appeal or the failure to make transcripts of hearings. Earlier, the Court had held that before a juvenile could be "waived" to an adult court for trial, there had to be a hearing and findings of reasons, a result based on statutory interpretation but apparently

constitutionalized in *Gault*.[1317] Subsequently, the Court held that the "essentials of due process and fair treatment" required that a juvenile could be adjudged delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if committed by an adult,[1318] but still later the Court held that jury trials were not constitutionally required in juvenile trials.[1319]

On a few occasions the Court has considered whether rights accorded to adults during investigation of crime are to be accorded juveniles. In one such case the Court ruled that a juvenile undergoing custodial interrogation by police had not invoked a *Miranda* right to remain silent by requesting permission to consult with his probation officer, since a probation officer could not be equated with an attorney, but indicated as well that a juvenile's waiver of *Miranda* rights was to be evaluated under the same totality-of-the-circumstances approach applicable to adults. That approach "permits— indeed it mandates—inquiry into all the circumstances surrounding the interrogation . . . includ[ing] evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him . . . ."[1320] In another case the Court ruled that, although the Fourth Amendment (/constitution/fourth_amendment) applies to searches of students by public school authorities, neither the warrant requirement nor the probable cause standard is appropriate.[1321] Instead, a simple reasonableness standard governs all searches of students' persons and effects by school authorities.[1322]

The Court ruled in *Schall v. Martin*[1323] that preventive detention of juveniles does not offend due process when it serves the legitimate state purpose of protecting society and the juvenile from potential consequences of pretrial crime, when the terms of confinement serve those legitimate purposes and are nonpunitive, and when procedures provide sufficient protection against erroneous and unnecessary detentions. A statute authorizing pretrial detention of accused juvenile delinquents on a finding of "serious risk" that the juvenile would commit crimes prior to trial, providing for expedited hearings (the maximum possible detention was 17 days), and guaranteeing a formal, adversarial probable cause hearing within that period, was found to satisfy these requirements.

Each state has a procedure by which juveniles may be tried as adults.[1324] With the Court having clarified the constitutional requirements for imposition of capital punishment, it was only a matter of time before the Court would have to determine whether states may subject juveniles to capital punishment. In *Stanford v. Kentucky*,[1325] the Court held that the Eighth Amendment (/constitution/eighth_amendment) does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17; earlier the Court had invalidated a statutory scheme permitting capital punishment for crimes committed before age 16.[1326] In weighing validity under the Eighth Amendment (/constitution/eighth_amendment), the Court has looked to state practice to determine whether a consensus against execution exists.[1327] Still to be considered by the Court are such questions as the substantive and procedural guarantees to be applied in proceedings when the matter at issue is non-criminal delinquent behavior.

The Problem of Civil Commitment.

As with juvenile offend-ers, several other classes of persons are subject to confinement by court processes deemed civil rather than criminal. Within this category of "protective commitment" are involuntary commitments for treatment of insanity and other degrees of mental disability, alcoholism, narcotics addiction, sexual psychopathy, and the like. In *O'Connor v. Donaldson*,[1328] the Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[1329] The jury had found that Donaldson was not dangerous to himself or to others, and the Court ruled that he had been unconstitutionally confined.[1330] Left to another day were such questions as "when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness"[1331] and the right, if any, to receive treatment for the confined person's illness. To conform to due process requirements, procedures for voluntary admission should recognize the possibility that persons in need of treatment may not be competent to give informed consent; this is not a situation where availability of a meaningful post-deprivation remedy can cure the due process violation.[1332]

Procedurally, it is clear that an individual's liberty interest in being free from unjustifiable confinement and from the adverse social consequences of being labeled mentally ill requires the government to assume a greater share of the risk of error in proving the existence of such illness as a precondition to confinement. Thus, the evidentiary standard of a preponderance, normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings. On the other hand, the criminal standard of beyond a reasonable doubt is not necessary because the state's aim is not punitive and because some or even much of the consequence of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment. The Court therefore imposed a standard of "clear and convincing" evidence.[1333]

In *Parham v. J.R.*, the Court confronted difficult questions as to what due process requires in the context of commitment of allegedly mentally ill and mentally retarded children by their parents or by the state, when such children are wards of the state.[1334] Under the challenged laws there were no formal preadmission hearings, but psychiatric and social workers did interview parents and children and reached some form of independent determination that commitment was called for. The Court acknowledged the potential for abuse but balanced this against such factors as the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually act in behalf of their children's welfare, the independent role of medical professionals in deciding to accept the children for admission, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing such care and

interfere with the ability of parents to assist with the care of institutionalized children.[1335] Similarly, the same concerns, reflected in the statutory obligation of the state to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the government.[1336] Left to future resolution was the question of the due process requirements for postadmission review of the necessity for continued confinement.[1337]

Footnotes

1082 Hurtado v. California, 110 U.S. 516 (1884) (/supremecourt/text/110/516). The Court has also rejected an argument that due process requires that criminal prosecutions go forward only on a showing of probable cause. Albright v. Oliver, 510 U.S. 266 (1994) (/supremecourt/text/510/266) (holding that there is no civil rights action based on the Fourteenth Amendment for arrest and imposition of bond without probable cause). [Back to text]

1083 Smith v. O'Grady, 312 U.S. 329 (1941) (/supremecourt/text/312/329) (guilty plea of layman unrepresented by counsel to what prosecution represented as a charge of simple burglary but which was in fact a charge of "burglary with explosives" carrying a much lengthier sentence voided). *See also* Cole v. Arkansas, 333 U.S. 196 (1948) (/supremecourt/text/333/196) (affirmance by appellate court of conviction and sentence on ground that evidence showed defendant guilty under a section of the statute not charged violated due process); *In re* Ruffalo, 390 U.S. 544 (1968) (/supremecourt/text/390/544) (disbarment in proceeding on charge which was not made until after lawyer had testified denied due process); Rabe v. Washington, 405 U.S. 313 (1972) (/supremecourt/text/405/313) (affirmance of obscenity conviction because of the context in which a movie was shown— grounds neither covered in the statute nor listed in the charge—was invalid). [Back to text]

1084 See Sixth Amendment (/constitution/sixth_amendment), Notice of Accusation, *supra.* [Back to text]

1085 Norris v. Alabama, 294 U.S. 587 (1935) (/supremecourt/text/294/587); Cassell v. Texas, 339 U.S. 282 (1950) (/supremecourt/text/339/282); Eubanks v. Louisiana, 356 U.S. 584 (1958) (/supremecourt/text/356/584); Hernandez v. Texas, 347 U.S. 475 (1954) (/supremecourt/text/347/475); Pierre v. Louisiana, 306 U.S. 354 (1939) (/supremecourt/text/306/354). On prejudicial publicity, *see* Beck v. Washington, 369 U.S. 541 (1962) (/supremecourt/text/369/541). [Back to text]

1086 Cantwell v. Connecticut, 310 U.S. 296 (/supremecourt/text/310/296), 308 (1940). [Back to text]

1087 Musser v. Utah, 333 U.S. 95 (/supremecourt/text/333/95), 97 (1948). "The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt." Id. at 97. "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, 408 U.S. 104 (/supremecourt/text/408/104), 108–09 (1972), *quoted in* Village of Hoffman Estates v. The Flipside, 455 U.S. 489 (/supremecourt/text/455/489), 498 (1982). [Back to text]

1088 Winters v. New York, 333 U.S. 507 (/supremecourt/text/333/507), 515–16 (1948). "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." Id. *Cf.* Colten v. Kentucky, 407 U.S. 104 (/supremecourt/text/407/104), 110 (1972). Thus, a state statute imposing severe, cumulative punishments upon contractors with the state who pay their workers less than the "current rate of per diem wages in the locality where the work is performed" was held to be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Const. Co., 269 U.S. 385 (1926) (/supremecourt/text/269/385). Similarly, a statute which allowed jurors to require an acquitted defendant to pay the costs of the prosecution, elucidated only by the judge's instruction to the jury that the defendant should only have to pay the costs if it thought him guilty of "some misconduct" though innocent of the crime with which he was charged, was found to fall short of the requirements of due process. Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (/supremecourt/text/382/399). [Back to text]

1089 *See* United States v. Beckles, 580 U.S. ___, No. 15–8544, slip op. at 5 (2017). [Back to text]

1090 *See* Kolender v. Lawson, 461 U.S. 352 (/supremecourt/text/461/352), 357 (1983). [Back to text]

1091 Lanzetta v. New Jersey, 306 U.S. 451 (1939) (/supremecourt/text/306/451); Edelman v. California, 344 U.S. 357 (1953). [Back to text]

1092 Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (/supremecourt/text/405/156); Smith v. Goguen, 415 U.S. 566 (1974) (/supremecourt/text/415/566). Generally, a vague statute that regulates in the area of First Amendment guarantees will be pronounced wholly void. Winters v. New York, 333 U.S. 507 (/supremecourt/text/333/507), 509–10 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940) (/supremecourt/text/310/88). [Back to text]

1093 405 U.S. 156 (1972) (/supremecourt/text/405/156). [Back to text]

1094 405 U.S. at 156 n.1. Similar concerns regarding vagrancy laws had been expressed previously. *See*, *e.g.*, Winters v. New York, 333 U.S. 507 (/supremecourt/text/333/507), 540 (1948) (Justice Frankfurter dissenting); Edelman v. California, 344 U.S. 357 (/supremecourt/text/344/357), 362 (1953) (Justice Black dissenting); Hicks v. District of Columbia, 383 U.S. 252 (1966) (/supremecourt/text/383/252) (Justice Douglas dissenting). [Back to text]

1095 Similarly, an ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by was found impermissibly vague and void on its face because it encroached on the freedom of assembly. Coates v. City of Cincinnati, 402 U.S. 611 (1971) (/supremecourt/text/402/611). *See* Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) (/supremecourt/text/382/87) (conviction under statute imposing penalty for failure to "move on" voided); Bouie v. City of Columbia, 378 U.S. 347 (1964) (/supremecourt/text/378/347) (conviction on trespass charges arising out of a sit-in at a drugstore lunch counter voided since the trespass statute did not give fair notice that it was a crime to refuse to leave private premises after being requested to do so); Kolender v. Lawson, 461 U.S. 352 (1983) (/supremecourt/text/461/352) (requirement that person detained in valid *Terry* stop provide "credible and reliable" identification is facially void as encouraging arbitrary enforcement). [Back to text]

1096 Where the terms of a vague statute do not threaten a constitutionally protected right, and where the conduct at issue in a particular case is clearly proscribed, then a due process challenge is unlikely to be successful. Where the conduct in question is at the margins of the meaning of an unclear statute, however, it will be struck down as applied. *E.g.*, United States v. National Dairy Corp., 372 U.S. 29 (1963) (/supremecourt/text/372/29). [Back to text]

1097 Palmer v. City of Euclid, 402 U.S. 544 (1971) (/supremecourt/text/402/544); Village of Hoffman Estates v. The Flipside, 455 U.S. 489 (/supremecourt/text/455/489), 494–95 (1982). [Back to text]

1098 402 U.S. 544 (1971) (/supremecourt/text/402/544). [Back to text]

1099 Kolender v. Lawson, 461 U.S. 352 (/supremecourt/text/461/352), 358 (1983). [Back to text]

1100 City of Chicago v. Morales, 527 U.S. 41 (1999) (/supremecourt/text/527/41). [Back to text]

1101 527 U.S. at 62. [Back to text]

1102 Colten v. Kentucky, 407 U.S. 104 (1972) (/supremecourt/text/407/104). [Back to text]

1103 *See, e.g.*, McDonnell v. United States, 579 U.S. ___, No. 15–474, slip op. at 23 (2016) (narrowly interpreting the term "official act" to avoid a construction of the Hobbs Act and federal honest-services fraud statute that would allow public officials to be subject to prosecution without fair notice "for the most prosaic interactions" between officials and their constituents). [Back to text]

1104 Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940) (/supremecourt/text/309/270). [Back to text]

1105 *E.g.*, United States v. Freed, 401 U.S. 601 (1971) (/supremecourt/text/401/601). Persons may be bound by a novel application of a statute, not supported by Supreme Court or other "fundamentally similar" case precedent, so long as the court can find that, under the circumstance, "unlawfulness . . . is apparent" to the defendant. United States v. Lanier, 520 U.S. 259 (/supremecourt/text/520/259), 271–72 (1997). [Back to text]

1106 *E.g.*, Boyce Motor Lines v. United States, 342 U.S. 337 (1952) (/supremecourt/text/342/337); Colautti v. Franklin, 439 U.S. 379 (/supremecourt/text/439/379), 395 (1979). *Cf.* Screws v. United States, 325 U.S. 91 (/supremecourt/text/325/91), 101–03 (1945) (plurality opinion). The Court have even done so when the statute did not explicitly include such a *mens rea* requirement. *E.g.*, Morissette v. United States, 342 U.S. 246 (1952) (/supremecourt/text/342/246). [Back to text]

1107 *See, e.g.,* Lambert v. California, 355 U.S. 225 (1957) (/supremecourt/text/355/225) (invalidating a municipal code that made it a crime for anyone who had ever been convicted of a felony to remain in the city for more than five days without registering.). In *Lambert*, the Court emphasized that the act of being in the city was not itself blameworthy, holding that the failure to register was quite "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Id.* at 228, 229–30. [Back to text]

1108 532 U.S. 451 (2001) (/supremecourt/text/532/451). [Back to text]

1109 Bouie v. City of Columbia, 378 U.S. 347 (/supremecourt/text/378/347), 354 (1964). [Back to text]

1110 In *United States v. Beckles*, the Supreme Court concluded that the federal sentencing guidelines "do not fix the permissible range of sentences" and, therefore, are not subject to a vagueness challenge under the Due Process Clause. *See* 580 U.S. ___, No. 15–8544, slip op. at 5 (2017). Rather, the sentencing guidelines "merely guide the district courts' discretion." *Id.* at 8. In so concluding, the Court noted that the sentencing system that predated the use of the guidelines gave nearly unfettered discretion to judges in sentencing, and that discretion was never viewed as raising similar concerns. *Id.* Thus, the Court reasoned that it was "difficult to see how the present system of guided discretion" could raise vagueness concerns. *Id.* Moreover, the *Beckles* Court explained that "the advisory Guidelines . . . do not implicate the twin concerns underlying [the] vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* According to the Court, the only notice that is required regarding criminal sentences is provided to the defendant by the applicable statutory range and the guidelines. Further, the guidelines, which serve to advise courts how to exercise their discretion within the bounds set by Congress, simply do not regulate any conduct that can be arbitrarily enforced against a criminal defendant. *Id.* at 9. [Back to text]

1111 *See* United States v. Batchelder, 442 U.S. 114 (/supremecourt/text/442/114), 123 (1979). [Back to text]

1112 *See, e.g.*, Sykes v. United States, 564 U.S. 1 (2011) (/supremecourt/text/564/1); Chambers v. United States, 555 U.S. 122 (2009) (/supremecourt/text/555/122); Begay v. United States, 553 U.S. 137 (2008) (/supremecourt/text/553/137); James v. United States, 550 U.S. 192 (2007) (/supremecourt/text/550/192). [Back to text]

1113 *See* Johnson v. United States, 576 U.S. ___, No. 13–7120, slip op. (2015). [Back to text]

1114 *See* 18 U.S.C. § 924(e)(2)(B) (/uscode/text/18/924#e_2_B)(2012). [Back to text]

1115 *Johnson*, slip op. at 2–3. [Back to text]

1116 *See James*, 550 U.S. at 208. [Back to text]

1117 *Johnson*, slip op. at 5–6. [Back to text]

1118 *Id.* [Back to text]

1119 *See id.* at 6–10 ("Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise."). [Back to text]

1120 Some of that difficulty may be alleviated through electronic and other surveillance, which is covered by the search and seizure provisions of the Fourth Amendment (/constitution/fourth_amendment), or informers may be used, which also has constitutional implications. [Back to text]

1121 For instance, in Sorrells v. United States, 287 U.S. 435 (/supremecourt/text/287/435), 446–49 (1932) and Sherman v. United States, 356 U.S. 369 (/supremecourt/text/356/369), 380 (1958) government agents solicited defendants to engage in the illegal activity, in United States v. Russell, 411 U.S. 423 (/supremecourt/text/411/423), 490 (1973), the agents supplied a commonly available ingredient, and in Hampton v. United States, 425 U.S. 484 (/supremecourt/text/425/484), 488–89 (1976), the agents supplied an essential and difficult to obtain ingredient. [Back to text]

1122 For instance, this strategy was seen in the "Abscam" congressional bribery controversy. The defense of entrapment was rejected as to all the "Abscam" defendants. *E.g.*, United States v. Kelly, 707 F.2d 1460 (https://www.law.cornell.edu/rio/citation/707_F.2d_1460)(D.C. Cir. 1983); United States v. Williams, 705 F.2d 603 (https://www.law.cornell.edu/rio/citation/705_F.2d_603)(2d Cir. 1983); United States v. Jannotti, 673 F.2d 578 (https://www.law.cornell.edu/rio/citation/673_F.2d_578)(3d Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982) (/supremecourt/text/457/1106). [Back to text]

1123 For a thorough evaluation of the basis for and the nature of the entrapment defense, *see* Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111. The Court's first discussion of the issue was based on statutory grounds, *see* Sorrells v. United States, 287 U.S. 435 (/supremecourt/text/287/435), 446–49 (1932), and that basis remains the choice of some Justices. Hampton v. United States, 425 U.S. 484 (/supremecourt/text/425/484), 488–89 (1976) (plurality opinion of Justices Rehnquist and White and Chief Justice Burger). In Sherman v. United States, 356 U.S. 369 (/supremecourt/text/356/369), 380 (1958) (concurring), however, Justice Frankfurter based his opinion on the supervisory powers of the courts. In United States v. Russell, 411 U.S. 423 (/supremecourt/text/411/423), 490 (1973), however, the Court rejected the use of that power, as did a plurality in *Hampton*, 425 U.S. at 490. The *Hampton* plurality thought the Due Process Clause would never be applicable, no matter what conduct government agents engaged in, unless they violated some protected right of the defendant, and that inducement and encouragement could never do that. Justices Powell and Blackmun, on the other hand, 411 U.S. at 491, thought that police conduct, even in the case of a predisposed defendant, could be so outrageous as to violate due process. The *Russell* and *Hampton* dissenters did not clearly differentiate between the supervisory power and due process but seemed to believe that both were implicated. 411 U.S. at 495 (Justices Brennan, Stewart, and Marshall); *Russell*, 411 U.S. at 439 (Justices Stewart, Brennan, and Marshall). The Court again failed to clarify the basis for the defense in Mathews v. United States, 485 U.S. 58 (1988) (/supremecourt/text/485/58) (a defendant in a federal criminal case who denies commission of the crime is entitled to assert an "inconsistent" entrapment defense where the evidence warrants), and in Jacobson v. United States, 503 U.S. 540 (1992) (/supremecourt/text/503/540) (invalidating a conviction under the Child Protection Act of 1984 because government solicitation induced the defendant to purchase child pornography). [Back to text]

1124 An "objective approach," although rejected by the Supreme Court, has been advocated by some Justices and recommended for codification by Congress and the state legislatures. *See American Law Institute*, MODEL PENAL CODE§ 2.13 (Official Draft, 1962); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE§ 702(2) (Final Draft, 1971). The objective approach disregards the defendant's predisposition and looks to the inducements used by government agents. If the government employed means of persuasion or inducement creating a substantial risk that the person tempted will engage in the conduct, the defense would be available. Sorrells v. United States, 287 U.S. 435 (/supremecourt/text/287/435), 458–59 (1932) (separate opinion of Justice Roberts); Sherman v. United States, 356 U.S. 369 (/supremecourt/text/356/369), 383 (1958) (Justice Frankfurter concurring); United States v. Russell, 411 U.S. 423 (/supremecourt/text/411/423), 441 (1973) (Justice Stewart dissenting); Hampton v. United States, 425 U.S. 484 (/supremecourt/text/425/484), 496–97 (1976) (Justice Brennan dissenting). [Back to text]

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Jacobson v. United States, 503 U.S. 540 (/supremecourt/text/503/540), 548–49 (1992). Here the Court held that the government had failed to prove that the defendant was initially predisposed to purchase child pornography, even though he had become so predisposed following solicitation through an undercover "sting" operation. For several years government agents had sent the defendant mailings soliciting his views on pornography and child pornography, and urging him to obtain materials in order to fight censorship and stand up for individual rights. [Back to text]

1126 Sorrells v. United States, 287 U.S. 435 (/supremecourt/text/287/435), 451–52 (1932); Sherman v. United States, 356 U.S. 369 (/supremecourt/text/356/369), 376–78 (1958); Masciale v. United States, 356 U.S. 386 (/supremecourt/text/356/386), 388 (1958); United States v. Russell, 411 U.S. 423 (/supremecourt/text/411/423), 432–36 (1973); Hampton v. United States, 425 U.S. 484 (/supremecourt/text/425/484), 488–489 (1976) (plurality opinion), and id. at 491 (Justices Powell and Blackmun concurring). [Back to text]

1127 Jacobson v. United States, 503 U.S. 540 (/supremecourt/text/503/540), 553–54 (1992). [Back to text]

1128 A hearing by the trial judge on whether an eyewitness identification should be barred from admission is not constitutionally required to be conducted out of the presence of the jury. Watkins v. Sowders, 449 U.S. 341 (1981) (/supremecourt/text/449/341). [Back to text]

1129 *E.g.*, Manson v. Brathwaite, 432 U.S. 98 (/supremecourt/text/432/98), 114–17 (1977) (only one photograph provided to witness); Neil v. Biggers, 409 U.S. 188 (/supremecourt/text/409/188), 196–201 (1972) (showup in which police walked defendant past victim and ordered him to speak); Coleman v. Alabama, 399 U.S. 1 (1970) (/supremecourt/text/399/1) (lineup); Foster v. California, 394 U.S. 440 (1969) (/supremecourt/text/394/440) (two lineups, in one of which the suspect was sole participant above average height, and arranged one-on-one meeting between eyewitness and suspect); Simmons v. United States, 390 U.S. 377 (1968) (/supremecourt/text/390/377) (series of group photographs each of which contained suspect); Stovall v. Denno, 388 U.S. 293 (1967) (/supremecourt/text/388/293) (suspect brought to witness's hospital room). [Back to text]

1130 Perry v. New Hampshire, 565 U.S. ___, No. 10–8974, slip op. (2012) (prior to being approached by police for questioning, witness by chance happened to see suspect standing in parking lot near police officer; no manipulation by police alleged). [Back to text]

1131 *See* Perry v. New Hampshire, 565 U.S. ___, No. 10–8974, slip op. at 6–7, 15–17 (2012). [Back to text]

1132 "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. 188 (/supremecourt/text/409/188), 198 (1972). An identification process can be found to be suggestive regardless of police intent. Perry v. New Hampshire, 565 U.S. ___, No. 10–8974, slip op. at 2 & n.1 (2012) (circumstances of identification found to be suggestive but not contrived; no due process relief). The necessity of using a particular procedure depends on the circumstances. *E.g.*, Stovall v. Denno, 388 U.S. 293 (1967) (/supremecourt/text/388/293) (suspect brought handcuffed to sole witness's hospital room where it was uncertain whether witness would survive her wounds). [Back to text]

1133 Neil v. Biggers, 409 U.S. 188 (/supremecourt/text/409/188), 196–201 (1972); Manson v. Brathwaite, 432 U.S. 98 (/supremecourt/text/432/98), 114–17 (1977). The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *See also* Stovall v. Denno, 388 U.S. 293 (1967) (/supremecourt/text/388/293). [Back to text]

1134 The Court eschewed a *per se* exclusionary rule in due process cases at least as early as *Stovall*. 388 U.S. 293 (/supremecourt/text/388/293), 302 (1967). In Manson v. Brathwaite, the Court evaluated application of a *per se* rule versus the more flexible, *ad hoc* "totality of the circumstances" rule, and found the latter to be preferable in the interests of deterrence and the administration of justice. 432 U.S. 98 (/supremecourt/text/432/98), 111–14 (1977). The rule in due process cases differs from the *per se* exclusionary rule adopted in the *Wade-Gilbert* line of cases on denial of the right to counsel under the Sixth Amendment (/constitution/sixth_amendment) in post-indictment lineups. Cases refining the *Wade-Gilbert* holdings include Kirby v. Illinois, 406 U.S. 682 (1972) (/supremecourt/text/406/682) (right to counsel inapplicable to post-arrest police station identification made before formal initiation of criminal proceedings; due process protections remain available) and United States v. Ash, 413 U.S. 300 (1973) (/supremecourt/text/413/300) (right to counsel inapplicable at post-indictment display of photographs to prosecution witnesses out of defendant's presence; record insufficient to assess possible due process claim). [Back to text]

1135 Foster v. California, 394 U.S. 440 (1969) (/supremecourt/text/394/440) (5–4) ("[T]he pretrial confrontations [between the witness and the defendant] clearly were so arranged as to make the resulting identifications virtually inevitable."). In a limited class of cases, pre-trial identifications have been found to be constitutionally objectionable on a basis other than due process. *See* discussion of Assistance of Counsel under Amend. VI, "Lineups and Other Identification Situations." [Back to text]

1136 Snyder v. Massachusetts, 291 U.S. 97 (/supremecourt/text/291/97), 116, 117 (1934). *See also* Buchalter v. New York, 319 U.S. 427 (/supremecourt/text/319/427), 429 (1943). [Back to text]

1137 Lisenba v. California, 314 U.S. 219 (/supremecourt/text/314/219), 236 (1941). [Back to text]

1138 273 U.S. 510 (/supremecourt/text/273/510), 520 (1927). *See also* Ward v. Village of Monroeville, 409 U.S. 57 (1972) (/supremecourt/text/409/57). *But see* Dugan v. Ohio, 277 U.S. 61 (1928) (/supremecourt/text/277/61). Similarly, in *Rippo v. Baker*, the Supreme Court vacated the Nevada Supreme Court's denial of a convicted petitioner's application for post-conviction relief based on the trial judge's failure to recuse himself. 580 U.S. ___, No. 16–6316, slip op. (2017). During Rippo's trial, the trial judge was the target of a federal bribery probe by the same district attorney's office that was prosecuting Rippo. Rippo moved for the judge's disqualification under the Fourteenth Amendment (/constitution/fourteenth_amendment)'s Due Process Clause, arguing the "judge could not impartially adjudicate a case in which one of the parties was criminally investigating him." *Id.* at 1. After the judge was indicted on federal charges, a different judge subsequently assigned to the case denied Rippo's motion for a new trial. In vacating the Nevada Supreme Court's decision, the Supreme Court noted that "[u]nder our precedents, the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias.' Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 2 (quoting Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813 (/supremecourt/text/475/813), 825 (1986); Withrow v. Larkin, 421 U.S. 35 (/supremecourt/text/421/35), 47 (1975)). Bias or prejudice of an appellate judge can also deprive a litigant of due process. Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813 (1986) (/supremecourt/text/475/813) (failure of state supreme court judge with pecuniary interest—a pending suit on an indistinguishable claim—to recuse). [Back to text]

1139 Mayberry v. Pennsylvania, 400 U.S. 455 (/supremecourt/text/400/455), 464 (1971) ("it is generally wise where the marks of unseemly conduct have left personal stings [for a judge] to ask a fellow judge to take his place"); Taylor v. Hayes, 418 U.S. 488 (/supremecourt/text/418/488), 503 (1974) (where "marked personal feelings were present on both sides," a different judge should preside over a contempt hearing). *But see* Ungar v. Sarafite, 376 U.S. 575 (1964) (/supremecourt/text/376/575) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to authority"). In the context of alleged contempt before a judge acting as a one-man grand jury, the Court reversed criminal contempt convictions, saying: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re* Murchison, 349 U.S. 133 (/supremecourt/text/349/133), 136 (1955). [Back to text]

1140 Ordinarily the proper avenue of relief is a hearing at which the juror may be questioned and the defense afforded an opportunity to prove actual bias. Smith v. Phillips, 455 U.S. 209 (1982) (/supremecourt/text/455/209) (juror had job application pending with prosecutor's office during trial). *See also* Remmer v. United States, 347 U.S. 227 (1954) (/supremecourt/text/347/227) (bribe offer to sitting juror); Dennis v. United States, 339 U.S. 162 (/supremecourt/text/339/162), 167–72 (1950) (government employees on jury). But, a trial judge's refusal to question potential jurors about the contents of news reports to which they had been exposed did not violate the defendant's right to due process, it being sufficient that the judge on *voir dire* asked the jurors whether they could put aside what they had heard about the case, listen to the evidence with an open mind, and render an impartial verdict. Mu'Min v. Virginia, 500 U.S. 415 (1991) (/supremecourt/text/500/415). Nor is it a denial of due process for the prosecution, after a finding of guilt, to call the jury's attention to the defendant's prior criminal record, if the jury has been given a sentencing function to increase the sentence which would otherwise be given under a recidivist statute. Spencer v. Texas, 385 U.S. 554 (1967) (/supremecourt/text/385/554). For discussion of the requirements of jury impartiality about capital punishment, *see* discussion under Sixth Amendment (/constitution/sixth_amendment), *supra*. [Back to text]

1141 Frank v. Mangum, 237 U.S. 309 (1915) (/supremecourt/text/237/309); Moore v. Dempsey, 261 U.S. 86 (1923) (/supremecourt/text/261/86). [Back to text]

1142 Sheppard v. Maxwell, 384 U.S. 333 (1966) (/supremecourt/text/384/333); Rideau v. Louisiana, 373 U.S. 723 (1963) (/supremecourt/text/373/723); Irvin v. Dowd, 366 U.S. 717 (1961) (/supremecourt/text/366/717); *But see* Stroble v. California, 343 U.S. 181 (1952) (/supremecourt/text/343/181); Murphy v. Florida, 421 U.S. 794 (1975) (/supremecourt/text/421/794). [Back to text]

1143 Initially, the televising of certain trials was struck down on the grounds that the harmful potential effect on the jurors was substantial, that the testimony presented at trial may be distorted by the multifaceted influence of television upon the conduct of witnesses, that the judge's ability to preside over the trial and guarantee fairness is considerably encumbered to the possible detriment of fairness, and that the defendant is likely to be harassed by his television exposure. Estes v. Texas, 381 U.S. 532 (1965) (/supremecourt/text/381/532). Subsequently, however, in part because of improvements in technology which caused much less disruption of the trial process and in part because of the lack of empirical data showing that the mere presence of the broadcast media in the courtroom necessarily has an adverse effect on the process, the Court has held that due process does not altogether preclude the televising of state criminal trials. Chandler v. Florida, 449 U.S. 560 (1981) (/supremecourt/text/449/560). The decision was unanimous but Justices Stewart and White concurred on the basis that *Estes* had established a *per se* constitutional rule which had to be overruled, id. at 583, 586, contrary to the Court's position. Id. at 570–74. [Back to text]

1144 For instance, the presumption of innocence has been central to a number of Supreme Court cases. Under some circumstances it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence, although the burden on the defendant is heavy to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction. Taylor v. Kentucky, 436 U.S. 478 (1978) (/supremecourt/text/436/478). However, an instruction on the presumption of innocence need not be given in every case. Kentucky v. Whorton, 441 U.S. 786 (1979) (/supremecourt/text/441/786) (reiterating that the totality of the circumstances must be looked to in order to determine if failure to so instruct denied due process). The circumstances emphasized in *Taylor* included skeletal instructions on burden of proof combined with the prosecutor's remarks in his opening and closing statements inviting the jury to consider the defendant's

prior record and his indictment in the present case as indicating guilt. *See also* Sandstrom v. Montana, 442 U.S. 510 (1979) (/supremecourt/text/442/510) (instructing jury trying person charged with "purposely or knowingly" causing victim's death that "law presumes that a person intends the ordinary consequences of his voluntary acts" denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event state would not have carried its burden of proving guilt). *See also* Cupp v. Naughten, 414 U.S. 141 (1973) (/supremecourt/text/414/141); Henderson v. Kibbe, 431 U.S. 145 (/supremecourt/text/431/145), 154–55 (1973). For other cases applying *Sandstrom*, *see* Francis v. Franklin, 471 U.S. 307 (1985) (/supremecourt/text/471/307) (contradictory but ambiguous instruction not clearly explaining state's burden of persuasion on intent does not erase *Sandstrom* error in earlier part of charge); Rose v. Clark, 478 U.S. 570 (1986) (/supremecourt/text/478/570) (*Sandstrom* error can in some circumstances constitute harmless error under principles of Chapman v. California, 386 U.S. 18 (1967) (/supremecourt/text/386/18)); Middleton v. McNeil, 541 U.S. 433 (2004) (/supremecourt/text/541/433) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear). Similarly, improper arguments by a prosecutor do not necessarily constitute "plain error," and a reviewing court may consider in the context of the entire record of the trial the trial court's failure to redress such error in the absence of contemporaneous objection. United States v. Young, 470 U.S. 1 (1985) (/supremecourt/text/470/1). [Back to text]

1145 Rock v. Arkansas, 483 U.S. 44 (1987) (/supremecourt/text/483/44). [Back to text]

1146 Wardius v. Oregon, 412 U.S. 470 (1973) (/supremecourt/text/412/470). [Back to text]

1147 Estelle v. Williams, 425 U.S. 501 (1976) (/supremecourt/text/425/501). The convicted defendant was denied *habeas* relief, however, because of failure to object at trial. *But cf.* Holbrook v. Flynn, 475 U.S. 560 (1986) (/supremecourt/text/475/560) (presence in courtroom of uniformed state troopers serving as security guards was not the same sort of inherently prejudicial situation); Carey v. Musladin, 549 U.S. 70 (2006) (/supremecourt/text/549/70) (effect on defendant's fair-trial rights of private-actor courtroom conduct—in this case, members of victim's family wearing buttons with the victim's photograph—has never been addressed by the Supreme Court and therefore 18 U.S.C. § 2254(d)(1) precludes *habeas* relief; see Amendment 8, Limitations on Habeas Corpus Review of Capital Sentences). [Back to text]

1148 544 U.S. 622 (2005) (/supremecourt/text/544/622). [Back to text]

1149 544 U.S. at 626. In Illinois v. Allen, 397 U.S. 337 (/supremecourt/text/397/337), 344 (1970), the Court stated, in dictum, that "no person should be tried while shackled and gagged except as a last resort." [Back to text]

1150 544 U.S. at 630, 631 (internal quotation marks omitted). [Back to text]

1151 The defendant called the witness because the prosecution would not. [Back to text]

1152 Chambers v. Mississippi, 410 U.S. 284 (1973) (/supremecourt/text/410/284). *See also* Davis v. Alaska, 415 U.S. 786 (1974) (/supremecourt/text/415/786) (refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, in order to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid); Crane v. Kentucky, 476 U.S. 683 (1986) (/supremecourt/text/476/683) (exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession); Holmes v. South Carolina, 547 U.S. 319 (2006) (/supremecourt/text/547/319) (overturning rule that evidence of third-party guilt can be excluded if there is strong forensic evidence establishing defendant's culpability). *But see* Montana v. Egelhoff, 518 U.S. 37 (1996) (/supremecourt/text/518/37) (state may bar defendant from introducing evidence of intoxication to prove lack of *mens rea*). [Back to text]

1153 North v. Russell, 427 U.S. 328 (1976) (/supremecourt/text/427/328). [Back to text]

1154 Mooney v. Holohan, 294 U.S. 103 (/supremecourt/text/294/103), 112 (1935). [Back to text]

1155 The Court dismissed the petitioner's suit on the ground that adequate process existed in the state courts to correct any wrong and that petitioner had not availed himself of it. A state court subsequently appraised the evidence and ruled that the allegations had not been proved in *Ex parte* Mooney, 10 Cal. 2d 1, 73 P.2d 554 (1937), *cert. denied*, 305 U.S. 598 (1938) (/supremecourt/text/305/598). [Back to text]

1156 Pyle v. Kansas, 317 U.S. 213 (1942) (/supremecourt/text/317/213); White v. Ragen, 324 U.S. 760 (1945) (/supremecourt/text/324/760). *See also* New York ex rel. Whitman v. Wilson, 318 U.S. 688 (1943) (/supremecourt/text/318/688); *Ex parte* Hawk, 321 U.S. 114 (1914) (/supremecourt/text/321/114). *But see* Hysler v. Florida, 315 U.S. 411 (1942) (/supremecourt/text/315/411); Lisenba v. California, 314 U.S. 219 (1941) (/supremecourt/text/314/219). [Back to text]

1157 Napue v. Illinois, 360 U.S. 264 (1959) (/supremecourt/text/360/264); Alcorta v. Texas, 355 U.S. 28 (1957) (/supremecourt/text/355/28). In the former case, the principal prosecution witness was defendant's accomplice, and he testified that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but did nothing to correct the false testimony. *See also* Giglio v. United States, 405 U.S. 150 (1972) (/supremecourt/text/405/150) (same). In the latter case, involving a husband's killing of his wife because of her infidelity, a prosecution witness testified at the *habeas corpus* hearing that he told the prosecutor that he had been intimate with the woman

but that the prosecutor had told him to volunteer nothing of it, so that at trial he had testified his relationship with the woman was wholly casual. In both cases, the Court deemed it irrelevant that the false testimony had gone only to the credibility of the witness rather than to the defendant's guilt. What if the prosecution should become aware of the perjury of a prosecution witness following the trial? *Cf.* Durley v. Mayo, 351 U.S. 277 (1956) (/supremecourt/text/351/277). *But see* Smith v. Phillips, 455 U.S. 209 (/supremecourt/text/455/209), 218–21 (1982) (prosecutor's failure to disclose that one of the jurors has a job application pending before him, thus rendering him possibly partial, does not go to fairness of the trial and due process is not violated). [Back to text]

1158 386 U.S. 1 (1967) (/supremecourt/text/386/1). [Back to text]

1159 The Constitution does not require the government, prior to entering into a binding plea agreement with a criminal defendant, to disclose impeachment information relating to any informants or other witnesses against the defendant. United States v. Ruiz, 536 U.S. 622 (2002) (/supremecourt/text/536/622). Nor has it been settled whether inconsistent prosecutorial theories in separate cases can be the basis for a due process challenge. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (/supremecourt/text/545/175) (Court remanded case to determine whether death sentence was based on defendant's role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting). [Back to text]

1160 373 U.S. 83 (/supremecourt/text/373/83), 87 (1963). In Jencks v. United States, 353 U.S. 657 (1957) (/supremecourt/text/353/657), in the exercise of its supervisory power over the federal courts, the Court held that the defense was entitled to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses during the investigatory stage. *Cf.* Scales v. United States, 367 U.S. 203 (/supremecourt/text/367/203), 257–58 (1961). A subsequent statute modified but largely codified the decision and was upheld by the Court. Palermo v. United States, 360 U.S. 343 (1959) (/supremecourt/text/360/343), sustaining 18 U.S.C. § 3500. [Back to text]

1161 Although the state court in *Brady* had allowed a partial retrial so that the accomplice's confession could be considered in the jury's determination of whether to impose capital punishment, it had declined to order a retrial of the guilt phase of the trial. The defendant's appeal of this latter decision was rejected, as the issue, as the Court saw it, was whether the state court could have excluded the defendant's confessed participation in the crime on evidentiary grounds, as the defendant had confessed to facts sufficient to establish grounds for the crime charged. [Back to text]

1162 Moore v. Illinois, 408 U.S. 786 (/supremecourt/text/408/786), 794–95 (1972) (finding *Brady* inapplicable because the evidence withheld was not material and not exculpatory). *See also* Wood v. Bartholomew, 516 U.S. 1 (1995) (/supremecourt/text/516/1) (per curiam) (holding no due process violation where prosecutor's failure to disclose the result of a witness' polygraph test would not have affected the outcome of the case). The beginning in *Brady* toward a general requirement of criminal discovery was not carried forward. *See* the division of opinion in Giles v. Maryland, 386 U.S. 66 (1967) (/supremecourt/text/386/66). In Cone v. Bell, 556 U.S. ___, No. 07–1114, slip op. at 23, 27 (2009), the Court emphasized the distinction between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment, and concluded that, although the evidence that had been suppressed was not material to the defendant's conviction, the lower courts had erred in failing to assess its effect with respect to the defendant's capital sentence. [Back to text]

1163 427 U.S. 97 (1976) (/supremecourt/text/427/97). [Back to text]

1164 427 U.S. at 103–04. This situation is the Mooney v. Holohan-type of case. [Back to text]

1165 A statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263 (/supremecourt/text/527/263), 283–84 (1999); Banks v. Dretke, 540 U.S. 668 (/supremecourt/text/540/668), 693 (2004). [Back to text]

1166 427 U.S. at 104–06. This the *Brady* situation. [Back to text]

1167 427 U.S. at 106–14. This was the *Agurs* fact situation. Similarly, there is no obligation that law enforcement officials preserve breath samples that have been used in a breath-analysis test; to meet the *Agurs* materiality standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479 (/supremecourt/text/467/479), 489 (1984). *See also* Arizona v. Youngblood, 488 U.S. 51 (1988) (/supremecourt/text/488/51) (negligent failure to refrigerate and otherwise preserve potentially exculpatory physical evidence from sexual assault kit does not violate a defendant's due process rights absent bad faith on the part of the police); Illinois v. Fisher, 540 U.S. 544 (2004) (/supremecourt/text/540/544) (per curiam) (the routine destruction of a bag of cocaine 11 years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process). [Back to text]

1168 473 U.S. 667 (1985) (/supremecourt/text/473/667). [Back to text]

1169 473 U.S. at 682. Or, to phrase it differently, a *Brady* violation is established by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Kyles v. Whitley, 514 U.S. 419 (/supremecourt/text/514/419), 435 (1995). *Accord* Smith v. Cain, 565 U.S. ___, No. 10–8145, slip op. (2012) (prior inconsistent statements of sole eyewitness withheld from defendant; state lacked other evidence sufficient to sustain confidence in the verdict independently). [Back to text]

1170 *See* United States v. Malenzuela-Bernal, 458 U.S. 858 (1982) (/supremecourt/text/458/858) (testimony made unavailable by Government deportation of witnesses); Strickland v. Washington, 466 U.S. 668 (1984) (/supremecourt/text/466/668) (incompetence of counsel). [Back to text]

1171 473 U.S. at 676–77. *See also* Wearry v. Cain, 577 U.S. ___, No. 14–10008, slip op. at 9 (2016) (per curiam) (finding that a state post-conviction court had improperly (1) evaluated the materiality of each piece of evidence in isolation, rather than cumulatively; (2) emphasized reasons jurors might disregard the new evidence, while ignoring reasons why they might not; and (3) failed to consider the statements of two impeaching witnesses). [Back to text]

1172 Strickler v. Greene, 527 U.S. 263 (/supremecourt/text/527/263), 296 (1999); *see also* Turner v. United States, 582 U.S. ___, No. 15–1503, slip op. at 12 (2017) (holding that, when considering the withheld evidence in the context of the entire record, the evidence was "too little, too weak, or too distant" from the central evidentiary issues in the case to meet *Brady's* standards for materiality.) [Back to text]

1173 Youngblood v. West Virginia, 547 U.S. 867 (/supremecourt/text/547/867), 869–70 (2006) (per curiam), quoting Kyles v. Whitley, 514 U.S. 419 (/supremecourt/text/514/419), 438, 437 (1995). [Back to text]

1174 Miles v. United States, 103 U.S. 304 (/supremecourt/text/103/304), 312 (1881); Davis v. United States, 160 U.S. 469 (/supremecourt/text/160/469), 488 (1895); Holt v. United States, 218 U.S. 245 (/supremecourt/text/218/245), 253 (1910); Speiser v. Randall, 357 U.S. 513 (/supremecourt/text/357/513), 525–26 (1958). [Back to text]

1175 *In re* Winship, 397 U.S. 358 (/supremecourt/text/397/358), 364 (1970). *See* Estelle v. Williams, 425 U.S. 501 (/supremecourt/text/425/501), 503 (1976); Henderson v. Kibbe, 431 U.S. 145 (/supremecourt/text/431/145), 153 (1977); Ulster County Court v. Allen, 442 U.S. 140 (/supremecourt/text/442/140), 156 (1979); Sandstrom v. Montana, 442 U.S. 510 (/supremecourt/text/442/510), 520–24 (1979). *See also* Sullivan v. Louisiana, 508 U.S. 275 (1993) (/supremecourt/text/508/275) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt). On the interrelationship of the reasonable doubt burden and defendant's entitlement to a presumption of innocence, *see* Taylor v. Kentucky, 436 U.S. 478 (/supremecourt/text/436/478), 483–86 (1978), and Kentucky v. Whorton, 441 U.S. 786 (1979) (/supremecourt/text/441/786). [Back to text]

1176 *E.g.*, Deutch v. United States, 367 U.S. 456 (/supremecourt/text/367/456), 471 (1961). *See also* Cage v. Louisiana, 498 U.S. 39 (1990) (/supremecourt/text/498/39) (per curiam) (jury instruction that explains "reasonable doubt" as doubt that would give rise to a "grave uncertainty," as equivalent to a "substantial doubt," and as requiring "a moral certainty," suggests a higher degree of certainty than is required for acquittal, and therefore violates the Due Process Clause). *But see* Victor v. Nebraska, 511 U.S. 1 (1994) (/supremecourt/text/511/1) (considered as a whole, jury instructions that define "reasonable doubt" as requiring a "moral certainty" or as equivalent to "substantial doubt" did not violate due process because other clarifying language was included.) [Back to text]

1177 Holt v. United States, 218 U.S. 245 (1910) (/supremecourt/text/218/245); Agnew v. United States, 165 U.S. 36 (1897) (/supremecourt/text/165/36). These cases overturned Coffin v. United States, 156 U.S. 432 (/supremecourt/text/156/432), 460 (1895), in which the Court held that the presumption of innocence was evidence from which the jury could find a reasonable doubt. [Back to text]

1178 397 U.S. at 363 (quoting Coffin v. United States, 156 U.S. 432 (/supremecourt/text/156/432), 453 (1895)). Justice Harlan's *Winship* concurrence, id. at 368, proceeded on the basis that, because there is likelihood of error in any system of reconstructing past events, the error of convicting the innocent should be reduced to the greatest extent possible through the use of the reasonable doubt standard. [Back to text]

1179 Thompson v. City of Louisville, 362 U.S. 199 (1960) (/supremecourt/text/362/199); Garner v. Louisiana, 368 U.S. 157 (1961) (/supremecourt/text/368/157); Taylor v. Louisiana, 370 U.S. 154 (1962) (/supremecourt/text/370/154); Barr v. City of Columbia, 378 U.S. 146 (1964) (/supremecourt/text/378/146); Johnson v. Florida, 391 U.S. 596 (1968) (/supremecourt/text/391/596). *See also* Chessman v. Teets, 354 U.S. 156 (1957) (/supremecourt/text/354/156). [Back to text]

1180 443 U.S. 307 (1979) (/supremecourt/text/443/307). [Back to text]

1181 *Id.* at 316, 18–19. *See also* Musacchio v. United States, 577 U.S. ___, No. 14–1095, slip op. (2016) ("When a jury finds guilt after being instructed on all elements of the charged crime plus one more element," the fact that the government did not introduce evidence of the additional element—which was not required to prove the offense, but was included in the erroneous jury instruction—"does not implicate the principles that sufficiency review protects."); Griffin v. United States, 502 U.S. 46 (1991) (/supremecourt/text/502/46) (general guilty verdict on a multiple-object conspiracy need not be set aside if the evidence is inadequate to support conviction as to one of the objects of the conviction, but is adequate to support conviction as to another object). [Back to text]

1182 Bunkley v. Florida, 538 U.S. 835 (2003) (/supremecourt/text/538/835); Fiore v. White, 528 U.S. 23 (1999) (/supremecourt/text/528/23). These cases both involved defendants convicted under state statutes that were subsequently interpreted in a way that would have precluded their conviction. The Court remanded the cases to determine if the new interpretation was in effect at the time of the previous convictions, in which case those convictions would violate due process. [Back to text]

1183 421 U.S. 684 (1975) (/supremecourt/text/421/684). *See also* Sandstrom v. Montana, 442 U.S. 510 (/supremecourt/text/442/510), 520–24 (1979). [Back to text]

1184 The general notion of "burden of proof " can be divided into the "burden of production" (providing probative evidence on a particular issue) and a "burden of persuasion" (persuading the factfinder with respect to an issue by a standard such as proof beyond a reasonable doubt). *Mullaney*, 421 U.S. at 695 n.20. [Back to text]

1185 Rivera v. Delaware, 429 U.S. 877 (1976) (/supremecourt/text/429/877), dismissing as not presenting a substantial federal question an appeal from a holding that *Mullaney* did not prevent a state from placing on the defendant the burden of proving insanity by a preponderance of the evidence. *See* Patterson v. New York, 432 U.S. 197 (/supremecourt/text/432/197), 202–05 (1977) (explaining the import of *Rivera*). Justice Rehnquist and Chief Justice Burger concurring in *Mullaney*, 421 U.S. at 704, 705, had argued that the case did not require any reconsideration of the holding in Leland v. Oregon, 343 U.S. 790 (1952) (/supremecourt/text/343/790), that the defense may be required to prove insanity beyond a reasonable doubt. [Back to text]

1186 432 U.S. 197 (1977) (/supremecourt/text/432/197). [Back to text]

1187 Proving the defense would reduce a murder offense to manslaughter. [Back to text]

1188 The decisive issue, then, was whether the statute required the state to prove beyond a reasonable doubt each element of the offense. *See also* Dixon v. United States, 548 U.S. 1 (2006) (/supremecourt/text/548/1) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). In *Dixon*, the prosecution had the burden of proving all elements of two federal firearms violations, one requiring a "willful" violation (having knowledge of the facts that constitute the offense) and the other requiring a "knowing" violation (acting with knowledge that the conduct was unlawful). Although establishing other forms of *mens rea* (such as "malicious intent") might require that a prosecutor prove that a defendant's intent was without justification or excuse, the Court held that neither of the forms of *mens rea* at issue in *Dixon* contained such a requirement. Consequently, the burden of establishing the defense of duress could be placed on the defendant without violating due process. [Back to text]

1189 Dissenting in *Patterson*, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold that as to those facts that historically have made a substantial difference in the punishment and stigma flowing from a criminal act the state always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. 432 U.S. at 216. *Patterson* was followed in Martin v. Ohio, 480 U.S. 228 (1987) (/supremecourt/text/480/228) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is "prior calculation and design"). Justice Powell, again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. Id. at 236, 240. [Back to text]

1190 548 U.S. 735 (2006) (/supremecourt/text/548/735). [Back to text]

1191 548 U.S. at 770, 774. [Back to text]

1192 McMillan v. Pennsylvania, 477 U.S. 79 (1986) (/supremecourt/text/477/79). It should be noted that these type of cases may also implicate the Sixth Amendment, as the right to a jury extends to all facts establishing the elements of a crime, while sentencing factors may be evaluated by a judge. *See* discussion in "Criminal Proceedings to Which the Guarantee Applies," *supra*. [Back to text]

1193 530 U.S. 466 (/supremecourt/text/530/466), 490 (2000) (interpreting New Jersey's "hate crime" law). It should be noted that, prior to its decision in *Apprendi*, the Court had held that sentencing factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986) (/supremecourt/text/477/79). Although the vitality of *McMillan* was put in doubt by *Apprendi*, *McMillan* was subsequently reaffirmed in Harris v. United States, 536 U.S. 545 (2002) (/supremecourt/text/536/545). [Back to text]

1194 Walton v. Arizona, 497 U.S. 639 (1990) (/supremecourt/text/497/639), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002). [Back to text]

1195 This limiting principle does not apply to sentencing enhancements based on recidivism. *Apprendi*, 530 U.S. at 490. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (/supremecourt/text/523/224) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (/supremecourt/text/506/20) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction). [Back to text]

1196 *See*, *e.g.*, Yee Hem v. United States, 268 U.S. 178 (1925) (/supremecourt/text/268/178) (upholding statute that proscribed possession of smoking opium that had been illegally imported and authorized jury to presume illegal importation from fact of possession); Manley v. Georgia, 279 U.S. 1 (1929) (/supremecourt/text/279/1) (invalidating statutory presumption that every insolvency of a bank shall be deemed fraudulent). [Back to text]

1197

319 U.S. 463 (/supremecourt/text/319/463), 467–68 (1943). *Compare* United States v. Gainey, 380 U.S. 63 (1965) (/supremecourt/text/380/63) (upholding presumption from presence at site of illegal still that defendant was "carrying on" or aiding in "carrying on" its operation), *with* United States v. Romano, 382 U.S. 136 (1965) (/supremecourt/text/382/136) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still). [Back to text]

1198 395 U.S. 6 (/supremecourt/text/395/6), 36 (1969). [Back to text]

1199 395 U.S. at 37–54. Although some of the reasoning in *Yee Hem*, *supra*, was disapproved, it was factually distinguished as involving users of "hard" narcotics. [Back to text]

1200 395 U.S. at 36 n.64. The matter was also left open in Turner v. United States, 396 U.S. 398 (1970) (/supremecourt/text/396/398) (judged by either "rational connection" or "reasonable doubt," a presumption that the possessor of heroin knew it was illegally imported was valid, but the same presumption with regard to cocaine was invalid under the "rational connection" test because a great deal of the substance was produced domestically), and in Barnes v. United States, 412 U.S. 837 (1973) (/supremecourt/text/412/837) (under either test a presumption that possession of recently stolen property, if not satisfactorily explained, is grounds for inferring possessor knew it was stolen satisfies due process). [Back to text]

1201 Ulster County Court v. Allen, 442 U.S. 140 (/supremecourt/text/442/140), 167 (1979). [Back to text]

1202 442 U.S. at 167. [Back to text]

1203 442 U.S. at 142. The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. 442 U.S. at 168. *See also* Estelle v. McGuire, 502 U.S. 62 (1991) (/supremecourt/text/502/62) (upholding a jury instruction that, to dissenting Justices O'Connor and Stevens, id. at 75, seemed to direct the jury to draw the inference that evidence that a child had been "battered" in the past meant that the defendant, the child's father, had necessarily done the battering). [Back to text]

1204 Pate v. Robinson, 383 U.S. 375 (/supremecourt/text/383/375), 378 (1966) (citing Bishop v. United States, 350 U.S. 961 (1956) (/supremecourt/text/350/961)). The standard for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (/supremecourt/text/362/402) (per curiam), cited with approval in Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008). The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. Indiana v. Edwards, *supra*. [Back to text]

1205 Pate v. Robinson, 383 U.S. 375 (/supremecourt/text/383/375), 378 (1966); *see also* Drope v. Missouri, 420 U.S. 162 (/supremecourt/text/420/162), 180 (1975) (noting the relevant circumstances that may require a trial court to inquire into the mental competency of the defendant). In *Ake v. Oklahoma*, the Court established that, when an indigent defendant's mental condition is both relevant to the punishment and seriously in question, the state must provide the defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." 470 U.S. 68 (/supremecourt/text/470/68), 83 (1985). While the Court has not decided whether *Ake* requires that the state provide a qualified mental health expert who is available exclusively to the defense team, *see* McWilliams v. Dunn, 582 U.S. ___, No. 16–5294, slip op. at 13 (2017), a state nevertheless deprives an indigent defendant of due process when it provides a competent psychiatrist only to *examine* the defendant without also requiring that an expert provide the defense with help in evaluating, preparing, and presenting its case. *Id.* at 15. [Back to text]

1206 Medina v. California, 505 U.S. 437 (1992) (/supremecourt/text/505/437). It is a violation of due process, however, for a state to require that a defendant must prove competence to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996) (/supremecourt/text/517/348). [Back to text]

1207 Jackson v. Indiana, 406 U.S. 715 (1972) (/supremecourt/text/406/715). [Back to text]

1208 Clark v. Arizona, 548 U.S. 735 (2006) (/supremecourt/text/548/735). [Back to text]

1209 *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), states that "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep., at 722. [Back to text]

1210 *See* Queen v. Oxford, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible"). [Back to text]

1211 *See* State v. Jones, 50 N.H. 369 (1871) ("If the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty; he is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance"). [Back to text]

1212 *Clark*, 548 U.S. at 752. In *Clark*, the Court considered an Arizona statute, based on the *M'Naghten* case, that was amended to eliminate the defense of cognitive incapacity. The Court noted that, despite the amendment, proof of cognitive incapacity could still be introduced as it would be relevant (and sufficient) to prove the remaining moral incapacity test. Id. at 753. [Back to text]

1213 Jones v. United States, 463 U.S. 354 (1983) (/supremecourt/text/463/354). The fact that the affirmative defense of insanity need only be established by a preponderance of the evidence, while civil commitment requires the higher standard of clear and convincing evidence, does not render the former invalid; proof beyond a reasonable doubt of commission of a criminal act establishes dangerousness justifying confinement and eliminates the risk of confinement for mere idiosyncratic behavior. [Back to text]

1214 463 U.S. at 368. [Back to text]

1215 463 U.S. at 370. [Back to text]

1216 Foucha v. Louisiana, 504 U.S. 71 (1992) (/supremecourt/text/504/71). [Back to text]

1217 477 U.S. 399 (1986) (/supremecourt/text/477/399). [Back to text]

1218 There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." Id. at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court's holding. [Back to text]

1219 477 U.S. at 416–17. [Back to text]

1220 536 U.S. at 317 (citation omitted), quoting Ford v. Wainwright, 477 U.S. 399 (/supremecourt/text/477/399), 416–17 (1986). The Court quoted this language again in Schriro v. Smith, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." 546 (/supremecourt/text/546/6) U.S. 6, 7 (2005) (per curiam). States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge." Id. [Back to text]

1221 494 U.S. 210 (1990) (/supremecourt/text/494/210) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others). [Back to text]

1222 539 U.S. 166 (2003) (/supremecourt/text/539/166). [Back to text]

1223 For instance, if the defendant is likely to remain civilly committed absent medication, this would diminish the government's interest in prosecution. 539 U.S. at 180. [Back to text]

1224 There are a number of other reasons why a defendant may be willing to plead guilty. There may be overwhelming evidence against him or his sentence after trial will be more severe than if he pleads guilty. [Back to text]

1225 United States v. Jackson, 390 U.S. 570 (1968) (/supremecourt/text/390/570). [Back to text]

1226 North Carolina v. Alford, 400 U.S. 25 (1971) (/supremecourt/text/400/25); Parker v. North Carolina, 397 U.S. 790 (1970) (/supremecourt/text/397/790). *See also* Brady v. United States, 397 U.S. 742 (1970) (/supremecourt/text/397/742). A guilty plea will ordinarily waive challenges to alleged unconstitutional police practices occurring prior to the plea, unless the defendant can show that the plea resulted from incompetent counsel. Tollett v. Henderson, 411 U.S. 258 (1973) (/supremecourt/text/411/258); Davis v. United States, 411 U.S. 233 (1973) (/supremecourt/text/411/233). *But see* Blackledge v. Perry, 417 U.S. 21 (1974) (/supremecourt/text/417/21). The state can permit pleas of guilty in which the defendant reserves the right to raise constitutional questions on appeal, and federal *habeas* courts will honor that arrangement. Lefkowitz v. Newsome, 420 U.S. 283 (1975) (/supremecourt/text/420/283). Release-dismissal agreements, pursuant to which the prosecution agrees to dismiss criminal charges in exchange for the defendant's agreement to release his right to file a civil action for alleged police or prosecutorial misconduct, are not *per se* invalid. Town of Newton v. Rumery, 480 U.S. 386 (1987). [Back to text]

1227 Blackledge v. Allison, 431 U.S. 63 (/supremecourt/text/431/63), 71 (1977). [Back to text]

1228 Bordenkircher v. Hayes, 434 U.S. 357 (1978) (/supremecourt/text/434/357). Charged with forgery, Hayes was informed during plea negotiations that if he would plead guilty the prosecutor would recommend a five-year sentence; if he did not plead guilty, the prosecutor would also seek an indictment under the habitual criminal statute under which Hayes, because of two prior felony convictions, would receive a mandatory life sentence if convicted. Hayes refused to plead, was reindicted, and upon conviction was sentenced to life. Four Justices dissented, id. at 365, 368, contending that the Court had watered down North Carolina v. Pearce, 395 U.S. 711 (1969) (/supremecourt/text/395/711). *See also* United States v. Goodwin, 457 U.S. 368 (1982) (/supremecourt/text/457/368) (after defendant was charged with a misdemeanor, refused to plead guilty and sought a jury trial in district court, the government obtained a four-count felony indictment and conviction). [Back to text]

1229 Blackledge v. Perry, 417 U.S. 21 (1974) (/supremecourt/text/417/21). Defendant was convicted in an inferior court of a misdemeanor. He had a right to a *de novo* trial in superior court, but when he exercised the right the prosecutor obtained a felony indictment based upon the same conduct. The distinction the Court draws between this case and *Bordenkircher* and *Goodwin* is that of pretrial conduct, in which vindictiveness is not likely, and post-trial conduct, in which vindictiveness is more

likely and is not permitted. *Accord*, Thigpen v. Roberts, 468 U.S. 27 (1984) (/supremecourt/text/468/27). The distinction appears to represent very fine line-drawing, but it appears to be one the Court is committed to. [Back to text]

1230 Boykin v. Alabama, 395 U.S. 238 (1969) (/supremecourt/text/395/238). In Henderson v. Morgan, 426 U.S. 637 (1976) (/supremecourt/text/426/637), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily, in the constitutional sense, entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt in the second degree; consequently no showing was made that he knowingly was admitting such intent. "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Id. at 645 n.13. However, this does not mean that a court accepting a guilty plea must explain all the elements of a crime, as it may rely on counsel's representations to the defendant. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (/supremecourt/text/545/175) (where defendant maintained that shooting was done by someone else, guilty plea to aggravated manslaughter was still valid, as such charge did not require defendant to be the shooter). *See also* Blackledge v. Allison, 431 U.S. 63 (1977) (/supremecourt/text/431/63) (defendant may collaterally challenge guilty plea where defendant had been told not to allude to existence of a plea bargain in court, and such plea bargain was not honored). [Back to text]

1231 Santobello v. New York, 404 U.S. 257 (/supremecourt/text/404/257), 262 (1971). Defendant and a prosecutor reached agreement on a guilty plea in return for no sentence recommendation by the prosecution. At the sentencing hearing months later, a different prosecutor recommended the maximum sentence, and that sentence was imposed. The Court vacated the judgment, holding that the prosecutor's entire staff was bound by the promise. Prior to the plea, however, the prosecutor may withdraw his first offer, and a defendant who later pled guilty after accepting a second, less attractive offer has no right to enforcement of the first agreement. Mabry v. Johnson, 467 U.S. 504 (1984) (/supremecourt/text/467/504). [Back to text]

1232 In Townsend v. Burke, 334 U.S. 736 (/supremecourt/text/334/736), 740–41 (1948) the Court overturned a sentence imposed on an uncounseled defendant by a judge who in reciting defendant's record from the bench made several errors and facetious comments. "[W]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." [Back to text]

1233 In Hicks v. Oklahoma, 447 U.S. 343 (1980) (/supremecourt/text/447/343), the jury had been charged in accordance with a habitual offender statute that if it found defendant guilty of the offense charged, which would be a third felony conviction, it should assess punishment at 40 years imprisonment. The jury convicted and gave defendant 40 years. Subsequently, in another case, the habitual offender statute under which Hicks had been sentenced was declared unconstitutional, but Hicks' conviction was affirmed on the basis that his sentence was still within the permissible range open to the jury. The Supreme Court reversed. Hicks was denied due process because he was statutorily entitled to the exercise of the jury's discretion and could have been given a sentence as low as ten years. That the jury might still have given the stiffer sentence was only conjectural. On other due process restrictions on the determination of the applicability of recidivist statutes to convicted defendants, *see* Chewning v. Cunningham, 368 U.S. 443 (1962) (/supremecourt/text/368/443); Oyler v. Boles, 368 U.S. 448 (1962) (/supremecourt/text/368/448); Spencer v. Texas, 385 U.S. 554 (1967) (/supremecourt/text/385/554); Parke v. Raley, 506 U.S. 20 (1992) (/supremecourt/text/506/20). [Back to text]

1234 Due process does not impose any limitation upon the sentence that a legislature may affix to any offense; that function is in the Eighth Amendment (/constitution/eighth_amendment). Williams v. Oklahoma, 358 U.S. 576 (/supremecourt/text/358/576), 586–87 (1959). *See also* Collins v. Johnston, 237 U.S. 502 (1915) (/supremecourt/text/237/502). On recidivist statutes, *see* Graham v. West Virginia, 224 U.S. 616 (/supremecourt/text/224/616), 623 (1912); Ughbanks v. Armstrong, 208 U.S. 481 (/supremecourt/text/208/481), 488 (1908), and, under the Eighth Amendment, Rummel v. Estelle, 445 U.S. 263 (1980) (/supremecourt/text/445/263). [Back to text]

1235 337 U.S. 241 (1949) (/supremecourt/text/337/241). *See also* Williams v. Oklahoma, 358 U.S. 576 (1959) (/supremecourt/text/358/576). [Back to text]

1236 430 U.S. 349 (1977) (/supremecourt/text/430/349). [Back to text]

1237 In *Gardner*, the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge sentenced the defendant to death, relying in part on a confidential presentence report which he did not characterize or make available to defense or prosecution. Justices Stevens, Stewart, and Powell found that because death was significantly different from other punishments and because sentencing procedures were subject to higher due process standards than when *Williams* was decided, the report must be made part of the record for review so that the factors motivating imposition of the death penalty may be known, and ordinarily must be made available to the defense. 430 U.S. at 357–61. All but one of the other Justices joined the result on various other bases. Justice Brennan without elaboration thought the result was compelled by due process, id. at 364, while Justices White and Blackmun thought the result was necessitated by the Eighth Amendment, id. at 362, 364, as did Justice Marshall in a different manner. Id. at 365. Chief Justice Burger concurred only in the result, id. at 362, and Justice Rehnquist dissented. Id. at 371. *See also* Lankford v. Idaho, 500 U.S. 110 (1991) (/supremecourt/text/500/110) (due process denied where judge sentenced defendant to death after judge's and prosecutor's actions misled defendant and counsel into believing that death penalty would not be at issue in sentencing hearing). [Back to text]

1238 438 U.S. 41 (1978) (/supremecourt/text/438/41). [Back to text]

1239 438 U.S. at 49–52. *See also* United States v. Tucker, 404 U.S. 443 (/supremecourt/text/404/443), 446 (1972); Chaffin v. Stynchcombe, 412 U.S. 17 (/supremecourt/text/412/17), 32 (1973). *Cf.* 18 U.S.C. § 3577 (/uscode/text/18/3577). [Back to text]

1240 *See, e.g,* Kent v. United States, 383 U.S. 541 (/supremecourt/text/383/541), 554, 561, 563 (1966), where the Court required that before a juvenile court decided to waive jurisdiction and transfer a juvenile to an adult court it must hold a hearing and permit defense counsel to examine the probation officer's report which formed the basis for the court's decision. *Kent* was ambiguous whether it was based on statutory interpretation or constitutional analysis. *In re* Gault, 387 U.S. 1 (1967) (/supremecourt/text/387/1), however, appears to have constitutionalized the language. [Back to text]

1241 386 U.S. 605 (1967) (/supremecourt/text/386/605). [Back to text]

1242 389 U.S. 128 (1967) (/supremecourt/text/389/128). [Back to text]

1243 512 U.S. 154 (1994) (/supremecourt/text/512/154). *See also* Lynch v. Arizona, 578 U.S. ___, No. 15–8366, slip op. at 3–4 (2016) (holding that the possibility of clemency and the potential for future "legislative reform" does not justify a departure from the rule of *Simmons*); Kelly v. South Carolina, 534 U.S. 246 (/supremecourt/text/534/246), 252 (2002) (concluding that a prosecutor need not express intent to rely on future dangerousness; logical inferences may be drawn); Shafer v. South Carolina, 532 U.S. 36 (2001) (/supremecourt/text/532/36) (amended South Carolina law still runs afoul of *Simmons*). [Back to text]

1244 530 U.S. 156 (2000) (/supremecourt/text/530/156). [Back to text]

1245 North Carolina v. Pearce, 395 U.S. 711 (1969) (/supremecourt/text/395/711). *Pearce* was held to be nonretroactive in Michigan v. Payne, 412 U.S. 47 (1973) (/supremecourt/text/412/47). When a state provides a two-tier court system in which one may have an expeditious and somewhat informal trial in an inferior court with an absolute right to trial *de novo* in a court of general criminal jurisdiction if convicted, the second court is not bound by the rule in *Pearce*, because the potential for vindictiveness and inclination to deter is not present. Colten v. Kentucky, 407 U.S. 104 (1972) (/supremecourt/text/407/104). *But see* Blackledge v. Perry, 417 U.S. 21 (1974) (/supremecourt/text/417/21), discussed *supra*. [Back to text]

1246 An intervening conviction on other charges for acts committed prior to the first sentencing may justify imposition of an increased sentence following a second trial. Wasman v. United States, 468 U.S. 559 (1984) (/supremecourt/text/468/559). [Back to text]

1247 Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (/supremecourt/text/412/17). The Court concluded that the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial nor the sentence imposed, nor would it feel either the personal or institutional interests of judges leading to efforts to discourage the seeking of new trials. Justices Stewart, Brennan, and Marshall thought the principle was applicable to jury sentencing and that prophylactic limitations appropriate to the problem should be developed. Id. at 35, 38. Justice Douglas dissented on other grounds. Id. at 35. The *Pearce* presumption that an increased, judge-imposed second sentence represents vindictiveness also is inapplicable if the second trial came about because the trial judge herself concluded that a retrial was necessary due to prosecutorial misconduct before the jury in the first trial. Texas v. McCullough, 475 U.S. 134 (1986) (/supremecourt/text/475/134). [Back to text]

1248 Alabama v. Smith, 490 U.S. 794 (1989) (/supremecourt/text/490/794). [Back to text]

1249 McKane v. Durston, 153 U.S. 684 (/supremecourt/text/153/684), 687 (1894). *See also* Andrews v. Swartz, 156 U.S. 272 (/supremecourt/text/156/272), 275 (1895); Murphy v. Massachusetts, 177 U.S. 155 (/supremecourt/text/177/155), 158 (1900); Reetz v. Michigan, 188 U.S. 505 (/supremecourt/text/188/505), 508 (1903). [Back to text]

1250 Griffin v. Illinois, 351 U.S. 12 (/supremecourt/text/351/12), 18 (1956); id. at 21 (Justice Frankfurter concurring), 27 (dissenting opinion); Ross v. Moffitt, 417 U.S. 600 (1974) (/supremecourt/text/417/600). [Back to text]

1251 The line of cases begins with Griffin v. Illinois, 351 U.S. 12 (1956) (/supremecourt/text/351/12), in which it was deemed to violate both the Due Process and the Equal Protection Clauses for a state to deny to indigent defendants free transcripts of the trial proceedings, which would enable them adequately to prosecute appeals from convictions. *See* analysis under "Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection—Generally," *infra.* [Back to text]

1252 237 U.S. 309 (/supremecourt/text/237/309), 335 (1915). [Back to text]

1253 Moore v. Dempsey, 261 U.S. 86 (/supremecourt/text/261/86), 90, 91 (1923); Mooney v. Holohan, 294 U.S. 103 (/supremecourt/text/294/103), 113 (1935); New York ex rel. Whitman v. Wilson, 318 U.S. 688 (/supremecourt/text/318/688), 690 (1943); Young v. Ragan, 337 U.S. 235 (/supremecourt/text/337/235), 238–39 (1949). [Back to text]

1254 *Ex parte* Hull, 312 U.S. 546 (1941) (/supremecourt/text/312/546); White v. Ragen, 324 U.S. 760 (1945) (/supremecourt/text/324/760). [Back to text]

1255 Carter v. Illinois, 329 U.S. 173 (/supremecourt/text/329/173), 175–76 (1946). [Back to text]

1256 In Case v. Nebraska, 381 U.S. 336 (1965) (/supremecourt/text/381/336) (per curiam), the Court had taken for review a case that raised the issue of whether a state could simply omit any corrective process for hearing and determining claims of

federal constitutional violations, but it dismissed the case when the state in the interim enacted provisions for such process. Justices Clark and Brennan each wrote a concurring opinion. [Back to text]

1257 Frank v. Mangum, 237 U.S. 309 (1915) (/supremecourt/text/237/309). [Back to text]

1258 261 U.S. 86 (1923) (/supremecourt/text/261/86). [Back to text]

1259 297 U.S. 278 (1936) (/supremecourt/text/297/278). [Back to text]

1260 District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. ___, No. 08–6 (2009). [Back to text]

1261 557 U.S. ___, No. 08–6, slip op. at 2. [Back to text]

1262 557 U.S. ___, No. 08–6, slip op. at 20 (citation omitted). Justice Stevens, in a dissenting opinion joined by Justices Ginsburg and Breyer and in part by Justice Souter, concluded, "[T]here is no reason to deny access to the evidence and there are many reasons to provide it, not least of which is a fundamental concern in ensuring that justice has been done in this case." Id. at 17. [Back to text]

1263 Ruffin v. Commonwealth, 62 Va. 790, 796 (1871). [Back to text]

1264 *Cf. In re* Bonner, 151 U.S. 242 (1894) (/supremecourt/text/151/242). [Back to text]

1265 Price v. Johnston, 334 U.S. 266 (/supremecourt/text/334/266), 285 (1948). [Back to text]

1266 "There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539 (/supremecourt/text/418/539), 555–56 (1974). [Back to text]

1267 Cruz v. Beto, 405 U.S. 319 (/supremecourt/text/405/319), 321 (1972). *See also* Procunier v. Martinez, 416 U.S. 396 (/supremecourt/text/416/396), 404–05 (1974) (invalidating state prison mail censorship regulations). [Back to text]

1268 Bell v. Wolfish, 441 U.S. 520 (/supremecourt/text/441/520), 545–548, 551, 555, 562 (1979) (federal prison); Rhodes v. Chapman, 452 U.S. 337 (/supremecourt/text/452/337), 347, 351–352 (1981). [Back to text]

1269 *See* Bell v. Wolfish, 441 U.S. 520 (/supremecourt/text/441/520), 535–40 (1979). Persons not yet convicted of a crime may be detained by the government upon the appropriate determination of probable cause, and the government is entitled to "employ devices that are calculated to effectuate [a] detention." *Id*. at 537. Nonetheless, the Court has held that the Due Process Clause protects a pretrial detainee from being subject to conditions that amount to punishment, which can be demonstrated through (1) actions taken with the "express intent to punish" or (2) the use of restrictions or conditions on confinement that are not reasonably related to a legitimate goal. *See Wolfish*, 441 U.S. at 538, 561. More recently, the Court clarified the standard by which the due process rights of pretrial detainees are adjudged with respect to excessive force claims. Specifically, in *Kingsley v. Hendrickson*, the Court held that, in order for a pretrial detainee to prove an excessive force claim in violation of his due process rights, a plaintiff must show that an officer's use of force was objectively unreasonable, depending on the facts and circumstances from the perspective of a reasonable officer on the scene, *see* 576 U.S. ___, No. 14–6368, slip op. at 6–7 (2015), aligning the due process excessive force analysis with the standard for excessive force claims brought under the Fourth Amendment (/constitution/fourth_amendment). *Cf.* Graham v. Connor, 490 U.S. 386 (/supremecourt/text/490/386), 388 (1989) (holding that a "free citizen's claim that law enforcement officials used excessive force . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard"). Liability for actions taken by the government in the context of a pretrial detainee due process lawsuit does not, therefore, turn on whether a particular officer subjectively knew that the conduct being taken was unreasonable. *See Kingsley*, slip op. at 1. [Back to text]

1270 *See* "Prisons and Punishment," *supra*. [Back to text]

1271 *E.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (/supremecourt/text/418/539); Baxter v. Palmigiano, 425 U.S. 308 (1976) (/supremecourt/text/425/308); Vitek v. Jones, 445 U.S. 480 (1980) (/supremecourt/text/445/480); Washington v. Harper, 494 U.S. 210 (1990) (/supremecourt/text/494/210) (prison inmate has liberty interest in avoiding the unwanted administration of antipsychotic drugs). [Back to text]

1272 *E.g.*, Procunier v. Martinez, 416 U.S. 396 (1974) (/supremecourt/text/416/396); Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) (/supremecourt/text/433/119). On religious practices and ceremonies, *see* Cooper v. Pate, 378 U.S. 546 (1964) (/supremecourt/text/378/546); Cruz v. Beto, 405 U.S. 319 (1972) (/supremecourt/text/405/319). [Back to text]

1273 *Ex parte* Hull, 312 U.S. 546 (1941) (/supremecourt/text/312/546); White v. Ragen, 324 U.S. 760 (1945) (/supremecourt/text/324/760). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971) (/supremecourt/text/404/15); Bounds v. Smith, 430 U.S. 817 (1978) (/supremecourt/text/430/817). Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim. *See* Lewis v. Casey, 518 U.S. 343 (1996) (/supremecourt/text/518/343) (no requirement that the state "enable [a] prisoner to discover grievances, and to litigate effectively"). [Back to text]

1274

Haines v. Kerner, 404 U.S. 519 (1972) (/supremecourt/text/404/519); Preiser v. Rodriguez, 411 U.S. 475 (1973) (/supremecourt/text/411/475). [Back to text]

1275 Lee v. Washington, 390 U.S. 333 (1968) (/supremecourt/text/390/333). There was some question as to the standard to be applied to racial discrimination in prisons after Turner v. Safley, 482 U.S. 78 (1987) (/supremecourt/text/482/78) (prison regulations upheld if "reasonably related to legitimate penological interests"). In Johnson v. California, 543 U.S. 499 (2005) (/supremecourt/text/543/499), however, the Court held that discriminatory prison regulations would continue to be evaluated under a "strict scrutiny" standard, which requires that regulations be narrowly tailored to further compelling governmental interests. Id. at 509–13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to 60 days before they are given a regular housing assignment). [Back to text]

1276 482 U.S. 78 (1987) (/supremecourt/text/482/78) [Back to text]

1277 482 U.S. at 89 (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child). *See* Overton v. Bazzetta, 539 U.S. 126 (2003) (/supremecourt/text/539/126) (upholding restrictions on prison visitation by unrelated children or children over which a prisoner's parental rights have been terminated and visitation where a prisoner has violated rules against substance abuse). [Back to text]

1278 For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. 539 U.S. at 135. [Back to text]

1279 482 U.S. at 90, 92. [Back to text]

1280 Hudson v. Palmer, 468 U.S. 517 (/supremecourt/text/468/517), 526 (1984). [Back to text]

1281 482 U.S. at 91. [Back to text]

1282 Hudson v. Palmer, 468 U.S. 517 (/supremecourt/text/468/517), 526 (1984); Block v. Rutherford, 468 U.S. 576 (1984) (/supremecourt/text/468/576) (holding also that needs of prison security support a rule denying pre-trial detainees contact visits with spouses, children, relatives, and friends). [Back to text]

1283 Hudson v. Palmer, 468 U.S. 517 (/supremecourt/text/468/517), 530 (1984). [Back to text]

1284 Hudson v. Palmer, 468 U.S. 517 (/supremecourt/text/468/517), 533 (1984) (holding that state tort law provided adequate postdeprivation remedies). *But see* Zinermon v. Burch, 494 U.S. 113 (1990) (/supremecourt/text/494/113) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not "unauthorized"). [Back to text]

1285 Daniels v. Williams, 474 U.S. 327 (1986) (/supremecourt/text/474/327); Davidson v. Cannon, 474 U.S. 344 (1986) (/supremecourt/text/474/344). [Back to text]

1286 Sandin v. Conner, 515 U.S. 472 (/supremecourt/text/515/472), 484 (1995) (30-day solitary confinement not atypical "in relation to the ordinary incidents of prison life"). [Back to text]

1287 418 U.S. 539 (1974) (/supremecourt/text/418/539). [Back to text]

1288 418 U.S. at 557. This analysis, of course, tracks the interest analysis discussed under "The Interests Protected: Entitlements and Positivist Recognition," *supra*. [Back to text]

1289 418 U.S. at 563. [Back to text]

1290 418 U.S. at 566. However, the Court later ruled that the reasons for denying an inmate's request to call witnesses need not be disclosed until the issue is raised in court. Ponte v. Real, 471 U.S. 491 (1985) (/supremecourt/text/471/491). [Back to text]

1291 418 U.S. at 561–72. The Court continues to adhere to its refusal to require appointment of counsel. Vitek v. Jones, 445 U.S. 480 (/supremecourt/text/445/480), 496–97 (1980), and id. at 497–500 (Justice Powell concurring); Baxter v. Palmigiano, 425 U.S. 308 (1976) (/supremecourt/text/425/308). [Back to text]

1292 Superintendent v. Hill, 472 U.S. 445 (/supremecourt/text/472/445), 454, 457 (1985). [Back to text]

1293 Meachum v. Fano, 427 U.S. 215 (1976) (/supremecourt/text/427/215); Montanye v. Haymes, 427 U.S. 236 (1976) (/supremecourt/text/427/236). [Back to text]

1294 Olim v. Wakinekona, 461 U.S. 238 (1983) (/supremecourt/text/461/238). [Back to text]

1295 Wilkinson v. Austin, 545 U.S. 209 (/supremecourt/text/545/209), 224 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship"). In *Wilkinson*, the Court upheld Ohio's multi-level review process, despite the fact that a prisoner was provided only summary notice

as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one 30-day review and then annually. Id. at 219–20. [Back to text]

1296 Vitek v. Jones, 445 U.S. 480 (1980) (/supremecourt/text/445/480). [Back to text]

1297 494 U.S. 210 (1990) (/supremecourt/text/494/210). [Back to text]

1298 Ughbanks v. Armstrong, 208 U.S. 481 (1908) (/supremecourt/text/208/481), held that parole is not a constitutional right but instead is a "present" from government to the prisoner. In Escoe v. Zerbst, 295 U.S. 490 (1935) (/supremecourt/text/295/490), the Court's premise was that as a matter of grace the parolee was being granted a privilege and that he should neither expect nor seek due process. Then-Judge Burger in Hyser v. Reed, 318 F.2d 225 (https://www.law.cornell.edu/rio/citation/318_F.2d_225)(D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963) (/supremecourt/text/375/957), reasoned that due process was inapplicable because the parole board's function was to assist the prisoner's rehabilitation and restoration to society and that there was no adversary relationship between the board and the parolee. [Back to text]

1299 389 U.S. 128 (1967) (/supremecourt/text/389/128). [Back to text]

1300 408 U.S. 471 (1972) (/supremecourt/text/408/471). [Back to text]

1301 408 U.S. at 480, 482. [Back to text]

1302 408 U.S. at 483. [Back to text]

1303 408 U.S. at 484–87. [Back to text]

1304 408 U.S. at 489. [Back to text]

1305 Black v. Romano, 471 U.S. 606 (1985) (/supremecourt/text/471/606). [Back to text]

1306 Bearden v. Georgia, 461 U.S. 660 (/supremecourt/text/461/660), 672 (1983). [Back to text]

1307 Gagnon v. Scarpelli, 411 U.S. 778 (1973) (/supremecourt/text/411/778). [Back to text]

1308 442 U.S. 1 (1979) (/supremecourt/text/442/1). Justice Powell thought that creation of a parole system did create a legitimate expectancy of fair procedure protected by due process, but, save in one respect, he agreed with the Court that the procedure followed was adequate. Id. at 18. Justices Marshall, Brennan, and Stevens argued in dissent that the Court's analysis of the liberty interest was faulty and that due process required more than the board provided. Id. at 22. [Back to text]

1309 Following *Greenholtz*, the Court held in Board of Pardons v. Allen, 482 U.S. 369 (1987) (/supremecourt/text/482/369), that a liberty interest was created by a Montana statute providing that a prisoner "shall" be released upon certain findings by a parole board. *Accord* Swarthout v. Cooke, 562 U.S. ___, 10–333, slip op. (2011) (*per curiam*). [Back to text]

1310 The Court in *Greenholtz* held that procedures designed to elicit specific facts were inappropriate under the circumstances, and minimizing the risk of error should be the prime consideration. This goal may be achieved by the board's largely informal methods; eschewing formal hearings, notice, and specification of particular evidence in the record. The inmate in this case was afforded an opportunity to be heard and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due. *Accord* Swarthout v. Cooke, 562 U.S. ___, 10–333, slip op. (2011) (*per curiam*). [Back to text]

1311 Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998) (/supremecourt/text/523/272). The mere existence of purely discretionary authority and the frequent exercise of it creates no entitlement. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (/supremecourt/text/452/458); Jago v. Van Curen, 454 U.S. 14 (1981) (/supremecourt/text/454/14). The former case involved not parole but commutation of a life sentence, commutation being necessary to become eligible for parole. The statute gave the Board total discretion to commute, but in at least 75% of the cases prisoner received a favorable action and virtually all of the prisoners who had their sentences commuted were promptly paroled. In *Van Curen*, the Court made express what had been implicit in *Dumschat*; the "mutually explicit understandings" concept under which some property interests are found protected does not apply to liberty interests. *Van Curen* is also interesting because there the parole board had granted the petition for parole but within days revoked it before the prisoner was released, upon being told that he had lied at the hearing before the board. [Back to text]

1312 For analysis of the state laws as well as application of constitutional principles to juveniles, *see* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM(2d ed. 2006). [Back to text]

1313 *In re* Gault, 387 U.S. 1 (/supremecourt/text/387/1), 12–29 (1967). [Back to text]

1314 387 U.S. 1 (1967) (/supremecourt/text/387/1). [Back to text]

1315 "Ultimately, however, we confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no

constitutional consequence—and of limited practical meaning— that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours . . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." 387 U.S. at 27–28. [Back to text]

1316 387 U.S. at 31–35. Justice Harlan concurred in part and dissented in part, id. at 65, agreeing on the applicability of due process but disagreeing with the standards of the Court. Justice Stewart dissented wholly, arguing that the application of procedures developed for adversary criminal proceedings to juvenile proceedings would endanger their objectives and contending that the decision was a backward step toward undoing the reforms instituted in the past. Id. at 78. [Back to text]

1317 Kent v. United States, 383 U.S. 541 (1966) (/supremecourt/text/383/541), noted on this point in *In re* Gault, 387 U.S. 1 (/supremecourt/text/387/1), 30–31 (1967). [Back to text]

1318 *In re* Winship, 397 U.S. 358 (1970) (/supremecourt/text/397/358). Chief Justice Burger and Justice Stewart dissented, following essentially the Stewart reasoning in *Gault*. "The Court's opinion today rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitation. . . . What the juvenile court systems need is not more but less of the trappings of legal procedure and judicial formalism; the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court." Id. at 375, 376. Justice Black dissented because he did not think the reasonable doubt standard a constitutional requirement at all. Id. at 377. [Back to text]

1319 McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (/supremecourt/text/403/528). No opinion was concurred in by a majority of the Justices. Justice Blackmun's opinion of the Court, which was joined by Chief Justice Burger and Justices Stewart and White, reasoned that a juvenile proceeding was not "a criminal prosecution" within the terms of the Sixth Amendment, so that jury trials were not automatically required; instead, the prior cases had proceeded on a "fundamental fairness" approach and in that regard a jury was not a necessary component of fair factfinding and its use would have serious repercussions on the rehabilitative and protection functions of the juvenile court. Justice White also submitted a brief concurrence emphasizing the differences between adult criminal trials and juvenile adjudications. Id. at 551. Justice Brennan concurred in one case and dissented in another because in his view open proceedings would operate to protect juveniles from oppression in much the same way as a jury would. Id. at 553. Justice Harlan concurred because he did not believe jury trials were constitutionally mandated in state courts. Id. at 557. Justices Douglas, Black, and Marshall dissented. Id. at 557. [Back to text]

1320 Fare v. Michael C., 442 U.S. 707 (/supremecourt/text/442/707), 725 (1979). [Back to text]

1321 New Jersey v. T.L.O., 469 U.S. 325 (1985) (/supremecourt/text/469/325) (upholding the search of a student's purse to determine whether the student possessed cigarettes in violation of school rule; evidence of drug activity held admissible in a prosecution under the juvenile laws). In Safford Unified School District #1 v. Redding, 557 U.S. ___, No. 08–479 (2009), the Court found unreasonable a strip search of a 13-year-old girl suspected of possessing ibuprofen. *See* Fourth Amendment (/constitution/fourth_amendment), "Public Schools," *supra*. [Back to text]

1322 This single rule, the Court explained, will permit school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." 469 U.S. at 342 n.9. [Back to text]

1323 467 U.S. 253 (1984) (/supremecourt/text/467/253). [Back to text]

1324 *See* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM, ch. 4, Waiver of Jurisdiction (2d ed. 1989). [Back to text]

1325 492 U.S. 361 (1989) (/supremecourt/text/492/361). [Back to text]

1326 Thompson v. Oklahoma, 487 U.S. 815 (1988) (/supremecourt/text/487/815). [Back to text]

1327 *See* analysis of Eighth Amendment (/constitution/eighth_amendment) principles, under "Capital Punishment," *supra*. [Back to text]

1328 422 U.S. 563 (1975) (/supremecourt/text/422/563). The Court bypassed "the difficult issues of constitutional law" raised by the lower courts' resolution of the case, that is, the right to treatment of the involuntarily committed, discussed under "Liberty Interests of People with Mental Disabilities: Commitment and Treatment," *supra*. [Back to text]

1329 422 U.S. at 576. Prior to O'Connor v. Donaldson, only in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940) (/supremecourt/text/309/270), had the Court considered the issue. Other cases reflected the Court's concern with the rights of convicted criminal defendants and generally required due process procedures or that the commitment of convicted criminal defendants follow the procedures required for civil commitments. Specht v. Patterson, 386 U.S. 605 (1967) (/supremecourt/text/386/605); Baxstrom v. Herold, 383 U.S. 107 (1966) (/supremecourt/text/383/107); Lynch v. Overholser,

369 U.S. 705 (1962) (/supremecourt/text/369/705); Humphrey v. Cady, 405 U.S. 504 (1972) (/supremecourt/text/405/504); Jackson v. Indiana, 406 U.S. 715 (1972) (/supremecourt/text/406/715); McNeil v. Director, 407 U.S. 245 (1972) (/supremecourt/text/407/245). *Cf.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) (/supremecourt/text/407/355). [Back to text]

1330 422 U.S. at 576–77. The Court remanded to allow the trial court to determine whether Donaldson should recover personally from his doctors and others for his confinement, under standards formulated under 42 U.S.C. § 1983. *See* Wood v. Strickland, 420 U.S. 308 (1975) (/supremecourt/text/420/308); Scheuer v. Rhodes, 416 U.S. 232 (1974) (/supremecourt/text/416/232). [Back to text]

1331 O'Connor v. Donaldson, 422 U.S. 563 (/supremecourt/text/422/563), 573 (1975). [Back to text]

1332 Zinermon v. Burch, 494 U.S. 113 (1990) (/supremecourt/text/494/113). [Back to text]

1333 Addington v. Texas, 441 U.S. 418 (1979) (/supremecourt/text/441/418). *See also* Vitek v. Jones, 445 U.S. 480 (1980) (/supremecourt/text/445/480) (transfer of prison inmate to mental hospital). [Back to text]

1334 442 U.S. 584 (1979) (/supremecourt/text/442/584). *See also* Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979) (/supremecourt/text/442/640). [Back to text]

1335 442 U.S. at 598–617. The dissenters agreed on this point. Id. at 626–37. [Back to text]

1336 442 U.S. at 617–20. The dissenters would have required a preconfinement hearing. Id. at 637–38. [Back to text]

1337 442 U.S. at 617. The dissent would have mandated a formal postadmission hearing. Id. at 625–26. [Back to text]

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