1998

Developments in State Constitutional Law: Due Process

Jill E. Family

IV. DUE PROCESS

A. Criminal Due Process Issues

1. Evidence[1]

In *Collins v. Commonwealth*,[2] the defendant urged the Supreme Court of Kentucky to reject the federal practice of recognizing evidence handling due process violations only when the government acts in bad faith. Instead, the defendant argued for a balancing approach based on the Kentucky Constitution,[3] asserting the failure to collect evidence in his case violated

---

1. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following cases: State v. Tomasko, 700 A.2d 28 (Conn. 1997) (holding due process requires state to disclose evidence that may exonerate a defendant and that is material to guilt or punishment); Demby v. Delaware, 695 A.2d 1127 (Del. 1997) (holding statute that eliminates required appearance at trial of those individuals who merely handle evidence is consistent with due process but does not reduce state's burden of identification or authentication of evidence); State v. Pulse, 925 P.2d 797 (Haw. 1996) (holding right to a meaningful hearing and to present a complete defense extends to pretrial suppression hearings); State v. Powdrill, 684 So. 2d 350 (La. 1996) (holding allowing certificate to constitute prima facie evidence did not violate defendant's due process right of confrontation); Sonner v. Nevada, 930 P.2d 707 (Nev. 1996) (holding state may not withhold evidence favorable to accused but state has no duty to respond to overbroad "fishing expedition" requests for evidence by the defendant); People v. Robinson, 679 N.E.2d 1055 (N.Y. 1997) (holding secondary form of evidence, here grand jury testimony of a witness unavailable for trial, when sufficiently cross examined and deemed material and sufficiently reliable is admissible under defendant's due process rights); State v. Hunt, 483 S.E.2d 417 (N.C. 1997) (holding state's failure to preserve evidence did not violate defendant's due process rights because the state's failure was not in bad faith); State v. Gulledge, 487 S.E.2d 590 (S.C. 1997) (holding state's obligation to disclose evidence favorable to the accused and material to guilt or punishment applied only to evidence in the state's possession); State v. Goodroad, 563 N.W.2d 126 (S.D. 1997) (holding references by police officer to defendant's silence after arrest did not violate defendant's due process rights where silence reference was not used to impeach the defendant); United States v. Marks, 949 S.W.2d 320 (Tex. 1997) (holding hearing of government attorney's argument ex parte and in camera during a grand jury proceeding did not violate due process where record was made of the hearing); State v. Evans, 944 P.2d 1120 (Wyo. 1997) (holding admission of involuntary confession offends due process, regardless of whether defendant was in custody when confession was given).

2. 951 S.W.2d 569 (Ky. 1997). The defendant was convicted of first-degree rape, second-degree rape, second-degree sodomy, incest, and first-degree wanton endangerment of his stepdaughter. *Id.* at 571.

3. *Id.* at 572. The federal approach is founded in *Arizona v. Youngblood*, 488 U.S. 51 (1988). There the United States Supreme Court held that "unless a criminal defendant can

his right to due process under the Kentucky Constitution.[4] Despite the defendant's argument that the due process clause of the Kentucky Constitution is textually different from the Due Process Clause found in the Federal Constitution[5] and that such variation leads to more expansive rights under the state constitution,[6] the court held that Kentucky would follow the federal approach.[7]

In *Snyder v. State*,[8] the Supreme Court of Alaska held the due process clause of the Alaska Constitution[9] entitles a driver arrested for driving while intoxicated to an independent chemical blood test.[10] The court recognized that

> although the state normally may not have an obligation to aid a suspect in gathering potentially exculpatory evidence . . . we believe that in the DWI context the accused's right and the state's duty extend to the opportunity to obtain an independent chemical test . . . whether or not the accused agrees to submit to a breath test.[11]

The court qualified its holding, however, by requiring that it "not be impracticable for the police to take a defendant to a facility" to obtain the blood test.[12] The court emphasized that the due process clause of the Alaska

---

show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process." *Id.* at 58.

4. *Collins*, 951 S.W.2d at 571. The evidence at issue was a towel the commonwealth negligently failed to collect from the rape victim's mother. *Id.*

5. Section 2 of the Kentucky Constitution reads, "Absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority." KY. CONST. § 2.

6. The defendant relied on decisions from other state jurisdictions that held negligent loss of evidence was sufficient to constitute a due process violation even in the absence of bad faith. *Collins*, 951 S.W.2d at 572. He also argued that Kentucky had never actually adopted the *Youngblood* bad faith requirement. *Id.*

7. *Id.* at 572-73. The court emphasized that *Youngblood* had previously been cited with favor in Kentucky. *Id.*; *see also* Perdue v. Commonwealth, 916 S.W.2d 148 (Ky. 1995); Allen v. Commonwealth, 817 S.W.2d 458 (Ky. 1991).

8. 930 P.2d 1274 (Alaska 1996). The defendant, arrested for driving while intoxicated, refused to blow properly into the breath test mechanism and requested an independent chemical test, which the police refused. *Id.* at 1275.

9. The due process clause of the Alaska Constitution reads: "No person shall be deprived of life, liberty, or property, without due process of law." ALASKA CONST. art. I, § 7.

10. *Snyder*, 930 P.2d at 1277.

11. *Id.* at 1278.

12. *Id.*

Constitution guarantees more protection than just a prohibition against the destruction of evidence. "[T]he opportunity to obtain evidence of blood alcohol content is a reasonably necessary safeguard, essential to the adequate protection of the accused's right to a fair trial [under the Alaska Constitution]."[13] The court also held dismissal of the driving while intoxicated charge was not an appropriate remedy for the due process violation of disallowing an independent chemical test.[14]

However, in *Cockerham v. State*,[15] the Supreme Court of Alaska held a defendant's state due process rights[16] were not violated when a court denied the defendant's motion for review of records that might have established credibility issues surrounding a witness who testified against the defendant at sentencing.[17] Despite the due process implications in discovery rights, the court concluded "the defendant's right to access information . . . is not absolute."[18] The court found the connection between the information that might be revealed through the discovery requested by the defendant and the possible impeachment of the witness "highly tenuous."[19]

In *State v. Winn*,[20] the Supreme Court of New Hampshire used its own state constitutional standard[21] and held a defendant's due process rights[22] were not violated when a trial court refused to compel the state to request use immunity for a defense witness invoking his right to silence.[23] The court

---

13. *Id.* at 1279.

14. *Id.* The court believed a more appropriate remedy was to remand the case with the instruction the trial court should assume the independent blood test would have been favorable to the defendant. *Id.*

15. 933 P.2d 537 (Alaska 1997). The defendant was convicted of sexual assault. *Id.* at 538.

16. See article I, section 7 of the Alaska Constitution for state due process rights.

17. *Cockerham*, 933 P.2d at 543. The court did recognize that the due process protections of the Alaska Constitution "require[] that in order for the guarantee of due process to be meaningful, it must at times encompass discovery rights." *Id.* at 542-43.

18. *Id.* at 543.

19. *Id.*

20. 694 A.2d 537 (N.H. 1997). Defendant was convicted of conspiracy to possess marijuana with the intent to sell. *Id.* at 538.

21. *Id.* at 539.

22. The defendant claimed the failure to compel the state to request use immunity for a defense witness violated her rights under both the United States and state constitutions, specifically the right to present all proofs favorable to her defense. *Id.* at 538-39 (citing N.H. CONST. pt. 1, art. 15).

23. *Id.* Under New Hampshire law, failure to immunize a witness may have due process implications only if the defendant can first show "the witness's testimony would be directly exculpatory or present a highly material variance from the State's case" and then if the court

underscored that it analyzed the defendant's state due process claim solely under the state constitution and relied on "federal case law only to aid in [the] analysis."[24] Because the court determined the Federal Constitution provides no greater rights than the state constitution, the court refrained from a separate federal analysis.[25]

The Supreme Court of Appeals of West Virginia, in *Lawyer Disciplinary Board v. Hatcher*,[26] considered the due process implications of withholding evidence. While not addressing the merits of the attorney disciplinary hearing, the court emphasized that the withholding of evidence by a prosecutor violates state due process protections[27] if the evidence withheld would tend to exculpate the defendant by creating reasonable doubt.[28]

2. Jury Issues[29]

In *State v. Medina*[30] and *Brown v. State*,[31] the Supreme Court of New Jersey and the Supreme Court of Mississippi, respectively, addressed jury instruction challenges in which the defendant claimed violations of both

---

decides the failure to immunize impeded a fair trial. *Id.* The court acknowledged that this standard is different from the federal standard and believed the state standard "reduces the possibility of cooperative perjury between defendants and their defense witnesses." *Id.* The defendant here could not satisfy the initial burden. *Id.*

24. *Id.*; *see also* State v. Haley, 689 A.2d 671 (N.H. 1997) (using a similar federal-state analysis, the court held that the New Hampshire Constitution did not require an evidentiary hearing to determine if the state had clear proof that defendant committed other bad acts before evidence of those acts was admitted).

25. *Winn*, 694 A.2d at 539.

26. 483 S.E.2d 810 (W. Va. 1997) (reviewing an attorney discipline hearing).

27. *See* W. VA. CONST. art. III, § 14.

28. *Hatcher*, 483 S.E.2d at 815-16.

29. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following cases: Bogdanov v. People, 941 P.2d 247 (Colo. 1997) (holding use of superfluous pattern jury instruction was not plain error and did not violate defendant's due process rights); State v. Morant, 701 A.2d 1 (Conn. 1997) (holding as valid jury instruction that defined reasonable doubt as not beyond all possible doubt, but that doubt for which a reasonable person can give a valid reason).

30. 147 N.J. 43, 685 A.2d 1242 (N.J. 1996). The defendant was convicted of various degrees of aggravated assault, possession of a weapon for an unlawful purpose, and making terroristic threats. 147 N.J. at 48, 685 A.2d at 1244.

31. 690 So. 2d 276 (Miss. 1996). The defendant was convicted of murder and sentenced to death. *Id.* at 280.

state and federal due process rights.[32] Both courts used mixed federal and state analysis.[33] The New Jersey Supreme Court held that neither the federal nor the state constitution defines reasonable doubt[34] and that reasonable doubt instructions, properly viewed in their entirety, violate state and federal due process protections only when the instructions lessen the state's burden of proof.[35] The Supreme Court of Mississippi upheld as constitutional a jury instruction on whether an offense was especially heinous, atrocious, or cruel because it was appropriately limited by additional language in the instruction and thus not too amorphous.[36]

In response to a challenge to a court's jury selection procedure, the Supreme Court of Connecticut, in *State v. McDougal*,[37] held that the use of preemptory challenges against young people as a group because of their youth did not violate a defendant's right to a fair trial under the state constitution.[38] Defendants relied on article I, section 8 of the Connecticut Constitution[39] to argue that "young persons" is a cognizable group[40] for jury selection purposes. Therefore, the defendants argued, use of peremptory challenges against the group violates the due process protections of the state constitution.[41] Deferring to the federal rule, the court held that "young people" is not a cognizable group.[42]

---

32. *Medina*, 147 N.J. at 49, 685 A.2d at 1245; *Brown*, 690 So. 2d at 294.

33. *Medina*, 147 N.J. at 49-52, 685 A.2d at 1245-46; *Brown*, 690 So. 2d at 294-95. Both courts seemed to acknowledge their state constitutions merit their own independent analysis but in these opinions that analysis was muddled with federal analysis.

34. *Medina*, 147 N.J. at 50, 685 A.2d at 1245.

35. *Id.* at 51-52, 685 A.2d at 1246.

36. *Brown*, 690 So. 2d at 295. The defendant argued the instruction was too uncertain in that it used disjunctive terms. *Id.* at 294. Thus, the defendant believed "four jurors could conclude that the offense was heinous, four that it was atrocious, and four that it was cruel," and in this manner the jury would not be unanimous. *Id.*

37. 699 A.2d 872 (Conn. 1997). Defendants were convicted of conspiracy to commit murder and attempted murder. *Id.* at 874.

38. *Id.* at 881. The Supreme Court of Connecticut reiterates factors to be used in considering a claim under the state constitution: "(1) the text of our constitution; (2) decisions of this court and the Appellate Court; (3) federal precedent; (4) sister state decisions; (5) the history of our constitution; and (6) economic and social considerations." *Id.* at 879-80 (citing State v. Geisler, 610 A.2d 1225 (Conn. 1992)).

39. Article I, section 8 addresses the rights of the accused, including due process protections, in criminal prosecutions. CONN. CONST. art. I, § 8.

40. According to federal law, the right to preemptory challenges dissipates when the challenges are used to exclude a cognizable group from serving on a petit jury. *McDougal*, 699 A.2d at 881.

41. *Id.* at 879.

42. *Id.* at 880-81. The court stated "[t]he defendants have not . . . provided this court

3. Parole Issues[43]

In *Southern v. Burgess*,[44] the Supreme Court of Appeals of West Virginia held the state constitution[45] demanded parole revocation hearings be conducted in compliance with due process.[46] The court acknowledged that article III, section 10 of the West Virginia Constitution provided greater due process protections than the Federal Constitution in this area of the law.[47] However, the court also stressed the hearing was not part of a criminal prosecution and thus did not carry with it "the full panoply of rights" afforded criminal defendants.[48]

The Supreme Judicial Court of Massachusetts also held its state constitution may extend broader due process rights than its federal counterpart in *Quegan v. Massachusetts Parole Board*.[49] The court recognized that while under the Federal Constitution an inmate does not have a liberty interest in parole,[50] the Massachusetts Constitution might extend greater protection to inmates seeking parole.[51] However, the court held consideration of a prisoner's admission of guilt or refusal to admit guilt in the parole decision was not arbitrary or unfair and did not violate protections afforded under the state constitution.[52] The court left open the

---

with authority developing the principle that young persons are a cognizable group." *Id.* at 881.

43. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following case: Sage v. Gamble, 929 P.2d 822 (Mont. 1996) (holding inmate's due process rights were violated when he was denied the opportunity to personally appear at his parole hearing).

44. 482 S.E.2d 135 (W. Va. 1996). Appellant argued his parole was unlawfully revoked by the admittance of an unauthenticated report at the hearing. *Id.* at 138.

45. *Id.* (citing Conner v. Griffith, 238 S.E.2d 529 (W. Va. 1977)).

46. *Id.*

47. *Id.*

48. *Id.* The court held that even if the act of admitting the questioned report rose to the level of due process scrutiny, any possible error was harmless because the same information was presented through a parole officer, whose testimony was not objectionable. *Id.* at 139-40.

49. 673 N.E.2d 42 (Mass. 1996). Quegan argued the parole board erroneously considered his refusal to admit guilt in the decision to deny him parole. *Id.* at 43.

50. *Id.*

51. *Id.* (citing Lanier v. Massachusetts Parole Bd., 489 N.E.2d 670 (Mass. 1986)).

52. *Id.* at 44 (quoting MASS. GEN. LAWS ch. 127, § 136 (1994)). Massachusetts law provides a relevant consideration for the parole board is "how the prisoner then regards the crime for which he is in prison." *Id.*

question whether the refusal to admit guilt can constitutionally be the sole reason for denial of parole.[53]

In *Monson v. Carver*,[54] the Supreme Court of Utah held due process rights granted under the Utah Constitution[55] were not offended by an inmate's lack of counsel at a parole hearing, his inability to call witnesses at a parole hearing, or his alleged inability to understand the parole board's written decision. Due process rights were not infringed because the inmate (1) never asked for assistance of counsel, (2) nor showed how the presence of counsel would have affected the hearing process, (3) nor showed how witnesses would assist the board in making its decision, and (4) failed to adequately explain his confusion with the board's explanation.[56]

4. Incarceration Issues[57]

The Supreme Court of Idaho adopted federal due process analysis in *Schevers v. State*,[58] holding a prisoner has no liberty interest in prison disciplinary segregation and thus deserved no due process protections in this regard.[59] The court recognized its own constitution's due process clause[60] and acknowledged that while the language of the Idaho clause is substantially similar to its federal counterpart, the court held its scope may not be the same.[61] Even though the court noted it was not necessarily bound by federal due process analysis, the court here elected to adopt federal analysis.[62]

---

53. *Id.*

54. 928 P.2d 1017 (Utah 1996).

55. *See* UTAH CONST. art. I, § 7.

56. *Monson*, 928 P.2d at 1030. These failures were important to the court because such "showing[s] [are] necessary because our decision to extend particular procedural due process requirements under . . . the Utah Constitution to certain parole hearings is grounded in the rationale that such requirements will substantially further the accuracy and reliability of the Board's fact-finding process." *Id.* (citing Neel v. Holden, 886 P.2d 1097, 1103 (Utah 1994)).

57. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following case: Mahoney v. Carter, 938 S.W.2d 575 (Ky. 1997) (holding inmates had no due process protected liberty interest in reclassification procedure of the department of corrections).

58. 930 P.2d 603 (Idaho 1996).

59. *Id.*

60. *Id.* (quoting IDAHO CONST. art. I, § 13).

61. *Id.* (quoting Cootz v. State, 785 P.2d 163, 165 (Idaho 1989)).

62. *Id.* at 607-08.

5. Death Penalty Issues[63]

The Supreme Court of Alabama, in *Ex parte Guthrie*,[64] held that the imposition of the death penalty for capital murder did not violate the right to life[65] guaranteed by the Alabama Constitution.[66] The court held the right to life proclaimed in the Alabama Constitution did not prohibit the state "from establishing that certain criminal acts are so heinous as to warrant the forfeiture of the convicted defendant's life."[67]

6. Vagueness[68]

In *People v. Warren*,[69] the Supreme Court of Illinois held a statute which prohibits unlawful interference with visitation rights[70] was not vague under the Illinois Constitution.[71] Due process under the state constitution "demands that a statute must not be so vague that persons of common intelligence must necessarily guess at either its meaning or its

63. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following cases: State v. Loyd, 689 So. 2d 1321 (La. 1997) (holding commutation statute instruction to jury in death penalty case does not violate due process); State v. Brown, 940 P.2d 546 (Wash. 1997) (holding proportionality review requires court to examine whether death penalty generally has been imposed in similar cases).

64. 689 So. 2d 951 (Ala. 1997).

65. The defendant claimed that the imposition of the death penalty violated article I, section 1 of the Alabama Constitution. *689* So. 2d at 953. That section provides "all men . . .are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." *Id.* (quoting ALA. CONST. art. I, § 1).

66. *Id.*

67. *Id.*

68. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following cases: State v. Wilchinski, 700 A.2d 1 (Conn. 1997) (holding statute is not void for vagueness as long as it contains some core meaning which instructs the state and the public how to act in regard to the statute); Hall v. State, 485 S.E.2d 755 (Ga. 1997) (holding a reckless conduct statute purporting to prohibit leaving children in the care of an eleven-year-old sibling unconstitutionally vague as the statute did not provide explicit standards and was thus susceptible to arbitrary and selective enforcement); State v. Hart, 687 So. 2d 94 (La. 1997) (holding statute prohibiting corrections officers from engaging in sexual conduct with prisoners not unconstitutionally vague).

69. 671 N.E.2d 700 (Ill. 1996). A complaint was filed against the defendant for detaining a child with the intent to deprive the child's father of visitation rights. *Id.* at 704.

70. *See* 720 ILL. COMP. STAT. 5/10-5.5 (West 1994).

71. *Warren*, 671 N.E.2d at 705.

application."[72] The defendant claimed the statute lacked definite standards and was subject to various interpretations.[73] The court disagreed, holding that the language of the statute as a whole gave an individual of average intelligence fair warning as to what it prohibits.[74]

Using similar reasoning, the Supreme Court of Missouri, in *State v. Barnes*,[75] refused to hold certain workers' compensation statutes[76] vague under the Missouri Constitution.[77] The court held the statutes at issue conveyed plain meaning and sufficient warning despite containing arguably vague words, because the words at issue had settled meaning within the law.[78]

---

72. *Id.* (citing People v. Hickman, 644 N.E.2d 1147 (Ill. 1994)).

73. *Id.*

74. *Id.* at 705, 707.

75. 942 S.W.2d 362 (Mo. 1997). Defendant was convicted of workers' compensation fraud. *Id.* at 364.

76. MO. REV. STAT. §§ 287.128.1(8), .128.3 (West 1994).

77. The defendant claimed the statutes were void for vagueness under the Fourteenth Amendment of the Federal Constitution and article I, section 10 of the Missouri Constitution. *Barnes*, 942 S.W.2d at 366.

78. *Id.* at 366-67.

7. Other Criminal Issues[79]

In *Mendonza v. Commonwealth*,[80] the Supreme Judicial Court of Massachusetts held a statute[81] which authorized pretrial detention of a defendant based on dangerousness proven by clear and convincing evidence did not violate state constitutional due process rights.[82] Defendant argued other Supreme Judicial Court of Massachusetts decisions demanded his pretrial detention also pass a reasonable doubt standard. Those decisions

---

79. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following cases: People v. Fuhrman, 941 P.2d 1189 (Cal. 1997) (holding three strikes law is unambiguous in providing that prior felony convictions need not have been brought and tried separately in order to qualify as strikes and therefore complies with due process rights of defendant); Hood v. Carsten, 481 S.E.2d 525 (Ga. 1997) (holding trial court's decision to revoke bond must comport with at least minimal due process requirements of notice and hearing); State v. Miller, 933 P.2d 606 (Haw. 1997) (holding statute constitutional that requires insanity acquitee to prove beyond a preponderance of the evidence freedom from insanity in order to be released); State v. Pulse, 925 P.2d 797 (Haw. 1996) (holding decision made at pretrial suppression hearing to exclude proffered testimony with the potential to directly contradict police officer's testimony was an abuse of discretion that prematurely assessed a witness' credibility in violation of the defendant's due process rights); Commonwealth v. Delaney, 682 N.E.2d 611 (Mass. 1997) (holding due process rights of defendant were not violated when charged with violating an order, original notice of which was left at last known address and not personally served on the defendant); *In re* Hinnant, 678 N.E.2d 1314 (Mass. 1997) (holding due process right to counsel includes competency on the part of the defendant to comprehend proceedings and to consult with counsel); Bone v. State, 944 P.2d 734 (Mont. 1997) (holding meaningful access to courts was not denied to defendant who waited four years for a ruling on his petition for post conviction relief); State v. Sullivan, 927 P.2d 1033 (Mont. 1996) (holding prosecutor committed harmful error and violated defendant's due process rights by commenting on defendant's post-*Miranda* silence as evidence of guilt); State v. Miller, 477 S.E.2d 915 (N.C. 1996) (holding trial court did not violate defendant's due process rights by striking portion of his closing argument consisting of expressions of personal opinion).

80. 673 N.E.2d 22 (Mass. 1996). Defendant was charged with armed assault with intent to murder, assault and battery on a police officer, and violation of a protective order. *Id.* at 26. The defendant reacted to service of a protective order by four policemen by barricading himself in a bedroom, pouring gasoline over his head, and threatening to light himself on fire. *Id.*

81. Defendant challenged a Massachusetts law, MASS. GEN. LAWS ch. 276, § 58A (1994), which authorizes preventative pretrial detention and is similar to the Federal Bail Reform Act, 18 U.S.C. § 3142. *Mendonza*, 673 N.E.2d at 24.

82. *Mendoza*, 673 N.E.2d at 30-31. Defendant challenged his pretrial detention under articles 1, 10, 12, and 26 of the Massachusetts Declaration of Rights and the Fourteenth Amendment of the Federal Constitution. *Id.* at 24-25.

held that civil commitment of dangerous and sexually dangerous persons requires a reasonable doubt showing despite that the United States Supreme Court only required a clear and convincing standard.[83] However, the court declined to follow its reasonable doubt line of cases because in those cases the term of confinement was "potentially infinite" while the type of pretrial detention authorized by the statute was "limited and preliminary."[84]

In *State v. Arceo*,[85] the Supreme Court of Hawaii considered allowing separate acts of sexual contact to be treated as a continuing offense. The court held this would violate state due process[86] standards where the prosecution was not required to specify the individual incidents[87] composing each count. The court was also influenced by the reasoning that to treat violations of the same statute as noncontinuous would lead to a different result.[88]

In *State v. Morgan*,[89] the Supreme Court of Iowa denied a defendant's request to impose a requirement, founded on the Iowa due process clause, that police must help a defendant to clarify his thoughts when he gives an equivocal request to consult with counsel and that police must record suspect interrogations.[90]

---

83. *Id.* at 30.

84. *Id.*

85. 928 P.2d 843 (Haw. 1996). The defendant was convicted of sexual assault in the first- and third-degrees against his six-year-old son. *Id.* at 844-45.

86. The relevant portion of the Hawaii Constitution reads: "[N]o person shall be deprived of life, liberty or property without due process of law." HAW. CONST. art. 1, § 5.

87. The prosecution argued that since sexual assault is a continuing offense it was not required to point to an incident to support each count charged and did not violate defendant's due process rights by not doing so. *Arceo*, 928 P.2d at 846.

88. *Id.* at 864-65. The court decided the prosecution's argument would violate the principle of *State v. Modica*, 567 P.2d 420 (Haw. 1977), which was specifically formulated to prevent the situation where the same act is punishable as either a felony or misdemeanor. Under *Modica*, a conviction under the felony statute as opposed to the misdemeanor statute would violate the accused's state due process rights. The court here applied that same principle and determined that to allow multiple convictions if the offense was viewed distinctly and to allow only a single conviction based on the same statute if the offense was viewed as continuous violates due process under *Modica*. *Arceo*, 928 P.2d at 864-65.

89. 559 N.W.2d 603 (Iowa 1997). The defendant was convicted of first-degree murder, kidnapping, and sexual abuse.

90. *Id.* at 609. The Iowa Supreme Court cited no supporting authority but states, "we are confident . . .that such procedures are in no way mandated by any provision of the Iowa Constitution." *Id.*

The Supreme Court of Utah, in *State v. Anderson*,[91] held that a defendant's voluntary absence[92] constituted waiver of his right to be present at sentencing.[93] Therefore, sentencing in abstentia did not violate state due process concerns.[94] The defendant admitted waiving his right to be present at trial but objected to being sentenced in his absence, claiming that a right to allocution[95] is absolute in Utah.[96]

In *State v. Williams*,[97] the Supreme Court of Appeals of West Virginia held that under the due process clause of the West Virginia Constitution,[98] a defendant convicted of an offense at the municipal level who then exercises his right to a trial is denied due process if after conviction the trial judge imposes a heavier penalty than that imposed at the municipal level.[99] In the case before it, however, the court concluded the second punishment was not more severe.[100] The trial judge merely corrected the first sentence which failed to provide required terms and conditions of home incarceration.[101]

---

91. 929 P.2d 1107 (Utah 1996). The defendant was convicted of aggravated sexual assault and interfering with a peace officer. *Id.* at 1108.

92. Here, the court found that the defendant was aware of court dates and did not argue he could not attend any court dates. *Id.* at 1111.

93. The court concluded the defendant had a duty to maintain contact with the court and his attorney and would therefore know his sentencing date if he had carried out his duty. *Id.* at 1110-11.

94. *Id.* at 1109-10. The Utah Constitution guarantees the right of an accused person to appear and defend in person against any cause against him. UTAH CONST. art. I, § 12; *Anderson*, 929 P.2d at 1109-10.

95. *Anderson*, 929 P.2d at 1109-10. Allocution is defined as an "inquiry of defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction." BLACK'S LAW DICTIONARY 49 (6th ed. 1991).

96. *Anderson*, 929 P.2d at 1110. Defendant relied on *State v. Young*, 853 P.2d 327 (Utah 1993), to support this argument. *Anderson*, 929 P.2d at 1110. The court held *Young* was not applicable here because the defendant in *Young* had not waived his right to be present at trial and was also charged with a capital crime, which Anderson was not. *Id.*

97. 490 S.E.2d 285 (W. Va. 1997). The defendant was convicted of driving under the influence and sentenced to six months of home incarceration. *Id.* at 286.

98. See article III, section 10 of the Virginia Constitution for relevant state due process rights.

99. *Williams*, 490 S.E.2d at 290.

100. *Id.* at 291.

101. *Id.*

B. Civil Due Process Issues

1. Opportunity to be Heard and Notice Issues[102]

In *Overfield v. Collins*,[103] the Supreme Court of Appeals of West Virginia held void an order granting custody of two children to their maternal grandparents.[104] The order violated the due process protections of

---

102. The high court of a state made no reference to its state constitution or made no significant distinction between the state constitution and the United States Constitution in the following cases: Weiss v. State, 939 P.2d 380 (Alaska 1997) (holding right to opportunity to be heard was not violated by court's imposition of a scheduled deadline to contest a class action settlement); Worsham v. Greifenberger, 698 A.2d 867 (Conn. 1997) (holding employee with workers compensation claim would not be foreclosed from bringing action where employer had already brought action but employee did not receive notice that his failure to intervene in employer's action would result in foreclosure of his cause of action); *In re* the Marriage of Seyler, 559 N.W.2d 7 (Iowa 1997) (holding issuance of decree by judge who had not presided at dissolution proceeding violated due process); *In re* Klos, 943 P.2d 1277 (Mont. 1997) (holding mildly retarded adult was denied due process when she was not given notice of a guardianship hearing and thus was denied the opportunity to object to the proceeding); *In re* Tabatha R., 564 N.W.2d 598 (Neb. 1997) (holding due process rights are in effect where a juvenile court action is the functional equivalent of a judgment terminating parental rights); Gray v. Upp, 943 P.2d 592 (Okla. 1997) (holding state constitutional amendment did not violate due process as it did not disturb the right of a parent to be tried by peers in any custody termination action); Nisenzon v. Sadowski, 689 A.2d 1037 (R.I. 1997) (holding unnamed partners could not be joined to judgment without proper notice via process service); State *ex. rel.* Richards v. McCarty, 489 S.E.2d 503 (W. Va. 1997) (holding trial court did not exceed its authority by granting temporary custody to the mother without notice to the father due to allegations that father's new wife had abused her own natural children, as long as permanent custody hearing was held within reasonable time); West Virginia *ex rel.* United Mine Workers v. Waters, 489 S.E.2d 266 (W. Va. 1997) (holding that the union was denied due process by the issuance of an ex parte preliminary injunction without affording the union notice or the opportunity to be heard); Hutchison v. City of Huntington, 479 S.E.2d 649 (W. Va. 1996) (holding state immunity statute constitutionally precluded due process claim against city); Pecha v. Smith, Keller & Assoc., 942 P.2d 387 (Wyo. 1997) (holding due process demanded that party present at first arbitration but not second and third would only be bound by the proceedings of the first arbitration); Teton v. Teton, 933 P.2d 1130 (Wyo. 1997) (holding trial court did not deny due process to husband by scheduling an order to show cause hearing on the same day as a previously scheduled divorce trial because the husband had proper notice of the substance of the appearance in court from the court and his wife).

103. 483 S.E.2d 27 (W. Va. 1996). After suffering serious injury, a mother signed an affidavit which she believed transferred only temporary custody to her parents. *Id.* at 31-32. The grandparents used the affidavit to obtain the order at issue, which granted them permanent custody of the children. *Id.*

104. *Id.* at 34.

the West Virginia Constitution[105] because notice of the order was never served on the children's mother.[106] The right of a natural parent to his or her child is a fundamental liberty interest protected by both the Federal and West Virginia Constitutions.[107]

The Supreme Court of Montana also held a trial court overstepped its bounds in *In re Marriage of Huotari*.[108] The court held the trial court violated a father's state due process right to an opportunity to be heard[109] by resolving the father's motion to modify custody at a hearing held to determine temporary custody issues.[110]

In *Dime Savings Bank v. Town of Pembroke*,[111] the Supreme Court of New Hampshire used only federal methods to aid its analysis.[112] The court held the state due process clause required notice informing a mortgagee their rights to the property would be abolished by a tax lien deed if the property were not redeemed.[113] Under the New Hampshire Constitution, "a mortgagee is entitled to actual notice of a tax deeding."[114] The court found the notice at issue did not include the required warning "that the mortgage will be eradicated by the tax lien deed if the property is not redeemed," and that no matter how sophisticated a bank organization is, it is still entitled to state due process protection.[115]

---

105. See article III, section 10 of the West Virginia Constitution for relevant state due process protections. The court described the clause as "a commitment . . . that no one will be arbitrarily deprived of a liberty interest unless the government provides . . . a fair decision making process, including the right to receive written notice of the attempt to affect the liberty interest." *Overfield*, 483 S.E.2d at 34.

106. *Overfield*, 483 S.E.2d at 34.

107. *Id.* at 33 (citing *In re* Willis, 207 S.E.2d 129 (W. Va. 1973)).

108. 943 P.2d 1295 (Mont. 1997).

109. See article II, section 17 of the Montana Constitution for relevant state due process protections.

110. *Huotari*, 943 P.2d at 1299. The Supreme Court of Montana held similarly in *Lurie v. Sheriff of Gallatin County*, 944 P.2d 205 (Mont. 1997), holding the trial court should not have decided ultimate issues at a temporary restraining order hearing.

111. 698 A.2d 539 (N.H. 1997). Mortgagee bank brought an action against a town that deeded itself title to a piece of property through a tax deed. *Id.* at 540. The bank claimed it did not receive constitutionally adequate notice of the tax deed under the federal or state constitutions. *Id.*

112. *Id.* at 540; *see also* N.H. CONST. pt. I, art. 15.

113. *Dime Sav. Bank*, 698 A.2d at 540-41.

114. *Id.* at 540 (citing First New Hampshire Bank v. Town of Windham, 639 A.2d 1089 (N.H. 1994)).

115. *Id.*

Under the guidance of the Federal Constitution, in *Federal Sign v. Texas Southern University*,[116] the Supreme Court of Texas held a state university's immunity from a breach of contract action did not violate the potential plaintiff's state due process right to be heard.[117] The court concluded sovereignty is "impervious to due process concerns."[118]

The Supreme Court of Connecticut, in *Northeast Savings v. Hintlian*,[119] held a statute establishing procedures for appraisal of property subject to a mortgage foreclosure sale[120] did not violate state due process protections.[121] The court held due process provided that whatever procedure the state adopts must provide meaningful time, notice and hearing in court, but due process did not mandate any particular procedure.[122]

In *Olson v. Ford Motor Co.*,[123] the Supreme Court of Minnesota held the state "seat belt gag rule"[124] did not violate a plaintiff's state due process[125] right to present all pertinent evidence without state interference.[126] The Minnesota Court employed a two-step due process analysis which considered whether "a substantive right of life, liberty or property [was] implicated . . . then balance[ed] the interests of the individual

---

116. 951 S.W.2d 401 (Tex. 1997). A sign maker sued a state university for breach of contract arising from an agreement to construct basketball scoreboards. *Id.* at 403. The court looked to federal analysis in this area "for guidance" in analyzing the state due process claim. *Id.* at 410.

117. *Id.* at 411.

118. *Id.*

119. 696 A.2d 315 (Conn. 1997).

120. *See* CONN. GEN. STAT. § 49-25. The claim here was that the statute failed to provide for an evidentiary hearing where the valuation of the property could be challenged. 696 A.2d at 318.

121. 696 A.2d at 319. The due process clause of the Connecticut Constitution reads: "All courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." CONN. CONST. art. I, § 10.

122. 696 A.2d at 317. The court held a trial court may conduct such an evidentiary hearing under the statute upon proper application to the court by a party wishing to challenge the appraisal amount. *Id.* at 318.

123. 558 N.W.2d 491 (Minn. 1997). Plaintiff brought suit claiming the seat belt system in his truck failed during a collision. *Id.* at 493.

124. *See* MINN. STAT. § 169.685 (1996). This statute prohibits admittance of evidence of the use of or failure to use seat belts in motor vehicle personal injury litigation. *Olson*, 558 N.W.2d at 494.

125. *See* MINN. CONST. art. I, § 7.

126. *Olson*, 558 N.W.2d at 497 (citing Yeager v. Chapman, 45 N.W.2d 776 (Minn. 1951)).

. . . against the governmental interests at stake."[127] The plaintiff here failed to establish that his individual interest outweighed governmental concerns.[128]

Also, in *Rosenthal v. Great Western Financial Securities Corp.*,[129] the Supreme Court of California held the state due process clause[130] was not offended when a court, without a jury, determined whether a valid arbitration agreement existed between the parties.[131]

2. Employment Termination Issues[132]

In *Wilhelm v. West Virginia Lottery*,[133] the Supreme Court of Appeals of West Virginia held that while the state constitution does recognize a liberty interest in "being free to move about, live and work at [a] chosen vocation without the burden of an unjustified label of infamy,"[134] an employer's statement that an at will employee was discharged because of a "loss of confidence" in the employee's abilities did not violate that liberty interest.[135]

---

127. *Id.*

128. *Id.* (quoting *In re* Harhut, 385 N.W.2d 305, 311-12 (Minn. 1986)).

129. 926 P.2d 1061 (Cal. 1996).

130. *See* CAL. CONST. art. I, §§ 7, 16.

131. *Rosenthal*, 926 P.2d at 1070. Plaintiffs asserted their state due process rights would be violated if the court, without a jury, determined the validity of the arbitration agreement. *Id.*

132. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following cases: Rynerson v. City of Franklin, 669 N.E.2d 964 (Ind. 1996) (holding police officer was not denied due process by the exclusion of polygraph result from his termination proceeding); Mysse v. Martens, 926 P.2d 765 (Mont. 1996) (holding that even if employee had protected property interest in employment, employee was afforded proper due process protections through advance notice of possibility of firing and employee was provided a full evidentiary post-termination hearing); Roach v. Regional Jail Auth., 482 S.E.2d 679 (W. Va. 1996) (holding classified exempt status limits due process rights available to terminated employee).

133. 479 S.E.2d 602 (W. Va. 1996).

134. *Id.* at 605 (quoting Waite v. Civil Serv. Comm'n, 241 S.E.2d 164, 167 (W. Va. 1977)); *see* W. VA. CONST. art. III, § 10.

135. *Wilhelm*, 479 S.E.2d at 605. The employer's statement did not rise to an unjustified "label of infamy." *Id.* Since the employee at issue was an at will employee, he has no protected property interest in his employment unless he could show his termination violated his "free to move about" liberty interest or was clearly against public policy. *Id.* at 604-05.

In another substantive right to employment case, the Supreme Court of Montana, in *Hafner v. Montana Department of Labor and Industry*,[136] disallowed a plaintiff's suit seeking to compel the state to issue unemployment benefits.[137] The plaintiff was fired when he failed to reveal to his employer that he had a discrimination suit pending against a company whose account his employer had assigned to him.[138] The plaintiff argued that to deny him unemployment benefits amounted to "a denial of his constitutional right to pursue a discrimination claim."[139] The court rejected this argument and held the plaintiff was not entitled to unemployment benefits because he was fired for a legitimate reason.[140]

In *City of North Pole v. Zabek*,[141] an employment termination procedure dispute, the Supreme Court of Alaska held that a city's failure to give a city employee, who could be terminated only for just cause,[142] an opportunity to be heard prior to her termination violated her due process rights under the state constitution.[143] However, the court also held the procedures for the appeal of her termination cured any due process violation.[144]

---

136. 929 P.2d 233 (Mont. 1996).

137. *Id.* at 238.

138. *Id.* at 235.

139. *Id.* at 237.

140. *Id.* at 237-38. While the court acknowledged that a termination may violate the state constitution's guarantee to pursue life's basic necessities, MONT. CONST. art. II, § 3, there was no such violation here because the plaintiff's termination for failing to disclose the discrimination suit was legitimate as his employer had "a legitimate expectation" to be informed of the conflict of interest. 929 P.2d at 237-38.

141. 934 P.2d 1292 (Alaska 1997).

142. *Id.* at 1297. The court held that, as under federal law, only public employees in Alaska who may be terminated for cause have a valid property interest, protected by due process, in their continued employment. *Id.* The court held similarly in *Ramsey v. City of Sand Point*, 936 P.2d 126 (Alaska 1997) (holding city employee waived just cause termination requirement in his employment contract and therefore did not hold a liberty interest in employment sufficient to invoke state due process protections).

143. *Zabek*, 934 P.2d at 1297; *see* ALASKA CONST. art. I, § 7.

144. *Zabek*, 934 P.2d at 1298.

3. Administrative and Sub-State Action[145]

In *Hupp v. Sasser*[146] and *Szejner v. University of Alaska*,[147] the Supreme Court of Appeals of West Virginia and the Supreme Court of Alaska, respectively, both heard claims surrounding an individual's due process rights in the status of being a graduate student at a state university. In *Hupp*, the court held a graduate student did not have a property interest in his position as a graduate teaching assistant.[148] In *Szejner*, the court also held a student's position as a graduate student was not a liberty interest sufficient to invoke the due process protections of the state constitution against a state university's actions.[149]

In *Putensen v. Hawkeye Bank*,[150] the Supreme Court of Iowa held a nonjudicial foreclosure[151] did not involve sufficient state action to trigger the state constitution's due process protections.[152] The court recognized it was the master of its own constitution, and yet refused to abolish or lower the state action requirement in this instance as to prevent the state constitution from "micromanaging" lawsuits.[153]

---

145. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following cases: Mills v. New Mexico State Bd. of Psychologist Exam'rs, 941 P.2d 502 (N.M. 1997) (holding substantive and procedural due process concerns were implicated in administrative decision to require a psychologist to take and pass an oral examination before reinstating her license following a brief retirement); Hardy v. Richardson, 479 S.E.2d 310 (W. Va. 1996) (holding Workers' Compensation Commissioner was obligated to perform disability evaluation in a timely manner when a statute scheduled to take effect in 90 days would bar the evaluation).

146. 490 S.E.2d 880 (W. Va. 1997). A graduate student was fired from his teaching assistantship after school administration officials received several complaints from the assistant's students. *Id.* at 883. The assistant claimed the school denied him due process in the termination decision. *Id.* at 884.

147. 944 P.2d 481 (Alaska 1997). A graduate student claimed he was denied due process in the school's decision not to admit him to another graduate program at the school and to sanction him for violating the student code. *Id.* at 486.

148. 490 S.E.2d at 891. The court found the assistant did not have an "objective expectation of continued employment." *Id.*

149. 944 P.2d at 486-87.

150. 564 N.W.2d 404 (Iowa 1997).

151. Here a bank foreclosed on a mental patient's home. *Id.* at 406-07.

152. *Id.* at 409; *see* IOWA CONST. art. I, § 9.

153. *Putensen*, 564 N.W.2d at 408.

The Supreme Court of Appeals of West Virginia, in *West Virginia ex rel. Hoover v. Smith*,[154] again demonstrated its inclination to develop its own analysis independent of the Federal Constitution.[155] The court held that while there is no *per se* due process right to pre-hearing discovery in administrative actions under the West Virginia Constitution,[156] if the administrative agency chooses to allow any type of discovery, the rules governing that discovery must abide by state due process concerns.[157] Additionally, if an agency in any way impedes the ability of individuals to obtain information necessary to address charges pending against them, the issuance of pre-hearing discovery subpoenas may be proper.[158]

In another procedural dispute, *Bollerud v. Alaska Department of Public Safety*,[159] the Supreme Court of Alaska held that while a drivers license is a property interest protected by the state constitution,[160] a licensee's due process rights were not violated in a license suspension hearing where the licensee failed to avail himself of the opportunity to call witnesses to rebut a damage claim.[161]

In response to a substantive due process claim, the Supreme Judicial Court of Massachusetts, in *Doherty v. Retirement Board of Medford*,[162] held

---

154. 482 S.E.2d 124 (W. Va. 1997). A physician was accused of taking advantage of the physician-patient relationship by engaging a patient in sexual activity. *Id.* at 127. The physician sought a writ of prohibition against the hearing examiner who disallowed the physician to take pre-hearing discovery depositions of five witnesses before the hearing on her alleged unethical actions. *Id.* The hearing officer did not issue the pre-hearing deposition subpoenas because she believed she had power only to issue subpoenas for appearance at hearings. *Id.*

155. The court noted that it was free to consider federal standards when it considers its own state constitution issues but "ultimately . . . we must be guided by our own principles." *Id.* at 128 n.4 (quoting Waik v. Civil Serv. Comm'n, 241 S.E.2d 166, 167 (W. Va. 1997)).

156. *Id.* at 129. The West Virginia due process clause provides: "No person shall be deprived of life, liberty, or property, without due process of law." W. VA. CONST. art. III, § 10.

157. *Hoover*, 482 S.E.2d at 129.

158. *Id.* at 130-32.

159. 929 P.2d 1283 (Alaska 1997). The licensee claimed he was denied a meaningful hearing under the Alaska Constitution and made no federal claim. *Id.* at 1286-87.

160. *Id.* at 1287. The Supreme Court of New Hampshire agreed on this point in *Bragg v. Director, New Hampshire Division of Motor Vehicles*, 690 A.2d 571 (N.H. 1997). The court stated a driver's license is a state constitutionally protected interest which may not be suspended without due process. *Id.*

161. *Bollerud*, 929 P.2d at 1287.

162. 680 N.E.2d 45 (Mass. 1997). The city retirement board determined that a former city employee had stolen an advance copy of the city police entrance examination and had

a statute that requires forfeiture of retirement benefits, if an individual is found to have misappropriated city funds, did not infringe on Massachusetts due process concerns.[163] The individual stripped of benefits by the city retirement board argued the city's actions amounted to a deprivation of property not by a jury of his peers or by the law of the land.[164] The unpersuaded court found the statute to be of a restitutionary nature, rather than penal or punitive.[165]

In *Connell v. State of Montana Department of Social & Rehabilitation Services*,[166] the Supreme Court of Montana held that administrative agencies must conduct hearings in a manner consistent with due process.[167] The failure of a hearing officer to make a decision in a child support collection action forty-four months after the close of the fact finding portion of the hearing violated the due process guarantees of the Montana Constitution.[168]

In *In re Worthen*,[169] a judicial disciplinary proceeding,[170] the Supreme Court of Utah held that the Judicial Conduct Commission must provide due process protections in tune with the due process clause of the Utah Constitution.[171] The court also held that to meet minimum due process requirements, the commission must at least provide notice naming the code or statute allegedly violated.[172]

In another administrative action notice challenge, the Supreme Court of Wyoming, in *Tate v. Wyoming Livestock Board*,[173] held that actual notice was not required to satisfy due process where the state livestock board sent notice to the livestock brand owner's last known address[174] that the

---

given it to his son. *Id.* at 46-47. The board ordered the former employee to forfeit retirement benefits. *Id.* at 46.

163. *Id.* at 50.

164. *Id.* at 49. The former employee invoked articles 12 and 15 of the Massachusetts Declaration of Rights. *Id.*

165. *Id.* at 49-50.

166. 930 P.2d 88 (Mont. 1997).

167. *Id.* at 91 (citing Montana Power Co. v. Pub. Serv. Comm'n, 671 P.2d 604 (Mont. 1983)); *see* MONT. CONST. art. II, § 17.

168. *Connell*, 930 P.2d at 92-93. The Montana Constitution guarantees justice without delay. *Id.* at 91.

169. 926 P.2d 853 (Utah 1996).

170. *Id.* at 856.

171. *Id.* at 876; *see* UTAH CONST. art. I, § 7.

172. *In re Worthen*, 926 P.2d at 878.

173. 932 P.2d 746 (Wyo. 1997). Here, a livestock brand owner petitioned the livestock board to have a brand reissued. *Id.* at 747.

174. The brand owner failed to inform the board of her current address. *Id.* at 749.

brand[175] would expire and be deemed abandoned if not re-recorded.[176] To arrive at this conclusion, the court held the interest in the brand was outweighed by the "extreme burden" that would be placed on the board if it was required to verify the current addresses of all brand owners.[177]

Also, in *Reis v. Campbell Country Board of Education*,[178] the Supreme Court of Kentucky held that under the Kentucky Constitution a school board is an entity entitled to the due process protections of the state constitution.[179]

4. Jury Issues[180]

A plaintiff argued she was denied a jury of her peers in *Brown v. Blackwood*.[181] There, the Supreme Court of Mississippi held a plaintiff was insured a fair trial with an impartial jury, as required by the Mississippi Constitution,[182] when the trial judge granted challenges for cause to all patients and their immediate families of the clinic where the defendant doctor worked.[183] Plaintiff argued the grant of the challenges made it impossible for her to receive a jury of her peers because the clinic was highly utilized in her community.[184] The court disagreed, holding a judge has discretion in juror exclusion and a duty to foster the selection of an impartial jury.[185]

---

175. Under Wyoming law, a livestock brand owner has a property interest in a properly recorded brand. *Id.* at 748.

176. *Id.* at 750.

177. *Id.*

178. 938 S.W.2d 880 (Ky. 1996). A board of education sought declaratory judgment that it should be able to appeal a decision of a tribunal ordering that a teacher not be fired. *Id.*

179. *Id.* at 885; *see* KY. CONST. § 2; *see also supra* note 5 for the text of section 2 of the Kentucky Constitution.

180. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following case: Parham v. Horace Mann Ins. Co., 490 S.E.2d 696 (W. Va. 1997) (holding belief that black prospective juror's occupation as a social worker meant prospective juror held a more liberal view and was more sympathetic towards individuals than corporations were race neutral explanations for asserting preemptory strike against that prospective juror).

181. 697 So. 2d 763 (Miss. 1997). Plaintiff brought suit against a doctor for medical malpractice relating to her son's birth. *Id.*

182. *See* MISS. CONST. art. III, § 14.

183. *Brown*, 697 So. 2d at 771. The judge's behavior here was appropriate. He summoned a large venire and meticulously cross checked juror questionnaires and gave each side unlimited challenges to jurors with any connection to the clinic. *Id.* at 770.

184. *Id.* at 769.

185. *Id.* (citing Scott v. Ball, 595 So. 2d 848 (Miss. 1992)).

5. Vagueness, Retroactivity, and Unreasonableness[186]

The Supreme Court of Appeals of West Virginia considered a vagueness challenge in *West Virginia ex rel. Hechler v. Christian Action Network.*[187] The court upheld the state's quest to enjoin the defendant from solicitation activities without complying with a state statute.[188] That statute required a specific disclosure statement[189] be "conspicuously displayed" on a "prominent part of the solicitation materials."[190] The court found the statute at issue was not unconstitutionally vague under the West Virginia Constitution.[191] The defendant argued the vagueness was obvious because the statute lacked explicit standards or instructions.[192] The court disagreed, holding the due process clause of the West Virginia Constitution required a law give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" and the common sense meaning of the statute in question leads directly to compliance.[193]

Using the same "ordinary reader" analysis, in *Board of Commissioners of the Utah State Bar v. Petersen,*[194] the Supreme Court of Utah upheld a statute that prohibited the unauthorized practice of law.[195] The court held the statute was not unconstitutionally vague under the state constitution.[196]

186. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following cases: State v. L.V.I. Group, 690 A.2d 960 (Me. 1997) (holding law is not unconstitutionally retroactive where the Legislature made clear the law's purpose is to clarify the original intent of the original law); State v. Chapman, 685 A.2d 423 (Me. 1996) (holding statutory DUI scheme where prior offenses within a 10-year period, instead of the former practice of a six-year period, were examined to determine severeness of penalty did not violate due process); Rivers v. State, 490 S.E.2d 261 (S.C. 1997) (holding retroactive statute that decreased capital gains tax refunds violated due process where statute retroactively applied at least two years and as long as three years).

187. 491 S.E.2d 618 (W. Va. 1997).

188. *Id.*; *see* The Solicitation of Charitable Funds Act, W. VA. CODE § 29-19-8 (1992).

189. The act requires a printed statement that directs state residents how to obtain additional information regarding the soliciting organization. *Hechler*, 491 S.E.2d at 622.

190. *Id.* at 630.

191. *Id.* at 631-32.

192. *Id.*

193. *Id.* (citing W. VA. CONST. art. III, § 10).

194. 937 P.2d 1263 (Utah 1997). The state bar won a suit against an individual for the unauthorized practice of law. *Id.* at 1265. The individual challenged the statute prohibiting such unauthorized practice as unconstitutionally vague under the Utah Constitution. *Id.*

195. The phrase "practice of law" was the main issue. *Id.*

196. *Id.* at 1267-68.

The defendant argued the statute read as prohibiting a nonlawyer from either claiming to be or working as a lawyer.[197] The court disagreed, holding that an ordinary reader would define the practice of law as encompassing certain activities regardless of whether the individual performing those activities claimed to be an attorney.[198]

In *American Legion Post No. 57 v. Leahey*,[199] the Supreme Court of Alabama held a statute allowing the admittance of evidence in personal injury actions that the plaintiff's medical or hospital expenses would be paid or reimbursed by a collateral source[200] was unreasonable[201] and thus violated the due process clause of the Alabama Constitution.[202] However, in *Custard Insurance Adjusters, Inc. v. Youngblood*,[203] the Supreme Court of Alabama held that under the due process clause of the Alabama Constitution[204] a state statute imposing liability upon insurance adjusters for investigating claims filed with unauthorized insurers was not unreasonable or overbroad.[205]

---

197. *Id.* at 1267.

198. *Id.* at 1267-68.

199. 681 So. 2d 1337 (Ala. 1996). Leahey sued to recover for injuries sustained when she slipped and fell on the premises of American Legion Post Number 57. *Id.*

200. *See* ALA. CODE § 12-21-45 (1975).

201. *Leahey*, 681 So. 2d at 1346-47. The court objected that the provision gave the jury "unbridled discretion" in the award of compensatory damages because the statute did not require a jury to reduce an award by the amount of any collateral source payment, *id.* at 1345, and may foster juries with biases towards insurance companies to leave a plaintiff with little or no award. *Id.* at 1346. The statute is also objectionable to the court because it makes collateral source evidence competent evidence "without stating what it is competent to prove or what effect its admission will have." *Id.* at 1347.

202. *Id.*; *see* ALA. CONST. art. I, § 6.

203. 686 So. 2d 211 (Ala. 1996). An insured whose agent purchased automobile and truck liability insurance from an unauthorized insurer sued the agent, broker and adjuster after the insurer refused to cover the insured's claim. *Id.* at 213.

204. *See* ALA. CONST. art. I, §§ 6, 22.

205. *Custard*, 686 So. 2d at 217. The court believed it was not unreasonable for the statute to include adjusters "because adjusters have a duty . . . to protect persons from unauthorized insurers illegally operating in Alabama." *Id.* Despite the adjuster's argument that adjusters do not sell insurance and therefore no public interest could be served by holding adjusters liable for the activities of unauthorized insurers, the court held the statute at issue was not just concerned with the sale of insurance, but also the operation of the insurance industry in Alabama as a whole. *Id.*

6. Remedy and Statute of Limitation Issues[206]

In *Injured Workers of Kansas v. Franklin*,[207] the Supreme Court of Kansas considered a plaintiff's argument that implementation of a more restrictive notice requirement in the state workers' compensation scheme unconstitutionally restricted a remedy protected by the due process concerns of the state constitution.[208] The court held that if a protected remedy is restricted by the Legislature, the restriction is valid as long as the change is reasonably necessary in the public interest and the Legislature provides an adequate substitute remedy.[209]

The Supreme Court of Illinois, in *M.E.H. v. L.H.*,[210] held under the state constitution that once a statute of limitations has expired, a right vests in the defendant to invoke the expiration as a defense.[211] That right can not be taken away without offending the defendant's state due process rights.[212]

---

206. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following cases: Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal. 1997) (holding proper remedy for interim loss caused by due process violation suffered by landlord regarding application of rent regulation limiting rent increases was adjustment of future rents); Schaffer v. Edward D. Jones & Co., 552 N.W.2d 801 (S.D. 1996) (holding while tortfeasor has substantive due process right to be free from imposition of grossly excessive punishment, that right was not violated by award of punitive damages in ratio to compensatory damages of 30 to 1, where defendant had profited substantially from the tort, and when the damage award was not high given the large resources of the defendant); State v. Egnor, 481 S.E.2d 504 (W. Va. 1996) (holding due process demands attorney sanctions be designed to address identified harm caused by objectionable conduct).

207. 942 P.2d 591 (Kan. 1997).

208. The due process clause of the Kansas Constitution reads: "Justice without delay. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." KAN. CONST. § 18.

209. *Franklin*, 942 P.2d at 603 (citing Manzanares v. Bell, 522 P.2d 1291 (Kan. 1974); *see also* Bonin v. Vannaman, 929 P.2d 754 (Kan. 1996).

210. 685 N.E.2d 335 (Ill. 1997). Adult children sued their father for childhood sexual abuse. *Id.*

211. *Id.* at 339.

212. *Id.* Claims remained barred even if the statute imposing the time limitation is later abolished. *Id.* at 339-40.

7. Miscellaneous Civil Substantive Due Process Issues[213]

In *Brookings v. Winker*,[214] the Supreme Court of South Dakota held a city ordinance that limited the number of unrelated adults who could live together did not violate due process concerns of the South Dakota Constitution.[215] The court did state the South Dakota substantive due process standard is more rigid than its federal counterpart[216] and that under the state constitution the statute must "bear a real and substantial relation to the objects sought to be attained."[217] Here, however, the court found the ordinance bore a rational relationship to its legitimate objective of controlling population density.[218]

Similarly, in *State v. Champoux*,[219] the Supreme Court of Nebraska held a municipal zoning ordinance's definition of "family"[220] did not violate state due process protections,[221] despite claims the definition was

---

213. The high court of a state made no reference to its state constitution nor made a significant distinction between the state constitution and the United States Constitution in the following cases: Madrid v. St. Joseph Hosp., 928 P.2d 250 (N.M. 1996) (holding substantive due process concerns did not require Legislature to maintain the same workers' compensation scheme indefinitely); Riggs v. Burson, 941 S.W.2d 44 (Tenn. 1997) (holding statute which prohibited use of land for heliport within nine miles of national park did not violate the heliport operator's substantive due process rights as the statute is reasonably related to the legitimate public interest of public safety).

214. 554 N.W.2d 827 (S.D. 1996). The defendant was convicted of violating a city ordinance which limited to three the number of unrelated adults who could live together. *Id.* at 828. Defendant had at least four unrelated college students living in one unit. *Id.*

215. The South Dakota Constitution provides: "No person shall be deprived of life, liberty or property without due process of law." *Id.* at 830 (quoting S.D. CONST. art.VI, § 2).

216. *Id.* (citing Katz v. State Bd. of Med. & Osteopathic Exam'rs, 432 N.W.2d 274, 278 n.6 (S.D. 1988)).

217. *Id.* (quoting *Katz*, 432 N.W.2d at 278).

218. *Id.* at 830-32. After the court determined the ordinance would pass federal due process analysis, it also concluded the ordinance satisfied it own state due process concerns, as South Dakota municipalities were specifically empowered to legislate to promote health, safety, morals, or the general welfare of the community. *Id.* at 830. The city argued the objective behind the ordinance was to limit the density of population. *Id.* at 829. Since the city has a population density problem, the court concluded the ordinance passed state constitutional muster. *Id.* at 831.

219. 566 N.W.2d 763 (Neb. 1997). Under the ordinance, a landlord was convicted of renting a residence to more than three unrelated tenants. *Id.* at 764.

220. The ordinance defines 'family' as "one or more persons immediately related by blood, marriage, or adoption . . . . A family may include, in addition, not more than two persons who are unrelated." *Id.*

221. *Id.* at 768; *see* NEB. CONST. art. I, § 3.

unreasonable and arbitrary.[222] The court concluded the ordinance's definition clearly fell within the municipality's police power[223] and was rationally related to "its legitimate objectives of preserving the sanctity of the family, quiet neighborhoods, low population, few motor vehicles and low transiency."[224]

Establishing that property rights may not always be absolute under the North Dakota Constitution, the Supreme Court of North Dakota, in *Continental Resources, Inc. v. Farrar Oil Co.*,[225] held that under the state constitution[226] property is properly subject to the police power of the state to impose restrictions upon private property rights as necessary to further the welfare of the general public.[227]

In *Fredette v. Secretary of State*,[228] the Supreme Judicial Court of Maine denied plaintiff's assertion that an election recount statute violated due process concerns of the Maine Constitution.[229] The plaintiff argued the statute violated due process because it required a $1000.00 deposit to initiate a recount if the candidate lost the election by more than four percent.[230] Applying independent state due process analysis,[231] the court held the

---

222. *Champoux*, 566 N.W.2d at 767.

223. *Id.*

224. *Id.* at 768. The court found persuasive a United States Supreme Court opinion and other state supreme court opinions upholding similar ordinances. *Id.* at 766-67 (citing Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Dinan v. Bd. of Zoning Appeals, 595 A.2d 864 (Conn. 1991); City of Brookings v. Winker, 554 N.W.2d 827 (S.D. 1996)). See *supra* note 214 and accompanying text for a discussion of *Brookings*.

225. 559 N.W.2d 841 (N.D. 1997). At issue here was a compulsory pooling order that allowed Continental Resources to drill a horizontal oil and gas well through the "subsurface formation" of Farrar Oil's leasehold. *Id.* at 842.

226. North Dakota property rights are protected by article I, sections 1, 12, and 16 of the North Dakota Constitution. *Id.* at 845.

227. *Id.* "Property is subject to the police power of the state 'to impose such restrictions upon private rights as are practically necessary for the general welfare of all.'" *Id.* (quoting State v. Cromwell, 9 N.W.2d 914, 919 (N.D. 1943)). The police powers were properly used in the case of an ordered pooling. *Id.* at 846. Therefore, the compulsory pooling order constitutionally displaces Farrar Oil's property rights. *Id.*

228. 693 A.2d 1146 (Me. 1997). The plaintiff was an unsuccessful candidate for the Republican nomination for the State House of Representatives. *Id.* Plaintiff garnered 46.7% of the vote to his opponent's 53%. *Id.* at 1147.

229. The due process clause of the Maine Constitution reads: "No person shall be deprived of life, liberty, or property without due process of law." ME. CONST. art. I, § 6-A.

230. *Fredette*, 693 A.2d at 1147-48.

231. Under the Maine Constitution a statute is presumed constitutional and is invalidated "only if there is a clear showing by strong and convincing reasons that it conflicts

statute constitutional as it was an appropriate means to an appropriate legislative objective of discouraging frivolous recounts.[232]

Finally, in *In re Linehan*,[233] the Supreme Court of Minnesota held the State's Sexually Dangerous Persons Act,[234] specifically its provision allowing civil commitment for treatment of persons deemed sexually dangerous,[235] did not violate a defendant committee's right to substantive due process under the federal or state constitutions.[236] The defendant had a record of sexual misconduct dating back to 1956, when he was fifteen-years old.[237] The defendant argued his commitment violated his federal and state due process rights.[238] The court determined that the Minnesota Constitution requires at least that demanded by the Federal Constitution: "future harmful sexual conduct must be highly likely in order to commit a proposed patient under the [Sexually Dangerous Persons] Act."[239] The court held, using mixed federal and Minnesota constitutional analysis, that the Sexually Dangerous Persons Act was sufficiently narrowly tailored to meet the compelling state interest in protecting the public from sexual assault.[240]

Jill E. Family

---

with the Constitution." *Id.* at 1148 (quoting State v. McGillicuddy, 646 A.2d 354, 355 (Me. 1994)).

232. *Id.* at 1148-49. The court determined this was a legitimate objective related to public welfare and therefore the statute was an adequate means to adequate end. *Id.*

233. 557 N.W.2d 171 (Minn. 1996). This case was vacated by the United States Supreme Court and remanded to the Supreme Court of Minnesota "for further consideration in light of *Kansas v. Hendricks* . . . 117 S. Ct. 2072 (1997)." Linehan v. Minnesota, 118 S. Ct. 596 (1997). Despite the lack of finality to this case, the analysis used by the Minnesota Supreme Court is still addressed because it may shed some light on a controversial issue in state constitutional law.

234. *See* MINN. STAT. §§ 253B.02, 253B.185 (1994). The Sexually Dangerous Persons Act amended the State's civil commitment statute to include sexually dangerous persons. *Linehan*, 557 N.W.2d at 175.

235. The statute defines a sexually dangerous person as one who "has engaged in a course of harmful sexual conduct; has manifested a sexual, personality, or other mental disorder or dysfunction; and as a result, is likely to engage in serious and harmful sexual conduct in the future." *Linehan*, 557 N.W.2d at 175 (quoting MINN. STAT. § 253B.02). The State must prove the defendant committee is likely to engage in harmful sexual conduct by clear and convincing evidence. *Id.* at 179.

236. *Id.* at 175.

237. *Id.*

238. *Id.* at 174.

239. *Id.* at 180.

240. *Id.* at 181-82.